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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.

BENSON *v.* HENKEL.

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

No. 308. Argued February 20, 21, 1905.—Decided April 17, 1905.

In proceedings before an extradition Commissioner, if the indictment produced as evidence of probable cause in proceedings for removal is framed in the language of the statute, with ordinary averments of time and place, and sets out the substance of the offense in language sufficient to apprise the accused of the nature of the charge against him, it is sufficient to justify removal, even though it may be open to motion to quash, or in arrest of judgment in the court in which it was originally found.

Whether § 5451, Rev. Stat., punishing bribery of officers of the United States, applies to bribery for acts to be committed in the future, in case a certain contingency which may never occur does occur, is a matter for the trial court to determine and not for the extradition Commissioner.

The District of Columbia is a District of the United States to which a person, under indictment for a crime or offense against the United States, may be removed for trial within the meaning, and under the provision, of § 1014, Rev. Stat.

Where an offense is begun by the mailing of a letter in one district and completed by the receipt of a letter in another district, the offender may be punished in the latter district even though he could also be punished in the other. *Re Palliser*, 136 U. S. 257.

THIS was an appeal from an order dismissing a writ of *habeas corpus*, and remanding appellant to the custody of the marshal to await the action of the District Judge.

On December 31, 1903, an indictment was found by the grand jury of the District of Columbia, charging appellant with a violation of Rev. Stat. sec. 5451, in bribing an officer of the United States to do an act in violation of his official duty. Appellant was arrested in the Southern District of New York, upon a warrant issued by a United States Commissioner, which warrant was issued upon the complaint of a special agent of the Interior Department, to which a copy of the indictment was annexed. Appellant demanded an examination before the Commissioner, in the course of which witnesses were examined on behalf of the Government, and a certified copy of the indictment was admitted as evidence. No material testimony was offered on behalf of the defendant. The Commissioner found there was probable cause, and remanded defendant to the custody of the marshal to await a warrant for his removal. Immediately thereafter appellant applied for a writ of *habeas corpus* and *certiorari*. At the close of the hearing he was remanded to the custody of the marshal. 130 Fed. Rep. 486.

Mr. J. C. Campbell and *Mr. Frank H. Platt* for appellant:

The appellant is deprived of his liberty without due process of law. The Commissioner was without jurisdiction to order his arrest or commitment. The process under color of which appellant is restrained of his liberty is illegal, unauthorized and void.

The sufficiency of the charge of a crime is jurisdictional. It has always been held that the writ of *habeas corpus* is a proper instrument to secure the release of a prisoner held under order or sentence of a tribunal which acted without jurisdiction, and whose process was consequently void. *In re Nielson*, 131 U. S. 176; *In re Coy*, 127 U. S. 731; *In re Snow*, 120 U. S. 274; *In re Sawyer*, 124 U. S. 200; *Ex parte Bain*, 121 U. S. 1;

In re Ayers, 123 U. S. 443; *Ex parte Siebold*, 100 U. S. 371; *Ohio* v. *Thomas*, 173 U. S. 276.

It has been the practice in all Federal jurisdictions, in removal proceedings, to determine whether the indictment sufficiently charges a crime and to discharge the prisoner if it does not. *Stewart* v. *United States*, 119 Fed. Rep. 89; *In re Buell*, 3 Dillon, 116; *In re Terrell*, 51 Fed. Rep. 213; *In re Corning*, 51 Fed. Rep. 205; *In re Dana*, 68 Fed. Rep. 886; *United States* v. *Lee*, 84 Fed. Rep. 626; *In re Greene*, 52 Fed. Rep. 104; *In re Belknap*, 96 Fed. Rep. 614; *In re Huntington*, 68 Fed. Rep. 881; *In re Conners*, 111 Fed. Rep. 734; *In re Doig*, 4 Fed. Rep. 193.

In *In re Palliser*, 136 U. S. 257, this court, in a removal proceeding similar to that at bar, examined the indictment to ascertain whether it charged a crime.

It appears affirmatively, both in the indictment and in the testimony of the Government's witnesses, that at the time of the payments to Harlan and Valk, the special agents' report had not come within the possession, knowledge or reach of either of them, and there is no allegation or proof that it ever would. They had no duty concerning it, and it was not shown that they ever would have any such duty. The crime of bribery cannot be predicated upon a payment to an officer to induce him to perform an act, as to which he has no duty, and may never have any duty. *In re Yee Gee*, 83 Fed. Rep. 145; *State* v. *Butler*, 178 Missouri, 272; *State* v. *Joaquin*, 62 Maine, 218; *State* v. *Howard*, 137 Missouri, 289; *Newman* v. *State*, 97 Georgia, 367; *Moore* v. *State*, 69 S. W. Rep. 521; *Ex parte Richards*, 72 S. W. Rep. 838; *Messner* v. *State*, 40 S. W. Rep. 438; *Barefeld* v. *State*, 14 Alabama, 603.

Neither Harlan nor Valk was forbidden by any lawful duty to reveal to Benson the contents of the report, even if they ever should come into a position to do so.

The indictment contains no allegation of fact showing that it would be a violation of duty for Harlan or Valk to reveal the contents of the report. *Beaver's Case*, 194 U. S. 73, 85.

An allegation that a duty exists or that a certain thing is a person's duty is a conclusion of law. It is for the court to determine upon a disclosure of the facts whether or not a duty exists. *Butler* v. *State*, 17 Indiana, 450; *Buffalo* v. *Holloway*, 7 N. Y. 498; *Atwood* v. *Welton*, 57 Connecticut, 515; *Cane* v. *Chapman*, 5 Ad. & El. 647; *Bailey* v. *Bussing*, 29 Connecticut, 1; *Nickerson* v. *Hydraulic Co.*, 46 Connecticut, 27; *Hayden* v. *Smithville Mfg. Co.*, 29 Connecticut, 548; *Hewison* v. *New Haven*, 34 Connecticut, 138; 12 Ency. of Pleading & Practice, 1040.

An allegation of a conclusion of law in an indictment, without a statement of the facts from which such conclusion may be drawn, is insufficient. *United States* v. *Hess*, 124 U. S. 483. Facts are to be stated, not conclusions of law alone. *United States* v. *Kelsey*, 42 Fed. Rep. 882, 889; *United States* v. *Kessel*, 62 Fed. Rep. 59; *United States* v. *Post*, 113 Fed. Rep. 852; *Rieger* v. *United States*, 107 Fed. Rep. 916, 934; *People* v. *Cooper*, 3 N. Y. Crim. Reps. 117; *W. St. L. & P. R. R. Co.* v. *People*, 12 Ill. App. 448; *State* v. *Paul*, 69 Maine, 215.

For indictments held insufficient even where following language of the statute, see *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Britton*, 107 U. S. 655, 669; *Keck* v. *United States*, 172 U. S. 434; *Batchelor* v. *United States*, 156 U. S. 426; *United States* v. *Hess*, 124 U. S. 483; *Evans* v. *United States*, 153 U. S. 584; *United States* v. *Melfi*, 118 Fed. Rep. 899; *United States* v. *Wardwell*, 49 Fed. Rep. 914.

The phrase "lawful duty" is equivalent to the expressions "legal duty" or "duty prescribed by law." The prohibition is limited and restricted to those duties which are prescribed by law. The words "legal" and "lawful" are synonyms. Standard Dictionary, Webster's Dictionary, Century Dictionary. A legal duty is defined to be that which the law requires to be done or forborne. Wharton on Negligence, § 24. The law takes no cognizance of a breach of a duty except it be a legal one, which the law imposes, *Pennsylvania Co.* v. *Frana*, 13 Ill. App. 98. For instances where of-

fense was held not to be bribery under § 5451, see *United States* v. *Boyer*, 85 Fed. Rep. 425; *United States* v. *Gibson*, 47 Fed. Rep. 833; *Re Palliser*, 136 U. S. 257, 264.

No law is alleged or exists prescribing that it shall be the duty of clerks in the General Land Office to maintain secrecy in reference to reports of special agents.

There is no allegation of any rule, regulation or order prescribing that it shall be the duty of clerks in the Land Office to maintain secrecy in reference to reports of special agents, or making such reports secret and confidential, and the Government's evidence shows that no such rule, regulation or order existed.

If it can be presumed in the absence of definite allegations to that effect, and in the face of the evidence to the contrary, that some rule or regulation had been prescribed and promulgated by the Secretary of the Interior or the Commissioner of the General Land Office, prohibiting the publication of the contents of special agents' reports, nevertheless, such a rule, regulation or order, even if formally promulgated, could not in any event lay the basis for a criminal prosecution.

Congress may delegate power to Department officers to make regulations, which, if made pursuant to that authority and in supplement of the act of Congress, will have the force of law. *In re Kollock*, 165 U. S. 526. But Congress cannot delegate the power to designate or prescribe what acts or omissions shall constitute crimes. *United States* v. *Eaton*, 144 U. S. 677. Departmental regulations are not laws. *Morrill* v. *Jones*, 106 U. S. 466; 4 Am. & Eng. Ency. Law, 642; *United States* v. *Mard*, 116 Fed. Rep. 650; *United States* v. *Manion*, 44 Fed. Rep. 800.

Section 1014 Rev. Stat. does not authorize a removal to the District of Columbia. The District of Columbia is not a district and the Supreme Court of the District of Columbia is not a court of the United States, within the meaning of that section. Appellant being committed for removal to the District

of Columbia, is, therefore, deprived of his liberty without due process of law.

The District of Columbia did not exist at the time of the enactment of section 33 of the judiciary act and was not, therefore, within its contemplation. It has never been constituted or included within one of the Federal judicial districts and is not, therefore, within the provisions of the present section.

By act of February 21, 1871, 16 Stat. 426, the District of Columbia was created a body corporate for municipal purposes. By the act of June 11, 1878, 20 Stat. 102, it was provided that the District of Columbia shall remain and continue a municipal corporation. See also *District of Columbia* v. *Woodbury*, 136 U. S. 450; *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1. See Sen. Rep. No. 658, 43d Cong. 2d Sess.; *In re Dana*, 68 Fed. Rep. 886, 898, and cases cited; *United States* v. *Burr*, Fed. Cas. No. 14,674*a*; *United States* v. *Guiteau*, 1 Mackey, 563.

The Supreme Court of the District of Columbia is not a court of the United States within the meaning of § 1014, Rev. Stat. (or its predecessor, section 33 of the judiciary act). *McAllister* v. *United States*, 141 U. S. 174; *Wingard* v. *United States*, 141 U. S. 201; *The Coquitlam*, 163 U. S. 346; *Thiede* v. *Utah*, 159 U. S. 510; *United States* v. *McMillan*, 165 U. S. 510; *Corbus* v. *Leonhardt*, 114 Fed. Rep. 12; *Jackson* v. *United States*, 102 Fed. Rep. 473, 479. See, however, *Moss* v. *United States*, 23 App. D. C. 475, and cases cited.

The appellant is in any event entitled under the provisions of the Sixth Amendment to the Constitution to a trial in the State of California.

If there was any crime committed it was in California and not the District of Columbia, as according to the indictment the letter containing the money alleged to have been sent as a bribe was mailed in California and the crime, if any, was then complete. *United States* v. *Worrall*, 2 Dall. 384; *United States* v. *Plympton*, 4 Cr. C. C. 309; *United States* v. *Wright*,

2 Cr. C. C. 296; *United States* v. *Bickford*, 4 Blatchf. 337; *United States* v. *Fowkes*, 53 Fed. Rep. 13; *Landa* v. *State*, 26 Tex. Cr. App. 580; *Commonwealth* v. *Dorrance*, 14 Philadelphia, 671; *Re Palliser*, 136 U. S. 257. Section 731, Rev. Stat., is not applicable when applied to the District of Columbia. *United States* v. *Guiteau*, 1 Mackey, 564; *Burton* v. *United States*, 196 U. S. 283, is not in point.

The Solicitor General and *Mr. Francis J. Heney*, Special Assistant to the Attorney General, with whom *Mr. Arthur B. Pugh*, Special Assistant United States Attorney, was on the brief, for the United States:

Sufficiency of an indictment and all technical objections are to be determined by the court in which the indictment was found, and are not matters of inquiry in removal proceedings. *Habeas corpus* cannot be used as a writ of error to review judicial action under section 1014, either as to evidence of probable cause or relative to sufficiency of indictment. *Greene* v. *Henkel*, 183 U. S. 249; *Beavers* v. *Henkel*, 194 U. S. 73; *Horner* v. *United States*, 143 U. S. 570; *Ex parte Rickelt*, 61 Fed. Rep. 203.

Section 5451 does not contemplate the violation only of duties specifically required by law. The head of a Department is not compelled to show a statutory provision for everything he does or prescribes. Duties additional to those imposed by law or published regulations may be prescribed from time to time in the ordinary course of administration. *United States* v. *Macdaniel*, 7 Pet. 1; *Tyner* v. *United States*, 32 Wash. Law Rep. 258.

The statute punishes bribery of an officer or employé of the United States "to *induce* him to do or omit to do any act in violation of his *lawful* duty." Such duty includes every act natural and proper to the particular function or which may be directed by a superior officer; and, *per contra*, refraining from inconsistent and forbidden acts is included. It is not necessary that the violation of duty should itself be a

substantive offense, nor that the duty be actually violated. The bribery denounced is accomplished without those elements.

The District of Columbia is the proper trial district and the Supreme Court of that District is "a court of the United States" and has cognizance of the offense under sec. 1014. Some payments were made in Washington and cash was sent by mail from San Francisco and received by the addressee at Washington. Section 731, Rev. Stat.; *In re Palliser*, 136 U. S. 257; §§ 1, 61, 83, New Code D. C.; *Embry* v. *Palmer*, 107 U. S. 3; *Phillips* v. *Negley*, 117 U. S. 665; *Moss* v. *United States*, 32 Wash. Law Rep. 342; § 1, ch. 39, p. 337, and § 24, ch. 35, p. 296, Comp. Stat., D. C., 1894; act of June 22, 1874, 18 Stat. 193; *United States* v. *Haskins*, 3 Sawy. 262.

In re Dana, 68 Fed. Rep. 886, does not support the contrary view. The real ground for refusing removal there was that libel was a local and not a Federal offense and therefore did not fall within § 1014.

Absurd and mischievous results must be avoided. The appellant's contention would make the entire United States outside the District of Columbia a refuge for fugitives from the administration of justice there. If there were no other reason for rejecting his contention, that would be sufficient.

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

But three questions are raised by the arguments and briefs of counsel in this case:

1. That the indictment charges no crime against the United States.

2. That the District of Columbia is not a District of the United States within the meaning of Rev. Stat. sec. 1014, authorizing the removal of accused persons from one District to another.

3. That the crime was committed in California, and is only triable there.

The indictment is founded upon Rev. Stat. sec. 5451, which enacts that "Every person who promises, offers, or gives . . . any money or other thing of value . . . to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any Department or office of the Government thereof, . . . with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, . . . or with intent . . . to induce him to do or omit to do any act in violation of his lawful duty, shall be punished as prescribed," etc.

The first three counts of the indictment charge, in substance, that the defendant was engaged with one Hyde, at San Francisco, California, in the business of unlawfully obtaining the public lands of the United States; that an investigation by special agents of the Land Department of the unlawful transactions so charged was ordered by the Secretary of the Interior; and it became the duty of such agents to make reports to the Secretary, the contents of which should not be revealed to any unofficial person; that at this time a Department clerk was acting as chief of the special service division of the General Land Office, whose duty it was to act upon all reports of such special agents and to preserve and keep for the exclusive use of the Land Department all such reports; and that pending such investigation the defendant unlawfully gave to such officer, in the District of Columbia, certain sums of money, with the intent to induce him to do an act in violation of his lawful duty—that is to say, to reveal to defendant the contents of the reports of such special agents relating to said investigation. These counts are representative of all the others, one of which is based upon the payment of money to another officer of the United States, with like intent.

(1) Objection is made to the indictment upon the ground that at the time of payments to these officers the special agents' report had not come into their possession or knowl-

edge, and there is no allegation to prove that it ever would; that they had no duty concerning it; that it was not shown that they ever would have such duty; and that a charge of bribery cannot be based upon payment to an officer to induce him to perform an act, as to which he has no duty, and may never have any duty. (2) That neither of these officers was forbidden by any lawful duty to reveal to Benson the contents of any report, even if they ever should come into a position to do so. Upon these grounds it is insisted that the indictment charges no offense against the United States under section 5451.

1. The extent to which a Commissioner in extradition may inquire into the validity of an indictment put in evidence before him, as proof of probable cause of guilt, has never been definitely settled, although we have had frequent occasion to hold generally that technical objections should not be considered, and that the legal sufficiency of the indictment is only to be determined by the court in which it is found. *Ex parte Reggel*, 114 U. S. 642, 650; *Roberts* v. *Reilly*, 116 U. S. 80, 96; *Horner* v. *United States, No. 2*, 143 U. S. 570, 577; *Greene* v. *Henkel*, 183 U. S. 249, 260; *Beavers* v. *Henkel*, 194 U. S. 73, 87.

Indeed, it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a Federal Court of another District, and subject to be passed upon by such court on demurrer or otherwise. Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another District from that to which the extradition is sought, the Commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause.

While the principle laid down in some of the earlier cases in this court, that an indictment upon a statute is ordinarily sufficient if framed in the language of the statutes has been somewhat qualified in later cases, the rule still holds good that

where the statute contains every element of the offense, and an indictment is offered in evidence before the extradition Commissioner as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, and with such a description of the fraud, if that be the basis of the indictment, as will apprise an intelligent man of the nature of the accusation, notwithstanding that such indictment may be open to motion to quash or motion in arrest of judgment in the court in which it was originally found. An extradition Commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts or the indictment offered in support thereof contains the necessary elements of the offense, it is sufficient, although a more critical examination may show that the statute does not completely cover the case. *Pearce* v. *Texas*, 155 U. S. 311; *Davis's Case*, 122 Massachusetts, 324; *State* v. *O'Connor*, 38 Minnesota, 243; *In re Voorhees*, 32 N. J. Law, 141; *In re Greenough*, 31 Vermont, 279, 288.

Applying these considerations to the present case, it appears plainly from the indictment that the accused was charged with the crime of bribery in paying to two officers certain sums of money to reveal to the petitioner the contents of certain reports, pertaining to an investigation then pending with respect to certain frauds used in obtaining public lands. The Commissioner was not required to determine for himself whether the statute applied to reports which had not yet been filed, and which might never be filed, or whether the words of the statute, "which may at any time be pending, or which may by law be brought before him in his official capacity," apply to the pendency of the investigation, or to the pendency of an obligation not to reveal the contents of a paper then in his possession. This was peculiarly a subject for examination by the court in which the indictment was found.

Like comment may be made with respect to the second

objection, that neither of these clerks was forbidden by any lawful authority to reveal the contents of such reports, upon the ground that there was no statute imposing such obligation. But it is clearly for the court to say whether every duty to be performed by an official must be designated by statute, or whether it may not be within the power of the head of a Department to prescribe regulations for the conduct of the business of his office and the custody of its papers, a breach of which may be treated as an act in violation of the lawful duty of an official or clerk. *United States* v. *Macdaniel*, 7 Pet. 1, 14.

While we have no desire to minimize what we have already said with regard to the indictment setting out the substance of the offense in language sufficient to apprise the accused of the nature of the charge against him, still it must be borne in mind that the indictment is merely offered as proof of the charge originally contained in the complaint, and not as a complaint in itself or foundation of the charge, which may be supported by oral testimony as well as by the indictment. When the accused is arraigned in the trial court he may take advantage of every insufficiency in the indictment, since it is there the very foundation of the charge, but to hold it to be the duty of the Commissioner to determine the validity of every indictment as a pleading, when offered only as evidence, is to put in his hands a dangerous power, which might be subject to serious abuse. If, for instance, he were moved by personal considerations, popular clamor or insufficient knowledge of the law to discharge the accused by reason of the insufficiency of the indictment, it might turn out that the indictment was perfectly valid and that the accused should have been held. But the evil once done is, or may be, irremediable, and the Commissioner, in setting himself up as a court of last resort to determine the validity of the indictment, is liable to do a gross injustice.

2. It is further urged in support of this appeal that Rev. Stat. sec. 1014 does not authorize a removal to the District of Columbia, as it is not a District of the United States within

the meaning of the law; and the Supreme Court of the District is not a court of the United States, as the words are used in that section. The pertinent words in the section are that "For any crime or offense *against the United States*, the offender may," by certain officers therein designated, "be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. . . . And where any offender or witness is committed in any District other than that where the offense is to be tried, it shall be the duty . . . of the marshal to execute a warrant for his removal to the District where the trial is to be had." It is true that this section was taken from the judiciary act of 1789, and at that time the District of Columbia was not in existence. But the same remark may be made of the dozens of different Districts which have been formed since this act was passed. The fact that the District of Columbia was not created out of territory theretofore unorganized, but was simply carved out of the District of Maryland, is of no more importance than would be the creation of a new District, rendered necessary by an increase of population or business, of which almost every Congress produces an example. Even if this were not so, the reënactment of this section of the judiciary act in 1873 as sec. 1014 of the Revised Statutes, clearly extended the word "District" to be District of Columbia, as well as to all other Districts created since the judiciary act. *United States* v. *Bowen*, 100 U. S. 508; *Arthur* v. *Dodge*, 101 U. S. 34; *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54, 57.

The anomaly in Rev. Stat. sec. 1014, as applied to this District, consists in its limitations to offenses "against the United States," since the courts of the District of Columbia have a local as well as a Federal jurisdiction, and may punish for offenses, which, if committed within the limits of any other District of the United States, would be relegated to the state courts. Offenders against state laws escaping from the State where the crime is committed and found in another State are surrendered upon the demand of the Governor, by proceedings

taken under a different statute. Rev. Stat. §§ 5278, 5279. Certain cases are to be found, which hold that persons accused of crimes committed within the District of Columbia, against its local laws, cannot be removed to this District for trial under section 1014. If this objection might have been a sound one under sec. 33 of the judiciary act, since the Revised Statutes local offenses have also been treated as offenses against the United States. The question, however, does not arise in this case, since the indictment charges an offense against the United States in violation of section 5451, respecting the bribery of public officers.

It is unnecessary to decide whether the power to remove offenders found in other Districts to this District is affected by the act of February 21, 1871, 16 Stat. 419, 426, providing that "the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States," since by section 2 of the act of June 22, 1874, 18 Stat. 193, the provisions of the thirty-third section of the judiciary act of 1789, from which Rev. Stat. sec. 1014 is taken, "shall apply to courts created by act of Congress in the District of Columbia." Criticism is made of this act in that it only authorizes a removal *from* the District of Columbia to other Districts, but that it does not authorize the removal of persons arrested in some other judicial District *to* the District of Columbia. But we think that if there were any doubt upon the subject still remaining it was removed by the new code of the District of Columbia, taking effect January 1, 1902, wherein it is declared by section 61 that the Supreme Court of the District "shall possess the same powers and exercise the same jurisdiction as the Circuit and District Courts of the United States, and shall be deemed a court of the United States;" and by section one (1) of the same code that "all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the

jurisdiction of the United States, in force at the date of the passage of this act, shall remain in force, except in so far as the same are inconsistent with, or are replaced by, some provision of this code."

In conclusion of this branch of the case it may be said that any construction of the law which would preclude the extradition to the District of Columbia of offenders who are arrested elsewhere would be attended by such abhorrent consequences that nothing but the clearest language would authorize such construction. It certainly could never have been intended that persons guilty of offenses against the laws of the United States should escape punishment simply by crossing the Potomac River, nor upon the other hand that this District should become an Alsatia for the refuge of criminals from every part of the country.

3. Appellant makes further objection to a removal to the District of Columbia upon the ground that the offense, if any, was committed in California, and that under the Constitution he is entitled to a trial in that jurisdiction.

The objection does not appear upon the face of the indictment, which charges the offense to have been committed within this District, but from the testimony of one of those clerks it seems that the money was received by him in certain letters mailed to him from San Francisco and received in Washington. Without intimating whether the question of jurisdiction can be raised in this way, the case clearly falls within that of *In re Palliser*, 136 U. S. 257, in which it was held that where an offense is begun by the mailing of a letter in one District and completed by the receipt of a letter in another District, the offender may be punished in the latter District, although it may be that he could also be punished in the former. A large number of authorities are collated by Mr. Justice Gray in the opinion, and the case is treated as covered by sec. 731, providing that when an offense is begun in one District and completed in another it shall be deemed to have been committed in either, and be tried in either, as though it had been

wholly committed therein. In addition to this, however, it is conceded that some of the offenses charged in the various counts were committed in Washington.

There was no error in the action of the court below, and its judgment is

Affirmed.

MR. JUSTICE DAY, with whom were MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA, concurring.

MR. JUSTICE WHITE, MR. JUSTICE PECKHAM, MR. JUSTICE MCKENNA and the writer agree in the conclusion just announced and in the main with the reasoning of the opinion. But we are unable to concur in the view that where the Commissioner may be of opinion that the indictment charges no offense against the laws of the United States, and there is no other proof of probable cause before him, the order of arrest may be made, remitting to the court where the indictment was found all questions of the sufficiency of the indictment. We agree that upon the hearing before the Commissioner the indictment is *prima facie* to be taken as good, and that no technical objection should prevail against it; its ultimate sufficiency being matter for determination of the court wherein it was returned against the accused, subject to review in the appellate courts. *Greene* v. *Henkel*, 183 U. S. 249. But the order of removal involves judicial rather than mere ministerial action, and must be issued by the judge of the District when the case made warrants it. Sec. 1014, Rev. Stat.; *Beavers* v. *Henkel*, 194 U. S. 73, 83. And whether found in the indictment, or as the result of other testimony, the order to remove the accused can only be issued upon a showing of probable cause. *Greene* v. *Henkel*, 183 U. S. *supra*.

In this case the argument chiefly relied upon against the right to issue the order of arrest, and subsequently of removal, rested upon the alleged insufficiency of the indictment to charge any offense within the terms of the statute, because the

reports which it was alleged the accused had been bribed to reveal were not then on file and might never be filed in the Department. It is said that the Commissioner was not required to determine for himself whether the statute applied to such reports, but such objections must be remitted for determination to the court in which the indictment was found. In other words, the order of arrest and commitment may be made, although the Commissioner be of opinion that the indictment, in a particular vital to the prosecution of the offense, and which cannot be supplied by other proof, is fatally defective, and the accused is charged with no offense against the laws of the United States. In our opinion, the Commissioner, when the case is thus presented, must pass upon the sufficiency of the indictment. It is his duty to decide whether an offense is charged, with a view to making or withholding the order of arrest, which when made, becomes the basis of an order of removal of a citizen to the place of trial, which may be many miles distant from his home. Such order is proper only in cases wherein probable cause has been shown to believe the accused guilty of an offense cognizable by the laws of the United States in the proceeding pending against him, and for which he is to answer at the place of indictment.

PABST BREWING COMPANY *v.* CRENSHAW.

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

No. 85. Argued December 8, 1904.—Decided April 17, 1905.

The malt liquor inspection law of Missouri provides for the inspection of malt liquors manufactured within the State and also for those manufactured without and held for sale and consumption within the State. The Supreme Court of the State sustained the law deciding among other things that the act does not affect liquors shipped into the State and held there for reshipment without the State, that it does not discriminate in favor of beer manufactured in the State, and that it is not a revenue, but an inspection law. The constitutionality of the law was attacked

by a manufacturer of malt liquors without the State as an interference with interstate commerce, and also on the ground that as the amount of the inspection charge far exceeds the expense of inspection it is a revenue, and not an inspection law, and therefore does not fall under permissive provisions of the Wilson Act. *Held:*

A state statute which operates upon beer and malt liquors shipped from other States after their arrival and while held for sale and consumption within the State, is not an interference with interstate commerce in view of the provisions of the Wilson Act.

The regulation of the sale of liquor is essentially a police power of the State, and a provision in a state law, tending to determine the purity of malt liquors sold in the State, is an exercise of the same power.

The purpose of the Wilson Act is to make liquor, after its arrival in a State, a domestic product, and to confer power on the States to deal with it accordingly. The police power is, hence, to be measured by the right of the State to control or regulate domestic products and this creates a state and not a Federal question as respects the commerce clause of the Constitution; and this court cannot review the determination of the state court that the statute involved in this case was not a revenue but an inspection measure.

A state regulation, valid under the Wilson Act, as to liquors shipped from another State after delivery at destination is not an interference with interstate commerce because it affects traffic in, and deters shipments of, the article into that State.

The rule that state inspection laws, which do not provide adequate inspection and impose a burden beyond the cost of inspection, are repugnant to the commeree clause of the Constitution does not apply to liquors after they have ceased to be articles of interstate commerce under the provisions of the Wilson Act.

THE facts are stated in the opinion.

Mr. Clifford Histed, with whom *Mr. James H. Harkless*, *Mr. Charles S. Crysler* and *Mr. Francis C. Downey* were on the brief, for appellant:

The business is interstate commerce. *United States* v. *Swift & Co.*, 122 Fed. Rep. 529; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Robbins* v. *Taxing District*, 120 U. S. 489; *Stockard* v. *Morgan*, 185 U. S. 27; *New York* v. *Roberts*, 171 U. S. 658. *Brewing Co.* v. *Brister*, 179 U. S. 445, distinguished.

The statute is not within the police power of the State.

The fees bear no just relation to the expense. The fees do not go to the inspectors but to the State which separately appropriates for the inspectors' salaries. The receipts are

$350,000 and the expenses about $12,500. It was introduced and regarded as a revenue measure, and afterwards disguised as an inspection law. House Journal, Missouri Legislation, 1899, 190, 278, 452; Sen. Journal, 386, 610, 620; Session Acts, 1901, 226. The act does not regulate the sale of beer. As to being subject to inspection fees, malt liquors stand on the same footing as other merchandise under the commerce clause of the Constitution. *License Cases*, 5 How. 599; *Bowman* v. *Chicago Ry. Co.*, 125 U. S. 465, and cases cited; *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Scott* v. *Donald*, 165 U. S. 58, 91.

As intoxicating liquors are subjects of lawful commerce in Missouri, the State, in imposing an inspection fee under its police power, is bound by the rule that the charge bears a reasonable and just relation to the cost of inspection. *Hopkins* v. *United States*, 171 U. S. 578, 597; *Express Co.* v. *Ohio*, 166 U. S. 185, 218; *W. U. Tel. Co.* v. *New Hope*, 187 U. S. 419; *Telegraph Co.* v. *Philadelphia*, 190 U. S. 160; *Postal Tel. Co.* v. *New Hope*, 192 U. S. 55; *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64.

No practical inspection is punished by the act, nor under it have the inspectors any power to make an actual inspection. The statute cannot be sustained as a police regulation because, in its practical workings, it has no relation whatever to the public health. *Vance* v. *Vandercook Co.*, 170 U. S. 438, 456; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Scott* v. *Donald*, 165 U. S. 93; *Reid* v. *Colorado*, 187 U. S. 150.

This court is not bound by the declaration of the state Supreme Court that the act is an inspection law. This court will determine that for itself, as interstate commerce is involved. *Brennan* v. *Titusville*, 153 U. S. 289; *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64; *People* v. *Compagnie Générale*, 107 U. S. 59, 63; *Minnesota* v. *Barber*, 136 U. S. 313.

The tax is not authorized by the Wilson Law. The act is an unreasonable burden on interstate commerce and is not within the police power as it is a pure revenue measure and does not come within the provisions of the Wilson Bill. The Missouri state court held that it did come within the provisions of that

act, *State* v. *Bixman*, 162 Missouri, 38, but that decision cannot be sustained by the cases cited. See *Brewing Co.* v. *Brister*, 179 U. S. 445, 455; *Brewing Co.* v. *Terre Haute*, 98 Fed. Rep. 330; *Ex parte Jervey*, 66 Fed. Rep. 957; *Re Bergen*, 115 Fed. Rep. 339; *Brewing Co.* v. *McGilivray*, 104 Fed. Rep. 258.

Mr. Edward C. Crow, Attorney General of the State of Missouri, and *Mr. William M. Williams* for appellee:

The Supreme Court of the State has held the law to be constitutional, and it is not open to appellant to question its validity upon the ground of any supposed conflict with the state constitution. *State* v. *Bixman*, 162 Missouri, 1.

This court will follow the highest court of the State in questions involving the construction of the state constitution.

The only question here is whether the act violates the Federal Constitution; in determining that, the Federal courts will adopt the construction given to the statute by the Supreme Court of the State. *Cargill Co.* v. *Minnesota*, 180 U. S. 452.

The "Wilson Bill" puts intoxicating liquors shipped into a State within the police power of such State immediately upon their arrival. Such liquors do not stand upon the same footing as other articles of interstate commerce, and authorities touching the latter are inapplicable, since the passage of said bill, to the former. The State may prescribe the terms and conditions upon which such liquors may be sold, even in original packages, and, in the absence of discrimination against the products of other States, such regulations are valid. *Vance* v. *Vandercook Co.*, 170 U. S. 438; *Brewing Co.* v. *Brister*, 179 U. S. 445.

The act is a police measure, is a valid exercise of the police power of the State, and comes within the express terms of the "Wilson Bill." 11 Am. & Eng. Ency. of Law, 1st ed., 592; Black on Intox. Liq. § 55; *Kurth* v. *State*, 86 Tennessee, 134; *McGahey* v. *Virginia*, 135 U. S. 662; *State* v. *Hudson*, 78 Missouri, 365.

It cannot be that this is not a tax upon the privilege or business on the ground that the right to engage in the business

is given by another statute. It was still within the power of the legislature to impose additional conditions and burdens upon the privilege of carrying on the business. It is not necessary that all the regulations of the liquor traffic should be contained in one statute. *State* v. *Luddington*, 33 Wisconsin, 107; *Kurth* v. *State*, 86 Tennessee, 134.

Complainant, after the passage of this act, was not authorized to sell beer by virtue of a license granted to it under other statutes, unless it also complied with the requirements of this law.

The right to manufacture and sell intoxicating liquors is not a natural right and may be granted or withheld by the legislature. Cases cited *supra;* Black, § 39; *Austin* v. *State*, 10 Missouri, 591; *State* v. *Bixman*, 162 Missouri, 1. The legislature may impose what conditions it sees fit. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Danville* v. *Hatcher*, 44 S. E. Rep. 723; *Tragresser* v. *Gray*, 9 L. R. A. 780; *Ex parte Sikes*, 24 L. R. A. 774; Cooley on Taxation, 2d ed., 587.

If appellant's contention, that under the guise of an inspection law, the state statute simply imposes a specific tax upon beer for general revenue purposes, was correct, still there is nothing in the interstate commerce clause of the Federal Constitution to prevent such tax. *Hinson* v. *Lott*, 8 Wall. 148; *Am. Steel Co.* v. *Speed*, 192 U. S. 500; *Carstairs* v. *Cochran*, 193 U. S. 10.

Mr. Justice White delivered the opinion of the court.

The Pabst Brewing Company, a Wisconsin corporation, filed its bill in the court below to enjoin the beer inspector of the State of Missouri and his assistant from collecting or attempting to collect an inspection charge, fee, license or burden, which it was alleged the law of Missouri imposed upon beer or other malt liquors when shipped from other States into Missouri, after its delivery within that State to the consignee, and when held for sale for consumption in Missouri or for shipment to other States. The general ground upon which the law was

assailed was that the exactions complained of were regulations of commerce repugnant to the Constitution of the United States. It was in addition specially averred that so far as the law imposed a charge on beer shipped from Wisconsin into Missouri, and held there by the consignee for sale and shipment for consumption in other States, the Missouri law was repugnant to the commerce clause, because in this particular it discriminated in favor of beer manufactured in Missouri and held for sale or shipment for consumption in other States.

The bill was amended and demurred to. Whilst the court considered the law not to be in conflict with the commerce clause on the general grounds alleged, it nevertheless concluded, because of the averment concerning discrimination as to beer shipped into Missouri for reshipment to other States, that the demurrer could not be sustained. 120 Fed. Rep. 144. An answer was thereupon filed, as also a replication, and subsequently the cause was submitted upon the pleadings and an agreed statement of facts.

The Supreme Court of Missouri having decided that the law in question did not provide for any charge or burden upon beer or other malt liquors shipped into Missouri and held there for reshipment to points outside of the State, the court below, adhering to its previous opinion as to the general averments of the bill, and applying the construction given by the Supreme Court of the State to the statute, held that it did not discriminate, and dismissed the suit.

The law of Missouri in question is entitled "An act creating the office of inspector of beer and malt liquors of the State, and providing for the inspection of beer and malt liquors manufactured and sold in this State." The provisions of the act essential to be considered may be summarized as follows:

It creates the office of beer inspector, to be appointed by the Governor, who shall be an expert beer brewer, and who is required to furnish a bond, and is given power to appoint the necessary deputies to execute the provisions of the act. The act forbids every person or corporation engaged in brewing

within the State from using any material or chemical in the manufacture of beer or other malt liquors other than pure hops or pure extract of hops, or barley, malt, or wholesome yeast or rice. It is provided that the inspector or his deputies shall keep a record of those engaged in the manufacture, brewing and sale of malt liquors within the State and of the quantity manufactured or sold, and shall make a full report to the Governor concerning the same, and imposes upon the officials named the duty of inspecting all beer or other malt liquors manufactured or sold within the State, to see that they conform to the standard of purity which the law requires. The act further imposes an inspection fee, charge or license, accompanied with provisions for a label or stamp to be affixed upon the packages containing the beer or other malt liquors so manufactured or offered for sale within the State.

Concerning beer or other malt liquors manufactured outside of the State of Missouri and shipped into that State for sale and consumption within the State, after delivery and receipt under the shipment, the act provides as follows:

"SEC. 5. Every person, persons or corporation who shall receive for sale or offer for sale any beer or other malt liquors other than those manufactured in this State shall, upon receipt of same, and before offering for sale, notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer thereof, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops or the extract of hops, or pure barley, malt or wholesome yeast, or rice, was used in the manufacture of same; upon the receipt of said affidavit the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beer and malt liquors in this State."

In the printed and oral argument at bar all the contentions concerning discrimination are waived, and the sole ground

relied upon is the assertion that the statute constitutes a regulation of commerce and is hence repugnant to the commerce clause of the Constitution of the United States.

Brevity and clearness in the consideration of the propositions relied upon to sustain the contentions made will be subserved by fixing at the outset exactly what the statute does and by stating the legal principles which are controlling.

The subject with which the statute deals is beer and other malt liquors. Plainly, it operates upon such liquors only when manufactured in the State or if shipped from other States, after their arrival in the State and when they are held there for sale and consumption therein.

It is provided by the act of Congress, commonly styled the Wilson Act, 26 Stat. 313, c. 728, as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The scope of this act and the power of Congress to adopt it were passed upon in *In re Rahrer*, 140 U. S. 545. The scope of the act was thus stated (p. 560):

"Congress has now spoken and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature."

It was decided that although the act had the effect thus stated it was not repugnant to the Constitution of the United States, the court saying (p. 562):

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at

an earlier period of time than would otherwise be the case, it is not within its competency to do so."

In *Rhodes* v. *Iowa*, 170 U. S. 412, the purport of the act was again passed upon. Reiterating the ruling made in the *Rahrer case*, it was decided that whilst the Wilson Act caused liquors shipped into Iowa from another State to be divested of their character as articles of interstate commerce after their delivery in Iowa to the person to whom consigned, nevertheless the act did not authorize the laws of Iowa to be applied to such merchandise whilst in transit from another State and before delivery in Iowa.

In *Vance* v. *Vandercook Co., No. 1*, 170 U. S. 438, the operation of a liquor law of South Carolina was considered. By the act in question the State of South Carolina took exclusive charge of the sale of liquor within the State, appointed its agents to sell the same, and empowered them to purchase the liquor, which was to be brought into the State for sale. The fact was that by the act in question the State of South Carolina, instead of forbidding the traffic in liquor, authorized it, and engaged in the liquor business for its own account, using it as a source of revenue. The act in addition affixed prerequisite conditions to the shipment into South Carolina from other States of liquor to a consumer who had purchased it for his own use and not for sale. Considering the Wilson Act and the previous decisions applying it, it was decided that the South Carolina law, in so far as it took charge in behalf of the State of the sale of liquor within the State and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the state law imposed burdens on the right to ship liquor from another State to a resident of South Carolina intended for his own use and not for sale within the State, the law was held to be repugnant to the Constitution, because the Wilson Act, whilst it delegated to the State plenary power to regulate the sale of liquors in South Carolina shipped into the State from other States, did not recognize the right of a State to prevent an individual

from ordering liquors from outside of the State of his residence for his own consumption and not for sale.

Quite recently, at this term, in *American Express Company* v. *Iowa*, and *Adams Express Co.* v. *Iowa*, 196 U. S. 133, 147, the construction affixed to the Wilson Act in the previous cases was applied, and the power of the State of Iowa to control the sale of liquors shipped from another State into that State, after their delivery to the consignee, was upheld.

Applying the Wilson Act and the decisions thereunder to the statute here assailed, we think it clear that the contention that it is repugnant to the commerce clause of the Constitution is without merit, unless the reasons urged to show that the present case is not within the scope of the Wilson Act be well founded. We proceed to consider the contentions relied on to establish that proposition.

1st. The Wilson Act, it is argued, subjects liquors shipped from one State into another, after their arrival at their destination, only to the "laws of such State or Territory enacted in the exercise of its police powers . . ." As, it is said, the law of Missouri was not enacted in the exercise of the police power, hence malt liquor received from another State and held in Missouri for sale retained its character as an article of interstate commerce until sold in the original package.

But the proposition rests upon the mere assumption that the law of Missouri was not enacted in the exercise of the police power of that State. Certainly the regulation of the sale of liquor is essentially a police power. Surely, also, provision made in a state law tending to determine the purity of malt liquors offered for sale and consumption within a State is likewise an exertion of the same power. Conceding that the law in question may be inadequate to accomplish the purpose designed and produces a large revenue to the State over and above the cost of inspection, this affords no Federal ground upon which to hold that the police power of the State was not brought into play in making the enactment where the law does not operate upon a subject within Federal control. This

becomes evident when it is borne in mind that, whether the statute be regarded as a prohibition, as a regulation, as a license or as an inspection law, if it encroached upon the Federal authority it would be void, and, on the contrary, in all or any of these aspects, the law would be valid, so far as the Federal Constitution is concerned, if it did not so encroach. The purpose of the Wilson Act was to make liquor after its arrival a domestic product and to confer power upon the States to deal with it accordingly. The police power is hence to be measured by the right of a State to control or regulate domestic products, a state and not a Federal question as respects the commerce clause of the Constitution. So far as the state aspect is concerned the matter is foreclosed by a decision of the Supreme Court of Missouri passing upon the validity, under the state constitution, of the law now under consideration. *State* v. *Bixman*, 162 Missouri, 1. In that case a person was proceeded against for selling malt liquor made within the State of Missouri without complying with the statute. The validity of the statute was assailed, on the ground, among others, that it was a revenue law and repugnant to the uniformity clause of the state constitution; that it was not an inspection law because it did not provide for an adequate inspection, and because the burden which it imposed was obviously out of all proportion to the cost of inspection, since the charge which was exacted copiously enriched the state treasury. The state court, after an elaborate review of its previous decisions, held that the mere fact that a revenue was produced by the execution of the statute did not cause the statute to be merely a revenue measure, and that although the inspection which the law provided might be inadequate, nevertheless the statute did not violate the state constitution. These views were sustained upon the ground that the statute dealt with a subject which was peculiarly within the police power of the State. Summing up its conclusions as to the validity of the statute, the court declared:

"In our opinion, it [the law] *is a police regulation, imposing*

conditions upon the business of manufacturing and selling beer and malt liquors in this State, which business the State may absolutely suppress, or permit upon such terms as the legislature may prescribe. We construe the act in view of all its parts, and in connection with other license laws of this State, and hold that the fee exacted is the price which the State demands for the privilege of doing the business of brewing and selling beer and malt liquors in this State, and it is immaterial by what name it is called."

As then, the Supreme Court of Missouri has determined that the statute does not conflict with the state constitution and is valid because it is a police regulation imposing conditions upon the business of manufacturing and selling beer in Missouri, a traffic which it is conceded the State had the power to prohibit entirely, it follows that we are without power, from a consideration of the state constitution, to treat the law as invalid because of the revenue provisions of the state constitution or other limitations imposed by that constitution upon the state government. It necessarily results from this that the assailed law comes directly within the express terms of the Wilson Act. The determination of this question by the Supreme Court of Missouri, as to liquor manufactured in Missouri, in the absence of discrimination, is necessarily conclusive also as to the character of the law when applied to a similar article shipped from other States into Missouri after arrival at its destination, and when held for sale and consumption in that State. This must be the case, since, as we have seen, the Wilson Act, to use the words of *In re Rahrer,* places liquor coming from another State after its arrival "within the category of domestic articles of a similar nature."

To decide that an exertion by a State of its power to regulate the sale of malt liquors manufactured within the State was an exercise of its police authority, and yet to say that the same, when applied to liquor shipped into the State from other States, after delivery, was not an exertion of the police power, would be to destroy the Wilson Act, and frustrate the very

object which it was intended to accomplish, and besides would overrule the previous decisions of this court upholding and enforcing that statute.

We need not, however, further consider the subject, since the proposition relied upon is not open to discussion, as a similar contention was expressly ruled upon in *Vance* v. *Vandercook Co., No. 1, supra.* In that case, as has already been said, the State of South Carolina had by law taken charge of the sale of liquors in the various counties of the State, no liquor being allowed to be sold except through the state agencies. The law by which this system was put in force had been upheld by the state courts as a lawful exertion of the police power. The validity of the act was assailed in the Circuit Court of the United States on the ground of its repugnancy to the commerce clause of the Constitution, and the lower court sustained the contention. Among the grounds relied upon in this court was that the law in question was not within the Wilson Act, because it was not an exertion of the police power of the State, since it did not forbid the sale of liquor, but on the contrary fostered and encouraged it and made it a source of revenue. In holding this proposition to be untenable the court said (p. 447):

"The confusion of thought which is involved in the proposition to which we have just referred is embodied in the principle upon which the court below mainly rested its conclusion. That is, 'if all alcoholic liquors, by whomsoever held, are declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power; but so long as their manufacture, purchase or sale, and their use as a beverage in any form or by any person are recognized, they belong to commerce and are without the domain of the police power.' But this restricts the police power to the mere right to forbid, and denies any and all authority to regulate or restrict. The manifest purpose of the act of Congress was to subject original packages to the regulations and restraints imposed by the state law. If the purpose of the act had been to allow the

state law to govern the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other States."

2d. Conceding, it is argued, that the Missouri statute attached to the liquor after delivery at its destination in Missouri, nevertheless as the burdens which the statute imposed were of such a character as to affect traffic in the article and hence operate to deter shipments into Missouri, therefore the statute must be treated as if it bore upon the liquor while still in transit as a subject of interstate commerce. This proposition simply amounts to contending that the Wilson Act should be disregarded, since to enforce it would give the States power to regulate interstate traffic in liquor. If when a State has but exerted the power lawfully conferred upon it by the act of Congress its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor, yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce by means of which the harmonious workings of our constitutional system has been made possible.

3d. It is further insisted that, as the Missouri law is denominated in its text as an inspection law, and does not provide an adequate inspection, and besides imposes a burden beyond the cost of inspection, the law is repugnant to the Constitution of the United States when tested by previous

decisions of this court determining when particular inspection laws amounted to a regulation of commerce, citing *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, and *Postal Telegraph-Cable Co.* v. *New Hope*, 192 U. S. 55. These cases, however, simply considered state laws which operated upon interstate commerce. To apply them to the Missouri law necessarily involves deciding that the malt liquors to which that law applied had not ceased to be articles of interstate commerce; and, therefore, again, merely disregards the Wilson Act and the decisions of this court concerning it. Indeed, the whole argument upon which the entire case of the plaintiff in error proceeds rests upon this fallacious assumption, since it admits on the one hand the validity of the Wilson Law, and yet seeks to take this case out of the reach of its provisions by distinctions which have no foundation in reason, unless it be that that law is to be disregarded or held to be unconstitutional.

Decree affirmed.

MR. JUSTICE BROWN, with whom the CHIEF JUSTICE, MR. JUSTICE BREWER and MR. JUSTICE DAY concurred, dissenting.

The opinion of the court is put upon the ground that the Wilson Act subjects liquors shipped from one State into another, after their arrival at their destination, to the laws of the State or Territory enacted in the exercise of its police powers; and that, as an inspection law is a law enacted in the exercise of its police powers, the law in question is within the act; and we are consequently precluded from inquiring whether such law is a legitimate exercise of the police powers or a mere revenue law to which the name of an inspection law is given for the purpose of obviating the difficulty, under the state constitution, of upholding it as a revenue measure. It may be conceded at once that if the law in question be a legitimate inspection law it necessarily follows that, as it was enacted in the exercise of the police power of the State, it applies to foreign liquors "to the same extent and in the same manner

as though such liquors or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise." The opinion practically concedes that the act must, if constitutional, be supported as an inspection law, passed under the police power of the State; and such was the position taken by the Supreme Court of Missouri. It was admitted in that case, both by the majority and minority judges, that the act could not be supported as a revenue measure, because in conflict with the constitution of the State.

To determine the question whether it can be supported as an inspection law it is necessary to consider at some length the nature of its provisions.

The agreed statement of facts shows that the plaintiff manufactures in the State of Wisconsin ten different kinds or grades of beer and malt liquors, each kind being separately manufactured and requiring special treatment; that it ships into the State of Missouri annually not less than 15,000 barrels of malt liquors, of thirty-one gallons each, of the aggregate value of $100,000; that there are a large number of domestic manufacturers of malt liquor in the State of Missouri, whose annual productions amount to over 2,250,000 barrels of beer of the aggregate value of $12,250,000, of which 1,275,000 are sold within the State; that there are other manufacturers outside of the State standing in the same position as the plaintiff, who annually ship into the State not less than 165,000 barrels of the aggregate value of $1,725,000, beside that imported from abroad; that plaintiff is licensed to carry on business in Missouri; that such business consists of shipping into the State, for the purposes of selling therein or reshipping therefrom, the product of its manufacture in Wisconsin; that in the usual course of its business it is compelled to maintain large warehouses in the State, as well as an office, as a necessary adjunct to the conduct of its business; that it maintains no manufactory in Missouri, and that it disposes of its beer in the original packages in which it is shipped.

There are insuperable difficulties in the way of the maintenance of this act as an inspection measure.

To inspect, as defined by Webster, is to examine, to view closely and critically, especially in order to ascertain quality and condition, to detect errors, etc.

The object of the act is declared by section 4 to be to exclude the use of any substance, material or chemical, in the manufacture of malt liquors other than pure hops, or pure extract of hops, or pure barley, malt or wholesome yeast or rice. So far as beer manufactured within the State is concerned, the inspection is made, or at least may be made, *State* v. *Bixman*, 162 Missouri, 1, 34, of the ingredients of the beer in the mash tub and before the beer is actually brewed. The inspector goes to the brewery and makes his test by taking a sample of the mash of the beer there fermenting, and, although thousands of gallons may be made from one mash, a single inspection is sufficient. With respect to beer manufactured outside of the State, section 5 requires that the consignee of the beer shall notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer thereof or other reputable person having actual knowledge of the composition of said beer or malt liquors, that no material other than pure hops, or the extract of hops, or pure barley, malt or wholesome yeast or rice, was used in the manufacture of the same. "Upon the receipt of said affidavit the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beers and malt liquors in this State."

It is true this section seems to require that upon receipt of such affidavit the inspector shall inspect and label the packages. But similar words used in section 7 with regard to domestic beer were interpreted by the Supreme Court in *State* v. *Bixman*, 162 Missouri, 1, as requiring only an inspection of the mash at the brewery, since the actual inspection of the beer

would require the opening of each package, or at least a sample package, which would practically ruin the contents. As it is impossible to suppose that the legislature should have contemplated that the inspectors should visit breweries outside of the State and inspect the mash, or that they should open the packages after their receipt in the State, and thus spoil the beer, it would seem that the inspectors have no alternative but to accept the affidavit as a basis of their inspection. This is said to be the manner in which the law is practically administered. Indeed, the agreed facts show that the beer involved in this case was inspected while still in the hands of the plaintiff, that the packages were never opened, but the affidavit was accepted as a sufficient compliance with the act.

While this may be the only inspection practicable, it is really no inspection at all, since it is dependent entirely upon the veracity of the person making the affidavit. There is no power given to these inspectors to investigate the truth of the statements contained in these affidavits, except, possibly, by tasting or analyzing the beer. There is no penalty provided for making a false affidavit, nor can the State proceed against the manufacturer who is beyond the jurisdiction of the court. There is no assurance that the affidavit, which may be made in the State of manufacture as well as in Missouri, has any relation to the particular shipment to which it is sought to apply it, and there is no power given even to open the boxes in which bottled liquors purport to be enclosed, to examine their contents. The object of inspection laws is to require such examination of the thing inspected as will insure to the public a safe and wholesome article. Obviously to secure this the inspection must be made by officers appointed for that purpose; at least it cannot be delegated, as it virtually is in this case, to the manufacturer. The requirement of an affidavit, and the acceptance of this in lieu of an actual inspection, make the affiant, who is the manufacturer or his agent, the sole judge of the fact whether the liquor contains only the ingredients allowed by law. We cannot treat this as a *bona fide* inspec-

tion. To justify an inspection in law there must be an inspection in fact.

We had occasion in *Vance* v. *Vandercook Co., No. 1*, 170 U. S. 438, 456, to pass upon a law requiring a sample of alcoholic liquor proposed to be shipped, to be sent to the state officer in advance of the shipment, and as a prerequisite to making a subsequent shipment. We held that the inspection of a sample so sent in advance was not in the slightest degree an inspection of the goods subsequently sent into the State. "The sample may be one thing and the merchandise which thereafter comes in another." This is a much stronger case for the application of the principle, as there is no inspection at all, but the acceptance of an affidavit made by an interested party in lieu thereof. Indeed, so perfunctory is this inspection that it appears to have awakened a suspicion in the court below "that the legislature was more concerned in collecting fees to swell the exchequer of the State, than in the protection of the people who might drink beer."

The obvious inefficacy of the inspection has an important bearing upon the more serious objection to this act, in that the fees for inspection bear no just relation to the expense, and make it evident that the law was not passed in a *bona fide* exercise of the police powers of the State, but as a convenient method of increasing the public revenues. Section 8 provides for an inspection fee of one cent per gallon and two cents for labelling each package containing eight gallons, making a total fee of one and a quarter cent per gallon. All of these fees are required to be paid into the state treasury, and pass to the general revenue fund of the State. The inspectors cannot even deduct their salaries from the fees, but are paid by a distinct appropriation for that purpose.

It is conceded in the stipulation of facts that the entire expenditure authorized on account of actual inspection amounts to $12,500, and that the inspection fees annually collected amount to $350,000, or $337,500 in excess of the costs for inspection, and that the fees chargeable under said act upon the

malt liquors manufactured out of and brought into the State from other States and from foreign countries, for sale in Missouri, exceed the total authorized cost for inspection, approximately, $60,000 a year.

In this connection it is pertinent to notice that the bill in question when first introduced in the House was entitled "An act creating the office of inspector of beer and malt liquors, and providing for the creation of a fund for the construction of roads and highways;" and as originally introduced into the Senate contained the words "providing for the increase of the general revenue fund." In the bill as passed these words were stricken out, and the words "providing for the inspection of beers and malt liquors manufactured and sold in this State" inserted in their place. Notwithstanding these changes in the title of the bill as finally passed, it is evident that the main object was to increase the general fund of the State by the amount of the inspection fees, less the expenses of the inspection, and that the inspection was really an incident to or an excuse for the revenue to be derived from the act. These facts are a cogent argument in favor of applying to this case the rule established in a number of recent cases, that fees cannot be imposed for the purpose of inspection upon companies doing an interstate business which are so far in excess of the expenses of such inspection as to make it plain that they were adopted, not as a means of paying such expenses, but as a means of raising revenue.

The latest of these is that of the *Postal Telegraph-Cable Company* v. *Taylor*, 192 U. S. 64, wherein a license fee was imposed upon the telegraph company which largely exceeded the entire cost to the company of maintaining its line, including repairs, reconstruction, costs of labor and of material and travelling expenses of employés, and all expenses incurred by it in a careful inspection of its poles and wires. The ordinance was defended as a police regulation. It was argued that the question of revenue was not its object, but that the defendant had the right to constantly inspect the poles and wires to protect

the lives of its citizens. The court found the borough to have been sparsely settled; that it had done nothing in the way of inspection, and had incurred no liability therefor; that the fee was twenty times as large as was necessary to make the most careful and efficient inspection that could have been made. The ordinance was adjudged to be invalid, the court saying: "To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet, because it is said to be an inspection measure, the court must take it as such and hold it valid, although resulting in a rate of taxation which, if carried out throughout the country, would bankrupt the company, were it added to the other taxes properly assessed for revenue, and paid by the company."

In previous cases arising under a similar state of facts the ordinances had been upheld as within the police power of the municipality, *St. Louis* v. *Telegraph Co.*, 148 U. S. 92; 149 U. S. 465; *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419, in which the ordinances were sustained upon the ground that the fees were not so excessive as to justify the inference that they were not imposed as a *bona fide* exercise of the police powers, and in *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, in which the question of reasonableness was held to have been properly submitted to the jury, and *Postal Telegraph-Cable Co.* v. *New Hope*, 192 U. S. 55, in which the verdict of a jury for a less amount than that fixed by the ordinance was held to be a verdict that the charge was unreasonable, and should have been followed by a judgment for the telegraph company.

The facts of this case show that the inspection, as applied to malt liquors manufactured out of the State, was purely perfunctory, and accomplished nothing for the protection of its citizens, but that the fee derivable therefrom was thirty times the actual cost of such inspection, even when applied

to liquors manufactured within the State. A disproportion so gross can only be accounted for upon the theory that the act was intended for the purposes of revenue and not for inspection.

It is insisted, however, that as the Supreme Court of the State has in the case of *State* v. *Bixman*, 162 Missouri, 1, by a majority vote, upheld the constitutionality of the act as an inspection law, applied to beer of *domestic* manufacture, and not as an act for raising revenue, we are bound by this definition, and are precluded from considering it in any other light than that of an inspection fee or license tax. But a question of constitutional law cannot be answered by a definition. While, as we have frequently said, we adopt the interpretation of the statute of a State affixed to it by the court of last resort thereof, we still feel at liberty in accepting such interpretation to determine for ourselves whether the act is a *bona fide* exercise of the police power of the State and not intended merely as an excuse for the taxation of interstate commerce.

As was said by this court in *Mugler* v. *Kansas*, 123 U. S. 623, 661: "If, therefore, 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 a 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."

In *Railroad Co.* v. *Husen*, 95 U. S. 465, the validity of the act of the State of Missouri, which prohibited the introduction into the State of any Texas or Mexican cattle between the months of March and November of each year, was considered. It was insisted that the law was valid as a quarantine or inspection law, as its purpose was to prevent the introduction of cattle afflicted with contagious diseases. But the court pointed out that no provision was made for the actual inspection of the cattle, so as to secure the rejection of those that were diseased, but that all importation of cattle, whether sound or diseased, was forbidden for long periods; and it was

held that the statute was void as a plain intrusion upon the exclusive domain of Congress.

And in *Reid* v. *Colorado*, 187 U. S. 137, 150, this court said:

"Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268. Another is that a State may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. *Railroad Company* v. *Husen*, 95 U. S. 465, 472. Again, the acknowledged police powers of a State cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 625, 626, and authorities cited."

The reasonableness of the law as compared with the cost of inspection is made the test of the validity of the law in *Patapsco Guano Co.* v. *North Carolina Board of Agriculture*, 171 U. S. 345; *Willis* v. *Standard Oil Co.*, 50 Minnesota, 290.

But treating it as an inspection law, the question remains whether, as applied to beer manufactured in other States, it is a *bona fide* exercise of the police powers of the State to protect the health of its citizens, and for the reasons already given we are of opinion it is not. The fact that the law may have been valid as applied to liquors manufactured within the State does not remove the difficulty, as the Wilson Act only applies to the police powers of the State to the same extent and in the same manner as though the liquors had been produced within the State. If foreign liquors were subject to the same inspection as domestic liquors there would be much force in the contention that the inspection was covered by the terms of the Wilson Act; but as in this case domestic liquors were actually inspected, and foreign liquors were not inspected at all, the

act does not apply. The object of the act is merely to place foreign and domestic liquors on the same footing as respects the police powers of the State. The inference is drawn in the opinion of the court that upon the arrival of foreign liquors at their destination the State may deal with such liquors as it pleases; in other words, that they have passed wholly beyond the Federal control as subjects of interstate commerce.

The Wilson Act was passed in consequence of our decision in *Leisy* v. *Hardin*, 135 U. S. 100, to the effect that a state statute prohibiting the sale of liquors was unconstitutional, as applied to a sale by the importer from another State in original packages. That case was put upon the ground that liquors had always been recognized by the commercial world as subjects of exchange, barter and traffic, and that the State could not prohibit their importation from abroad or their sale by the importer. To meet this exigency, and to enlarge the powers of the State with respect to intoxicating liquors, the Wilson Act was passed, declaring that upon their arrival in the State they should be subject to the police powers of the State to the same extent and in the same manner as though such liquors had been produced within such State. The constitutionality of this act was sustained in *Rahrer's case*, 140 U. S. 545, although in the subsequent case of *Rhodes* v. *Iowa*, 170 U. S. 412, it was held that the Wilson Act did not operate to attach to liquors the prohibitory legislation of the State at the moment they reached the state line, or before the completion of the act of transportation by their arrival at their point of destination and delivery to the consignee.

The primary, if not the sole, object of the Wilson Act was to attach the prohibitory laws of the State as a police measure to liquors the moment they were delivered to the consignee, although they might still be in their original packages. The State was then at liberty to forbid their sale.

The act does not affect the right of *inspection*, since that right was one which existed wholly independent of the act,

and had been applied and recognized ever since the case of *City of New York* v. *Miln*, 11 Pet. 102, as one of the ordinary police powers of the State, which it was at liberty to exercise quite irrespective of any Federal statute for the protection of the health of its citizens. The Wilson Act neither creates, adds to, takes from or affects the police powers of the State with respect to inspection in any particular. The power of the State to enact inspection laws, provided that such laws are intended in good faith for the protection of the people, and not as a covert means for raising revenue by exorbitant charges, remains precisely as it was before the act was passed. In the *Miln case* an act of the State of New York, requiring the masters of vessels arriving from foreign ports to report to the city authorities the names, etc., of his passengers, was upheld as a proper exercise of the police power; though subsequently, in the *Passenger Cases*, 7 How. 283, a similar law, requiring the master of vessels to pay a certain sum on account of every passenger brought from a foreign country into the State, was held to be inoperative, although passed under the general denomination of a health law. It was said that, although the amount of the tax was small, it might have been increased so as to become prohibitory at the discretion of the legislature; and the fact that the tax was applied to the maintenance of a marine hospital, and to the reformation of juvenile delinquents, showed that it could not be sustained as an exercise of the police power.

While we may concede that the liquors in this case had arrived at their destination, it does not follow that they were subject to any law which the State chose to pass in an assumed exercise of the police power. The State has an undoubted right to inspect all goods arriving therein, but it does not follow that it has the right to subject them to an inspection which is no inspection at all, and charge them with a fee out of all proportion to the costs of even a proper inspection, and call it an exercise of the police power. Though these liquors had arrived at their destination, the State provided, by section 5

of the act, that they should be inspected before offering them for sale and before they had been commingled with the general mass of property. The fact that they had been delivered to the consignee was of no materiality, since the act which the State required should be done was one which applied a condition precedent to their admission to the State for commercial purposes. Until this act was performed, they were protected against an unlawful interference. This inspection might have taken place at the state line, but for the convenience of the state officers, as well as that of the brewers, it was postponed until the arrival at their destination, as is frequently the case in foreign countries, where imported goods are not examined at the frontier, but at Paris or London, upon their arrival there; but they are not legally entered until such examination takes place. To say that their character as interstate commerce existed at the state line, but had been lost upon their arrival at their place of destination before they had shown themselves entitled to enter the State, is to apply a test wholly irrelevant under the circumstances. Indeed, in the case of *Rhodes* v. *Iowa*, 170 U. S. 412, we held expressly that the prohibitory liquor laws did not apply to liquors while in transit from their point of shipment to their delivery to the consignee. The vital question is whether the inspection was applied at a time prior to their legal importation into the State as a commercial article. If it were, and the inspection were a lawful one, it is a proper regulation of interstate commerce; but if the inspection were not a *bona fide* exercise of the police power it was an unlawful interference with such commerce. Whether the inspection was made at the state line or at the destination of the goods is absolutely immaterial.

The case of *Vance* v. *Vandercook Company, No. 1*, 170 U. S. 438, so strongly relied upon in the opinion of the court, seems to me to have little or no bearing on this feature of this case, and tends rather to support the theory that the Wilson Act had nothing to do with the question of inspection. The case turned upon the power of the consignee of liquors to receive

them for his own use within the State of South Carolina, as well as the power to sell them in the original unbroken packages as imported, to citizens of South Carolina. It was held in substance that the consignee had the constitutional right to receive them for his own use without regard to the state laws, but that under the Wilson Act he could no longer assert a right to *sell* them in original packages in defiance of the state laws. It was said that although the state law permitted the sale of liquors subject to particular restrictions and upon certain enumerated conditions, it did not follow that the law was not a manifestation of the police powers of the State. The case, as do all others in which the Wilson Act has been construed, relates to the power to *sell*, and not to the power to inspect. I have no criticism to make upon the extract from that opinion, particularly when taken in connection with the following extract from *Scott* v. *Donald*, 165 U. S. 58, also cited with apparent approval in the *Vandercook case:* "The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or, it may provide *equal* regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

But we are not without authority upon this point. In *Minnesota* v. *Barber*, 136 U. S. 313, a law of Minnesota, as in this case, prohibited the sale of fresh meats except after an inspection, and was sought to be sustained as a law for the protection of the health of the inhabitants. The act required the inspection to take place within twenty-four hours before the animals were slaughtered, and was held to be void as a law intended to be applied only to cattle slaughtered outside the State. While the question was not discussed, it was as-

sumed that the meats had arrived at their destination within the State and been delivered to their consignee, and that the inspection, not being a *bona fide* one, was an unlawful discrimination against interstate commerce. So in the subsequent case of *Brimmer* v. *Rebman*, 138 U. S. 78, a law of Virginia provided that meat should not be sold from animals slaughtered a hundred miles or more from the place where offered for sale, unless previously inspected by local inspectors. The act was held to be void as in restraint of commerce between the States, and as imposing a tax upon the products of other States. Both of these acts, as does the act of Missouri in question, provided against the sale of uninspected merchandise, and this court held, quite irrespective of other considerations, that the act was void. To the same effect is *Walling* v. *Michigan*, 116 U. S. 446.

For the reasons already given, I think the act in this case is void as an inspection law, and an illegal interference with interstate commerce, since the assumed inspection preceded the arrival of the liquors within the State as a constituent part of its general property.

The consequences of this decision seem to me extremely serious. If the States may, in the assumed exercise of police powers, enact inspection laws, which are not such in fact, and thereby indirectly impose a revenue tax on liquors, it is difficult to see any limit to this power of taxation, or why it may not be applied to any other articles brought within the State, and the cases of *Minnesota* v. *Barber*, 136 U. S. 313, and *Brimmer* v. *Rebman*, 138 U. S. 78, be practically overruled. The Wilson Act does not give the legislature any greater authority with respect to the inspection of liquors than with respect to other imported articles, and, as already observed, it leaves the question of inspection exactly where it found it. If the Wilson Act receive its natural application, that is, of meeting the exigency created by our decision in *Leisy* v. *Hardin*, and enabling the States to enforce their prohibitory liquor laws upon the arrival of the liquor within the State, as we have

repeatedly held, the law has a definite and distinct value and is readily understood.

I am authorized to state that the CHIEF JUSTICE, MR. JUSTICE BREWER and MR. JUSTICE DAY concur in this dissent.

LOCHNER *v.* NEW YORK.

ERROR TO THE COUNTY COURT OF ONEIDA COUNTY, STATE OF NEW YORK.

No. 292. Argued February 23, 24, 1905.—Decided April 17, 1905.

The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.

Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor.

There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified as a health law to safeguard the public health, or the health of the individuals following that occupation.

Section 110 of the labor law of the State of New York, providing that no employés shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract, in relation to labor, and as such it is in conflict with, and void under, the Federal Constitution.

THIS is a writ of error to the County Court of Oneida County, in the State of New York (to which court the record had been remitted), to review the judgment of the Court of Appeals of that State, affirming the judgment of the Supreme Court, which itself affirmed the judgment of the County Court, convicting the defendant of a misdemeanor on an indictment under a statute of that State, known, by its short title, as the labor

law. The section of the statute under which the indictment was found is section 110, and is reproduced in the margin,[1] (together with the other sections of the labor law upon the subject of bakeries, being sections 111 to 115, both inclusive).

The indictment averred that the defendant "wrongfully and unlawfully required and permitted an employé working for him in his biscuit, bread and cake bakery and confectionery establishment, at the city of Utica, in this county, to work more than sixty hours in one week," after having been theretofore convicted of a violation of the same act; and therefore, as averred, he committed the crime or misdemeanor, second offense. The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not

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[1] "§ 110. *Hours of labor in bakeries and confectionery establishments.*—No employé shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employé shall work.

"§ 111. *Drainage and plumbing of buildings and rooms occupied by bakeries.*—All buildings or rooms occupied as biscuit, bread, pie or cake bakeries, shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing and ventilation of such rooms or buildings. No cellar or basement, not now used for a bakery shall hereafter be so occupied or used, unless the proprietor shall comply with the sanitary provisions of this article.

"§ 112. *Requirements as to rooms, furniture, utensils and manufactured products.*—Every room used for the manufacture of flour or meal food products shall be at least eight feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed, at least once in three months. He may also require the wood work of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of a room. The manufactured flour or meal food products shall be kept in dry and airy rooms, so arranged that the floors, shelves and all

constitute a crime. The demurrer was overruled, and the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine of $50 and to stand committed until paid, not to exceed fifty days in the Oneida County jail. A certificate of reasonable doubt was granted by the county judge of Oneida County, whereon an appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, where the judgment of conviction was affirmed. 73 App. Div. N. Y. 120. A further appeal was then taken to the Court of Appeals, where the judgment of conviction was again affirmed. 177 N. Y. 145.

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other facilities for storing the same can be properly cleaned. No domestic animals, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery, or any room in such bakery where flour or meal products are stored.

"§ 113. *Wash-rooms and closets; sleeping places.*—Every such bakery shall be provided with a proper wash-room and water-closet or water-closets apart from the bake-room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth-closet, privy or ash-pit shall be within or connected directly with the bake-room of any bakery, hotel or public restaurant.

"No person shall sleep in a room occupied as a bake-room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

"§ 114. *Inspection of bakeries.*—The factory inspector shall cause all bakeries to be inspected. If it be found upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the persons owning or conducting such bakeries.

"§ 115. *Notice requiring alterations.*—If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly."

Mr. Frank Harvey Field and *Mr. Henry Weissmann* for plaintiff in error:

The statute in question denies to certain persons in the baking trade the equal protection of the laws.

The legislation must affect equally all persons engaged in the business of baking in order to conform to this provision of the Fourteenth Amendment. It really affects but a portion of the baking trade, namely, employés "in a biscuit, bread or cake bakery, or confectionery establishment." *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Ex parte Westerfield*, 55 California, 550.

The Constitution itself says that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It does not say, "no considerable number of persons," but "any person." And this plaintiff in error may appeal with confidence to the supreme law of the land against this law which singles out a certain number of men employing bakers, and permits all others similarly situated, including many who are competitors in business, to work their employés as long as they choose. Freund's Police Power, 633; *Missouri* v. *Lewis*, 101 U. S. 31; *Barbier* v. *Connolly*, 113 U. S. 27; *Colling* v. *Goddard*, 183 U. S. 79, 92; *Yick Wo* v. *Hopkins*, 118 U. S. 356; Cooley's Const. Lim. 282; *Tin Sing* v. *Washburn*, 20 California, 534.

Classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted, but no mere arbitrary selection can ever be justified by calling it classification. *Santa Fé R. R. Co.* v. *Matthews*, 174 U. S. 105. Class legislation of the character of the act in issue enacted by the States which discriminates in favor of one person or set of persons and against another or others is forbidden by the Fourteenth Amendment. *Gulf C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City S. Y. Co.*, 183 U. S. 79; *Connolly* v. *U. S. P. Co.*, 184 U. S. 540; *People* v. *Orange County Road Co.*, 175 N. Y. 87, 90.

The equal protection of the laws is a pledge of the protection

of equal laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *M., K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 626.

The statute in question is not a reasonable exercise of the police power either from the standpoint of the trade itself or from the standpoint of the decisions interpreting the exercise of the police power in connection with the Fourteenth Amendment.

As to the trade there is no danger to the employé in a first-class bakery and so far as unsanitary conditions are concerned the employé is protected by other sections of the law. *Ex parte Westerfield*, 55 California, 550; 2 Buck's Hygiene and Public Health, 10; The Lancet, vol. 2, 1895, 298; Special Sanitary Report of The Lancet on Bakeries, 1889, p. 1140; and 1890, pp. 42, 208, 719; Reference Handbook of Medical Sciences, vol. 6, p. 317; The Practitioner, vol. 53, 1894, p. 387; Arlidge on Diseases of Occupations; Dragle in 45th Annual Report, Register General.

The law is not a proper exercise of the police power. 4 Black. 162; Jeremey Bentham, Edinburgh ed., part IX, 157; Cooley Const. Lim. 572; 2 Kent's Com. 340; *Slaughter House Case*, 16 Wall. 36; *Re Jacobs*, 98 N. Y. 98; Tiedemann Police Power, § 178; Freund Police Power, 534.

Where the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end, it cannot invade the rights of persons and property under the guise of the police regulation, when it is not such in fact. *Eden* v. *People*, 161 Illinois, 296; *Ex parte Jentsch*, 112 California, 468; *Ritchie* v. *People*, 155 Illinois, 98; *Lake View* v. *Rose Hill Cemetery Co.*, 70 Illinois, 191; *People* v. *Marx*, 99 N. Y. 377, 387; *People* v. *Gillson*, 109 N. Y. 389, 399; *People* v. *Bresecker*, 169 N. Y. 53; *People* v. *Hawkins*, 157 N. Y. 1; *People* v. *Beattie*, 96 App. Div. N. Y. 383, 390, 399. For other decisions of the Court of Appeals, interpreting the labor law, see *People ex rel.* v. *Coler*, 166 N. Y. 1; *Ryan* v. *City*

of New York, 177 N. Y. 271; *People ex rel.* v. *Grout*, 179 N. Y. 417.

As to fundamental right to pursue occupations, see decisions of this court in cases cited *supra* and *Calder* v. *Bull*, 3 Dall. 386; *Munn* v. *Illinois*, 94 U. S. 79; *United States* v. *Martin*, 94 U. S. 400. And see *People* v. *Phyfe*, 136 N. Y. 554; *Henderson* v. *Mayor*, 92 U. S. 259.

In the other state courts legislation of the kind in issue has been almost uniformly declared invalid. *Sawyer* v. *Davis*, 136 Massachusetts, 239, 243; *Eden* v. *People*, 161 Illinois, 296; *Ritchie* v. *People*, 155 Illinois, 98; *Ex parte Kuback*, 85 California, 274; *Godcharles* v. *Wigeman*, 113 Pa. St. 431; *State* v. *Goodwill*, 33 W. Va. 179; *Leep* v. *St. Louis R. R. Co.*, 58 Arkansas, 407; *Low* v. *Rees Pub. Co.*, 41 Nebraska, 127.

The statute in question was never intended as a health provision but was purely a labor law. This is indicated by the facts leading up to the adoption of this statute by the New York legislature. For acts of this nature generally, see English Bakehouse Acts of 1863, 26, 27 Vict., ch. 40; English Factory Act of 1883; Baker's Journal, New York City, May 8, 1895; Report New York State Bureau Labor Statistics, 1892, vol. 3; Ch. 548, New York Laws of 1895; Ch. 672, 1896; Ch. 415, § 5, Laws of 1897; New Jersey act of April, 1896; Bakeshop Act of Ontario, April 7, 1896; Acts of Maryland, and Massachusetts, passed in 1897.

Mr. Julius M. Mayer, Attorney General of the State of New York, for defendant in error:

The New York statute under consideration involves an exercise of the police power of the State. The burden of demonstrating that this statute is repugnant to the provisions of the Federal Constitution is upon the plaintiff in error, and he must show that there was no basis upon which the state court could rest its conclusion that the legislation in question was a proper exercise of police power. *Holden* v. *Hardy*, 169 U. S. 366.

The conditions existing in the State of New York, which may be considered as the occasion for the enactment of the statute under consideration, show that it was a proper exercise of the police power of the State.

The power of the legislature to decide what laws are necessary to secure the public health, safety or welfare is subject to the power of the court to decide whether an act purporting to promote the public health or safety has such a reasonable connection therewith as to appear upon inspection to be adapted to that end. And the court may take judicial notice of the fact of the common belief of the people upon that subject. *Matter of Viemeister*, 179 N. Y. 235.

There are two views as to the words in the statute—"no employé shall be required or *permitted to work*." The statute was carefully drafted so as to prevent evasion. It was intended to be a barrier to the employer who might testify that he had not orally or in writing *required* his employé to work, and yet he might by inference and acquiescence accomplish the same result by "permitting" him to so work.

The State, in undertaking this regulation, has a right to safeguard the citizen against his own lack of knowledge. In dealing with certain classes of men the State may properly say that, for the purpose of having able-bodied men at its command when it desires, it shall not permit these men, when engaged in dangerous or unhealthful occupations, to work for a longer period of time each day than is found to be in the interest of the health of the person upon whom the legislation acts.

The unhealthful character of the baker's occupation was fully commented upon by Judge Vann in his opinion in the Court of Appeals. The opinions of the judges of that court are very exhaustive and refer fully to all the cases on this subject.

The propriety of its exercise within constitutional limits is purely a matter of legislative discretion with which courts cannot interfere. *People* v. *King*, 110 N. Y. 418, 423.

If the act "admits of two constructions as to its being a

health measure or otherwise, the courts should give the construction which sustains the act and makes it applicable in furtherance of the public interests. *Bohmer* v. *Haffen*, 161 N. Y. 390, 399.

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

The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employé working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the Supreme Court or the Court of Appeals of the State, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employé. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words "required" and "permitted." The mandate of the statute that "no employé shall be required or permitted to work," is the substantial equivalent of an enactment that "no employé shall contract or agree to work," more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment. The employé may desire to earn the extra money, which would arise from his working more than the prescribed

time, but this statute forbids the employer from permitting the employé to earn it.

The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer* v. *Louisiana*, 165 U. S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of

person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employé), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden* v. *Hardy*, 169 U. S. 366. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employés in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employés from being constrained by the rules laid down by the proprietors in regard to labor. The following citation

from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in *Holden* v. *Hardy* which covers the case now before us. Nor does *Atkin* v. *Kansas*, 191 U. S. 207, touch the case at bar. The *Atkin case* was decided upon the right of the State to control its municipal corporations and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, is equally far from an authority for this legislation. The employés in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of *Jacobson* v. *Massachusetts*, decided at this term and reported in 197 U. S. 11. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case "of an adult who, for aught that appears, was himself in perfect health and a fit

subject for 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." That case is also far from covering the one now before the court.

Petit v. *Minnesota*, 177 U. S. 164, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the

court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail —the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes

with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the Appellate Division dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the State, the Court of Appeals has upheld the act as one relating to the public health—in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden* v. *Hardy* and *Jacobson* v. *Massachusetts, supra.*

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the

business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employés. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employés condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength

of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employés named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employés, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash-rooms and water-closets, apart from the bake-room, also with regard to providing proper drainage, plumbing and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of

that nature; alterations are also provided for and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements, a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The State in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law,"

it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. In the Supreme Court of New York, in the case of *People* v. *Beattie*, Appellate Division, First Department, decided in 1904, 89 N. Y. Supp. 193, a statute regulating the trade of horseshoeing, and requiring the person practicing such trade to be examined and to obtain a certificate from a board of examiners and file the same with the clerk of the county wherein the person proposes to practice such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (*In re Aubry*) by the Supreme Court of Washington in December, 1904. 78 Pac. Rep. 900. The court held that the act deprived citizens of their liberty and property without due process of law and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the State, as a business concerning and directly affecting the health, welfare or comfort of its inhabitants; and that therefore a law which provided for the examination and registration of horseshoers in certain cities was unconstitutional, as an illegitimate exercise of the police power.

The Supreme Court of Illinois in *Bessette* v. *People*, 193 Illinois, 334, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal interference with the liberty of the individual in adopting and pursuing such calling as he may choose, subject only to the restraint necessary to secure the common welfare. See also *Godcharles* v. *Wigeman*, 113 Pa. St. 431, 437; *Low* v. *Rees Printing Co.*, 41 Nebraska, 127, 145. In

these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78. The court looks beyond the mere letter of the law in such cases. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employé, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York as well as that of the Supreme Court and of the County Court of Oneida County must be reversed and the case remanded to

the County Court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting.

While this court has not attempted to mark the precise boundaries of what is called the police power of the State, the existence of the power has been uniformly recognized, both by the Federal and state courts.

All the cases agree that this power extends at least to the protection of the lives, the health and the safety of the public against the injurious exercise by any citizen of his own rights.

In *Patterson* v. *Kentucky*, 97 U. S. 501, after referring to the general principle that rights given by the Constitution cannot be impaired by state legislation of any kind, this court said: "It [this court] has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." So in *Barbier* v. *Connolly*, 113 U. S. 27: "But neither the [14th] Amendment—broad and comprehensive as it is—nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

Speaking generally, the State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to every one, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." This was de-

clared in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. But in the same case it was conceded that the right to contract in relation to persons and property or to do business, within a State, may be "regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes" (p. 591).

So, as said in *Holden* v. *Hardy*, 169 U. S. 366, 391: "This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employés as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases of *Davidson* v. *New Orleans*, 96 U. S. 97, and *Yick Wo* v. *Hopkins*, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Lawton* v. *Steele*, 152 U. S. 133, 136." Referring to the limitations placed by the State upon the hours of workmen, the court in the same case said (p. 395): "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

Subsequently in *Gundling* v. *Chicago*, 177 U. S. 183, 188, this court said: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and

to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

"As stated in *Crowley* v. *Christensen*, 137 U. S. 86, '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.' "

In *St. Louis, Iron Mountain &c. Ry.* v. *Paul*, 173 U. S. 404, 409, and in *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 21, 22, it was distinctly adjudged that the right of contract was not "absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State." Those cases illustrate the extent to which the State may restrict or interfere with the exercise of the right of contracting.

The authorities on the same line are so numerous that further citations are unnecessary.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import," this court has recently said, "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." *Jacobson* v. *Massachusetts*, 197 U. S. 11.

Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In *Jacobson* v. *Massachusetts*, *supra*, we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists *only* "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"—citing *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 320: *Atkin* v. *Kansas*, 191 U. S. 207, 223. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

Let these principles be applied to the present case. By the statute in question it is provided that, "No employé shall be required or permitted to work in a biscuit, bread or cake

bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employé shall work."

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employés in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. *Mugler* v. *Kansas, supra.* Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens, *Patterson* v. *Kentucky, supra;* or that it is not promotive of the health of the employés in question, *Holden* v. *Hardy, Lawton* v. *Steele,*

supra; or that the regulation prescribed by the State is utterly unreasonable and extravagant or wholly arbitrary, *Gundling* v. *Chicago, supra.* Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. *Jacobson* v. *Massachusetts, supra.* Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is

greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring cities and resulted in measures for the sanitary protection of the bakers."

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that among the occupations involving exposure to conditions that interfere with nutrition is that of a baker (p. 52). In that Report it is also stated that "from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class—improved health, longer life, more content and greater intelligence and inventiveness" (p. 82).

Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, $9\frac{3}{4}$; in Denmark, $9\frac{3}{4}$; in Norway, 10; Sweden, France and Switzerland, $10\frac{1}{2}$; Germany, $10\frac{1}{4}$; Belgium, Italy and Austria, 11; and in Russia, 12 hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute

before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the State to labor has well said: "The manner, occasion, and degree in which the State may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science." Jevons, 33.

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the States. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitu-

tion of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the Fourteenth Amendment, without enlarging the scope of the Amendment far beyond its original purpose and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several States when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation which "embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves." *Gibbons* v. *Ogden*, 9 Wheat. 1, 203. A decision that the New York statute is void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health and well-being of their citizens. Those are matters which can be best controlled by the States.

The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government.

When this court had before it the question of the constitutionality of a statute of Kansas making it a criminal offense for a contractor for public work to permit or require his employés to perform labor upon such work in excess of eight hours each day, it was contended that the statute was in derogation of the liberty both of employés and employer. It was further contended that the Kansas statute was mischievous in its tendencies. This court, while disposing of the question only as it affected public work, held that the Kansas statute was not void under the Fourteenth Amendment. But it took occasion to say what may well be here repeated: "The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true —indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Atkin* v. *Kansas*, 191 U. S. 207, 223.

The judgment in my opinion should be affirmed.

MR. JUSTICE HOLMES dissenting.

I regret sincerely that I am unable to agree with the judg-

ment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson* v. *Massachusetts*, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co.* v. *United States*, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis* v. *Parker*, 187 U. S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden* v. *Hardy*, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.

It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

BEAVERS *v.* HAUBERT.

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

No. 354. Argued February 23, 1905.—Decided April 17, 1905.

SAME *v.* UNITED STATES.

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

No. 355. Argued February 23, 1905.—Decided April 17, 1905.

The rule that where jurisdiction has attached to a person or thing it is exclusive in effect until it has wrought its function is primarily a right of the court or sovereignty itself. The sovereignty where jurisdiction first attaches may yield it, and the implied custody of a defendant by his sureties cannot prevent it, although the bail may be exonerated by the removal. Where the court consents, the Government may elect not to proceed on indictments in the court having possession of the defendant and may remove him to another district for trial under indictments there pending. Whether such election exists without the consent of the court, not decided.

The constitutional right of a defendant to a speedy trial and by a jury of the district where the offense was committed, relates to the time and not to the place of trial, and cannot be invoked by a defendant, indicted in more than one district, to prevent his removal from the district in which he happens to be to the other in which the Government properly elects to try him.

In removal proceedings, the degree of proof is not that necessary upon the trial, and where defendant makes a statement and under the law of the State claims exemption from, and refuses to submit to, cross-examination, the deficiencies of his statement may be urged against him, and, unless the testimony removes all reasonable ground of the presumptions raised by the indictment, this court will consider the commissioner's finding of probable cause was justified.

The District of Columbia is a district of the United States within the meaning of § 1014, Rev. Stat., authorizing the removal of accused persons from one district to another. *Benson* v. *Henkel*, *ante*, p. 1.

THESE cases were submitted together. No. 354 is an appeal from an order and judgment of the District Court of the Eastern District of New York, in *habeas corpus*, remanding to

the custody of appellee. No. 355 is an appeal from an order of the United States Circuit Court for the same district, dismissing a writ of *habeas corpus* arising out of the same proceedings as No. 354. The same questions of law are presented and we need not further distinguish the cases.

The arrest, from which appellant prayed to be discharged, was made upon a commitment and warrant in proceedings to remove him to the District of Columbia, to be tried upon an indictment there found against him. He attacks the commitment and warrant as not being due process of law, in that the commissioner who issued them had no jurisdiction to entertain proceedings against him, or to require bail, or in default thereof to commit him to await the order of the District Judge, because indictments were pending against him in the Circuit Court of the United States for the Eastern District of New York. The contention is that while the indictments were so pending he could not be removed to another jurisdiction.

The facts are as follows: On the sixteenth of July, 1903, two indictments were found against appellant in the Eastern District of New York, charging him with violations of sections 1781 and 1782 of the Revised Statutes of the United States, and on the twenty-fifth of July, 1903, another indictment was found against him in the same district for the violation of section 1781.

On the third of September, 1903, a bench warrant was issued on the indictments and proceedings instituted against him on the indictment of July 25, 1903. A warrant of removal was issued by the District Judge of the Southern District of New York, and subsequently an order was entered by the Circuit Court, directing appellant to surrender himself to the United States marshal for said district, and in pursuance thereof the appellant did so, and entered into a recognizance before one of the District Judges for said district in the penal sum of $10,000 for his appearance in the Circuit Court for the Eastern District at the next regular term.

On the first of June, 1904, he appeared in said court in pursuance of the notice from the United States District At-

torney, for the purpose of pleading to the indictments. On the seventh of June, a continuance having been granted, he moved to quash the indictment on affidavits and other papers properly served on the District Attorney. On the eighth he appeared before the Circuit Court, "prepared to move upon and plead to the said indictments." Thereupon the District Attorney refused to proceed further with the indictments, but stated his intention to institute proceedings for the removal of appellant to the District of Columbia, under the indictments found against him there. The court thereupon continued the proceedings until the thirteenth of June, 1904, from time to time thereafter, until the date of the petition herein, and enlarged him from day to day upon his recognizance, which is still in full force. On the eighth of June, 1904, he was arrested upon the warrant now in question. The indictments have not been quashed or nolle prossed, and the appellant is ready to plead thereto if the motions submitted in respect thereto be overruled.

The petitioner alleges that the only evidence adduced by the Government was a certified copy of the indictment, which, it is alleged, constituted no proof, but was incompetent and inadmissible because it failed to state facts sufficient to constitute a crime, and because it appeared from the testimony of the witnesses on whose testimony it was found and who were called before the commissioner that there was no probable cause to believe he was guilty of any offense against the United States, and whatever strength the indictment possessed was rebutted by such evidence.

Mr. William M. Seabury, with whom *Mr. Bankson T. Morgan* was on the brief, for appellant:

The arrest and commitment of the appellant on warrants issued by a United States Commissioner in a proceeding brought to effect his removal to the District of Columbia, while he was in the custody of the Circuit Court of the United States for the Eastern District of New York for trial, and

subject to its jurisdiction, was void as an unlawful interference with the jurisdiction of such Circuit Court, and a violation of the appellant's constitutional rights.

In criminal cases priority of jurisdiction is determined by the date of service of process. *United States* v. *Lee*, 84 Fed. Rep. 631; *Craig* v. *Hoge*, 28 S. E. Rep. (Va.) 317; *Union Mutual Life Ins. Co.* v. *University of Chicago*, 6 Fed. Rep. 443; *Owens* v. *Railroad Co.*, 20 Fed. Rep. 10; *Wilmer* v. *Railroad Co.*, 30 Fed. Cases, 73; *Herndon* v. *Ridgway*, 17 How. 424; *Chaffee* v. *Hayward*, 20 How. 208, 215; *Boswell's Sons* v. *Otis*, 9 How. 336, 348; *Pennoyer* v. *Neff*, 95 U. S. 714; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 209.

The fact that Beavers had given bail on the first arrest and was not in actual custody of the marshal when the second arrest took place is immaterial. *In re Beavers*, 125 Fed. Rep. 988. By admission to bail the appellant had not been relieved from custody.

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. See Bail, Bacon's Abridg.; *Taylor* v. *Taintor*, 16 Wall. 371; *Anon's Case*, 6 Mod. 231; *Cosgrove* v. *Winney*, 174 U. S. 68; *In re Grice*, 79 Fed. Rep. 633; *United States* v. *Stevens*, 16 Fed. Rep. 105; *Turner* v. *Wilson*, 49 Indiana, 581; *Divine* v. *State*, 5 Sneed. 625; *Levy* v. *Arnsthall*, 10 Grat. (Va.) 641; *Ex parte Gibbons*, 1 Atk. 238; Spear on Extradition, 445; Petersdorf on Bail, 91, 406.

Wherever a conflict of jurisdiction has arisen between a state and Federal court, the court whose jurisdiction has first attached to the person or thing, has universally held and retained it until its completion. No other court has been permitted by its process to interfere with the jurisdiction of the court which has first attached. *Byers* v. *McAuley*, 149 U. S. 608, 614; *Hagan* v. *Lucas*, 10 Peters, 400; *Taylor* v. *Carryl*, 20 How. 583; *Peck* v. *Jenness*, 7 How. 612, 625; *Freeman* v. *Howe*, 24 How. 450; *Ellis* v. *Davis*, 109 U. S. 485, 498; *Krippendorf* v. *Hyde*, 110 U. S. 276, 280; *Covell* v. *Heyman*, 111

U. S. 176; *Borer* v. *Chapman*, 119 U. S. 587, 600; *In re Chambers, Calder & Co.*, 98 Fed. Rep. 866; *Jordan* v. *Taylor*, 98 Fed. Rep. 643; *Keegan* v. *King*, 96 Fed. Rep. 758; *Chapin* v. *James*, 11 R. I. 87; *The E. L. Cain*, 45 Fed. Rep. 367; *Moran* v. *Sturges*, 154 U. S. 256, 269, 279; *Ex parte Chetwood*, 165 U. S. 443, 460; *Pac. Coast S. S. Co.* v. *Bancroft Whitney Co.*, 94 Fed. Rep. 186; *Yonley* v. *Lavender*, 21 Wall. 276; *Sharon* v. *Terry*, 36 Fed. Rep. 337; aff'd 131 U. S. 40.

The same principle is universally applicable where Federal and state courts each claim jurisdiction over the same person at the same time. *Abelman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb* v. *Connolly*, 111 U. S. 624; *In re Spangler*, 11 Michigan, 298; *In re James*, 18 Fed. Rep. 853.

In fact even where a State has sought the rendition of a fugitive from another State, if he is held in custody in the State upon which the demand is made on account of an offense committed therein, the duty to surrender is postponed until the existing charge against the prisoner has been satisfied. Am. & Eng. Ency. of Law, vol 12, p. 604; *Matter of Troutman*, 24 N. J. Law, 634; *Matter of Briscoe*, 51 How. Pr. 422; *Hobbs* v. *State*, 22 S. W. Rep. (Tex.) 1035; *Taintor* v. *Taylor*, 36 Connecticut, 242; *Taylor* v. *Taintor*, 16 Wall. 366; *Ex parte Rosenblat*, 51 California, 285; Clark Cr. Proc., 63; Spear on Extradition, 442.

The rule is the same where Federal courts of different districts have asserted jurisdiction at the same time over the same personal property. *Re Miller*, 30 Fed. Rep. 895; *Ames* v. *Ry. Co.*, 60 Fed. Rep. 967, 974; *Clyde* v. *Richmond & D. R. Co.*, 65 Fed. Rep. 336; *Chattanooga Terminal Ry. Co.* v. *Felton*, 69 Fed. Rep. 273, 283; *N. Y. Security & Trust Co.* v. *Equitable Mtge. Co.*, 71 Fed. Rep. 556; *Wiswall* v. *Sampson*, 14 How. 60.

This principle is not restricted in its application to questions of jurisdiction between courts of different sovereignties, but is applicable wherever two courts subject to the same general sovereignty and existing under the same judicial system seek

to exercise criminal jurisdiction over the same person for antagonistic purposes at the same time. *In re Johnson,* 167 U. S. 125; *In re Beavers,* 125 Fed. Rep. 988; *In re Beavers,* 131 Fed. Rep. 366.

A United States Commissioner is a subordinate ministerial officer, an arm or branch of the District Court, and is himself neither court nor judge. *United States* v. *Allred,* 155 U. S. 595; *Todd* v. *United States,* 158 U. S. 278; *Rice* v. *Ames,* 180 U. S. 371, 378; *United States* v. *Schumann,* 2 Abb. U. S. 523; *United States* v. *Jones,* 134 U. S. 483; *Re Ellerbe,* 13 Fed. Rep. 530; *In re Perkins,* 100 Fed. Rep. 950; *Ex parte Dole,* 7 Phila. 595. Even conceding the right of the commissioner to issue process against the appellant, the process could not be lawfully executed by the marshal so long as he was in the custody of a court of superior jurisdiction. *In re Beavers,* 125 Fed. Rep. 988; *Hobbs* v. *The State,* 22 S. W. Rep. 1035; *Matter of Troutman,* 24 N. J. Law, 634; *Higgins* v. *Dewey,* 39 N. Y. 94.

Whether or not the Circuit Court might have waived or relinquished its jurisdiction is immaterial. This was never done. The appellant's recognizance was not cancelled. If the arrest of the appellant herein under a commissioner's warrant was void, no subsequent willingness of the Circuit Court to waive its jurisdiction could give the arrest validity.

The refusal of the District Attorney to proceed with the prosecution and the failure of the court below to discharge Beavers from the arrest complained of deprived him of his constitutional right to a speedy trial by jury in the Eastern District of New York. *United States* v. *Fox,* 3 Montana, 312; note to *In re Bergeron,* 85 Am. St. Rep. 178, 204; Sutherland's notes on the U. S. Const.; *Nixon* v. *State,* 41 Am. Dec. 601; Cooley Const. Lim., 7th ed., 440.

The positive evidence adduced by the appellant before the commissioner was such as wholly to deprive the indictment of its *prima facie* probative force, and the decision of the commissioner was in effect a determination that the indictment was conclusive evidence.

See § 196, N. Y. Code Civ. Pro., which is here applicable under the rule that proceedings under § 1014 are in all respects similar to criminal proceedings instituted before a committing magistrate in the State where the arrest is made, and are controlled and governed by the rules of evidence and procedure in such State. *Re Dana*, 68 Fed. Rep. 886, 893; *United States* v. *Rundlett*, 2 Curt. 42; *United States* v. *Case*, 8 Blatch. 251; *United States* v. *Horton*, 2 Dill. 94; *United States* v. *Brawner*, 7 Fed. Rep. 86, 90; *United States* v. *Martin*, 17 Fed. Rep. 150, 156; *Re Burkhardt*, 33 Fed. Rep. 25; *United States* v. *Green*, 100 Fed. Rep. 941.

The indictment is not conclusive evidence of the facts therein stated. *United States* v. *Green*, 100 Fed. Rep. 941; *S. C.*, 108 Fed. Rep. 816; *Green* v. *Henkel*, 183 U. S. 241; *In re Richter*, 100 Fed. Rep. 295; *In re Belknap*, 96 Fed. Rep. 614; *In re Wood*, 95 Fed. Rep. 288; *United States* v. *Price*, 84 Fed. Rep. 636; *In re Price*, 83 Fed. Rep. 830; aff'd 89 Fed. Rep. 84; *In re Dana*, 68 Fed. Rep. 886; *United States* v. *Fowkes*, 49 Fed. Rep. 50; *In re Wolf*, 27 Fed. Rep. 606; *Alexander's Case*, 1 Lowell, 530; *United States* v. *Haskins*, 3 Sawy. 262; *United States* v. *Pope*, 24 Inter. Rec. 29. In *Beavers* v. *Henkel*, 194 U. S. 73, this point was not considered.

Mr. Assistant Attorney General Purdy for the United States:

The fact that an indictment is pending against George W. Beavers in the United States Circuit Court for the Eastern District of New York in no manner affects the power or the right of the United States Government to institute and maintain proceedings against said Beavers, under § 1014, Rev. Stat., for the purpose of securing his appearance for trial before the Supreme Court of the District of Columbia. *Taylor* v. *Taintor*, 16 Wall. 271, is not in point.

Whether a removal proceeding from Brooklyn to Washington would operate to discharge the sureties upon the bond of Beavers for his appearance at Brooklyn for trial is a question which need not here be considered.

Every sovereignty has the power to waive its right to try a person accused of having committed an offense against its laws, and may elect to surrender such accused person, without his consent, to a demanding State. *Taylor* v. *Taintor*, 16 Wall. 366; *In re Hess*, 5 Kan. App. 763; *State* v. *Allen*, 2 Humph. (Tenn.) 258.

The evidence produced upon the hearing, in behalf of the defendant, was totally insufficient to overthrow the *prima facie* case established by the Government.

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

It will be observed that indictments were found against appellant in the Eastern District of New York. He was then living in the city of New York, which is in the Southern District. He was removed from the latter by removal proceedings to the former for trial, and, having been called upon to plead to the indictments, he made certain motions in respect thereto. The District Attorney, however, announced an intention not to proceed further with the prosecution, and announced further that he intended to prosecute proceedings to remove appellant to the District of Columbia for trial. This was done, and with the consent of the court. It is stated in Judge Thomas's opinion that the Circuit Court "deferred the hearing of the motions pending the hearing before the commissioner, for the purpose of allowing the warrant to be served upon the defendant (petitioner), and to permit the proceedings to continue before the commissioner."

The appellant contends, nevertheless, that the commissioner had no power to issue warrants, and relies on two propositions:

(1) The proceedings were void because they were an unlawful interference with the jurisdiction of the Circuit Court for the Eastern District of New York, in the custody of which he was.

(2) The proceedings were a violation of appellant's constitutional rights to a speedy trial by jury upon such indictments.

(1) In support of the first proposition is urged the principle "that where jurisdiction has attached to a person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function." *Taylor* v. *Taintor*, 16 Wall. 366, 370. But this is primarily the right of the court or sovereignty, and has its most striking examples in cases of extradition. The cited case shows that whatever right a party may have is not a constitutional right. The question in the case was the effect on the bail of a defendant given to a State by the action of its Governor, sending him out of the State under extradition proceedings. It was held that his bail was exonerated. The court said: "It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law." And the act of the Governor of a State yielding to the requisition of the Governor of another State was decided to be the act of the law. It was further said: "In such cases the Governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse there is no means of compulsion, but if he act, and the fugitive is surrendered, the State whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect."

This case establishes that the sovereignty where jurisdiction first attaches may yield it, and that the implied custody of a defendant by his sureties cannot prevent. They may, however, claim exemption from further liability to produce him.

There is nothing in *In re Johnson*, 167 U. S. 120, which militates against this view. Indeed, that it is the right of the court of sovereignty to insist upon or waive its jurisdiction

is there decided (page 126). In *Cosgrove* v. *Winney,* 174 U. S. 68, Cosgrove was brought into this country from Canada under a treaty which confined action against him to the very offense for which he was surrendered until he should have an opportunity of returning. His subsequent arrest for a non-extraditable offense was held to be a violation of the process under which he was brought into the United States, and therefore illegal.

The Circuit Court, as we have seen in the case at bar, consented to the removal of the appellant, and we are not called upon to decide whether the Government had the right of election, without such consent, to proceed in New York or the District of Columbia.

(2) Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged, or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that the right attaches and becomes fixed to the first accusation, and whatever be the demands of public justice they must wait. We do not think the right is so unqualified and absolute. If it is of that character it determines the order of trial of indictments in the same court. Counsel would not so contend at the oral argument, but such manifestly is the consequence. It must be remembered that the right is a constitutional one, and if it has any application to the order of trials of different indictments it must relate to the time of trial, not to the place of trial. The place of trial depends upon other considerations. It must be in the district where the crime was committed. There is no other injunction or condition,

and it cannot be complicated by rights having no connection with it. The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest—means of bringing a defendant to trial. And this leads to the other contentions of appellant.

Upon the hearing before the commissioner the Government introduced in evidence a copy of the indictment and proof of the identity of appellant. The latter called witnesses and made a statement in his own behalf, and contends that he rebutted every material allegation of the indictment, and that the finding of the commissioner gave to the indictment the effect of conclusive proof.

Two questions are involved, whether appellant may rebut the indictment and whether he has done so. If the latter be answered in the negative, and we think it must be, no reply need be given to the other.

There is no question made of the sufficiency of the indictment. It certainly charges a crime. It charges that Beavers was Superintendent of the Division of Salaries and Allowances in the office of the First Assistant Postmaster General, and that he entered into a corrupt agreement with W. Scott Towers, an agent of the Elliott & Hatch Book Typewriter Company, whereby Towers promised to pay to Beavers the sum of twenty-five dollars out of each two hundred dollars paid to said company for book typewriters, and that Beavers received from Towers, in pursuance of the agreement, a draft for the sum of three hundred and fifty dollars. The agreement was made and the draft given for the purpose of influencing Beavers' official judgment and action. The only testimony that is material to notice was delivered by Henry J. Gensler, Charles Flint, Howard W. Jacobs and E. H. Schley.

Gensler testified that up to June, 1900, he was an agent of the Elliott & Hatch Book Typewriter Company, and as such

had charge of all the trade in the locality of the District of Columbia. After that time his son had such charge. It may be inferred that he had some knowledge of his son's business and was familiar with sales made during the year 1900. He testified that he had no knowledge of any agreement with Towers and Beavers in October, 1900, relating to Beavers' official conduct with regard to the Elliott & Hatch Book Typewriter Company.

Flint was the assistant treasurer and the assistant secretary of the company from February, 1901, to March, 1903. He testified that during the year 1901 the corporation, so far as the books and accounts showed, paid no money to Beavers for any purpose whatever, and that he had no knowledge that would lead him to believe that such money was paid. He further testified that if any money of the corporation had been paid for the purpose of securing the contract of the Government it would necessarily have come under his notice. Also that he had no knowledge of money being paid by Towers to Beavers, nor had he knowledge of money having been authorized by the corporation to be paid, either directly or indirectly, to Beavers either three hundred and fifty dollars, or any sum, on July 11, 1901, or any other time, and if such payment had been authorized he would have known it. He further testified that the sales to the Post Office Department were to Mr. Gensler, and the method adopted was that the machines were charged to Gensler as being outright purchases by him at one hundred and forty dollars each. The machines returned were credited to his account. A few sales were charged directly against the Postmaster General, with the understanding that they were to be paid for at two hundred dollars and charged to Gensler at one hundred and forty dollars. He also testified that while he was assistant treasurer he had no knowledge of the payment of money to Gensler or of authority given Gensler to pay money to Towers for Beavers, for the purpose of influencing Beavers' official action in regard to the sale of the Elliott & Hatch Book Typewriter, or that Beavers ever re-

ceived anything of value from the company for such purpose; and that if such payment had been made he believed he would have known it.

Howard W. Jacobs was bookkeeper and cashier of the corporation; Schley became secretary and treasurer in 1899. Both these witnesses testified as to knowledge of the affairs of the corporation, the trades made by it, and sales in Washington of machines and the business and knowledge of the payment by the corporation or any of its officers or agents to Beavers, or to Towers for Beavers substantially as Flint. The witnesses also testified that the Elliott & Hatch machines were the best of the book typewriters and their usual price was $200.

Beavers was sworn for the purpose, as expressed by his counsel, "of permitting the accused to make a statement in his own behalf." In answer to questions of his counsel he testified that he was the person accused and the person against whom three indictments had been found in the Eastern District of New York, charged with violations of sections 1781 and 1782 of the Revised Statutes of the United States. That it was not at his instance the Elliott & Hatch typewriter was placed in the Post Office Department; it was placed there under the direction of the First Assistant Postmaster General. It was the rule of the Department in making the allowance for the typewriter to act under the instructions of that officer, and he so acted. Under a like rule he acted in the purchase of the machines, and he further testified that he entered into no agreement with Towers whereby he was to receive $25 for each typewriter thereafter purchased by the Post Office Department. He admitted he received a draft from Towers, but it was in the nature of a loan, as he remembered it; also that he received many drafts from Towers, who was a man of considerable influence with the banks of Washington, and frequently obtained drafts for him (Beavers) and had notes discounted for him. This practice ran through their entire acquaintance. There was not, he further testified, on or

about July 11, 1901, any matter relating to the Elliott & Hatch Book Typewriter pending before him.

Counsel for Government attempted to cross-examine Beavers to which the latter's counsel objected. The commissioner ruled against the objection, and counsel directed Beavers not to answer. The objection to cross-examination was based upon the ground that Beavers took the stand merely for the purpose of making a statement in answer to the charge made against him and to explain the facts alleged, in accordance with section 196 of the New York Code of Criminal Procedure, and, it was urged, that that section, or any other section which governed the proceedings, did not contemplate cross-examination. And counsel further observed that as the indictment, which was the basis of the proceedings, was not the only one found against Beavers "for that reason it would be extremely unwise to allow him to enter into any rambling cross-examination."

The commissioner committed the appellant in default of bail, finding that there was probable cause that the offenses charged had been committed. The finding was affirmed by the District Court in the proceedings for *habeas corpus*.

We think the finding was justified, in other words, the proof afforded by the indictment was not overcome, and this is all that it is necessary to now decide. Regarding the letter of the testimony when weighed with the indictment, it does not remove all reasonable grounds of presumption of the commission of the offense. The degree of proof is not that necessary upon the trial of the offense, and a certain latitude of judgment must be allowed the commissioner. We cannot say that such latitude was exceeded. The testimony was negative and, for the most part, confined to general statements, and Beavers resisted cross-examination, and the test of the circumstances which might thereby have been elicited. But granting that he could under the New York Code offer himself to be sworn and deliver a statement under the directions of questions by counsel and be exempt from cross-examination,

nevertheless the deficiencies of his statement may be urged against him. It cannot be said, therefore, that the commissioner's finding of probable cause was not justified.

The contention that the District of Columbia is not a District of the United States within the meaning of section 1014 of the Revised Statutes, authorizing the removal of accused persons from one District to another, is disposed of by *Benson* v. *Henkel*, page 1.

The orders of the Circuit Court and the District Court dismissing the writs of *habeas corpus* are

Affirmed.

HUMPHREY *v.* TATMAN.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 169. Argued March 7, 1905.—Decided April 17, 1905.

Whether the taking possession of after-acquired property within four months of the filing of the petition in bankruptcy, under a mortgage made in good faith prior to that period, is good or is void as against the trustee in bankruptcy, depends upon whether it is good or void according to the law of the State. *Thompson* v. *Fairbanks*, 196 U. S. 516. *Held*, that such a taking is under the circumstances of this case good according to the law of Massachusetts as construed by its Supreme Judicial Court.

THE facts are stated in the opinion.

Mr. William H. Brown for plaintiff in error.

Mr. Charles T. Tatman for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by a trustee in bankruptcy, the defendant in error, to recover an alleged preference. The case was heard on agreed facts, which may be summed up as follows: Davis filed a voluntary petition in bankruptcy on May 23, 1901. Two years before, on May 6, 1899, being then solvent, he executed to the plaintiff in error, Humphrey, a mortgage of his present and after-acquired stock in trade and fixtures, which covered the goods in controversy; but the mortgage was not recorded, and the goods remained in Davis's possession. On April 30, 1901, Humphrey, having reasonable cause to believe that Davis was insolvent, took possession of the goods, in accordance, it fairly is implied, with the terms of the mortgage, although against the wishes and protest of Davis. The defendant in error was qualified as trustee on June 18, 1901, and at once demanded the goods without payment of the mortgage debt. The case went from the Superior Court to the Supreme Judicial Court of the State, and the latter court ordered judgment for the plaintiff, 184 Massachusetts, 361, which was entered below, and thereupon the case was brought here.

It may be assumed in view of the recent decision in *Thompson* v. *Fairbanks*, 196 U. S. 516, that, if the taking possession was good as against the trustee in bankruptcy so far as the Massachusetts law is concerned, it should be held good here. We assume also, without deciding, that if, as against the trustee, the mortgage is to be regarded as first having come into being when the mortgagee took possession, it would be void. In the latter view the anomalous case would be presented of a mortgage of all a man's stock in trade to secure a past debt, executed to one who had reasonable cause to believe that the mortgagor was insolvent and that he was receiving a preference, but executed without intent to prefer on the part of the mortgagor. There would be a preference within the definition in § 60*a*, and the mortgagee would know it, but he

could not be said in a strict sense to have reasonable cause to believe that it was intended to give a preference. We assume, for purposes of decision, that such a case must be regarded as falling within the intent of the act.

The question then is one of Massachusetts law, and unfortunately the decision does not leave us free from doubt upon that point. If hereafter the Supreme Court of the State should adopt a different view from that to which we have been driven this case would cease to be a precedent. The language of the Massachusetts statute is, "unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto until it has been so recorded; and a record made subsequently to the time limited [fifteen days] shall be void." Mass. R. L. c. 198, § 1. There are cases which indicate that an assignee in bankruptcy is a universal successor like an executor or a husband, and so that, as it is put in Lowell, Bankruptcy, § 309, the assignee is the bankrupt. *Phosphate Sewage Co.* v. *Molleson*, 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1138; *Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462, 481; *Selkrig* v. *Davies*, 2 Dow, 230, 248; *S. C.*, 2 Rose, 291, 317. So in the Roman law *Bonorum emptor ficto se herede agit.* Gaius, IV, § 35. But it is the settled law of Massachusetts that such a fictitious identity does not satisfy the statute, that the trustee in bankruptcy is "a person other than the parties thereto," and that therefore as against him the mortgage is void. *Bingham* v. *Jordan*, 1 Allen, 373; *Blanchard* v. *Cooke*, 144 Massachusetts, 207, 226; *Haskell* v. *Merrill*, 179 Massachusetts, 120, 124, 125. *Haskell* v. *Merrill* is cited and relied on in the Supreme Court of the State, and we assume that it and the other cases cited still correctly state the law. It is clear under these cases that recording or taking possession after the qualification of the trustee would be too late, and it certainly would seem not illogical to hold that as against him the mortgage was to be treated as non-existent at any earlier date until the things were done which made it good under the

act. In this case the court speaks of "the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition," which at least suggests if it does not adopt the idea that the mortgage then first came into being as against the trustee.

On the other hand the court says in terms that "the defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this Commonwealth, or against an assignee in bankruptcy under the United States Bankruptcy Act of 1867." We feel bound, on the whole, to take this as expressing a deliberate attitude of the court on the question under discussion, as undoubtedly that has been its attitude in the past.

In *Briggs* v. *Parkman*, 2 Met. 258 [1841], a messenger in insolvency took possession of the mortgaged property on July 15, at half-past one. At half-past three the mortgage was recorded. The first publication of the notice of issuing the warrant to the messenger was on July 16, and that by the terms of the insolvent law fixed the time when the property passed. It was held that the mortgage was valid as against the assignee in insolvency. In *Mitchell* v. *Black*, 6 Gray, 100 [1856], a similar decision was made as to a bill of sale by way of security, and it was intimated that the law did not interfere with the action of purchasers in perfecting a title under a contract to which there was no legal objection when made. This case was relied on in *Sawyer* v. *Turpin*, 91 U. S. 114, a case like the present, decided as we decide this, and cited by the court below. In *Bingham* v. *Jordan*, 1 Allen, 373 [1861], which decided that the assignee in insolvency was not a "party" within the statute, *Briggs* v. *Parkman* was referred to for its implications in favor of that view, without a hint that the decision was disapproved and seemingly with no

consciousness of inconsistency. Finally, in *Folsom* v. *Clemence*, 111 Massachusetts, 273 [1873], twelve years after *Bingham* v. *Jordan*, it was held that a mortgage made more than six months before the date of a petition in bankruptcy and recorded within the six months was valid. This case also betrays no sense of inconsistency with its predecessor and is cited by the Supreme Court of Massachusetts as authority for its last quoted statement of law. See further *Bliss* v. *Crosier*, 159 Massachusetts, 498.

As the Supreme Court of Massachusetts says that taking possession under the mortgage within four months would be valid as against the trustee in bankruptcy but for supposed peculiarities of the present bankruptcy law, and as *Thompson* v. *Fairbanks*, 196 U. S. 516, although distinguishable from the the present case, decides that it is valid under the present bankruptcy law if good by the laws of the State, it follows that the mortgagee was entitled to keep his goods and that the judgment against him was wrong.

Judgment reversed.

REMINGTON *v.* CENTRAL PACIFIC RAILROAD COMPANY.

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

No. 460. Submitted March 6, 1905.—Decided April 17, 1905.

This court has jurisdiction of a writ of error, upon a judgment dismissing the suit for want of jurisdiction, when it appears in due form that the ground of the judgment was want of service on defendant and that the plaintiff denied the validity of the removal of the case from a state court.

If a petition to remove is filed as soon as it appears in the case that the amount in controversy is sufficient to warrant removal it is filed in season even if the time for answer has expired under the New York practice, notwithstanding failure to serve a complaint as to which *quære*.

Following up a motion to stay in the state court the day after notice of the amount in controversy, and obtaining an order relieving defendant from any technical default, which order took effect the same day that the petition for removal was filed, two days after such notice does not estop defendant from removing the suit. The facts appearing of record, an allegation in a petition for removal that the time has not arrived at which defendant was required to answer or plead is sufficient.

Presenting the petition to a judge in chambers satisfies the statute.

Although the state court, before removal, has refused, subject to an appeal, to set aside a summons, the Circuit Court has power to reopen the question and to set the summons aside.

Semble, service on a director of a corporation, which is doing no business and has no property in the State, when he is casually in the State for a few days, is bad.

THE facts are stated in the opinion.

Mr. James G. Flanders for plaintiff in error.

Mr. Maxwell Evarts for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to the Circuit Court upon a judgment dismissing the action for want of jurisdiction of the defendant. That question is certified from the court below.

The action was brought in the Supreme Court of the State of New York on April 10, 1903, by serving a summons on a director of the defendant in error, the railroad. On April 22 the plaintiff's attorney gave twenty days' additional time to the defendant in which to appear generally or specially or to move to vacate the summons. On May 11 a firm of lawyers gave notice of a motion to set aside the service, and also that they appeared only for that purpose. An agreement was made giving the defendant time to appear after the motion was decided. The motion was not decided until September 28, 1903, when it was denied and an order to that effect was entered on October 2. The defendant's attorneys filed a notice of appeal on October 15, and the next day gave notice of a motion to stay proceedings on the order, to be made on Octo-

ber 24. On the same October 16 the plaintiff made an affidavit in which it appeared that the sum which he sought to recover was more than $2,000. This contained the first definite notice to defendant, as no declaration had been filed. An order to take plaintiff's deposition and this affidavit were served on the defendant on October 23. On October 26 a petition for removal to the United States Circuit Court was presented by the defendant to a judge of the state court in chambers and the bond was approved. Before the petition for removal was filed the motion for a stay came up on October 24 in the state court and was argued, and a stay was ordered, the defendant at the same time being relieved from any default in appearing. The matter of the appeal was not passed upon. This order was entered on October 26. On November 4 the record was filed in the United States Court.

In the Circuit Court the defendant renewed its motion to set aside the service of the summons, the plaintiff objecting on various grounds, which will be dealt with, and moving to remand the case. On July 23, 1904, the court granted the defendant's motion and overruled the plaintiff's, and on August 30 a judgment was entered dismissing the action for want of jurisdiction of the defendant. See *Wabash Western Ry.* v. *Brow*, 164 U. S. 271. The plaintiff's rights were saved by a bill of exceptions, the form of the judgment and a certificate of the judge, and the case now is brought here.

It is objected by the defendant that this court has not jurisdiction, on the ground that it does not appear that the want of jurisdiction of the court below as a Federal court was the ground of the judgment. But it appears clearly that the ground of the judgment was the absence of service on the defendant, and that the plaintiff denied the validity of the attempt to remove. See *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 284, 285, and cases cited. The former question was decided to be subject to review on error by this court in *Shepard* v. *Adams*, 168 U. S. 618. That case has not been overruled. The latter question was held also

proper to be brought here, in *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92. The jurisdiction of this court must be sustained.

Coming then to the motion to remand it is said that the petition to remove was filed too late, because the time for answer had expired. It would be a strong interpretation of the New York Code of Civil Procedure, § 418, to say that it requires an answer within twenty days after the summons when no complaint or even notice stating the sum of money for which judgment will be taken, § 419, has been served. See *Dancel* v. *Goodyear Shoe Machinery Co.*, 106 Fed. Rep. 551. But it is a sufficient reply to the motion and to the objection to the removal that the petition was filed as soon as the case became a removable one. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92; *Kansas City Suburban Belt Ry.* v. *Herman*, 187 U. S. 63, 67, 68. The suggestion that the defendant was estopped by the fact that it followed up its motion to stay in the state court in accordance with its notice, on October 24, when the right to remove had been made to appear the day before, seems to us too technical, supposing it to be open here. Indeed it was a proper preliminary in one respect. The order made on that motion was "that the defendant be relieved from any default in appearing herein, and that all proceedings on the part of the plaintiff be stayed, pending said appeal and until ten days after the decision thereof, except" an order for the examination of the plaintiff. It did not estop the defendant from insisting on a substantial right that it got rid of a purely formal objection which still is pressed—in our opinion without ground. *Dancel* v. *Goodyear Shoe Machinery Co.*, 106 Fed. Rep. 551. The order did not take effect until October 26. *Wilcox* v. *National Shoe & Leather Bank*, 67 App. Div. N. Y. 466; *Hastings* v. *Twenty-third Ward Land Improvement Co.*, 46 App. Div. N. Y. 609; *Vilas* v. *Page*, 106 N. Y. 439, 455.

It is urged that the petition did not justify removal, because the allegation that the time had not arrived at which the defendant was required to answer or plead was an allegation of a conclusion of law. Allegations which involve such conclu-

sions import that the facts which justify them are true. Many such allegations are permitted to avoid an intolerable prolixity on matters not likely to be controverted. *Haskell* v. *Merrill*, 179 Massachusetts, 120, 123; *Alton* v. *First National Bank of Webster*, 157 Massachusetts, 341, 343; *Commonwealth* v. *Clancy*, 154 Massachusetts, 128, 132; *Windram* v. *French*, 151 Massachusetts, 547, 551; Evans, Pleading, 1st ed., 48, 139, 143–146, 149–157, 164. The facts appeared of record. When the defendant expected the plaintiff to demand more than $2,000 is immaterial. The only material point is when the demand was stated in the case. Assuming the objection to be open here, if there was any defect, which we do not imply, it was but a defect of form. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92, 98, 101. The presenting of the petition to a judge in chambers, and the filing of it in the state court, satisfied the statute. See *Noble* v. *Massachusetts Benefit Association*, 48 Fed. Rep. 337; *Loop* v. *Winters' Estate*, 115 Fed. Rep. 362.

We come then to the setting aside of the summons. We assume, for purposes of decision, as we already have assumed, that *Shepard* v. *Adams*, 168 U. S. 618, is consistent with the decisions that the jurisdiction of the Circuit Court as a Federal court only is in question. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523; *Courtney* v. *Pradt*, 196 U. S. 89. If there has been no valid service the court has no power, and a distinction is possible between such a case and a mere question touching the proper limits between equity and law, or the traditional authority of the court. We leave *Shepard* v. *Adams* as we find it, since a reconsideration of the point is not necessary to decide the present case. It is said that the decision of the state court, although appealed from, was *res judicata*. But it stood no higher than a similar decision made by the Circuit Court, if the case had been begun before that court. It may be that the defendant would have had no right to renew its motion, but the Circuit Court would have had power to give it leave. If the Circuit Court was satisfied that it, or its predecessor the state court, had made a mistake,

it had power to reopen the matter. It did so and its action in that respect is not open to question here. However stringent may be the practice in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule.

The plaintiff in error does not argue the merits of the order of the Circuit Court. Assuming that they, as well as the jurisdiction of the court to make the order, are open here, we see no sufficient reason for disturbing the decision. The Circuit Court was warranted by the affidavits before it in finding that the defendant was doing no business and had no property in the State of New York, and that the service on a director casually within the State for a few days was bad. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428. The arguments do not seem to us to need to be noticed in greater detail.

Judgment affirmed.

COVINGTON *v.* FIRST NATIONAL BANK OF COVINGTON.

FIRST NATIONAL BANK OF COVINGTON *v.* COVINGTON.

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

Nos. 113, 114. Argued January 5, 1905.—Decided April 17, 1905.

A Federal court is not required to give a judgment in a state court any greater weight than is awarded to it in the courts of the State in which it was rendered. As it is the settled rule in Kentucky that an adjudication in a suit for taxes is not an estoppel between the parties as to taxes of any other year, even though such adjudication involves the finding of an exemption by contract, not only as to taxes involved in the suit but also as to all taxes that might be levied under the contract, the

Federal courts will not enjoin the collection of taxes for subsequent years on the ground that their invalidity was adjudicated by such a judgment.

The statute of Kentucky of March 21, 1900, taxing shares of national banks, from the years 1893 to 1900 and thereafter held, void and in conflict with § 5219, Rev. Stat., as to those portions which are retroactive as imposing a burden on the bank not borne by other moneyed corporations of the State, and valid and not in conflict with § 5219 as to taxes imposed thereafter.

A difference in methods in assessing shares of national banks from that of taxing state banks does not necessarily amount to a discrimination, rendering the act invalid under § 5219, and justify the judicial interference of courts for the protection of the shareholders, unless it appears that the difference in method actually results in imposing a greater burden on the national banks than is imposed on other moneyed capital in the State.

THIS case was here upon a former appeal, which was dismissed for want of final decree in the court below. *Covington* v. *Covington First National Bank*, 185 U. S. 270.

The original action was brought to enjoin the assessment or collection of taxes on certain shares of capital stock of the First National Bank of Covington for the years from 1893 to 1900, inclusive, and to enjoin the arrest of the president and cashier of the bank for not listing such shares, and for a decree adjudicating the same not liable to taxation up to the time of the expiration of the charter of the bank on November 17, 1904.

The principal grounds alleged and relied upon are that by reason of the acceptance of the terms of the act of the general assembly of Kentucky, passed in 1886, known as the Hewitt law, an irrevocable contract had been made between the bank and the State, whereby the former was to pay to the State taxes at a certain rate on its stock, surplus and undivided profits, which, when paid, were to be in full of all other State, county or municipal taxes, except those levied on the bank's real estate. It was averred that complainant had regularly paid such taxes up to and including those due July 1, 1900. That the fact that the bank had such irrevocable contract had been adjudicated and finally determined by a decision in the

Court of Appeals of Kentucky in a litigation wherein the State and the city of Covington and the bank were parties. The bill further set up that an attempt was being made to compel the complainant to list for taxation its shares of stock under an act of the State of Kentucky, passed March 21, 1900 (Session Acts 1900, p. 65). The act under which the taxes were assessed is given in the margin of the opinion in the case of *Covington* v. *Covington First National Bank*, 185 U. S. *supra*, and for convenience of reference is also inserted in the margin here.[1] It was also averred in the bill that the act of March 21,

[1] "An act relating to the taxation of the shares of stock of national banks:

"Whereas, the Supreme Court of the United States has lately decided that article three (3), chapter one hundred and three (103), of the acts of eighteen hundred and ninety-one, eighteen hundred and ninety-two, and eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two any adequate mode of taxing national banks, while state banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all state purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"SEC. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: *Provided*, That where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years: *And provided further*, That where any national bank has heretofore, for any year or years, paid state taxes under the Hewitt bill in excess of the state taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its state taxes required by this act.

1900, which undertakes to impose taxes for the years 1893 and following, is unconstitutional and void, and operates to discriminate against the complainant, in violation of section 5219 of the Revised Statutes of the United States. The defendants having filed a plea to the jurisdiction and a general demurrer to the bill, upon motion for a temporary injunction, attempts to enforce taxes levied or assessed upon the shares of capital stock at any time previous to March 21, 1900, were enjoined. 103 Fed. Rep. 523.

December 17, 1900, a decree was entered, but not being final the writ of error was dismissed. 185 U. S. *supra*. After the case was sent back to the Circuit Court the prior decision in that court was followed, and it was further held that the judgment of the state court was not a bar to the right to collect taxes for other years than the year directly involved in the judgment set up, and that as the Hewitt law and its acceptance by the bank had been conclusively held not to constitute an irrevocable contract as to taxes between the State and the complainant, and as the law was valid as to future taxation the injunction could not be granted as to taxes assessed under the law of March 21, 1900, after its passage. A decree was, therefore, entered, dismissing the complainant's bill as to taxes levied after said date, and permitting the former

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"SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

"SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as state banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

"SEC. 7. Whereas, it is important that state banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

Approved March 21, 1900.

decree enjoining the assessment and levying of taxes before the passage of the law to stand. 129 Fed. Rep. 792.

From so much of the decree as enjoined the taxes assessed prior to March 21, 1900, the city appealed; from so much thereof as refused the injunction and dismissed the bill as to taxes assessed after that date, the bank appealed. Both appeals are now before this court.

Mr. J. H. Hazelrigg, with whom *Mr. F. J. Hanlon* and *Mr. Ira Julian* were on the brief, for the City of Covington:

The act of March 21, 1900, providing for taxation of shares of national banks is not repugnant to § 5219, Rev. Stat., because of its retroactive provision. Kentucky Stat., Ch. 108; *Nat. Bank* v. *Owensboro*, 173 U. S. 664; *Board of Councilmen* v. *Mason & Foard Co.*, 100 Kentucky, 48; Blackwell on Tax Titles, 5th ed., § 324; Kentucky Statutes, §§ 3176-3375, 4020, 4022, 4090, 4241; Constitution of Kentucky, §§ 170-174; *Scobee* v. *Bean*, 22 Ky. L. R. 1076; *Chester* v. *Black*, 6 L. R. A. 802; *Butler* v. *Toledo*, 5 Ohio St. 225; *Mills* v. *Charleston*, 29 Wisconsin, 400; *Marion Co.* v. *L. & N. R. R. Co.*, 91 Kentucky, 388; *In re Van Antwerp*, 56 N. Y. 261; *L. & N. R. R. Co.* v. *Commonwealth*, 1 Bush. 250; *Long* v. *Kiende*, 27 Hun, 66; *Mattingly* v. *Dist. Columbia*, 97 U. S. 687; *Plummer* v. *Marathon Co.*, 46 Wisconsin, 104; *Florida &c. R. R.* v. *Reynolds*, 183 U. S. 471; Cooley on Taxation, 291, 309; *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138; *Lou. & Jeff. Ferry Co.* v. *Commonwealth*, 22 Ky. L. R. 446; *Commonwealth* v. *Citizens' Nat. Bank* and *Citizens' Nat. Bank* v. *Commonwealth*, 25 Ky. L. R. 2254; *London* v. *Hope*, 26 Ky. L. R. 112.

The act in controversy is not unconstitutional by reason of any conflict whatever with section 5219 Rev. Stat. *Adams* v. *Nashville*, 95 U. S. 22; *Bank* v. *Commonwealth*, 9 Wall. 362; *Nat. Bank* v. *Davenport &c.*, 123 U. S. 83; *Van Slyke* v. *Wisconsin*, 154 U. S. 581; *First Nat. Bank* v. *Ayres*, 160 U. S. 660; *Aberdeen Bank* v. *Chehalis Co.*, 166 U. S. 440; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461; *Lander* v.

Mercantile Bank, 186 U. S. 458; *Hammond* v. *Massachusetts &c.*, and *Churchill* v. *Utica*, 154 U. S. 550; and see 3 Wall. 387; *People* v. *Commissioners*, 4 Wall. 244.

As to the alleged contract of exemption, the estoppel proposed by the bank should not prevail in this court because the same would not prevail in the courts of Kentucky. Section 905, Rev. Stat.; *Mills* v. *Duryee*, 7 Cr. 484; *Hampton* v. *McConnell*, 3 Wheat. 234; *McElmoyle* v. *Cohen*, 13 Pet. 326; *Christmas* v. *Russell*, 5 Wall. 290; *Thompson* v. *Whitman*, 18 Wall. 457; *Phoenix Ins Co.* v. *Tennessee*, 161 U. S. 184; *Abrahams* v. *Casey*, 179 U. S. 218; *Newport* v. *Commonwealth*, 21 Ky. L. R. 47; *Metcalf* v. *Watertown*, 153 U. S. 671; *Negley* v. *Henderson*, 59 S. W. Rep. 19; *Bell Co. Coke Co.* v. *Pineville*, 23 Ky. L. R. 933; *Cooper* v. *Newell*, 173 U. S. 555; *Union Planters' Bank* v. *Memphis*, 111 Fed. Rep. 570; *S. C.*, 189 U. S. 71; *Hilton* v. *Guyot*, 159 U. S. 113; *Chicago & A. R. R. Co.* v. *Wiggins F. Co.*, 108 U. S. 118; *Chase* v. *Curtis*, 113 U. S. 452; *Renaud* v. *Abbott*, 116 U. S. 227; *Embry* v. *Palmer*, 107 U. S. 3; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; Freeman on Judgments, § 576; Wills' Res Judicata, § 531; *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *Bergman* v. *Bly*, 66 Fed. Rep. 40, 43; *Lavin* v. *Emigrant Savings Bank*, 1 Fed. Rep. 641, 650; *Shelby* v. *Gay*, 11 Wheat. 367; *Green* v. *Neal's Lessees*, 6 Pet. 299; *Morley* v. *Lake Shore Ry. Co.*, 146 U. S. 166; *Insurance Company* v. *Iron Company*, 42 Fed. Rep. 376; *Railroad Company* v. *Blossburg*, 20 Wall. 137, 143; *Bank* v. *Bank*, 136 U. S. 235; *Lawton* v. *Young*, 52 Fed. Rep. 439; *Sanford* v. *Roe*, 69 Fed. Rep. 546; *Bauserman* v. *Blunt*, 147 U. S. 647; *Thompson* v. *Sawyer Co.*, 57 Fed. Rep. 1030; *Luther* v. *Borden*, 7 How, 1; *Christy* v. *Pidgeon*, 4 Wall. 196; *Leffingwell* v. *Warren*, 2 Black, 603; *Railroad Company* v. *Trust Company*, 82 Fed. Rep. 124; *Hill* v. *Hite*, 85 Fed. Rep. 268; *Railroad Company* v. *Reed*, 80 Fed. Rep. 234; *Rice* v. *Adler*, 71 Fed. Rep. 151; *Hodgson* v. *Burleigh*, 4 Fed. Rep. 121; *Durden* v. *Malloy*, 43 Fed. Rep. 407; *Railroad Company* v. *Guest*, 84 Fed. Rep. 628; *Southerland* v. *Village of Ernst*, 86 Fed. Rep. 597;

Thomas v. *Burney*, 35 Fed. Rep. 115; *Talliaferro* v. *Barnett*, 47 Arkansas, 359.

Mr. Shelley D. Rouse and *Mr. Edmund F. Trabue*, with whom *Mr. James S. Pirtle*, *Mr. John C. Doolan* and *Mr. Attila Cox, Jr.*, were on the brief, for First National Bank:

The act of March 21, 1900, so far as it is retroactive, infringes the Fourteenth Amendment, in taking the property of the bank and its shareholders without due process, and denying it the equal protection of the law; and so far as it authorizes the assessment and taxation either previously or subsequently to March 21, 1900, discriminates against national banks and their shareholders, and offends § 5219 of Rev. Stat. *Commonwealth* v. *Citizens' Nat. Bk.*, 25 Ky. L. R. 2100, 2254; *Scobee* v. *Bean*, 109 Kentucky, 526; *Baldwin* v. *Shine*, 84 Kentucky, 502; *Lexington* v. *Fishback*, 109 Kentucky, 170; *Frankfort* v. *Fidelity Trust Co.*, 111 Kentucky, 667; *National Bank* v. *Owensboro*, 173 U. S. 664; *Ferry Co.* v. *Kentucky*, 188 U. S. 385, 395; *Bellevue* v. *Peacock*, 89 Kentucky, 495; *Van Allen* v. *Assessors*, 3 Wall. 573; *Railroad Co.* v. *Commonwealth*, 24 Ky. L. R. 2124; *Commonwealth* v. *Nute*, 24 Ky. L. R. 2138; *Franklin County Court* v. *L. & N. R. R. Co.*, 84 Kentucky, 59; *Commonwealth* v. *L. & N. R. R. Co.*, 89 Kentucky, 139.

The judgment of the Campbell Circuit Court, affirmed by the Kentucky Court of Appeals, adjudging in the bank's favor an irrevocable contract under the "Hewitt law" exempting the bank from all taxation, except by that law imposed, is *res judicata* of that question, and prevents its relitigation here. *Owensboro National Bank case*, 173 U. S. 648; *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383; *S. C.*, 174 U. S. 799; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Sou. Pac. Co.* v. *United States*, 168 U. S. 45; *Baldwin* v. *Maryland*, 179 U. S. 220; *Newport* v. *Commonwealth*, 50 S. W. Rep. 845; *S. C.*, 51 S. W. Rep. 433; *Frankfort* v. *Deposit Bank*, 111 Kentucky, 950; *S. C.*, 191 U. S. 499.

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

That the acceptance of the provisions of the so-called Hewitt law did not constitute an irrevocable contract, releasing the bank from taxes upon compliance with its terms, has been settled. *Bank Tax Cases*, 102 Kentucky, 174; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636. Reference is made to the various cases leading up to this result in *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 508. We are, therefore, left upon this branch of the case to consider the effect of the judgment of the state court of Kentucky, set up in the complainant's bill as an adjudication of the rights of the parties and a final determination that the acceptance of the Hewitt law had the effect of a valid contract. When this case was before the Circuit Court for the second time, 129 Fed. Rep. 792, Judge Cochran, after an elaborate review of the Kentucky cases, reached the conclusion that as the taxes involved in the case in which the adjudication was had were for a different year than those involved in this suit, the former judgment did not have the effect of an estoppel between the parties, being only conclusive, under the Kentucky decisions, as to taxes in the years involved in the suit in which the judgment was rendered. We do not doubt that this is the settled law of the Supreme Court of Kentucky. Nor does it make any difference, in the view which that court takes of the matter, that the adjudication as to the right to collect the taxes involved the finding of an exemption by contract, which included not only the taxes for the years in suit, but all taxes which might be levied under the authority of the contract. The ground upon which the court based its decision with reference to the effect of such adjudication is stated in the case of *City of Newport* v. *Commonwealth*, 106 Kentucky, 434, 444, as follows:

"The only question remaining for decision is upon the plea of *res judicata*.

"The plea in this case avers that the subject matter of the

former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. . . .

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity exist, regardless of former adjudications as to the validity of a different tax."

It is unnecessary to cite the cases; they will be found in Judge Cochran's opinion. It is sufficient to say that if this case had been decided in the state court in Kentucky the adjudication pleaded herein, not involving taxes for the same years as those now in controversy, would not avail as an estoppel between the parties. It is true that a different rule prevails in the courts of the United States. The reasons therefor were stated in an opinion by Mr. Justice White, speaking for the court, in the case of *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, and in cases arising in a Federal jurisdiction the doctrine therein announced will doubtless be adhered to. The learned counsel for the plaintiff in error refer to the decision of this court in *Deposit Bank* v. *Frankfort*, 191 U. S. *supra*, as authority for the doctrine that where a contract right has been adjudicated which involves an exemption from all taxation such adjudication will conclude the parties as to the right to legally tax for other years, although the particular year was not directly involved in the suit in which the adjudication was made. But in that case the court was dealing with the effect to be given to a judgment of a Federal court in which such

contract right had been adjudicated, when the Federal judgment was set up in a state court; and in that case it was recognized, in the opinion of the court as well as in the dissenting opinion, that the courts of Kentucky, in giving effect to the judgments of their own courts, were guided by a different rule, and in that State an adjudication involving taxes for one year cannot be pleaded as an estoppel in suits involving taxes for other years. 191 U. S. 514, 524.

The case of *Deposit Bank* v. *Frankfort* was only concerned with the effect to be given to a Federal judgment adjudicating a contract right, when pleaded in a state court. We are now dealing with the weight to be attached to a state judgment when pleaded as *res judicata* in a Federal court. That was the very question decided by this court in the case of *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, wherein it was held that the Federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the State where they were rendered. Upon this branch of the case the question then is, What effect is given in the courts of Kentucky to such pleas of estoppel? As we have seen, it is there settled that the judgment would not be effectual to protect the alleged contract rights of the complainant as to the taxes involved for years other than the one directly involved in the adjudication set up. We, therefore, find no error in the judgment of the Circuit Court refusing an injunction upon the ground of an estoppel by judgment.

As to the taxes for the years prior to the passage of the act of March 21, 1900, it is argued by the bank that to give this retroactive effect to the law will be to deprive it and its stockholders of their property without due process of law, and will be in violation of section 5219 of the Revised Statutes, prohibiting discrimination against national banks and their stockholders. The act of March 21, 1900, as stated in the preamble, was passed because of a decision of this court holding prior legislation of the State undertaking to tax the property of national banks unconstitutional. *Owensboro National Bank* v.

Owensboro, 173 U. S. 664. In the *Owensboro case* it was held that section 5219, Rev. Stat., was the measure of the power of the State to tax national banks, their property or franchises, which power was confined to the taxing of the stock in the name of the shareholders and the assessment of the real estate of the banks, and that taxation under the laws of the State of Kentucky upon the franchise of the bank was not within the purview of the authority conferred by the act of Congress, and was therefore illegal. Section 5219 of the Revised Statutes of the United States is as follows:

"SEC. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, 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. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Under the new taxing law, act of March 21, 1900, it is declared to be the purpose to require the bank to return the shares of stock for the years prior to 1900, and since the adoption of the revenue law of 1892, with the privileges and deductions stated in section 3 of the act. Notwithstanding the prior revenue law had been held invalid, and there was no statute specifically taxing these shares of national bank stock on the statute books of Kentucky, prior to the passage of the act of March 21, 1900, the Supreme Court of Kentucky, in the case of

Scobee v. *Bean*, 109 Kentucky, 526, has held that there was ample statute law in that State for the taxing of shares in national banks under the laws of that State providing for the taxation of real and personal property of every kind, and that the provision that the individual shareholder in a corporation shall not be required to list his property therein so long as the corporation pays the taxes on its property of every kind, impliedly requires the individual to list his shares and pay the tax in the absence of the return required by law of the corporation. In that case the court held that there was nothing in its decisions running counter to section 5219. These views were further enforced in *Commonwealth* v. *Citizens' National Bank*, 80 S. W. Rep. 158; *Town of London* v. *Hope*, 80 S. W. Rep. 817; *Citizens' National Bank of Lebanon* v. *Commonwealth*, 25 Ky. L. R. 2254. Following the state court in the interpretation of its own statutes, it may be said that, as to shareholders residing in Kentucky and over whom the State has jurisdiction, the Supreme Court of that State has construed its statutes as requiring shareholders in national banks for the years 1893 to 1900, inclusive, to return their shares for taxation; and if they did not make the return the duty was required of the corporation. In this view of the law it may be that, as to local shareholders, the act of March 21, 1900, as held by the Supreme Court of Kentucky, created no new right of taxation, but gave simply a new remedy, which by the law, is operative to enforce pre-existing obligations. It may be admitted that section 5219 permits the State to require the bank to pay the tax for the shareholders. *National Bank* v. *Commonwealth*, 9 Wall. 353; *Van Slyke* v. *Wisconsin*, 154 U. S. 581; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440.

But there is nothing in the general statutes of Kentucky before the act of March 21, 1900, specifically requiring national banks to return shares of stock in the corporation when such shares are held by persons domiciled beyond the State. The situs of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the

company to return the stock within the State as the agent of the owner, is at the domicile of the owner. Cooley on Taxation, 16. It is true that the State may require its own corporations to return the foreign-held shares for the owner for the purposes of taxation. *Corry* v. *The Mayor and Council of Baltimore*, 196 U. S. 466. Section 5219, Rev. Stat., authorizes the State to tax all the shares of a national banking association, including those owned by non-residents, as well as those owned in the State, in the city or town where the bank is located, but this section does not itself impose the tax; it is authority for state legislation to thus tax national bank shareholders. And this statute is express authority to the State by appropriate legislation to make the bank the agent of the shareholders for the purpose of returning the shares and paying the taxes thereon.

In *Commonwealth* v. *Citizens' National Bank*, 80 S. W. Rep. 158, the Kentucky Court of Appeals seems to have held that a national bank might be required, under § 4241, Kentucky Statutes of 1903, to return the shares held in it for the years 1893 to 1900, inclusive, as omitted property. In that case it is said: "It was held under the previous statute that the shares of stock in national banks might be assessed to the shareholder by the assessor, and should be given in by the shareholder in the list of his personal property. *Scobee* v. *Bean*, 109 Kentucky, 526; *S. C.*, 59 S. W. Rep. 860. The act of March 21, 1900, did not, therefore, make that taxable which was not taxable before, but simply provided another mode for the assessment of the shares of stock and the payment of the taxes. It was the duty of the assessor to make the assessment. It was also the duty of the president and cashier of the bank to list the shares of stock with the assessor; but when the assessment was not made the property was simply omitted from the tax list, and the sheriff is authorized by section 4241, Ky. Stat., 1903, to institute the proceeding to have any omitted property assessed." And the court further held the bank liable for the penalty imposed for not listing taxable property. The ground

upon which this judgment rests is that shareholders were bound to return the shares in the years from 1893 to 1900 under the then existing state law, and the act of 1900 made the bank the agent of the shareholders and did not require a new duty, but only imposed the duty upon the agent as a means of making effectual the former obligation of the shareholders. None of the Kentucky cases deals with the effect of the requirement under the act of 1900, that the bank return the shares of stock held by foreign stockholders, who clearly were not required under the previous laws of that State to return shares of stock when neither the shares nor the owners were within the State.

Section 5219 requires that a State in taxing national banks shall be subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other capital in the hands of the individual citizen. Neither this section nor section 5210 of the Revised Statutes, requiring a list of the shareholders to be kept by the bank, has the effect to levy taxes. It is a limitation upon the right of the State, and the State must not discriminate against national banks by the use of methods of taxation differing from those in use in taxing other moneyed capital in the hands of individual citizens.

It is averred in the amended bill, and the answer having been stricken from the files and the case submitted upon the plea to the jurisdiction and general demurrer, it must be taken as true "that during said years [1893 to 1900] many of its shareholders were non-residents of the State of Kentucky, who, in many instances, have sold and transferred their shares of stock during said time."

The statutes of the State of Kentucky, which have been construed by the Supreme Court of that State in the cases cited, to require the payment of taxes by the shareholders or by the bank for its shareholders, can have reference only to shareholders within the jurisdiction of the State. Whether the system operates as a discrimination against national banks within the prohibition of section 5219, involving, as it does, a

right of Federal creation must be ultimately determined in this court. The act of March 21, 1900, imposes upon the bank a liability for taxes assessed upon its shareholders, whether within or without the State. This liability did not exist before the passage of the act, and in *Commonwealth* v. *Citizens' National Bank, supra*, the Court of Appeals of Kentucky held that the statutes of the State made the bank liable for a penalty of twenty per cent for the years 1893 to 1900, inclusive. It seems to us that to permit the statute to require the bank to return the shares of such foreign-held stock, and be subjected to a penalty in addition, is imposing upon national banks a burden not borne by other moneyed capital within the State. In support of the equivalency of taxation, which it is the purpose of section 5219 to require, this court said, in *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 676: "The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact."

Without considering the question of constitutional power to tax non-resident shareholders by means of this retroactive law, it seems to us that in imposing upon the bank the liability for the past years, for taxes and penalty, upon stock held without the State, and which before the taking effect of the act under consideration it was not required to return, there has been imposed upon national banks in this retroactive feature of the law a burden not borne by other moneyed capital in the State. This law makes a bank liable for taxes upon property beyond the jurisdiction of the State, not required to be returned by the bank as agent for the shareholders, by a statute passed in pursuance of the authority delegated in § 5219, thus imposing a burden not borne by other moneyed capital within the State.

We think the Circuit Court was right in that part of the decree which enjoined the collection of taxes against the bank for the years 1893 to 1900, inclusive.

As to the alleged discrimination against shareholders in

national banks because the assessment of the property of state banks is upon the franchise and not upon the shares of stock, there is nothing in the bill to show that this difference in method operates to discriminate against national bank shareholders by assessing their property at higher rates than are imposed upon capital invested in state banks. And as to the deduction of the value of real estate and other deductions allowed to state banks, the Supreme Court of Kentucky has held that all deductions allowed to state banks must be allowed in like manner in assessing the property of shareholders in national banks. *Commonwealth* v. *Citizens' Bank*, 80 S. W. Rep. 158. Nor does the allegation that in cities of the first, second and third class state banks are assessed upon their shares for city taxation, but upon their franchises and property for state and county taxation, in the absence of averments of fact showing that thereby a heavier burden of taxation is imposed upon national than state banks in such cities, warrant judicial interference for the protection of shareholders in national banks. *Davenport Bank* v. *Davenport Board of Equalization*, 123 U. S. 83.

Judgment affirmed.

BONIN v. GULF COMPANY.

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

No. 50. Argued March 16, 1905.—Decided April 24, 1905.

In an action of ejectment plaintiff pitched his claim solely on a patent from the United States; defendant removed the action to the Circuit Court on the ground of diverse citizenship and obtained a verdict and judgment on the plea of prescription after nonsuit on plea of *res judicata;* the judgment was affirmed by the Circuit Court of Appeals. *Held,* that the judgment was final and the writ of error must be dismissed. The jurisdiction of the Circuit Court rested solely on diverse citizenship, the assertion of title under patent from the United States presented no ques-

tion in itself conferring jurisdiction, and plaintiff's petition did not assert, in legal and logical form, if at all, the existence of any real controversy as to the effect or construction of the Constitution or of any law or treaty of the United States constituting an independent ground of jurisdiction.

THE facts are stated in the opinion.

Mr. Branch K. Miller for plaintiffs in error.

Mr. Edgar H. Farrar, Mr. B. F. Jonas and *Mr. Ernest B. Kruttschnitt* for defendant in error.

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

This was a petitory action for real property, or an action of ejectment, brought by the heirs of Gonsoulin, plaintiffs in error, against the Gulf Company, defendant in error, in the District Court of St. Mary's Parish, Louisiana, where the land was situated. The petition alleged that a grant or concession by the Spanish Government was originally made to Dubuclet, St. Clair and Gonsoulin in 1783, and that the interest of Dubuclet and St. Clair were conveyed to the heirs of Gonsoulin after 1808.

That the United States Government issued a patent to the heirs of Gonsoulin, and that petitioners' "claim by said grant and concession covering said lands, dates back to the year seventeen hundred and eighty-three or thereabouts, and said concession was recognized and confirmed by the United States Government after proper and legal surveys had defined the boundaries and segregated said grants."

That said lands were "now in the possession of and illegally detained and held by the Gulf Company, a body corporate organized under the laws of the State of New Jersey, domiciled in the State of New Jersey."

The Gulf Company filed its petition for the removal of the cause, alleging that it was, at the time the suit was brought, and when the petition was filed, a citizen of New Jersey, and

that the heirs of Gonsoulin were citizens of the State of Louisiana. The cause was removed accordingly, and plaintiffs filed in the Circuit Court an amended and supplemental petition, stating that all the plaintiffs were citizens of Louisiana, and that defendant was a citizen of New Jersey, and praying that petitioners "be recognized as the true and lawful owners of the said property described in the patent, letters patent, or grant, issued to Dautrieve Dubuclet, Benoist de St. Clair and Francois Gonsoulin by the United States of America, on August 21, 1878," and that they be put in possession.

Plaintiffs pitched their title solely on this patent. Defendant for peremptory exception pleaded the prescription of ten years; the prescription of thirty years; and *res judicata.*

On the trial the Circuit Court charged the jury to find for defendant on the pleas of prescription, and non-suited defendant on the plea of *res judicata.* Verdict was returned, and judgment entered accordingly, and the case having been carried to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed. 116 Fed. Rep. 251.

The jurisdiction of the Circuit Court rested alone on diversity of citizenship. The assertion of title under a patent from the United States, presented no question, which, of itself, conferred jurisdiction. *Florida Central Railroad Company* v. *Bell,* 176 U. S. 321, 328. No dispute or controversy as to the effect or construction of the Constitution, or of any law, or treaty of the United States, on which the result depended, appeared by the record to have been really and substantially involved, so that it could be successfully contended that jurisdiction was invoked on the ground that the suit arose under Constitution, law, or treaty. *Arbuckle* v. *Blackburn,* 191 U. S. 405.

On the pleadings and evidence, the questions in the Circuit Court were questions of prescription, and of *res judicata;* in the Circuit Court of Appeals, of prescription; and plaintiffs' petitions did not assert, in legal and logical form, or at all, the existence of a real controversy, in itself, constituting an independent ground of jurisdiction.

The judgment of the Circuit Court of Appeals was, therefore, final, and the writ of error must be dismissed.

The judgment was entered in the Circuit Court of Appeals May 27, 1902; this writ of error was allowed May 22, 1903; and the case was docketed here June 1, 1903.

Plaintiffs in error filed a petition for certiorari herein, February 17, 1905, which was submitted February 27, and its consideration postponed to the hearing on the merits. In our opinion that writ should not be granted. *Ayres* v. *Polsdorfer*, 187 U. S. 595.

Writ of error dismissed; certiorari denied.

HOWE SCALE COMPANY *v.* WYCKOFF, SEAMANS & BENEDICT.

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

No. 130. Argued January 16, 17, 1905.—Decided April 24, 1905.

In an action to restrain the use of a personal name in trade, where it appears that defendant has the right to use the name and has not done anything to promote confusion in the mind of the public except to use it, complainant's case must stand or fall on the possession of the exclusive right to the use of the name.

A personal name—an ordinary family surname such as Remington—cannot be exclusively appropriated by any one as against others having a right to use it; it is manifestly incapable of exclusive appropriation as a valid trade-mark, and its registration as such can not in itself give it validity.

Every man has a right to use his name reasonably and honestly in every way, whether in a firm or corporation; nor is a person obliged to abandon the use of his name or to unreasonably restrict it.

It is not the use, but dishonesty in the use, of the name that is condemned, and it is a question of evidence in each case whether there is false representation or not.

One corporation cannot restrain another from using in its corporate title a name to which others have a common right.

Where persons or corporations have a right to use a name courts will not interfere where the only confusion results from a similarity of names

and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one person for that of another, and if defendant is not attempting to palm off its goods as those of complainant the action fails.

THIS was a bill exhibited, in September, 1898, by Wyckoff, Seamans & Benedict, a corporation of New York, in the Circuit Court of the United States for the District of Vermont, against the Howe Scale Company of 1886, a corporation of Vermont, alleging that complainant had been for many years engaged in the manufacture and sale of typewriting machines known in the markets and to the trade and public, and referred to, identified, offered for sale and sold as the "Remington typewriter," and the "Remington standard typewriter," and that the words "Remington" and "Remington standard" had been registered in the Patent Office under the act of Congress; and charging defendant with fraud and unfair competition in making use of the corporate name "Remington-Sholes Company" and the designations "Remington-Sholes," "Rem-Sho" and "Remington-Sholes Company," in advertising for sale, offering for sale and selling typewriting machines; and praying for an accounting, and for an injunction restraining defendant from advertising or offering for sale or selling typewriting machines manufactured by the "Remington-Sholes Company," bearing the name "Remington" or "Remington-Sholes" or "Rem-Sho" or "Remington-Sholes Company," and from advertising or offering for sale or selling any such machines under said designation, or under any designation of which the name "Remington" was a part.

Defendant was the sales agent of the "Remington-Sholes Company," a corporation of Illinois, and was engaged in selling the typewriting machines called the "Remington-Sholes" or "Rem-Sho" typewriter, which were manufactured by the Illinois corporation at Chicago. The right to use those designations in the way they were used was asserted by the defense, of which the Remington-Sholes Company, and subsequently the Fay-Sholes Company, had charge. The word

"Rem-Sho" was alleged to have been registered in the Patent Office as a trade-mark.

The Circuit Court found that defendant's use of the name "Remington" was an unjustifiable invasion of complainant right to the use of that name, and entered a decree, August 14, 1901, denying an account for gains and profits, without prejudice to the recovery thereof from the Remington-Sholes Company; and perpetually enjoining the use of the designation "Remington," or "Rem-Sho," as the name or part of the name of any typewriting machine whatsoever manufactured by the "Remington-Sholes Company," or by defendant, or any person or concern, and from selling, offering or advertising for sale in any manner, typewriting machines so manufactured "under the name of or as 'Remington-Sholes' or 'Rem-Sho,' or by any designation of which the word 'Remington' or the abbreviation 'Rem' shall constitute a part." 110 Fed. Rep. 520.

The case was carried by appeal to the Circuit Court of Appeals for the Second Circuit, and was there heard before Circuit Judges Wallace, Lacombe and Coxe. April 20, 1903, the decree was reversed, without costs, and the cause remanded "with instructions to decree in favor of complainant only as to the name 'Remington.'" Lacombe, J., delivered an opinion in support of that decree, Coxe, J., concurring in the conclusion because "unable to distinguish this cause from *Rogers* v. *Rogers*, 70 Fed. Rep. 1017;" Wallace, J., dissented, holding that the decree of the Circuit Court should be reversed with instructions to dismiss the bill. 122 Fed. Rep. 348.

It appeared that the mandate of the Circuit Court of Appeals was issued April 22, 1903, and that the Circuit Court entered a final decree, June 22, 1903, enjoining the use of the word "Remington," and also that after the original decree of the Circuit Court the Remington-Sholes Company changed its corporate name to that of Fay-Sholes Company, and ceased to make its machines marked with the registered trade-mark "Rem-Sho," and with the inscription "Remington-Sholes Company, Mfrs., Chicago."

It also appeared that in October, 1901, complainant filed its bill in the Circuit Court of the United States for the Northern District of Illinois against the Remington-Sholes Company, for alleged unfair trade competition, and that, after answer filed, an order was entered staying proceedings until the determination of this cause, and providing that if this cause resulted in favor of complainant, that cause should be sent at once to an accounting.

On petition of the Howe Scale Company of 1886, and the Fay-Sholes Company, filed October 22, 1903, and on petition of Wyckoff, Seamans & Benedict, filed December 21, 1903, writ and cross writ of certiorari were granted.

For some years prior to 1860 E. Remington and his three sons were engaged at Ilion, New York, in the manufacture of firearms under the firm name of E. Remington & Sons. The father died in 1863, and in 1865 the sons, who had continued the business, organized the corporation E. Remington & Sons under the laws of New York. About 1866 E. Remington & Sons produced a breech-loading rifle that obtained great vogue throughout the world, and was and is known as "The Remington Rifle." The "Remington Sewing Machine" and other machines were also manufactured and sold.

In 1873 E. Remington & Sons began the manufacture of a typewriting machine, the most important features of which were invented and patented by Christopher Latham Sholes. It was the pioneer writing machine and called "The Typewriter," and "The Sholes and Glidden Typewriter," and in 1880 the names "Remington" and "Remington Standard" were used instead, as they have since been continuously.

One of complainant's witnesses testified that the typewriter was called "Remington" "for the reason that the name Remington was known the world over, owing to their building guns for foreign governments, building sewing machines, and having one of the largest manufacturing works in the world." In March, 1886, the typewriter branch of the business of E. Remington & Sons was sold to Messrs. Wyckoff, Seamans & Bene-

dict, and there was also transferred the exclusive right to the name "Standard Remington Typewriter," by which name the assignment states the machines were generally known. The assignment contained the express reservation to E. Remington & Sons of the right to engage in the manufacture and sale of typewriters at any time after ten years from its date.

Complainant's typewriting machines have been for years conspicuously marked with the name "Remington" and with a large "Red Seal" trade-mark on the paper table and frame; the name and address "Remington Standard Typewriter, manufactured by Wyckoff, Seamans and Benedict, Ilion, N. Y., U. S. A.," on the cross bar in front of the key board; the words and figures "No. 6 Remington Standard Typewriter No. 6" on the front of the base, and the words "This machine is protected by 67 American and foreign patents" on the back. "Remington" and "Remington Standard" and the "Red Seal" have all been registered by complainant as trade-marks.

In 1892 Z. G. Sholes, a son of Christopher Latham Sholes, invented a typewriting machine, and early in 1893 the Z. G. Sholes Company was organized under the laws of Wisconsin for its manufacture, but the stock of the company was never issued, and no machine was ever made or sold by it. Later in the year Franklin and Carver Remington, sons of Samuel Remington, formerly president of the E. Remington & Sons corporation, bought a three-fourths interest in Sholes' invention, Sholes retaining one-fourth, and a like interest in the stock of the company, paying from eight to nine thousand dollars. They entered into a written agreement with Sholes, which provided, among other things, that "no further, other or different business of any kind or nature shall be transacted by said corporation or in its behalf, except that the same may be dissolved, in due form of law, as soon as practicable hereafter." Franklin Remington gave his entire time to the promotion of the enterprise, and advanced for expenses from six to seven thousand dollars in addition to the original investment of eight or nine thousand. The name of the machine

was subsequently changed by Sholes from "The Z. G. Sholes" to "The Remington-Sholes." Thereafter the Remingtons and Sholes induced Head and Fay of Chicago to furnish funds to manufacture the Remington-Sholes machine; and a corporation organized in the spring of 1894 for its manufacture was designated the "Remington-Sholes Typewriter Company." This company purchased tools and machinery, and its typewriting machines were placed on the market in December, 1894. In the fall of 1896 the company had become so deeply indebted that it became necessary to take steps to meet its obligations, and at a meeting of the stockholders December 14, 1896, it was resolved that the property and assets be sold at public auction, the buyer to have the privilege of using all or any part of the company's corporate name. Thereupon Fay purchased in his own name, but as trustee for himself and other stockholders, the whole of the assets of the company, together with its good will, the exclusive right to use its trade-marks, etc., and for some months carried on the business at the factory formerly occupied by the Remington-Sholes Typewriter Company. The charter of that company was surrendered in April, 1897, and the Remington-Sholes Company was incorporated under the laws of Illinois, and purchased all the assets, good will, trade-marks, trade names, etc., theretofore belonging to Fay and the Remington-Sholes Typewriter Company. And the new company continued at the same factory and through the same instrumentalities to manufacture and sell its typewriters. It was stipulated that the common stock in the new company "was divided among the stockholders in keeping with the amounts of cash actually invested by them in the Remington-Sholes Typewriter Company, and that the allotment of said common stock to said Franklin Remington was in keeping with such plan."

The machines made and sold by the Remington-Sholes Typewriter Company were plainly marked with the words "Remington-Sholes, Chicago." After the new company entered on the business the trade-mark "Rem-Sho" was adopted

(registered as a trade-mark October 19, 1897), and the machines were also marked on the cross bars with the words "Remington-Sholes Company, Mfrs., Chicago." The Remington-Sholes Typewriter Company widely advertised that its machine "was not the Remington Standard Typewriter," and the catalogues circulated by the Remington-Sholes Company declared: "We state, then, emphatically that this company has no connection whatever with that well-known and excellent machine, the Remington Standard Typewriter, and caution possible customers against confusing the 'Rem-Sho' with that machine or any other."

Mr. Austen G. Fox and *Mr. George P. Fisher, Jr.*, with whom *Mr. James H. Peirce* and *Mr. William Henry Dennis* were on the brief, for petitioners:

A personal name, such as the name "Remington," is incapable of exclusive appropriation, and its registration in the Patent Office cannot render it a valid trade-mark. *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; *Brown Chemical Co.* v. *Myer*, 139 U. S. 540; *McLean* v. *Fleming*, 96 U. S. 245; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460; *Harson* v. *Halkyard*, 46 Atl. Rep. 271; *Jamieson & Co.* v. *Jamieson & Co.*, 15 R. P. C. 169; *Canal Co.* v. *Clark*, 13 Wall. 311; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665; *Sarrazin* v. *Irby Co.*, 93 Fed. Rep. 625; *Brower* v. *Boulton*, 52 Fed. Rep. 389; *Centaur Co.* v. *Marshall*, 97 Fed. Rep. 785.

A man's name is his own property and he has the same right to its use and enjoyment as he has to that of any other species of property, the only restriction imposed by this court upon the use of a personal name being that it shall be a reasonable, honest and fair exercise of such right. *Brown Chemical Co.* v. *Myer; McLean* v. *Fleming; Singer Mfg. Co.* v. *June Mfg. Co., supra.*

To a personal name (or like generic name) no secondary signification can attach that will diminish the right of any one bearing such name to use it in every honest way and for

every legitimate purpose; and where a personal or generic name has acquired a secondary signification, the most that can be required of a person having a right to use such name is that he shall accompany its use "with such indications as to show that the thing manufactured is the work of the one making it." *Holzapfel Co.* v. *Rahtjens Co.*, 183 U. S. 1; *Baker* v. *Baker*, 115 Fed. Rep. 297; *Duryea* v. *National Starch Co.*, 79 Fed. Rep. 651.

In cases like that at bar, the ground of relief is the injury to a complainant by the passing off of defendant's wares for those of complainant, and where a complainant invariably marks his wares with his name, address and a designating mark, the fact that a defendant has invariably marked *his* wares with *his own* name and address and with a different distinctive mark, is most persuasive of the absence of any intent to pass off his wares as and for complainant's. Cases *supra* and *Goodyear Rubber Co.* v. *Goodyear Rubber Mfg. Co.*, 128 U. S. 598; *Corbin* v. *Gould*, 153 U. S. 328; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Lorillard* v. *Peper*, 86 Fed. Rep. 956; *Kahn* v. *Diamond Steel Co.*, 89 Fed. Rep. 706; *Proctor & Gamble Co.* v. *Globe Ref. Co.*, 92 Fed. Rep. 357; *Dadirrian* v. *Yacubian*, 98 Fed. Rep. 872; Sebastian on Trade Marks, 4th ed., 123.

The issuing of cautionary circulars is recognized by the courts as clearly repugnant to any purpose to palm off defendant's wares for complainant's. Cases *supra* and *Boiler Co.* v. *Tripod Boiler Co.*, 142 Ill. Sup. 494; *Salt Co.* v. *Burnap*, 73 Fed. Rep. 818; *Walter Baker Co.* v. *Sanders*, 80 Fed. Rep. 889; *Allegretti Co.* v. *Keller*, 85 Fed. Rep. 643; *Menendez* v. *Holt*, 128 U. S. 514, 520; *Pittsburg Co.* v. *Pittsburg Co.*, 64 Fed. Rep. 841.

Where the name or mark adopted by a defendant is sufficiently different from that employed by a complainant to enable the ordinary purchaser, using reasonable care, to distinguish defendant's from complainant's goods, no injunction will issue. The name "Sholes" amply differentiates the com-

pound names "Remington-Sholes" and "Remington-Sholes Company" from the single name "Remington." Cases *supra* and *Liggett & Myers Co.* v. *Finzer*, 128 U. S. 182; *Meneely* v. *Meneely*, 62 N. Y. 427.

The courts have uniformly recognized that a man's use of his name in a firm name is a reasonable, honest and legitimate use. *National Starch Mfg. Co.* v. *Duryea*, 101 Fed. Rep. 117; *S. C.*, 79 Fed. Rep. 651; *Gilman* v. *Hunnewell*, 122 Massachusetts, 139; *English* v. *Publishing Co.*, 8 Daly (N. Y.), 375; *Marcus Ward & Co.* v. *Ward*, 61 Hun, 625; *Burgess* v. *Burgess*, 3 DeG. M. & G. 896; *Hardy* v. *Cutter*, 3 O. G. 468.

It being a general custom to employ personal names for corporations, no distinction can be made between the use of such names in a firm and in a corporation, since in both cases the names adopted are selected and artificial. *Baker* v. *Baker*, 115 Fed. Rep. 297, 303; *Celluloid Co.* v. *Cellonite Co.*, 32 Fed. Rep. 94; *Monarch* v. *Rosenfeld*, 39 S. W. Rep. 236; *Am. Cereal Co.* v. *Eli Pettijohn Co.*, 72 Fed. Rep. 903; *Scott S. & C. Co.* v. *J. W. Scott Co.*, 58 N. Y. Super. Ct. 379; *Employers' Co.* v. *Employers' Co.*, 61 Hun, 552; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460.

The courts recognize that the business of a corporation or of a firm in which a man has his capital invested, and to which he devotes his whole time and energy is his business, and that he has a right to use his name in connection therewith.

Although it is true that there is no *necessity* for a man engaged in a corporation or in a firm to employ his name in connection therewith—since both firm and corporate names are alike artificial—this lack of necessity for using a personal name cannot affect the individual's *right* to so use it, because such use is a universally recognized legitimate and reasonable use of a personal name. *Turton & Sons* v. *Turton & Sons*, 42 Ch. D. 128; *Continental Ins. Co.* v. *Continental Assn.*, 96 Fed. Rep. 846; *Chivers & Sons* v. *Chivers & Co.*, 17 R. C. P. 420.

The decisions recognize family reputation as a valuable heritage and as an ample reason for the use by a man of his

name in the selection of a firm name and in its business. In this case defendant has never imitated complainant's signs, labels or other indicia, nor trespassed upon its good will, which complainant owns, but has simply availed in an honest way of the family reputation, which complainant does not own, of Mr. Franklin Remington, the general manager of the Remington-Sholes Company. See German decisions regarding name "Remington-Sholes," in *Newald* v. *Glogowski & Co.*, rendered by the Koenigliches Kammergericht, July 3, 1897, affirmed March 4, 1898, by the German Reichsgericht, and these decisions although not of controlling force, should be recognized as precedents. *Liebig Co.* v. *Libby, McNeill &c.*, 103 Fed. Rep. 87; *Centaur Co.* v. *Heinsfurter*, 84 Fed. Rep. 955; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169.

In considering a corporate name comprising one or more personal names, the impression is different from that conveyed, under certain circumstances, by a corporate name involving geographical or purely fanciful names. In such latter cases the public may assume that the corporation having the double name is a consolidation of two corporations, but even in such cases the courts have frequently refused to grant injunctions against defendants bearing the double names. *Merchants' Banking Co. of London* v. *Merchants' Joint Stock Bank*, L. R. 9 Ch. Div. 560; *London & Provincial Law Assurance Society* v. *London & Provincial Joint Stock Life Assurance Co.*, 17 L. J. (Ch.) 37; *London Assurance* v. *London & Westminster Assurance Corp., Ltd.*, 32 L. J. (Ch.) 664; *Colonial Life Assurance Co.* v. *Home & Colonial Assurance Co., Ltd.*, 33 Beav. 548; Kerly on Trade Marks, 2d ed., 510.

The Remington-Sholes Company never used its corporate name otherwise than as an entirety (except as its machines are marked "Rem-Sho", or in any manner tried to conceal or disguise its own identity.

While the appearance of the name "Remington" in the corporate name of the Remington-Sholes Company may tempt the curiosity of some persons to inquire as to the existence of

a connection between such company and complainant, the use of the name "Sholes" in such corporate name is a distinction so prominent that no reasonable person can fail to recognize it, and, if vested with common intelligence, to understand its significance. *Yost Typewriter Co.* v. *Typewriter Exchange Co.*, 19 R. P. C. 423; *Aerators, Ltd.* v. *Tollit*, 19 R. P. C. 419; *Heintz* v. *Lutz*, 146 Pa. St. 592.

Where a name is incapable of exclusive appropriation—like the name Remington—a court will not destroy the right of another to use such name but will direct its injunctive process against the specific abuse of the right, if any such has occurred. The sweeping decrees of the lower courts in the case at bar are therefore manifestly in error. *Singer Mfg. Co.* v. *June Mfg. Co., supra; Meriden Brittania Co.* v. *Parker*, 39 Connecticut, 450; *Ill. National Watch Co.* v. *Ill. Watch Case Co., supra.*

That defendant in the case at bar has not been guilty of any unfair trade competition (unless the use of the name "Remington-Sholes" be so regarded) is conclusively established by the record and has been unanimously so held by the Circuit Court of Appeals.

The record being devoid of any showing that there has ever been any deception or mistake or injury to complainant by reason of the use of the name "Rem-Sho," this court will not disturb the unanimous finding of the Court of Appeals allowing defendant's right to use such fanciful name.

Rem-Sho is a fanciful name and can be trade-marked. Brown on Trade Marks, §§ 273, 337; *Sterling Co.* v. *Eureka Co.*, 80 Fed. Rep. 105; *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S. 51, 56; nor can its suggestiveness detract from its character as a distinctive trade-mark. *Davis* v. *Kendall*, 2 R. I. 566; *Holt Co.* v. *Wadsworth*, 41 Fed. Rep. 34; 26 Am. & Eng. Ency. 282.

Cases cited by appellee are inapplicable, as in those cases the trade-mark was held illegal and adopted for purposes of deception and imitation.

As to what is necessary to establish a charge of unfair competition, see *Gorham Co.* v. *Emery &c. Co.*, 104 Fed. Rep. 243; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Centaur Co.* v. *Marshall*, 97 Fed. Rep. 785; *Lorillard* v. *Peper*, 86 Fed. Rep. 956; *Sterling Co.* v. *Eureka Co.*, 80 Fed. Rep. 105; *Rogers* v. *Rogers Mfg. Co.*, 70 Fed. Rep. 1019; *Mueller Co.* v. *McDonally & Morrison Co.*, 132 Fed. Rep. 585; *Am. Washboard Co.* v. *Saginaw Co.*, 103 Fed. Rep. 281; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 573; *Richardson & Boynton* v. *Richardson & Morgan*, 8 N. Y. 52; and cases cited *supra*.

Petitioner's machine is the only typewriter actually made by a Remington, and equity will not enjoin a defendant from speaking the truth. *Canal Co.* v. *Clark*, 13 Wall. 311; *Lawrence Co.* v. *Tennessee Co.*, 138 U. S. 537; *Holmes, Booth & Hayden case*, 97 Connecticut, 278; *Leather Cloth Co.* v. *American L. C. Co.*, 11 Jur. N. S. 513; *Jennings* v. *Johnson*, 37 Fed. Rep. 365; *Tarrant & Co.* v. *Hoff*, 76 Fed. Rep. 959.

The law assumes that purchasers will use ordinary care. Cases *supra* and *Rogers* v. *Simpson*, 54 Connecticut, 568; *Faber* v. *Faber*, 49 Barb. 357; *Ball* v. *Siegel*, 116 Illinois, 137; *Monroe* v. *Tousey*, 129 N. Y. 138; *Knights of Pythias case*, 71 N. W. Rep. 470; *Singer Co.* v. *Wilson*, 2 Ch. Div. 477; *Popham* v. *Cole*, 66 N. Y. 69; *Fairbanks* v. *Bell Co.*, 77 Fed. Rep. 869; *Morse* v. *Worrel*, Price & Steuart Am. Tr. Cas. 8.

Mr. Henry D. Donnelly and *Mr. Edmund Wetmore*, with whom *Mr. William W. Dodge* and *Mr. Archibald Cox* were on the brief, for respondent:

Respondent is the exclusive owner of all trade-names and trade-marks of its predecessors, relating to the typewriter business, and has the legal right to designate its product by the trade-names and trade-marks adopted and used by E. Remington & Sons and by its other predecessors. *Richmond & Co.* v. *Richmond*, 159 U. S. 293; *Walter Baker & Co.* v. *Sanders*, 80 Fed. Rep. 889; *Raymond* v. *Royal Baking Powder Co.*, 85 Fed. Rep. 231; *Kidd* v. *Johnson*, 100 U. S. 618; *Le Page*

Glue cases, 51 Fed. Rep. 943; and 147 Massachusetts, 206; *Hoxie* v. *Chaney*, 143 Massachusetts, 592; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 548; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Derringer* v. *Plate*, 29 California, 292; *Clark Thread Co.* v. *Armitage*, 74 Fed. Rep. 940; *Rahtjen Co.* v. *Holzappel Co.*, 101 Fed. Rep. 260; Kerly on Trade Marks, 2d ed., 463; *Rogers Co.* v. *Rogers Co.*, 11 Fed. Rep. 330, 495; *Shipwright* v. *Clements*, 19 W. Rep. 599; *Wilmer* v. *Thomas*, 74 Maryland, 485; *Born* v. *Moss*, 70 N. Y. 473; *Morgan* v. *Rogers*, 19 Fed. Rep. 596; Sebastian on Trade Marks, 4th ed., 299; *Hillson Co.* v. *Foster*, 80 Fed. Rep. 896.

For definition of good will to effect that it is the probability that customers will resort to the old place, see *Menendez* v. *Holt*, 128 U. S. 514, 522; *Cruttwell* v. *Lye*, 17 Ves. 335, 346; *Churton* v. *Douglas*, Johnson V. C. 174, 178; *Knœdler* v. *Boussod* 47 Fed. Rep. 465; *Washburn* v. *Wall Paper Co.*, 81 Fed. Rep. 17.

The name "Remington," which has for many years been generally and widely known to the trade as symbolizing complainant-appellee's product and business, is a very important and valuable part of the good will of its business. Sebastian, 4th ed., 17.

A corporation may acquire a property right to the use of a name other than its corporate name as incidental to the good will of its business. *Goodyear R. Co.* v. *Goodyear Rubber M. Co.*, 21 Fed. Rep. 277; *Thomas* v. *Dakin*, 22 Wend. 9; 1 Cook on Corp. § 15, p. 58; 1 Thompson on Corp. § 286; 7 Ency. Law, 2d ed., 685; 10 Cyc. Law, 151; *Higgins Soap case*, 144 N. Y. 462; *Tuerk Co.* v. *Tuerk*, 36 N. Y. Supp. 384; *S. Howes Co.* v. *Howes Co.*, 52 N. Y. Supp. 468.

The fact that petitioner had discontinued the sale of the machines after suit was commenced and before the entry of the decree, did not disentitle the appellee to the relief granted. *Oxford University* v. *Wilmore-Andrews Pub. Co.*, 101 Fed. Rep. 443; *Clark Thread Co.* v. *William Clark Co.*, 37 Atl. Rep. 599; *Burnett* v. *Hahn*, 88 Fed. Rep. 694.

As petitioner had full knowledge of respondents' use in its

business of the name, it is no defense that the name "Remington" or "Remington Company" or "Remington Typewriter Company" was assumed in good faith and without design to mislead the public and acquire appellee's trade. *Higgins Soap case*, 144 N. Y. 462, 471; *Roy Watch Case Co.* v. *Camm-Roy Watch Case Co.*, 58 N. Y. Supp. 979; *Fuller* v. *Huff*, 104 Fed. Rep. 141; *Johnston* v. *Orr-Ewing*, 7 App. Cas. 219.

This is not a case where the Illinois corporation is obliged to use complainant's name and is not, therefore, one of *damnum absque injuria*. It is the case of an *unnecessary use* of a name long previously employed by another in the same business, and in which the use thereof by the "second comer" constitutes an untrue and deceptive representation. *Fuller* v. *Huff*, 104 Fed. Rep. 141; *R. W. Rogers Co.* v. *Wm. Rogers Mfg. Co.*, 70 Fed. Rep. 1017; *Clark Thread Co.* v. *Armitage*, 74 Fed. Rep. 936, 944; *Meyer* v. *Bull Medicine Co.*, 58 Fed. Rep. 884; *Investor Pub. Co.* v. *Dovinson*, 72 Fed. Rep. 603; *Rogers* v. *Rogers & Spurr*, 11 Fed. Rep. 495; *Lamb Knit Goods Co.* v. *Lamb Glove & Mitten Co.*, 120 Michigan, 159; *Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *De Long* v. *De Long Hook & Eye Co.*, 32 N. Y. Supp. 203; *Penberthy Injector Co.* v. *Lee*, 120 Michigan, 174; *Holmes* v. *Holmes, B. & A. Mfg. Co.*, 37 Connecticut, 278; *Meriden B. Co.* v. *Parker*, 39 Connecticut, 450; *Williams* v. *Brook*, 50 Connecticut, 278; *Bissell* v. *Plow Co.*, 121 Fed. Rep. 357; *Peck Bros. & Co.* v. *Peck Bros. Co.*, 113 Fed. Rep. 291, 302; *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. Rep. 941; *Chickering* v. *Chickering*, 120 Fed. Rep. 69; *International Silver Co.* v. *Rogers Co.*, 110 Fed. Rep. 955; *S. C.*, 113 Fed. Rep. 291; *S. C.*, 118 Fed. Rep. 133; *Garrett* v. *Garrett*, 78 Fed. Rep. 472; *Valentine Meat Juice Co.* v. *Valentine Extract Co., Ltd.*, 17 Pat. & Tr. Mk. Cas. 673, 684; *S. C.*, 83 L. T. N. S. 271.

Corporations which do not inherit their names, but assume them voluntarily, may not use their assumed names if such use shall result in the confusion and deception of the public and the displacement of the good will of another's business.

Lee v. *Haley*, L. R. 5 Ch. App. 160; *Massam* v. *Cattle Co.*, L. R. 14 Ch. Div. 748; *Celluloid Co.* v. *Cellonite Co.*, 32 Fed. Rep. 94; *Newby* v. *Ore. Cent. Ry. Co.*, 1 Deady, 609; *Stuart* v. *Stewart Co.*, 91 Fed. Rep. 243. The selection of this particular name shows fraud. Cases *supra* and *Taylor* v. *Taylor*, 25 L. J. Eq. N. S. 255; *Landreth* v. *Landreth*, 22 Fed. Rep. 41; *Butterick* v. *Standard Co.*, N. Y. Law J., March 21, 1896; *Gray* v. *Pulley Works*, 16 Fed. Rep. 436.

That another may have the right to use a particular name, as well as complainant-appellee is unimportant, if appellee's right be exclusive as against appellants. Cases *supra* and *Newman* v. *Alvord*, 51 N. Y. 189; *Croft* v. *Day*, 9 Beav. 88. *Shaver* v. *Heller & M. Co.*, 108 Fed. Rep. 821.

It is not material in this case whether the name "Remington" is or is not a lawful technical trade-mark, for the right of the appellee to the use of this name is so far exclusive as against the appellants that the court will treat the name as a descriptive term to the benefit of which appellee is entitled. Cases *supra* and *Koehler* v. *Sanders*, 122 N. Y. 65, 74; *Montgomery* v. *Thomson* (1891), App. Cas. 217; *Wotherspoon* v. *Currie*, 5 L. R. H. L. 508; *Reddaway* v. *Banham* (1896), App. Cas. 199.

The use by the Howe Scale Co. and the Remington-Sholes Company of the names "Remington," "Remington . . . Company," etc., was calculated to produce and cause confusion in the mind of the public and in the business of appellee, and the public and purchasers and users of writing machines were mislead, and caused to believe that the typewriters manufactured by the Remington-Sholes Company, and sold by defendant-appellant were of appellee's manufacture, and were "Remington machines," or a species thereof, or a new and improved "Remington," and that the Remington-Sholes Company's business and its machines had some connection with the complainant-appellee. Kerly on Trade Marks, 2d ed., 476; *Randall* v. *Shoe Co.*, 19 Rep. Pat. Law Br. 393; *Eastman Co.* v. *Cycle Corp.*, 15 R. P. Cas. 105, 112;

Brewery Co. v. *Brewery Co.*, 1 Ch. 536; *S. C.*, (1899) App. Cas. 83.

As to the right of a person who has popularized a name to be protected against its use, in connection with other words or names, see *Anheuser-Busch* v. *Piza*, 24 Fed. Rep. 149; *Congress Spring Co.* v. *High Rock Co.*, 45 N. Y. 291; *Carlsbad* v. *Kutnow*, 71 Fed. Rep. 168; *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Cochrane* v. *MacNish*, L. R. A. C. 231; *Fuller* v. *Huff*, 104 Fed. Rep. 141; *Saxlehner* v. *Eisner &c. Co.*, 179 U. S. 19, 33; *Hier* v. *Abrahams*, 82 N. Y. 519. Especially where it is unnecessary. *Taendsticksfabriks &c.* v. *Myers*, 139 N. Y. 364; *Manufacturing Co.* v. *Trainer*, 101 U. S. 61; *Biscuit Co.* v. *Baker*, 95 Fed. Rep. 135; *Orr* v. *Johnston*, 13 Ch. Div. 434; *Collensplatt* v. *Finlayson*, 88 Fed. Rep. 693.

The decision in the German courts will not avail appellants here. Wharton's Conflict of Law, §§ 793, 827; *Hohner* v. *Gratz*, 50 Fed. Rep. 369; *Carlsbad* v. *Kutnow*, 68 Fed. Rep. 794; *S. C.*, 71 Fed. Rep. 167. The cases cited by appellants can be distinguished.

Among other cases which emphasize the fact that where the symbol which embodies a good will consists of a name the appearance or "get-up" of the article is of practically no value in preventing the evil which the law aims to correct, see those involving trade-names as follows: "Queen" and "Queen Quality," 105 Fed. Rep. 377; "Congress" and "High Rock Congress," 54 N. Y. 291; "Carlsbad" and "Kutnow's Improved Effervescing Carlsbad," 71 Fed. Rep. 168; "Home" and "Home Delight," 59 Fed. Rep. 284; "Apollinaris" and "London Apollinaris," 33 L. T. R. 242; "Glenfield" and "Royal Palace Glenfield," 5 H. L. 508; "Budweiser" and "Milwaukee Budweiser," 87 Fed. Rep. 864; "Sunlight" and "American Sunlight," 88 Fed. Rep. 485; "Royal" and "Royal London," 76 Fed. Rep. 465; "Health Food" and "Sanitarium Health Food," 104 Fed. Rep. 141; "Comfort" and "Home Comfort," 127 Fed. Rep. 962; "Sanitas" and "Condi-Sanitas," 56 L. T. N. S. 621; "Portland" and "Famous Portland," 52

N. J. Eq. 380; "Roy Watch Case Co." and "Camm-Roy Watch Case Co.," 59 N. Y. Supp. 979; "Star" and "Lone Star," 51 Fed. Rep. 832; "Cashmere" and "Violets of Cashmere," 88 Fed. Rep. 899; "Hohner" and "Improved Hohner," 52 Fed. Rep. 871; "Pride" and "Pride of Syracuse," 82 N. Y. 519; "German Household Dyes" and "Excellent German Household Dyes," 94 Wisconsin, 583; "Guinea Coal Co." and "Pall Mall Guinea Coal Co." 5 Ch. 155; "Le Page's Liquid Glue" and "Le Page's Improved Liquid Glue." 147 Massachusetts, 206; "The American Grocer" and "The Grocer," 25 Hun (N. Y.), 398.

The reasoning which takes account of facts as they exist and which corrects instead of encourages fraud is endorsed and applied in the majority of cases. Cases *supra* and *Von Munn* v. *Frash*, 56 Fed. Rep. 830; *Hostetter* v. *Sommers*, 84 Fed. Rep. 303; *Little* v. *Kellam*, 100 Fed. Rep. 353; *Hostetter* v. *Becker*, 73 Fed. Rep. 297. And see *Awl Co.* v. *Marlborough Co.*, 168 Massachusetts, 154; *Powell* v. *Vinegar Co.*, L. R. 1896, Ch. D 88.

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

Referring to the Remington-Sholes Company, it was unanimously held by the Circuit Court of Appeals: "We do not find in this voluminous record sufficient evidence that defendant has itself done anything to promote confusion in the minds of the public, except to use the name 'Remington' on its machines and in its literature."

Accepting that conclusion, it follows that complainant's case must stand or fall on the possession of the exclusive right to the use of the name "Remington."

But it is well settled that a personal name cannot be exclusively appropriated by any one as against others having a right to use it; and as the name "Remington" is an ordinary family surname, it was manifestly incapable of exclusive appropriation as a valid trade-mark, and its registration as such

could not in itself give it validity. *Brown Chemical Company* v. *Meyer*, 139 U. S. 540; *Singer Manufacturing Company* v. *June Manufacturing Company*, 163 U. S. 169; *Elgin National Watch Company* v. *Illinois Watch Case Company*, 179 U. S. 665.

The general rule and the restrictions upon it are thus stated in *Brown Chemical Company* v. *Meyer*. There plaintiff had adopted as a trade-mark for its medicine the words "Brown's Iron Bitters," and the defendants used upon their medicine the words "Brown's Iron Tonic." This court, after commenting upon the descriptive character of the words "Iron Tonic," and confirming the defendants' right to the use of these, said:

"It is hardly necessary to say that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions to restrain the use even of one's own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it."

And, after citing numerous authorities, Mr. Justice Brown, delivering the opinion, continued:

"These cases obviously apply only where the defendant adds to his own name imitation of the plaintiff's labels, boxes or packages, and thereby induces the public to believe that his goods are those of the plaintiff. A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest and fair exercise of such right, he is no more liable for the incidental damage he may do a rival in trade than he would be for an injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own lands. These and similar instances are cases of *damnum absque injuria.*"

In *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, the rule is thus laid down by Mr. Justice White:

"Although 'every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, in such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But although he may thus use his name he cannot resort to any artifice, or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name.' "

In the present case, the decree enjoined the use, "in any manner whatsoever," "of the designation 'Remington' as the name, or part of the name, of any typewriting machine whatsoever manufactured by the Remington-Sholes Company, or by defendant or any person or concern, and from selling, offering, exposing or advertising for sale by means of signs, show cards, catalogues, circulars, publications, advertisements or by word of mouth, or in any manner whatsoever, typewriting machines manufactured by said Remington-Sholes Company or by defendant, or any person or concern under the name of or as 'Remington-Sholes,' or by any designation of which the word Remington shall constitute a part." This denies the right to use the personal name, rather than aims to correct an abuse of that right, and involves the assertion of the proposition that the use of a family name by a corporation stands on a different footing from its use by individuals or firms. But if every man has the right to use his name reasonably and honestly, in every way, we cannot perceive any practical distinction between the use of the name in a firm and its use in a corporation. It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the use itself.

Goodyear's India Rubber Glove Manufacturing Company v. *Goodyear Rubber Company*, 128 U. S. 598, was a suit by a corporation of New York against a corporation of Connecticut,

to restrain the use in business of the name "Goodyear's Rubber Manufacturing Company," or any equivalent name. It was held that "Goodyear Rubber" described well known classes of goods produced by the process known as Goodyear's invention; and that such descriptive names could not be exclusively appropriated. And Mr. Justice Field, delivering the opinion, said: "Names of such articles cannot be adopted as trademarks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specification, create any exclusive right to the use of the name."

The principle that one corporation is not entitled to restrain another from using in its corporate title a name to which others have a common right, is sustained by the discussion in *Columbia Mill Company* v. *Alcorn*, 150 U. S. 460, and is, we think, necessarily applicable to all names *publici juris*. *American Cereal Company* v. *Eli Pettijohn Cereal Company*, 72 Fed. Rep. 903; *S. C.*, 76 Fed. Rep. 372; *Hazelton Boiler Company* v. *Hazelton Tripod Boiler Company*, 142 Illinois, 494; *Monarch* v. *Rosenfeld*, 39 S. W. Rep. 236.

It is said that the use of the word "Remington" in the name "Remington-Sholes" was unnecessary, as if necessity were the absolute test of the right to use. But a person is not obliged to abandon the use of his name or to unreasonably restrict it. The question is whether his use is reasonable and honest, or is calculated to deceive.

"It is a question of evidence in each case whether there is false representation or not." *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

The Circuit Court of Appeals in the present case quotes with approval from the concurring opinion of Wallace, J., in *R. W. Rogers Company* v. *William Rogers Mfg. Co.*, 70 Fed. Rep. 1017, that "a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number when it appears that such

name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. . . . The corporators chose the name unnecessarily, and, having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant."

This, of course, assumes not only that the name selected was calculated to deceive, but that the selection was made for that purpose.

In *Turton and Sons* v. *Turton and Sons*, 42 Ch. Div. 128, plaintiffs had carried on the iron business as "Thomas Turton and Sons." Defendant began the same business as John Turton, then traded as John Turton and Co., and finally took in his sons and changed the firm name to "John Turton and Sons." Some confusion had arisen, and plaintiffs contended that there was no necessity for defendants to use their own names.

Lord Esher said: "Therefore the proposition goes to this length; that if a man is in business and has so carried on his business that his name has become a value in the market, another man must not use his own name. If that other man comes and carries on business he must discard his own name and take a false name. The proposition seems to me so monstrous that the statement of it carries its own refutation."

And Lord Macnaghten said in *Reddaway* v. *Banham*, L. R. Appeal Cases, 1896, 199, 220: "I am quite at a loss to know why *Turton* v. *Turton* was ever reported. The plaintiff's case there was extravagant and absurd." And see *Meneely* v. *Meneely*, 62 N. Y. 427; *Meriden Co.* v. *Parker*, 39 Connecticut, 450.

In our opinion the Remingtons and Sholes made a reasonable and fair use of their names in adopting the name "Remington-Sholes" for their machine, and in giving that name to the corporation formed for its manufacture and sale.

The formation of a corporation as an effective form of busi-

ness enterprise was not only reasonable in itself, but the usual means in the obtaining of needed capital. And as Wallace, J., said: "It was natural that those who had invented the machine, and given all their time and means in introducing it to the public, when they came to organize the corporation which was to represent the culmination of their hopes and efforts, should choose their own name as the corporate name. In doing so I think they were exercising only the common privilege that every man has to use his own name in his own business, provided it is not chosen as a cover for unfair competition. They did not choose the complainant's name literally, or so closely that those using ordinary discrimination would confuse the identity of the two names, and that differentiation is sufficient to relieve them of any imputation of fraud."

The name "Remington-Sholes Company" is not identical with, or an imitation of, "Remington Standard Typewriter Company," or "Remington Typewriter Company," or "E. Remington and Sons." Defendant's marks "Rem-Sho," "Remington-Sholes Co., Mfrs., Chicago," are not identical with, or an imitation of, complainant's marks "Remington;" Large Red Seal; "Remington Standard Typewriter, manufactured by Wyckoff, Seamans and Benedict, Ilion, N. Y., U. S. A."; "Remington Standard Typewriter."

The use of two distinct surnames clearly differentiated the machines of defendant from those of complainant, and when defendant's cards, signs, catalogues, instructions to agents, etc., are considered, it seems to us that the record discloses, to use the language of Mr. Justice Field in the *Goodyear case*, a persistent effort on defendant's part "to call the attention of the public to its own manufactured goods, and the places where they are to be had, and that it has no connection with the plaintiff." Doubtless the Remingtons and Sholes, in using the name "Remington-Sholes," desired to avail themselves of the general family reputation attached to the two names, but that does not in itself justify the assumption that their purpose was to confuse their machines with complainant's; or that the

use of that name was in itself calculated to deceive. Remington and Sholes were interested in the old company, and Remington continued as general manager of the new company. Neither of them was paid for the use of his name, and neither of them had parted with the right to that use. Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.

As observed by Mr. Justice Strong in the leading case of *Canal Company* v. *Clark*, 13 Wall. 311: "Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." And by Mr. Justice Clifford, in *McLean* v. *Fleming*, 96 U. S. 245: "A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other." And by Mr. Justice Jackson in *Columbia Mills Company* v. *Alcorn*, 150 U. S. 460: "Even in the case of a valid trade-mark, the similarity of brands must be such as to mislead the ordinary observer." And see *Coats* v. *Merrick Thread Company*, 149 U. S. 562; *Liggett & Myers Tobacco Company* v. *Finzer*, 128 U. S. 182.

We hold that, in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. And, in our view, defendant's name and trade-mark were not intended or likely to deceive, and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition, or calling for the imposition of restrictions lest actionable injury might result, as may confessedly be done in a proper case.

Decree of Circuit Court of Appeals reversed; decree of Circuit Court also reversed, and cause remanded to that court with a direction to dismiss the bill.

STEIGLEDER *v.* McQUESTEN.

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

No. 227. Submitted April 14, 1905—Decided April 24, 1905.

An averment in the bill of the diverse citizenship of the parties is sufficient to make a *prima facie* case of jurisdiction so far as it depends on citizenship.

While under the act of 1789, an issue as to the fact of citizenship can only be made by plea of abatement, when the pleadings properly aver citizenship, it is the duty of the court, under the act of March 3, 1875, which is still in force, to dismiss the suit at any time when its want of jurisdiction appears.

A motion to dismiss the cause, based upon proofs taken by the master, is an appropriate mode in which to raise the question of jurisdiction.

Residence and citizenship are wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States; and a mere averment of residence in a State is not an averment of citizenship in that State for the purposes of jurisdiction.

One who has been for many years a citizen of a State is still a citizen thereof, although residing temporarily in another State but without any purpose of abandoning citizenship in the former.

THE bill filed in the Circuit Court by the plaintiff, McQuesten, alleged her to be "a citizen of the United States and of the State of Massachusetts, and residing at Turners Falls in said State," while the defendants Steigleder and wife were alleged to be "citizens of the State of Washington, and residing at the city of Seattle in said State."

The object of the suit was to obtain a decree adjudging defendants to be trustees for the plaintiff in respect of certain real estate in King County, State of Washington. The defendants demurred to the bill for want of equity. The demurrer was overruled, and the defendants answered, without making any issue as to the citizenship of the parties, but denying the alleged trust, and averring that there had been a final settlement between the parties before the institution of the suit in respect of all the matters in dispute.

The cause was referred to a master, and, after proof was

taken, the defendants moved the court to dismiss the suit for want of jurisdiction, the reason assigned in the motion being only that the plaintiff was, and for a long time prior to the commencement of the suit had been, a "resident" of the State of Washington, while the defendants were "residents" of the same State.

The motion to dismiss was denied, and the case went to a decree in favor of the plaintiff upon the merits.

The defendants were granted an appeal directly to this court, the question of jurisdiction being certified.

Mr. John E. Humphries and *Mr. George B. Cole* for appellants.

Mr. George McKay and *Mr. J. B. Howe* for appellee.

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

The averment in the bill that the parties were citizens of different States was sufficient to make a *prima facie* case of jurisdiction so far as it depended on citizenship. While under the judiciary act of 1789 an issue as to the fact of citizenship could only be made by plea in abatement, when the pleadings properly averred citizenship, the act of March 3, 1875, 18 Stat. 470, 472, c. 137, made it the duty of the Circuit Court, at any time in the progress of a cause, to dismiss the suit, if it was satisfied either that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties were improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act of Congress. *Sheppard* v. *Graves*, 14 How. 505; *Williams* v. *Nottawa*, 104 U. S. 209, 211; *Farmington* v. *Pillsbury*, 114 U. S. 138, 143; *Little* v. *Giles*, 118 U. S. 596, 602; *Morris* v. *Gilmer*, 129 U. S. 315, 326. This provision of the act of 1875 was not superseded by the judiciary act of 1887, 1888, and is

still in force. *Lehigh Min. & Manuf. Co.* v. *Kelly*, 160 U. S. 327, 339; *Lake County Com'rs* v. *Dudley*, 173 U. S. 243, 251; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194, 195; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 66. The motion to dismiss the cause, based upon the proofs taken by the master, was, therefore, an appropriate mode in which to raise the question of the jurisdiction of the Circuit Court.

It is to be observed that the grounds assigned for the motion to dismiss the cause, taken alone, did not distinctly raise any question concerning the absence of diverse citizenship; for the motion only stated that the plaintiff and the defendants were, respectively, residents of the State of Washington. But it has long been settled that residence and citizenship are wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States; and that a mere averment of residence in a particular State is not an averment of citizenship in that State for the purposes of jurisdiction. *Parker* v. *Overman*, 18 How. 137; *Robertson* v. *Cease*, 97 U. S. 646; *Everhart* v. *Huntsville College*, 120 U. S. 223; *Timmons* v. *Elyton Land Co.*, 139 U. S. 378; *Denny* v. *Pironi*, 141 U. S. 121, 123; *Wolfe* v. *Hartford L. & A. Ins. Co.*, 148 U. S. 389.

But the Circuit Court treated the question of jurisdiction as raised and passed upon it. We must therefore look at the evidence bearing on that point. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194, 195. The evidence warrants the conclusion reached by that court, namely, that the plaintiff was, for many years prior to the commencement of the action, a citizen of Massachusetts, and that her residence in the State of Washington, at and before the suit was brought, is not shown to be otherwise than temporary, without any fixed purpose to abandon citizenship in Massachusetts. So far as appears from the record, she was, when the suit was brought, a citizen of Massachusetts.

The Circuit Court did not err in taking jurisdiction of the cause, and

It will be so certified.

JASTER *v.* CURRIE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 205. Argued April 7 and 10, 1905.—Decided April 24, 1905.

Service of a writ, in Ohio, upon a party who came into the State for the purpose of being present at the taking of a deposition, which was taken according to the notice, if it would have been good otherwise, is not made bad by the fact that the notice was given for the sole purpose of inducing the party to come into the State. Refusal by the court of the other State to treat the judgment based on such service as binding is a failure to give it due faith and credit as required by Article IV, § 1, of the Constitution of the United States.

THE facts are stated in the opinion.

Mr. O. A. Abbott, with whom *Mr. J. R. Webster* was on the brief, for plaintiff in error:

Whether one State has given full faith and credit to the judgment of another State is always a Federal question and this court has jurisdiction to review such judgment where the question appears from the record. *Huntington* v. *Attrill,* 146 U. S. 657. The Nebraska courts have held this Ohio judgment void and refused to enforce it. *Anderson* v. *Anderson,* 8 Ohio St. 109, held that fraud in procuring a judgment in a sister State was no defense when that judgment was sued on in Ohio.

The Ohio judgment was not given full faith and credit. It was not enforced.

So long as the judgment of a sister State stands unimpeached in the State where rendered it is unimpeachable in every other State. *Christmas* v. *Russell,* 5 Wall. 290; *Maxwell* v. *Stewart,* 22 Wall. 77; *Anderson* v. *Anderson,* 8 Ohio St. 109; *McRae* v. *Mattoon,* 30 Massachusetts, 53; *Hanna* v. *Read,* 102 Illinois, 596; *Davis* v. *Hagler,* 40 Kansas, 187; *Engstrom* v. *Sherburne,* 137 Massachusetts, 153.

The Ohio judgment was not obtained by fraud in obtaining service of the summons by means of notice to take depositions. The simple ordinary service of notice to take depositions is all the act laid at our doors. If this constitutes fraud, trickery and deception, no judgment is safe when under review by the courts of another State. It cannot be true that attending the taking of depositions in Ohio grants defendant eternal immunity from service in Ohio. A reasonable time to return is all he can ask. *Smythe* v. *Bank*, 4 Dall. 329; *Chaffee* v. *Jones*, 19 Pick. (Mass.) 250.

Mr. E. J. Clements, with whom *Mr. Hallack F. Rose* was on the brief, for defendant in error:

A writ of error brings before this court only the Federal questions involved. *Watson* v. *Mercer*, 8 Peters, 88; *Barbier* v. *Connolly*, 113 U. S. 27; *Eustis* v. *Bolles*, 150 U. S. 361; *Ashley* v. *Ryan*, 153 U. S. 440; *Jacobs* v. *Marks*, 182 U. S. 590.

The test in this case is not whether the judgment has been impeached for fraud in Ohio, but rather, would the courts of Ohio permit it to be impeached for fraud in an action brought therein to enforce it.

Section 1, Art. IV, Const. U. S., requires nothing more than that the judgment of a sister State be given the same effect that it has in the State where it was pronounced; and whatever pleas would be good in a suit thereon in such State can be pleaded in any other courts in the United States. Act of May 26, 1790, 1 Stat. 115; *Mills* v. *Duryee*, 7 Cranch. 481; *Hampton* v. *McConnell*, 2 Wheat. 235. And see also *Lockwood* v. *Mitchell*, 19 Ohio St. 448; *Conway* v. *Duncan*, 28 Ohio St. 102; *Kingsborough* v. *Towsley*, 56 Ohio St. 540; *Greene* v. *Woodland Ave. Co.*, 62 Ohio St. 67; *Pitcher* v. *Graham*, 18 Ohio C. R. 5.

In code States, where law and equity are administered by the same tribunals, and the disposition of the entire controversy between parties in one action is intended to be encouraged, such fraud as would entitle the party to relief from

a judgment upon application to chancery constitutes a good defense to an action on such judgment. *Mandeville* v. *Reynolds*, 68 N. Y. 544; *White* v. *Reid*, 24 N. Y. Supp. 290; *Eaton* v. *Hasty*, 6 Nebraska, 419; *Keeler* v. *Elston*, 22 Nebraska, 310; *Snyder* v. *Critchfield*, 44 Nebraska, 69; *Fletcher* v. *Rapp*, 1 S. & M. Ch. (Miss.) 374; *Holt* v. *Alloway*, 2 Blackf. (Ind.) 108; *Duringer* v. *Moschino*, 93 Indiana, 495; *Davis* v. *Smith*, 5 Georgia, 274; *Wood* v. *Wood*, 78 Kentucky, 628; *Dunlap* v. *Cody*, 31 Iowa, 260; *Pilcher* v. *Graham*, 18 Ohio C. R. 5; *Ward* v. *Quinlan*, 57 Missouri, 425; *Gray* v. *Richmond & Co.*, 167 N. Y. 348; *Bank* v. *Anderson*, 48 Pac. Rep. 197; *Toof* v. *Foley*, 54 N. W. Rep. 59; *Abercrombie* v. *Abercrombie*, 67 Pac. Rep. 539. *Christmas* v. *Russell*, 5 Wall. 290; *Maxwell* v. *Stewart*, 22 Wall. 77, distinguished. See *Dobson* v. *Pierce*, 12 N. Y. 156; 2 Freeman on Judg. § 435; 1 Ency. Pl. & Pr. 837.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the plaintiff in error in Nebraska upon a judgment recovered by him against the defendant in error in Ohio. To this the defendant pleads that the plaintiff had brought a previous action in Nebraska for the same cause and afterwards served notice upon the defendant's attorney that the plaintiff's deposition would be taken in Ohio at a certain place on September 5, 1899, for use in the cause; that defendant was advised by his attorney to be present and went to Ohio for that purpose only; that the deposition was taken and the defendant then went to his father's house in the same county for the night of September 5, and that on September 8, in the early morning, being the earliest time convenient for leaving his father's for Nebraska, he took the train back. The writ in the Ohio suit was received and served on September 7. It is alleged that the notice to take the deposition was simply a ruse, and was given for the purpose of enticing the defendant into Ohio and for no other reason. There was a motion to set aside the service in the Ohio court, which was overruled,

66 Ohio St. 661, but the defendant alleges that at that time he had not discovered what he styles the fraud perpetrated upon him. There was a general demurrer to this answer, which was overruled, and judgment was given for the defendant. This judgment was affirmed by the Supreme Court of Nebraska, 94 N. W. Rep. 995, and thereupon the case was brought here on the ground that due faith and credit had not been given to the Ohio record, as required by Art. IV, § 1, of the Constitution of the United States. *Huntington* v. *Attrill*, 146 U. S. 657; *Jacobs* v. *Marks*, 182 U. S. 583.

The Supreme Court of Nebraska affirmed the judgment on the ground that in that State the distinction between actions at law and suits in equity had been abolished, that the decision in *Christmas* v. *Russell*, 5 Wall. 290, was limited to legal defenses, 5 Wall. 304, 306, and that fraud would have been an equitable defense to the judgment in Ohio, and therefore was in Nebraska. We take up the question on this footing, without stopping to discuss the premises, which we find it unnecessary to do, and we will assume that on general demurrer a plea that the judgment was obtained by fraud would be a good equitable plea. See 5 Wall. 303.

It is assumed that the service of the writ in Ohio would have been good but for the alleged fraud. *Smythe* v. *Banks*, 4 Dall. 329; *Chaffee* v. *Jones*, 19 Pick. 260. That point must have been decided by the Ohio courts. Moreover, the facts constituting the fraud are set forth and gain no new force from the vituperative epithet. If the inducement to enter the State of Ohio furnished by the notice to take a deposition there was made fraudulent by the motive with which the notice was given, then there was fraud, otherwise there was not. On the face of the answer fraud is simply the pleader's conclusion from the specific facts. The question is whether the motive alleged can have the effect supposed.

It will be observed that there was no misrepresentation, express or implied, with regard to anything, even the motives of the plaintiff. The parties were at arm's length. The plain-

tiff did not say or imply that he had one motive rather than another. He simply did a lawful act by all the powers enabling him to do it, and that was all. Therefore the word fraud may be discarded as inappropriate. The question is whether the service of a writ, otherwise lawful, becomes unlawful because the hope for a chance to make it was the sole motive for other acts tending to create the chance, which other acts would themselves have been lawful but for that hope. We assume that motives may make a difference in liability. But the usual cases where they have been held to do so have been cases where the immediate and expected effect of the act done was to inflict damage, and where therefore, as a matter of substantive law, if not of pleading, the act was thought to need a justification, see *Aikens* v. *Wisconsin*, 195 U. S. 194, 204, or else where the intent was to do a further and unlawful act to which the act done was the means. *Swift and Company* v. *United States*, 196 U. S. 375, 396.

It is hard to exhaust the possibilities of a general proposition. Therefore it may be dangerous to say that doing an act lawful in itself as a means of doing another act lawful in itself cannot make a wrong by the combination. It is enough to say that it does not usually have that result, and that the case at bar is not an exception to the general rule. We must take the allegations of the answer to be true, although they are manifestly absurd. The plaintiff could not have known that the defendant's lawyer would advise him to go to Ohio, and that the defendant would go to his father's house, instead of to Nebraska, when his business was over. But we assume, as far as possible, that the anticipation of these things was the sole inducement for giving the notice and taking the disposition. Still the notice was true, and the taking of the deposition needed no justification. It could be taken arbitrarily, because the plaintiff chose. On the other hand, the defendant could be served with process if he saw fit to linger in Ohio. That also the plaintiff could do arbitrarily, because he chose, if he thought he had a case. He arbitrarily could unite the

two acts, and do the first because he hoped it would give him a chance to do the last.

Judgment reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE DAY concur in the result.

ALLEN v. ARGUIMBAU.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 523. Submitted April 3, 1905.—Decided May 1, 1905.

Where the judgment of the state court rests on two grounds, one involving a Federal question and the other not, and it does not appear on which of the two the judgment was based and the ground, independent of a Federal question, is sufficient in itself to sustain it, this court will not take jurisdiction.

The certificate of the Chief Justice of the Supreme Court of the State on the allowance of the writ of error that the judgment denied a title, right or immunity specially set up under the statutes of the United States, cannot in itself confer jurisdiction on this court.

Plaintiff in error contended as defendant in the state court, which overruled the plea, that his notes were void because given in pursuance of a contract which involved the violation of §§ 3390, 3393, 3397, Rev. Stat., providing for the collection of revenue on manufactured tobacco. *Held*, that as an individual can derive no personal right under those sections to enforce repudiation of his notes, even though they might be illegal and void as against public policy, the defense did not amount to the setting up by, and decision against, the maker of the notes of a right, privilege or immunity under a statute of the United States, within the meaning of § 709, Rev. Stat., and the writ of error was dismissed.

THIS was an action upon two promissory notes for twenty-five hundred dollars each, payable to Horace R. Kelly, endorsed to the Horace R. Kelly & Company, Limited, and by that company endorsed to the firm of which Arguimbau was survivor.

Many pleas were interposed in defense, and, among them, several filed March 24, 1900, and several filed February 2, 1903. By the first of these pleas, defendant below, plaintiff in error here, averred "that on or about the eighteenth day

of March, A. D. 1893, Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for two thousand five hundred dollars each, two of the said notes payable in one year from the date thereof and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly Company, Limited, a corporation then existing, judicially dissolved and after said dissolution, together with himself and others, to organize a company under the laws of the State of West Virginia, to be known as the Horace R. Kelly Company; that the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, that the cigars so manufactured as aforesaid by the Havana & Key West Cigar Company, Limited, at its factory at Key West, Florida, to fill the order for cigars secured by the said Horace R. Kelly Company were to be removed from said factory or place where said cigars were made without being packed in boxes on which should be stamped, indented, burned or impressed into each box, in a

legible and durable manner, the number of cigars contained therein and the number of the manufactory in which the said cigars had been manufactured. That at the time of the making of said contract and understanding and agreement between the said Horace R. Kelly and the said Max T. Rosen, president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal and sale of cigars provided that, before any cigars were removed from any manufactory or place where cigars were made, they should be packed in boxes and that there should be stamped, indented, burned or impressed into each box in a legible and durable manner, the number of cigars contained therein and the number of the manufactory where said cigars were made, and affixed a penalty for the non-compliance therewith; and the said promissory notes sued on are two of the notes made and delivered to the said Horace B. Kelly in consideration of the promises and understandings and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them; and this the defendant is ready to verify."

The second and third pleas were so nearly identical with the first that they need not be set forth. The pleas of February 2, 1903, set up the same defenses in substance, coupled with the allegation that at the time of the endorsement each of the endorsees had notice of the contract alleged to have formed the consideration of the notes. All these pleas were separately demurred to, special grounds being assigned to this effect; that neither of the pleas stated facts constituting any defense; that the consideration of the notes sued on was the promise of Horace R. Kelly to have cigars manufactured in Key West, and neither of the pleas alleged a breach of the promise; that neither of the pleas averred that the alleged proposed contract between the two companies in the plea stated, and alleged to be illegal, was ever consummated or executed or anything done thereunder; that if cigars were manufactured in Key West, under the said contract between

the said two companies in the said pleas stated, the defendant and his intestate derived the same benefit and received the same consideration for the said notes, whether said contract was legal or illegal.

The demurrers were severally sustained, the case went to judgment in favor of plaintiff, and was taken on error to the Supreme Court of Florida. The errors assigned there, so far as these pleas were concerned, were simply that the trial court erred in sustaining the demurrer in each instance. The Supreme Court affirmed the judgment, whereupon a writ of error from this court was allowed by the Chief Justice of that court, who certified, in substance, that the judgment denied "a title, right, privilege or immunity specially set up and claimed by the plaintiff in error under the statutes of the United States of America."

Six errors were assigned in this court, namely, that the state court erred in holding that the demurrer to the first plea of March 24, 1900, was properly sustained, and that the plea constituted no defense under section 3397 of the Revised Statutes; and as to the second plea and section 3393, Revised Statutes; and as to the third plea and section 3390, Revised Statutes; and in so holding as to the fourth plea, filed February 2, 1903, and section 3397, Revised Statutes; and as to the fifth plea of that date, and section 3393, Revised Statutes; and as to the sixth plea of that date, and section 3390, Revised Statutes.

The case was submitted on motions to dismiss or affirm.

Mr. Richard H. Liggett for plaintiff in error:

This court has jurisdiction. A Federal question is involved. A right construction of §§ 3390 *et seq.*, of Rev. Stat., invalidated these notes, and the decision of the state court was against the immunity from liability so claimed. *Dubuque & Si. C. R. R. Co.* v. *Richmond*, 15 Wall. 3; *Railway Co.* v. *Renicke*, 102 U. S. 180; *Anderson* v. *Carkins*, 135 U. S. 483; *McCormick* v. *Bank*, 165 U. S. 545, 546.

While the certificate of the Chief Justice of the Supreme Court of the State could not give jurisdiction to this court, it may be resorted to, in the absence of an opinion, to show that a Federal question, otherwise presented in the record, was actually passed upon by the court. *Gulf &c. R. Co.* v. *Hewes*, 183 U. S. 66.

Mr. H. Bisbee and *Mr. George C. Bedell* for defendant in error:

As to the question of jurisdiction:

It was proper for the state Supreme Court to decide that as the part of the plea setting up an intention in the future to violate a statute could not be legally proven, it was not necessary for it to decide whether the alleged illegal part of a contract made the notes void or not.

This court is without jurisdiction for the further reason that the plea does not set up any personal right, or personal right of property under any act of Congress, but sets up a right of a third party to-wit: the United States to have the revenue laws enforced. This proposition is maintained in the following cases: *Austin* v. *Anderson*, 7 Wall. 694; 6 Rose's Notes, 1066; *Long* v. *Converse*, 91 U. S. 114; *Conde* v. *York*, 168 U. S. 648. Setting up a title in the United States by way of defense is not claiming a personal interest affecting the subject in litigation. *Hale* v. *Gaines*, 22 How. 160.

Under § 25, judiciary act, it is not every misconstruction of an act of Congress, which can be reëxamined. The decision must have been against some right, etc., so claimed under such act. *Montgomery* v. *Hernandez*, 12 Wheat. 129. And see also *Udell* v. *Davidson*, 7 How. 769; *Walworth* v. *Kneeland*, 15 How. 348; *Railroad Co.* v. *Morgan*, 160 U. S. 288; *Railroad Co.* v. *Fitzgerald*, 160 U. S. 557; *Gill* v. *Oliver*, 11 How. 529, peculiarly applicable.

The mere abstract right, if any, in the makers of the notes to have the Federal statute complied with without alleging any injury to them, is unimportant, and a moot question.

Hooker v. *Burr*, 194 U. S. 419; *Dibble* v. *Land Co.*, 163 U. S. 69; *Eustis* v. *Bolles*, 150 U. S. 361; *Klinger* v. *Missouri*, 13 Wall. 257.

Although the promise of the payee in an independent contract, or the act to be done as the consideration of a promissory note, is a violation of an act of Congress, still the note is not void, unless the act of Congress expressly declares the note void, which is not this case. Tiedeman on Commercial Paper, §§ 178, 280; 21 Wall. 241, 248; 4 Ency. of Law, 2d ed., 191, 192; *Harris* v. *Rummels*, 12 How. 79; 5 Rose's Notes, 70.

In such a case as this no one can raise the question but the United States. *Thompson* v. *St. Nicholas Bank*, 146 U. S. 240, 250; *Armstrong* v. *Bank*, 133 U. S. 467; *Armstrong* v. *Toler*, 11 Wheat. 258.

And assuming that Kelly's contract was performed, the makers of the notes after such performance, and after receiving the consideration expected, cannot plead as a defense that such contract was illegal or void. *Brooks* v. *Martin*, 2 Wall. 70; *Kimbro* v. *Burdett*, 22 How. 256; and see also 11 Wheat. 258; 2 Rose's Notes, 482.

The asserted Federal element was too remote and frivolous. *Blythe* v. *Hinckley*, 180 U. S. 333.

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

The only ground on which our jurisdiction can be maintained is that defendant specially set up or claimed some title, right, privilege or immunity under a statute of the United States, which was denied by the state court. The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient

in itself to sustain it, this court will not take jurisdiction. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63; *Klinger* v. *Missouri*, 13 Wall. 257; *Johnson* v. *Risk*, 137 U. S. 300. And we are not inclined to hold that if in the view of the state court the promise of Kelly to manufacture cigars at Key West was the consideration of the notes and had been performed, and the makers could not defend on the ground that it was contemplated between Kelly and Rosen that the cigars should be removed without compliance with the revenue laws, a Federal question was decided in sustaining the demurrers to the pleas.

But, apart from that, no title, right, privilege or immunity under a statute of the United States, within the intent and meaning of section 709 of the Revised Statutes, was specially set up or claimed by defendant and decided against him.

Sections 3390, 3393, and 3397 of the Revised Statutes are regulations to secure the collection of the taxes imposed by chapter 7, Tit. 35, and defendant could derive no personal right under those sections to enforce the repudiation of his notes, even although, on grounds of public policy, they were illegal and void.

In *Walworth* v. *Kneeland*, 15 How. 348, it was held, as correctly stated in the headnotes:

"Where a case was decided in a state court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the twenty-fifth section of the judiciary act.

"The state court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States.

"But even if the state court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case."

And Mr. Chief Justice Taney said: "But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the twenty-fifth section of the act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength." p. 353.

The certificate on the allowance of the writ of error could not in itself confer jurisdiction on this court, *Fullerton* v. *Texas*, 196 U. S. 192, 194; and the result is that the writ of error must be

Dismissed.

RODRIGUEZ *v.* UNITED STATES.

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

No. 183. Submitted March 15, 1905.—Decided May 1, 1905.

Under §§ 34, 35 of the Foraker act of 1900, 31 Stat. 85, this court can review judgments of the District Court of the United States for Porto Rico in criminal cases where the accused claimed and, as alleged, was denied a right under an act of Congress and under the Revised Statutes of the United States.

Although a motion in arrest of judgment, based on the ground that the grand jury was not properly impaneled by reason of the deputy clerk acting in place of the clerk, was made in time, and the court below may have erred in its interpretation of the statute, the accused cannot avail of that even in this court unless the record shows that an exception was properly taken. The accused could have waived such an objection to the grand jury and by not excepting to the ruling he must be held to have acquiesced in the ruling and waived his objection.

THIS writ of error brings up for review a final decree of the District Court of the United States for the District of Porto Rico, by which, in conformity with the verdict of a jury, the plaintiffs in error, Rafael Rodriguez and Euripides Rodriguez, were sentenced to confinement in the penitentiary—the former, for three years at hard labor; the latter, for two years and to pay a fine of five hundred dollars.

The indictment contained two counts. The first count charged that on the first day of November, 1902, in the district of Porto Rico, the defendants unlawfully conspired together to steal, embezzle and purloin the moneys of the United States, and that, to effect the object of such conspiracy, Rafael Rodriguez, on the above date, being a postmaster of the United States, did feloniously steal, embezzle and purloin out of certain letters which came to his possession as postmaster, and which had not then been delivered to the party to whom they were directed, divers bank notes and United States notes, the property of the United States, of the value of five hundred and sixty dollars. The second count charged that the defendants—Rafael Rodriguez being postmaster as aforesaid—on the above date, and within the said district, feloniously stole, embezzled and purloined bank notes and United States notes, the property of the United States, of the value of five hundred and sixty dollars, out of certain letters addressed to the postmaster of the United States at San Juan, Porto Rico, and intended to be conveyed by mail, which letters had previously come into the possession of Rafael Rodriguez, as postmaster, and had not then been delivered to the party to whom they were directed.

The defendants jointly moved to quash the indictment upon grounds substantially involving its sufficiency. The motion was overruled, the court observing: "The indictment charges the defendants with conspiring to commit an offense, and that, in pursuance to that, one of them did certain acts which, owing to the alleged conspiracy, were the acts of both. The use of the word embezzle in the indictment is surplusage. The charge is a larceny as described in the indictment." The defendants took an exception.

The defendants then moved to quash the panel of petit jurors, on the ground, among others, that the jurors had not been selected and drawn in the mode required by the Revised Statute of the United States. On this motion evidence was heard, but the evidence was not made a part of the record by bill of exceptions or otherwise. The motion to quash was denied.

Thereupon the defendants were arraigned, and pleaded not guilty. Bystanders were summoned to serve on the panel, and from them a jury was selected. No objection was made to the jury so selected.

The result of the trial was a verdict of guilty on the first count.

After the return of the verdict the accused moved in arrest of judgment upon the following grounds: That the grand jury was not selected or drawn according to the requirements of the statute in such cases made and provided; that the clerk of the court took no part in the selection of the names to be placed in the jury box, but the other jury commissioner of the court, after directing a deputy clerk to prepare lists and tickets of persons, placed all the tickets with names in the box himself; that from the tickets and names so placed in the box by the commissioner the grand jury was subsequently drawn; that the deputy clerk was not and is not a person authorized under the law to take part in the selection or drawing the grand and petit juries of the court; that he had not been theretofore appointed by the court for that purpose; that he

was not shown to be of a different political affiliation from the jury commissioner theretofore appointed by the court; and that said names were not placed in the box alternately by the commissioner and the clerk. 21 Stat. 43, c. 52.

The motion in arrest of judgment was overruled, the court making an order, which contained the following recitals: "It appears the regular jury commissioner, Andres Crosas and the deputy clerk, Frank Antonsanti, acted in doing so, the clerk of the court being absent on sick leave. There is no charge of corruption or that the selection was not by impartial persons. The general rule as to provisions of law for the selection of jurors is, that they are only directory. There appear to have been some irregularities, and not an exact compliance with the terms of the statute; but both the commissioner Crosas and the deputy clerk made the selection and both were present all the time, during the selection, and no one else took part in it. It is not shown they are not of opposite politics, and this is to be presumed. There was no such material irregularity as vitiated the panel but a substantial compliance with the statute upon the subject. The motion in arrest of judgment is overruled."

Subsequently the defendant moved for a new trial upon various grounds. That motion was overruled, and this writ of error was brought.

Mr. Francis H. Dexter, Mr. Frederic D. McKenney and *Mr. John Spalding Flannery* for plaintiffs in error:

This court has jurisdiction to review, on writ of error, the proceedings of the court below. *Crowley* v. *United States*, 194 U. S. 461, 467.

The grand jury having been selected by a person having no authority to do so the whole proceeding of forming the panel is void. The objection was taken in time. *United States* v. *Gale*, 109 U. S. 65; *Sanders* v. *State*, 55 Alabama, 186; *Miller* v. *State*, 33 Mississippi, 357; *Curtis* v. *Commonwealth*, 87 Virginia, 590; *Yelm Jim* v. *Territory*, 1 Wash. Ty. R. 63.

Mr. Assistant Attorney General Robb and *Mr. Assistant Attorney Glenn E. Husted* for the United States:

This court has no jurisdiction. Act of April 12, 1900, 31 Stat. 85; act of March 3, 1885, 23 Stat. 443; *Royal Ins. Co.* v. *Martin*, 192 U. S. 149; *Gonzales* v. *Cunningham*, 164 U. S. 617; *Amado* v. *United States*, 195 U. S. 172; *New* v. *Oklahoma*, 195 U. S. 252. The summoning of talesmen was done properly. § 804, Rev. Stat.; *St. Clair* v. *United States*, 154 U. S. 134, 146; *Lovejoy* v. *United States*, 128 U. S. 171; *United States* v. *Eagan*, 30 Fed. Rep. 608; *United States* v. *Munford*, 16 Fed. Rep. 164; *United States* v. *Rose*, 6 Fed. Rep. 136. No objection was raised or exception taken; both are essential. *Alexander* v. *United States*, 138 U. S. 355.

As the evidence in support of this motion forms no part of the bill of exceptions, and does not in any way appear in the record, the action of the court in the premises cannot be reviewed here. *Suydam* v. *Williamson*, 20 How. 427, 433; *Baltimore & P. R. R.* v. *Trustees*, 91 U. S. 127; *Storm* v. *United States*, 94 U. S. 76, 81; *England* v. *Gebhardt*, 112 U. S. 502; *Duncan* v. *Atchison &c. R. R.*, 72 Fed. Rep. 808, 812; *State* v. *Henderson*, 109 Missouri, 292; *State* v. *McClintock*, 37 Kansas, 40; *State* v. *Smith*, 26 La. Ann. 62; *St. Louis &c. Ry.* v. *Wheelis*, 72 Illinois, 538; *Wiggins* v. *Witherington*, 96 Alabama, 535.

There is nothing to overcome the presumption that the jury was selected and drawn according to law, and that the clerk and jury commissioner performed their duties. *United States Bank* v. *Dandridge*, 12 Wheat. 68; *Kie* v. *United States*, 27 Fed. Rep. 351; *United States* v. *Greene*, 113 Fed. Rep. 683, 693; *Osgood* v. *State*, 64 Wisconsin, 472; *People* v. *Madison County*, 125 Illinois, 334, 340; *Wheeler* v. *State*, 42 Georgia, 306; *Smith* v. *State*, 88 Alabama, 73; *Pauska* v. *Daus*, 31 Texas, 72; Thompson and Merriam on Juries, §§ 63, 586, and cases cited.

The overruling of the motion in arrest is not a denial of a right claimed under an act of Congress. It was not made until after defendants had pleaded not guilty to the indictment and had been tried, convicted and sentenced. Such motions come

too late if made after verdict. *United States* v. *Gale*, 109 U. S. 65, 69; *Crowley* v. *United States*, 191 U. S. 461, distinguished, and see *State* v. *Swift*, 14 La. Ann. 827; *State* v. *White*, 35 La. Ann. 96; *State* v. *Jackson*, 36 La. Ann. 96; *People* v. *Ah Lee Doom*, 97 California, 171, 176; *Brown* v. *State*, 12 Arkansas, 623; *Commonwealth* v. *Freeman*, 166 Pa. St. 332; *Brill* v. *State*, 1 Tex. App. 572.

Even if the facts were as stated in motions to quash the panel and in arrest the action of the court was proper. *United States* v. *Eagan*, 30 Fed. Rep. 608; *United States* v. *Richardson*, 28 Fed. Rep. 61; *United States* v. *Ambrose*, 3 Fed. Rep. 283; *United States* v. *Tuska*, 14 Blatch. 5; *S. C.*, Fed. Cas. No. 16,550; *United States* v. *Greene*, 113 Fed. Rep. 683, 692; Wharton, Cr. Pl. & Prac. §§ 350, 388.

Indictments will only be quashed in very clear cases. Wharton, Cr. Pl. & Pr. § 386, and cases cited.

Embezzlement and theft under this section may be charged in a single count. *United States* v. *Golding*, 2 Cranch C. C. 212; *United States* v. *Byrne*, 44 Fed. Rep. 188. The indictment was therefore proper as it stood, without treating the word "embezzlement" as surplusage.

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

The first question is one of the jurisdiction of this court to reëxamine the judgment below—the Government insisting that we are without jurisdiction.

We are of opinion that this question is settled by *Crowley* v. *United States*, 194 U. S. 461, 462, which was a criminal prosecution for the violation of certain statutes of the United States relating to the postal service.

By the act of April 12, 1900, 31 Stat. 77, 85, c. 191, establishing a civil government for Porto Rico, it was provided that, except as otherwise provided, the statutory laws of the United States shall have the same force and effect in Porto Rico as in

the United States; also, that writs of error and appeals may be prosecuted from the final decisions of the District Court of the United States for Porto Rico "in all cases where . . . an act of Congress is brought in question and the right claimed thereunder is denied." Section 35. The same act provided that the United States Court for Porto Rico shall have jurisdiction "of all cases cognizant in the Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court." Section 34. In *Crowley's case* the contention of the accused, based upon a plea in abatement, was that certain members of the jury finding the indictment were disqualified under the local law to serve as grand jurors, and that the statutes of the United States made it the duty of the District Court to follow the local law in that respect. Referring to the above act, we said: "In this case that act was brought in question by the *contention* of the parties—the contention of the accused being, in substance, that pursuant to that act of Congress the court below, in the matter of the qualifications of grand jurors, should have been controlled by the provisions of the local law relating to jurors, in connection with the statutes of the United States relating to the organization of grand juries and the trial and disposition of criminal causes; and the court below deciding that, notwithstanding the Foraker act, the local act of January 31, 1891, referred to in the plea, was not applicable to this prosecution, and that the grand jury finding the indictment, if a grand jury was necessary, was organized consistently with the laws of the United States under which the court proceeded. It thus appears that the accused claimed a right under the act of Congress and under the Revised Statutes of the United States, which, it is alleged, was denied to him in the court below. This court has, therefore, jurisdiction to inquire whether there is anything of substance in that claim."

As the Porto Rican statutes contain no provisions relating to the selection, drawing or impaneling of grand jurors, it was, as the accused contends in this case, the duty of the Dis-

trict Court of the United States for Porto Rico in criminal prosecutions for crimes against the United States, to keep in view section 800 of the Revised Statutes, which provides: "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such state court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such State."

It was also its duty, in such prosecutions, to conform to the act of Congress of June 30, 1879, 21 Stat. 43, c. 52, which provides that jurors to serve in the courts of the United States "shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein, . . . and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith."

When, therefore, the accused in this case, by their motion

in arrest of judgment, claimed the benefit of the above statutes, the acts of Congress referred to were brought in question within the meaning of the act of April 12, 1900, as interpreted in the *Crowley case;* and the rights asserted by the accused under those statutes having been denied, when the motion in arrest of judgment was overruled, the case could be brought here. The words, "brought in question," in that act do not mean that the accused, in order to bring the final judgment here, must have disputed the validity of the acts of Congress which were alleged to have been violated to their prejudice. It was quite sufficient that they should assert rights under those acts and that the rights so claimed were denied to them. *Crowley* v. *United States, supra.*

The Government, however, contends that the motion in arrest of judgment came too late, and in support of that view cites the following language from *United States* v. *Gale*, 109 U. S. 65, 69: "Much more would it seem to be requisite that all ordinary objections based upon the disqualification of particular jurors, or upon informalities in summoning or impaneling the jury, where no statute makes proceedings utterly void, should be taken *in limine*, either by challenge, by motion to quash, or by plea in abatement. Neglecting to do this, the defendant should be deemed to have waived the irregularity." Wharton Cr. Pl. and Prac. §§ 344, 350, 426. But in the same case the court said what is pertinent to the present discussion: "There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void; as where the jury is not a jury of the court or term in which the indictment is found; *or has been selected by persons having no authority whatever to select them;* or where they have not been sworn; or where some other fundamental requisite has not been complied with."

Here the objection to the grand jury was, in substance, that it was not such a body as could legally find an indictment. This view rests upon the ground that the names were placed

in the box by a jury commissioner, and by a deputy clerk, the latter, it is contended, having no authority to act at all in such a matter in place of the clerk, because the statute required the joint action of a commissioner and the clerk of the court. If, therefore, the requirement that the grand jurors should be selected by the commissioner and the clerk was a fundamental requisite, that is, if the deputy clerk, in the absence of the clerk, had no authority under any circumstances to act, then the motion in arrest of judgment did not come too late. There are authorities which give some support to the view that this requirement is of substance, and not a mere "defect or irregularity in matter of form only." Rev. Stat. § 1025; *Hulse* v. *The State,* 35 Ohio St. 421. Whether this position be well taken or not we do not stop to consider; for, assuming that the motion in arrest of judgment was made in time, and assuming even that the court, as matter of law, erred in its interpretation of the statute, still the accused cannot avail themselves here of that error; for the record does not show any exception taken to the overruling of the motion in arrest of judgment. By not excepting to the ruling of the court the accused must be held to have acquiesced in it, and to have waived the objection made to the grand jury. We perceive no reason why they could not have legally waived an objection based upon the grounds stated in the motion.

This disposes of the case; for the assignments of error present no other question that needs to be noticed. Besides, counsel for the accused have properly confined their discussion of the case to the question of the jurisdiction of this court, and to the action of the court below in overruling the motion in arrest of judgment. The judgment is

Affirmed.

DUNBAR *v.* GREEN.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 200. Submitted April 6, 1905.—Decided May 1, 1905.

The guardian of an Indian minor appointed in a county of Kansas, other than that in which the land was situated, gave a deed to his ward's property; the grantees did not take possession or exercise any act of ownership for thirty years, when the original owner took possession of the land which was still vacant and unimproved, and for the first time asserted the invalidity of his guardian's deed; thereupon the grantees under the guardian's deed brought ejectment; the defendant answered by general denial and also by cross-petition asked for equitable relief quieting the title and declaring his guardian's deed void; the state court held the deed void but awarded possession to the grantees thereunder on the ground of the ward's laches.

Held, error; that in an action of ejectment plaintiff must recover on the strength of his own title and not on the weakness of defendant's, and that the rule is not affected in this case by the fact that the defendants, by cross-petition, had asked for equitable relief.

THIS was an action of ejectment brought September 22, 1900, in the District Court of Wyandotte County by defendants in error, who were plaintiffs below, to recover possession of certain lots of land in the city of Argentine. The case was tried upon an agreed state of facts, substantially as follows:

The land was patented December 28, 1859, to Susan Whitefeather, as the head of a family, consisting of herself and her son, George Washington, who were members of the Shawnee tribe of Indians. The patent was issued under the treaty of May 10, 1854 (Indian Treaties, p. 792), with the Shawnees. Whitefeather died prior to July 10, 1862, and her son George Washington inherited the land. On November 27, 1867, he being then fourteen years of age, the Probate Court of *Johnson* County appointed Jonathan Gore as his guardian, though the land was in *Wyandotte* County. In these proceedings Washington is described as the minor heir of George and Judy

Washington. Under such appointment the guardian sold the land to one Joel F. Kinney for $2,000, executing to him a guardian's deed, which was approved by the Secretary of the Interior, May 21, 1869, and the title so acquired by Kinney passed by a series of conveyances to the plaintiffs Green. In these proceedings for a sale Gore described himself as guardian of George Washington, the minor heir of Susan Whitefeather, deceased. Washington remained a member of the Shawnee tribe until September 26, 1900, when he was made a citizen of the United States. He took no steps to impugn the validity of the guardian's deed until June 25, 1895, when, according to the agreed statement of facts, the defendant Dunbar took possession of the land as his agent. Up to this time it had remained vacant and unimproved. Plaintiffs recovered judgment, which was affirmed by the Supreme Court. 66 Kansas, 557.

Mr. L. F. Bird and *Mr. H. G. Pope* for defendants in error.

There was no brief for plaintiffs in error.

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

The deed of Jonathan Gore, guardian, to Joel F. Kinney, dated October 14, 1868, of property situated in *Wyandotte* County, was attacked upon the ground:

1. That Gore was never appointed guardian of the defendant, George Washington, who was the son of Susan Whitefeather, but was appointed by the Probate Court of *Johnson* County as the guardian of George Washington, while another person, named Elizabeth Longtail, was on July 9, 1862, appointed by the Probate Court of *Wyandotte* County the guardian of apparently another George Washington, the minor son of George and Judy Washington, who lived and owned land in that county. Indeed the records are in a hopeless state of confusion.

2. Because the guardian's deed was executed and delivered five months before he had obtained authority from the Probate Court to make it.

3. Because the petition of the guardian to sell the land did not describe the property, and because it was void on its face.

Not only did this not involve a Federal question, but in its opinion the court assumed, for the purposes of the case, that the guardian's deed was void for want of jurisdiction, and placed its decision solely upon the ground that Washington had been guilty of such laches as would bar recovery.

The only Federal question turns upon the right of George Washington, a Shawnee Indian, and one of that class of persons who are aptly described as "wards of the nation," to avail himself of the Whitefeather patent, notwithstanding his assumed laches in taking possession thereunder. We are much embarrassed by the failure of the defendants in error to file a brief. But we do not understand how the defense of laches is pertinent to the case. The action is ejectment. The plaintiffs must recover on the strength of their own title, and not upon the weakness of the defendants'. The only title set up by the plaintiffs is that derived from the deed of Jonathan Gore, guardian of the defendant Washington, which is assumed by the Supreme Court to be void. The plaintiffs did not show that they were ever in possession of the land, which appears to have been vacant and unoccupied until Dunbar took possession for the defendant Washington, in June, 1895. The plaintiffs are not shown to have exercised acts of ownership, or even to have paid taxes. We do not understand the materiality of the suggestion that the defendants have lost their rights to the land by the laches of George Washington, the Indian. Laches is a defense often set up in courts of equity in bar of plaintiffs' claim, but here it is set up by the plaintiffs, as a weapon of attack, although the defendants are the only parties who are or have been in possession of the land. They have shown plaintiffs' title to be void, and that they have been in possession of the land for five years. They are entitled to

stand upon their rights. As the deed was void, no affirmative action on the part of George Washington was necessary. Indeed, as plaintiffs took no action under the guardian's deed to Kinney for over thirty years, it would appear that they were guilty of greater and more inexcusable delay than the defendants.

The only difficulty arises from the cross-petition of the defendants, incorporated with their answer, in which they demand that their title be quieted, and that plaintiffs be enjoined from setting up or making any claim to the property. If this were an original petition by defendants in possession to remove a cloud from their title, it is entirely possible that the court might find that they had been guilty of such laches as would disentitle them to recover; but the petition of plaintiffs in the case is an ordinary petition in ejectment, praying for possession of the land as against the defendants, for damages, and for an injunction pending trial. The case was tried by the court without a jury, as an ordinary action of ejectment, and recovery decreed in favor of the plaintiffs for possession of the property, with costs. No mention was made in the opinion or judgment of the cross-petition of the defendants.

We do not see how the case can be treated other than as an ordinary action of ejectment. In the case of *Cheesebrough* v. *Parker*, 25 Kansas, 566, it was held that where, under the practice in Kansas, an action is commenced for the recovery of real estate, the right of the plaintiff to demand a second trial under the statute is not taken away by the addition to the petition of a claim for mesne profits, nor by the fact that the defendants set up an equitable defense and claimed equitable relief in the answer. In delivering the opinion of the court, Mr. Justice Brewer, now of this court, observed: "Under a general denial," (in an action of ejectment) "every possible defense may be interposed. If, instead of such general denial, the defendant sets out in detail an equitable defense, this does not change the character of the action or abridge the rights of the plaintiff. It is a grand mistake to suppose that by setting

up in an answer an equitable defense to an action for the recovery of real estate, either the plaintiffs' right to a jury trial, or a second trial, under the statute, can be abridged. Whatever effect such defense may have upon defendants' rights, the plaintiffs' are unchanged. They have commenced an action, under the statute, for the recovery of real property, and no rights given by such statute can be taken away by the character or form of the defense." The substance of the opinion is that an action of ejectment must be tried as at law, notwithstanding that an equitable claim or defense is set up by one of the parties.

Had the plaintiffs taken possession of the land under their guardian's deed, and an action been brought by the Indian, they might perhaps have pleaded in defense laches or the statute of limitations; but as the property remained vacant and unimproved for over twenty years, we do not see why the defendants do not stand in a position to avail themselves of the fact that the plaintiffs' only title is derived from a void deed, especially in view of the fact that the defendant Washington shows a patent to the land to his mother, Susan Whitefeather, and that he is her only heir. The record presents the curious anomaly of a recovery by plaintiffs who have neither title nor prior possession against defendants, who have both.

Had the defendants, after taking possession, filed a bill to quiet their title and remove the cloud created by the guardian's deed, a different question would have been presented.

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

Ex parte: In re GLASER, PETITIONER.

ORIGINAL.

No. 16. Original. Submitted April 20, 1905.—Decided May 8, 1905.

Since the passage of the act of March 3, 1891, this court has no jurisdiction to review judgments or decrees of the District and Circuit Courts, directly by appeal or writ of error, in cases not falling within § 5 of that act. In cases over which this court possesses neither original nor appellate jurisdiction it cannot grant mandamus.

THE facts are stated in the opinion.

Mr. Richard A. Irving and *Mr. Lewis E. Carr, Jr.*, for petitioner, as to the jurisdictional question:

Mandamus lies to compel the Circuit Court to take jurisdiction. *Railroad Co.* v. *Wiswell*, 22 Wall. 507; *Ex parte Schollenberger*, 96 U. S. 369; *Re Pennsylvania Co.*, 137 U. S. 451; *Matter of Hohorst*, 150 U. S. 653; *Re Grossmeyer*, 177 U. S. 48.

Petitioner cannot appeal from any decision of the Circuit Court of the Eastern District of New York for the reason that the court has refused to take jurisdiction.

If there is no action pending, there is no such thing as a proceeding to compel the filing of an answer to compel the placing of the case upon the calendar, and there is no such ground for the entry of such an order, and no appeal therefrom. It is a nullity unless an action is pending, except to show the attitude of the judge as to jurisdiction. Mandamus to the judges of the court to take jurisdiction is plaintiff's only remedy.

Mr. Alvin Cushing Cass for respondent.

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

This is a petition by Gertrude Glaser, as administratrix,

for mandamus, requiring the judges of the Circuit Court of the United States for the Eastern District of New York to take jurisdiction and proceed against Anthony P. Langer in a certain suit alleged by petitioner to be pending and undetermined in that court, wherein Gertrude Glaser, as administratrix, is plaintiff, and Anthony P. Langer is defendant, and to strike from the records of the court a certain order made on the fourteenth day of November, 1904, entitled: " 'In the Matter of the Application of Gertrude Glaser, Administratrix, &c., to compel the filing of an answer, or other relief, in an action alleged to be pending between Gertrude Glaser, as Administratrix, &c., of Isador Glaser, deceased, Plaintiff, and Anthony P. Langer, Defendant,' whereby petitioner's application to compel the filing of said answer was denied, on the ground that no such action was pending, and to make such disposition of said suit as ought to have been made had said order not been made and entered therein . . ."

The petition alleged the commencement in the Circuit Court of a common law action by petitioner as administratrix against Langer, to recover damages for negligence causing the death of petitioner's husband, and rested the jurisdiction on diversity of citizenship. The circumstances in respect of a mistake, by reason of which no summons was issued, though service of copy was made, are set forth in detail, and the fact alleged of notice of appearance and answer, and the assertion by defendant's attorney that this was in ignorance of the defect as to summons.

Leave to file the petition was granted, and this having been done, a rule was entered thereon, to which the judge presiding in the Circuit Court, and before whom all the proceedings referred to in the petition were had, and by whom the decision was made, made due return, submitting his action in the premises, and certifying that his reasons for denying the motion were set forth in the order, which is given at length. It appears therefrom that the motion was denied "upon the sole ground that no action of Gertrude Glaser, as administratrix of

the goods, chattels and credits of Isador Glaser, deceased, plaintiff, against Anthony P. Langer, defendant, is nor ever has been pending in this court."

In cases over which we possess neither original nor appellate jurisdiction, we cannot grant mandamus. Rev. Stat. § 716; *In re Commonwealth of Massachusetts, Petitioner*, 197 U. S. 482.

Of course there is no pretense of original jurisdiction here, and since the passage of the act of March 3, 1891, 26 Stat. 826, c. 517, we have no jurisdiction to review the judgments or decrees of the District and Circuit Courts directly by appeal or writ of error in cases such as this case if pending in the Circuit Court.

Rule discharged. Petition denied.

SCHLOSSER *v.* HEMPHILL.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 175. Argued March 13, 14, 1905.—Decided May 8, 1905.

Where the judgment of the highest court of a State, in reversing a judgment against defendant, does not direct the court below to dismiss the petition but remands the cause for further proceedings, in harmony with the opinion, it is not a final judgment in such a sense as to sustain a writ of error from this court.

THE case is thus stated by the Supreme Court of Iowa, to which it had been carried by appeal from the District Court of Palo Alto county:

"This is an action in equity to quiet title to a tract of some two hundred and ninety acres of land in the south half of section 30, township 97, range 34, in Palo Alto county. Plaintiff is the admitted owner of lots two and three, forming a part of said tract, and containing about 99 acres. According to the

original Government survey, made in 1857, this land was adjacent to a lake, which was meandered, and the meander lines were run along the north side of the said two lots. The remainder of the land claimed lies between this meander line and the alleged shore of the lake, and is the subject of the controversy. The half section in question—that is, such part of it as lies beyond the original meander line—was resurveyed by the Government in the year 1898, and platted into five lots, of which lots 11, 14, and 16 are claimed by defendant Hemphill, and lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto county, under a patent issued to the State, under the swamp land grant of 1850, and which is based upon the resurvey of 1898. Schlosser insists that the meander line is not his boundary, it not marking the edge of the lake, but that he is entitled to claim up to the east and west half section line of said section. There was a decree for plaintiff, and defendants appeal." 118 Iowa, 452.

The Supreme Court ruled that "where a body of water is meandered, such lines are not boundary lines, and the adjacent owner will usually take title to the actual shore, but where there is no adjacent body of water proper to be meandered, such line becomes a boundary, and a purchaser from the Government cannot claim title beyond it;" and held upon the facts that there was no body of water in section thirty necessary to be meandered, and that plaintiff could not claim title beyond the meandered line. The court said in concluding: "In our opinion, the plaintiff has no right to any other than the land patented to his grantor, and the decree of the trial court must therefore be reversed." And entered judgment as follows:

"In this cause, the court being fully advised in the premises, file their written opinion reversing the judgment of the District Court.

"It is therefore considered by the court that the judgment of the court below be and it is hereby reversed and set aside, and the cause is remanded for further proceedings in harmony

with the opinion of this court, and that a writ of *procedendo* issue accordingly.

"It is further considered by the court that the appellee pay the costs of this appeal, taxed at $227.70, and that execution issue therefor."

This writ of error was thereupon brought.

Mr. Charles A. Clark and *Mr. George E. Clarke* for plaintiff in error.

Mr. E. B. Evans, with whom *Mr. H. C. Evans* was on the brief, for defendants in error.

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

By its judgment the Supreme Court of Iowa reversed the decree of the trial court and remanded the cause "for further proceedings in harmony with the opinion of this court."

We have heretofore held that a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this court. *Haseltine* v. *Bank*, 183 U. S. 130. It was there ruled that the face of the judgment is the test of its finality, and that this court cannot be called on to inquire whether, when a cause is sent back, the defeated party might or might not make a better case.

It is true that in Iowa the Supreme Court hears equity cases on appeal *de novo*, and the successful party is entitled to a decree in that court, if he moves for it, *First National Bank* v. *Baker*, 60 Iowa, 132; but in the present case no such decree was applied for or rendered. Nor did the Supreme Court direct the court below to dismiss plaintiff's petition, or in terms direct the specific decree to be entered.

And it has been repeatedly held by that court that when a case triable *de novo* is remanded for judgment in the court below, the parties may be permitted to introduce material evi-

dence discovered since the original trial, and may amend the pleadings for the purpose of setting up matters materially affecting the merits, subsequently occurring. *Sanxey* v. *Iowa City Glass Company*, 68 Iowa, 542; *Adams County* v. *Railroad Company*, 44 Iowa, 335; *Shorthill* v. *Ferguson*, 47 Iowa, 284; *Jones* v. *Clark*, 31 Iowa, 497. In the latter case, the court below, the District Court, refused to permit amendments, holding, "as a matter of law, that when a chancery case has been appealed to the Supreme Court, and has been there heard upon its merits, and is remanded to the District Court, with instructions as set forth in the *procedendo* in this cause, the District Court has no power to grant leave to amend." But the Supreme Court reversed the District Court, and held that that court might, "at any time, in furtherance of justice, and on such terms as may be proper, permit a party to amend any pleadings or proceedings. Rev. § 2977."

Doubtless the conclusions arrived at by the state Supreme Court, and expressed in its opinion, furnish the grounds on which the court below must proceed, when the case goes to a decree there, if no change in pleadings or proof takes place, but we cannot say what action might nevertheless be taken, and as no decree was entered in the Supreme Court, and no specific instruction was given to the court below, we think the writ of error cannot be maintained. Assuming, without deciding, that a Federal question was so raised as otherwise to have justified the exercise of our jurisdiction, we can but repeat what we said in *Haseltine's case:* "The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher*, they might have sued out a writ of error at once."

Writ of error dismissed.

W. L. WELLS COMPANY *v.* GASTONIA COTTON MANUFACTURING COMPANY.

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

No. 237. Argued April 28, 1905.—Decided May 8, 1905.

The charter of a corporation in Mississippi provided that the incorporators "are hereby created a body politic and corporate," and also that "as soon as ten thousand dollars of stock is subscribed and paid for said corporation shall have power to commence business." The ten thousand dollars was not paid in, but the corporation after doing business commenced an action against a citizen of another State in the Circuit Court of the United States for North Carolina for goods sold; defendant denied any knowledge or information sufficient to form a belief as to plaintiff's corporate capacity. Plaintiff recovered in the Circuit Court but the Circuit Court of Appeals held that owing to the failure to pay in the amount specified in the charter, plaintiff was not a corporation and a citizen of Mississippi, and that the jurisdiction of the Circuit Court did not affirmatively appear. *Held*, error:

That the denial of defendant was sufficient under the practice of North Carolina to put the question of plaintiff's corporate capacity to sue in issue.

That for purposes of suing and being sued in the courts of the United States the members of a corporation are to be deemed citizens of the State by whose laws it was created.

That plaintiff became in law a corporation when its charter was approved and the Great Seal of the State affixed thereto, and as such was entitled to sue in the United States Circuit Court as a citizen of Mississippi, and the subscription and payment of the required amount of capital stock was not such a condition precedent that the corporation did not exist until it was paid. If the organization of the company as a corporation was tainted with fraud it was for the State by appropriate proceedings to annul the charter.

THE plaintiff, the W. L. Wells Company, seeks in this action to recover a balance alleged to be due from the defendant, the Gastonia Cotton Manufacturing Company, on account of certain sales of cotton in the years 1899 and 1900.

The complaint averred that the plaintiff and defendant were, respectively, created and duly organized as *corporations*—the former, under the laws of Mississippi; the latter, under the laws of North Carolina.

The defendant admitted that it was a corporation, duly organized under the laws of North Carolina and a citizen and resident of that State, but averred that it had "no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the first section of the complaint, to wit, that the plaintiff is a corporation organized under the laws of the State of Mississippi and a citizen and resident of that State, and, therefore, it denies the said allegation." The other paragraphs of the answer put in issue the allegations of the complaint touching the plaintiff's claim against the defendant.

There was another action in the same court brought by the W. L. Wells Company against the Avon Mills on account of transactions like those involved in the other case.

By consent of the parties and pursuant to an order of court the two cases were consolidated and tried together. In answer to questions propounded by the court the jury found that the W. L. Wells Company was, as alleged in the complaint, a corporation and a citizen and resident of Mississippi and entitled to recover the sum of $39,313.88. A judgment was rendered for that amount against the Gastonia Cotton Manufacturing Company—the Circuit Court holding, upon a review of the evidence in connection with the findings of the jury, that the W. L. Wells Company was a corporation of Mississippi, and as such entitled to invoke the jurisdiction of that court as against the defendant corporation of North Carolina. 118 Fed. Rep. 190.

The case was then carried to the Circuit Court of Appeals which adjudged that the plaintiff had failed to establish the allegations of the complaint as to its corporate capacity, and, therefore, was not entitled to sue in the Circuit Court in its alleged corporate name. Without considering the merits of the case, that court reversed the judgment for want of jurisdiction in the Circuit Court and the cause was remanded with liberty to the plaintiff, if it was so advised, to amend the complaint by inserting the individual names of those constituting the company in whose name the action was brought, which

being done a new trial should be granted; and if the plaintiff declined to amend, then the case was to be dismissed without prejudice. 128 Fed. Rep. 369. Subsequently, the present writ of certiorari was granted.

Mr. Joseph Hirsh and *Mr. Charles W. Tillett,* with whom *Mr. Murray F. Smith* was on the brief, for petitioner:

Plaintiff was created a corporation by the terms of its charter, and its right to sue was thereby expressly authorized. *Perkins* v. *Sanders,* 56 Mississippi, 733, 739; *St. J. & Iowa R. R. Co. v. Shambaugh,* 166 Missouri, 567; *Hammond* v. *Strauss,* 53 Maryland, 1.

Plaintiff was at least a corporation *de facto. Tulare Irrigation District* v. *Shepard,* 185 U. S. 1, 13.

The corporate existence of plaintiff cannot be assailed, even if the capital stock was not paid before the commencement of business. 1 Clark & Marshall, Corp., 231, 257, citing *Stokes* v. *Findlay,* 4 McCrary, 205; *Bibb* v. *Hall,* 101 Alabama, 79; *Canfield* v. *Gregory,* 66 Connecticut, 917; *Union Water Co.* v. *Kean,* 52 N. J. Eq. 111. See also *Bank* v. *Stone et al.,* 38 Michigan, 779; *Att'y Gen'l* v. *Simonton,* 78 N. Car. 57; *Hackensack Water Co.* v. *De Kay,* 36 N. J. Eq. 548; *Eaton* v. *Aspinwall,* 19 N. Y. 121; *Rice* v. *Rock Island &c. R. R. Co.,* 21 Illinois, 93; *Burns* v. *Beck,* 10 S. E. Rep. 121; *McCandless* v. *Inland Co.,* 42 S. E. Rep. 449; *First Nat. Bank* v. *Almy,* 117 Massachusetts, 476; *Fargason* v. *Oxford Mercantile Co.,* 78 Mississippi, 65; *Oregonian R. R. Co.* v. *Oregon Ry. &c. Co.,* 23 Fed. Rep. 232; *Armour* v. *Bement,* 123 Fed. Rep. 56.

A failure to pay for the capital stock of a corporation cannot be made the basis of defense by a debtor of said corporation, and the question can only be raised by the State. Cases *supra* and *Smith* v. *Meridian & Ala. R. R. Co.,* 6 S. & M. 179; *Frost* v. *Frostberg Coal Co.,* 24 How. 278; *Smith* v. *Sheely,* 12 Wall. 358; *Kayser* v. *Bremen,* 16 Missouri, 88.

The failure to issue capital stock is immaterial. *Close* v. *Glenwood Cemetery,* 107 U. S. 385.

Defendant having contracted with the plaintiff as a corporation, and being now in the enjoyment of the fruits of such contract, is estopped to deny its corporate existence. *Casey* v. *Galli*, 94 U. S. 673, 680; *Andes* v. *Ely*, 158 U. S. 312, 322; *Debenture Co.* v. *Louisiana*, 180 U. S. 320, 328.

It is sufficient to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation, on a note, bond or other contract. 1 Clark & Marshall on Corporations, 231. Citing cases in Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Missouri, Nebraska, New York, Vermont, West Virginia, and see also *Dallas Co.* v. *Huidekoper*, 154 U. S. 654.

Even where there is a condition precedent, the right to recover is maintained. *Sherwood* v. *Alvis*, 83 Alabama, 115; *Smith* v. *Sheely*, 12 Wall. 358.

Where the failure to comply with the restrictions imposed by the statute does not by its terms vitiate and declare void the corporate acts, it is simply an inhibition and no one but the State can object. *Whitney* v. *Wyman*, 101 U. S. 392. And this right the State may waive. 2 Cook on Corp. § 636.

It is not essential to the existence of a corporation that certificates of stock be issued. 1 Cook on Corp., 5th ed., § 13.

Courts act with extreme caution in proceedings which have for their object the forfeiture of corporate franchises. Freeman in note to *State* v. *Atchison &c. R. R.*, 8 Am. St. Rep. 181.

Courts must construe the charter favorably and liberally for the corporation. *Harris* v. *Miss. Valley &c. R. R. Co.*, 51 Mississippi, 602.

Mr. Augustus H. Price, with whom *Mr. Charles Price*, *Mr. Armistead Burwell* and *Mr. Edwin Causler* were on the brief, for respondent:

The plaintiff was not a *de jure* corporation, as it had not been organized under the Mississippi statute. No stock had

been paid for, even if John T. Wells' testimony is taken as true. The pretended payment was not even colorable.

If there was no payment for the subscriptions for stock, there was necessarily no proper organization of the corporation, under the laws of the State of Mississippi, and, therefore, the Circuit Court had no jurisdiction, even though the defendant was estopped to deny the general corporate existence of the plaintiff. Morawetz, Corp., 1st ed., § 267, and cases cited; Am. Corp. Leg. Manual, 1902, 301; 1 Beach on Corp., 18, 26; *Bigelow* v. *Gregory,* 73 Illinois, 197; *Kaiser* v. *Lawrence Sav. Bank,* 56 Iowa, 104; *Hicks* v. *Converse,* 37 La. Ann. 484.

It is not sufficient to give the court jurisdiction, that the plaintiff is a *de facto* corporation, or a corporation by reason, merely, of an estoppel. It must be a *de jure* corporation.

The Federal courts have only limited jurisdiction. Their authorities and powers are strictly statutory. They can acquire jurisdiction of a case only in the manner pointed out by the statute. *Farrington* v. *Pillsbury,* 114 U. S. 138.

The statute requires that the plaintiff shall be a citizen of a State other than that of defendant, but there must be diverse *citizenship.* A corporation can become a citizen within the meaning of this statute only by being duly chartered and organized under the law of the State of its origin.

The question of plaintiff's citizenship was properly raised by the denial in the answer. Code N. Car. §§ 130, 260, 276; *S. P. Co.* v. *Denton,* 146 U. S. 202.

If there was no payment of the subscriptions for stock, then the plaintiff had no capacity to make any contract, and those alleged in the complaint are void, and cannot be enforced in any court. *Tube Works* v. *Improvement Co.,* 39 L. R. A. 810; *Empire Mills* v. *A. G. Co.,* 12 L. R. A. 366. The individual incorporators must be treated as partners. *Jones* v. *Hardware Co.,* 29 L. R. A. 143; *Bergeron* v. *Hobbs,* 96 Wisconsin, 641; *Burns* v. *Beck,* 10 S. E. Rep. 121.

Defendant is not estopped by dealing with the corporation

to deny that it has power to contract or to sue. *Doyle* v. *Miznir*, 3 N. W. Rep. 968; *Welland* v. *Hathaway*, 25 Am. Dec. 51; *Davis* v. *Stevens*, 104 Fed. Rep. 235; *Wechselberg* v. *Bank*, 64 Fed. Rep. 90.

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

As the plaintiff was not entitled to maintain its action in the Circuit Court unless it was a corporation of Mississippi, *Great Southern Fire-Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 454, 456, and the authorities there cited, the denial in the answer of knowledge or information sufficient to form a belief on that point put in issue the plaintiff's corporate character, within the meaning of the rule, no longer to be questioned, that for purposes of suing and of being sued in the courts of the United States the members of a corporation are to be deemed citizens of the State by whose laws it was created; and as the jurisdiction of the courts of the United States must always appear affirmatively, of record, it became necessary, under existing statutes and under the rules of practice and pleading in North Carolina, for the plaintiff to prove that it was a corporation of Mississippi. *Roberts* v. *Lewis*, 144 U. S. 653, 656; 17 Stat. 196, 197, c. 255, act of June 1, 1872; Rev. Stat. § 914; 18 Stat. 470, c. 137; act of March, 1875; Code of Civil Procedure, N. Car. §§ 133, 243, 260, 276; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202. It was so held, and correctly, by the Circuit Court of Appeals. 128 Fed. Rep. 369.

Was the plaintiff a corporation of Mississippi within the meaning of the above rule? In that State individuals may become incorporated for certain purposes under general laws. The first step there towards incorporation is to apply to the Governor for a charter, stating the purposes for which the corporation is to be created. That officer then takes the advice of the Attorney General as to the constitutionality and legality of the provisions of the proposed charter. If the Gov-

ernor approves the charter, and causes the Great Seal of the State to be affixed thereto by the Secretary of State, it would seem that the process of incorporation then becomes complete. Charters of incorporation in that State are required to be recorded in the office of the Secretary of State and in the office of the clerk of the Chancery Court of the county in which the corporation does business. Anno. Code of Miss. 1892, c. 25.

It appeared in evidence that W. L. Wells, John T. Wells and George Butterworth submitted to the Governor of Mississippi, to be referred to the Attorney General of the State, the following form of charter:

"§ 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure. § 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business. § 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and generally may have all powers conferred by Chapter 25 of the Annotated Code of 1892 necessary and requisite to carry out the purpose of said corporation. § 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers."

The Attorney General having certified that the proposed charter of incorporation was not repugnant to the constitution or laws of the State, it was approved by the Governor, and such approval was attested by the Secretary of State, the Great Seal of the State being thereto affixed. The Secretary thereupon certified under the Great Seal that the charter "incorporating the W. L. Wells Company, was, pursuant to the provisions of Chapter 25 of the Annotated Code, 1892, recorded in the Book of Incorporations in this office." It was also recorded in the office of the clerk of the proper Chancery Court.

The contention of the defendants in the court below was—and their contention here is—that the subscription of $10,000 to the capital stock of the W. L. Wells Company and the payment thereof, was a condition precedent to the company's becoming a corporation; that is, it could not become a corporation *de jure* until such subscription and payment. And this view was sustained by the Circuit Court of Appeals, which said in its opinion: "It is very clear from this that, having a charter like this, conditioned upon the payment of $10,000 in subscriptions, then these men undertook to exercise powers in the charter without fulfilling or attempting to fulfill the conditions precedent in the charter; that, even when they had made money in the business, they ignored the corporation altogether, and drew the money out of the business as if it belonged to them, and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed corporators went on in business, and contracted obligations in the name of the so-called corporation, which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law. And that the Wells Company had never, and

could not have, any legal existence. When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with." 128 Fed. Rep. 369, 372.

We are of opinion that the Circuit Court of Appeals erred in holding that the charter of the W. L. Wells Company made it a *condition* of its becoming a corporation that $10,000 of capital stock should be subscribed and paid for. The question was not as to the good faith of the incorporators, nor whether the company was organized in fraud of the law. Those were not matters to be inquired into in ordinary suits between the company and individuals or incorporations. If the organization of the company as a corporation was tainted with fraud, it was for the State, by some appropriate proceeding, to annul its charter. The question before the court below was whether the company was, technically, a corporation, and that depended upon the legal effect of the words of its charter. The first section of that charter expressly declares that the incorporators, their associates and assigns, "are *hereby created* a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure." These words can have but one meaning. They manifest the purpose of the legislature to create a corporation. Substantially the same words in a charter granted by Congress were held to create a corporation. *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46, 63. The second section of the company's charter did not modify the provisions of the first section. It did not *require* the payment of a given amount of stock subscriptions before the company should be considered *in esse* as a corporation. It did nothing more than confer the privilege or power of commencing business when a specified amount, less than the whole, of its authorized capital stock was subscribed and paid for. The company was created a corporation by the previous section,

with power in its corporate name to sue and be sued, contract and be contracted with; and, under the general statutes of the State, it came into existence as a corporation immediately upon its charter being approved by the Governor of Mississippi and such approval certified by the Secretary of State under the Great Seal of the State. If the commencing of the business for which it was incorporated before a certain amount of capital stock was subscribed and paid for was in violation of the company's charter, that was a matter for which it could be called to account by the State, and did not affect the existence in law of the company as a corporation. Of course, if the charter of the company had made it a *condition precedent* to its becoming a corporation that a certain amount of capital stock should be subscribed and paid for, a compliance with that condition would have been necessary before the company would have become a corporation entitled to sue and be sued in the courts of the United States. But, as we have seen, the charter in question prescribed no such condition. If the legislature had intended to withhold corporate existence until a given amount of capital stock was subscribed and paid for, that intention, we may assume, would have been manifested by clear language. We do not feel at liberty, by mere construction, to qualify the explicit declaration in the first section of plaintiff's charter as to the corporate existence thereby created. We therefore hold that under the statutes of Mississippi the only conditions precedent to the existence of the corporation were the approval by the Governor of the State of its proposed charter and the certification of that approval under the Great Seal of the State.

It is said that the interpretation we have given to the charter of the W. L. Wells Company is not in harmony with the principles announced by the Supreme Court of Mississippi. We are referred in support of this view to *Perkins* v. *Sanders*, 56 Mississippi, 733, 738, 739, which was a suit by a creditor to enforce the personal liability of stockholders for the debts of a certain company. But there is nothing in that case clearly indicating

that the Supreme Court of Mississippi would, if this question were before it, hold the requirement of the subscription of $10,000 of stock and its payment before commencing business to have been a condition precedent to the plaintiff becoming a corporation. That court, in the case cited, referred to a section of the charter of the company there in question, providing that the persons named in it, and all others who then were or might thereafter become associated with them, and their successors and assigns, "be, and they are hereby, created a body politic and corporate, under the name," etc.,—a provision like that found in the plaintiff's charter. The court said: "This was no proposition to create a corporation upon the performance of certain conditions, but it was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter, and this even was unnecessary, if, as it is probable, the corporators had applied for the grant of the charter, and thus accepted it in advance. . . . The distinction between the two classes of charters is thus seen to be that in the first class the charter is mere permission on the part of the legislature for the formation of a corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until those conditions have been performed, except such as may be expressly permitted by the charter; and, as to those acts, it would be considered that the corporation had an existence before its full investiture with its corporate franchises. In the latter class in which is this company the corporation is in existence for all the purposes of its creation from the beginning, except so far as there may be restraints placed on it by the charter, either expressly or by plain implication."

It thus appears that the Supreme Court of Mississippi, in the case referred to, decided that where acts are required to be performed before the corporation comes into existence, no corporation is created or can exist until those acts are performed. In this general view we entirely concur. But the

question remains whether the particular charter here in question made it a condition precedent to the existence of the W. L. Wells Company as a corporation, that a certain amount of its capital stock should be subscribed and paid for. As already indicated, we are of opinion that no such condition precedent was prescribed, and that under the statutes of Mississippi and independently of the subscription of a certain amount of stock and its payment, the plaintiff became, in law a corporation when the Governor approved its charter and the fact of such approval was certified by the Secretary of State under the Great Seal of Mississippi. It could not thereafter dispute its liability for acts done by it in its corporate name nor be denied the right to sue in that name.

As the Circuit Court of Appeals proceeded on different grounds as to the jurisdiction of the Circuit Court, its judgment must be reversed, and the case remanded, with directions to that court to set aside its own judgment, and for such further proceedings touching the merits of the case as may be consistent with this opinion and with law.

Reversed.

RIVERDALE COTTON MILLS, PETITIONER *v.* ALABAMA AND GEORGIA MANUFACTURING COMPANY.

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

No. 194. Argued April 5, 6, 1905.—Decided May 8, 1905.

A Federal court exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed, and may protect the title which it has decreed as against all parties to the original suit and prevent any of such parties from relitigating questions of right already determined.

Where parties litigate in a Federal court whose jurisdiction is invoked

on the ground of diverse citizenship, alleged and admitted, the judgment or decree which is entered is conclusive and cannot be upset by either of them in any other tribunal on the mere ground that diverse citizenship did not actually exist.

In an ancillary suit a party to the original action cannot challenge the jurisdiction of the Circuit Court in the original action on the ground that its admission of citizenship was an error and that a correct statement would have disclosed a lack of jurisdiction.

Although where two corporations of the same name, chartered by different States, exist and there has been no merger, the corporations are separate legal persons, the court may, where the circumstances as in this case justify it, look beyond the formal and corporate differences and regard substantial rights rather than the mere matter of organization.

Federal tribunals are not moot courts, and parties having substantial rights must, when brought before those tribunals, present those rights or they may lose them.

On February 7, 1866, an act passed the Alabama legislature incorporating five persons named, their associates and successors, as "The Alabama and Georgia Manufacturing Company." On March 21, 1866, the Georgia legislature incorporated the same individuals under the same name, "The Alabama and Georgia Manufacturing Company." The purposes of the two corporations were identical. Among others, the use of the water power of the Chattahoochee River, the boundary line between Alabama and Georgia, was contemplated, and the Georgia act specifically authorized the corporation "to carry on any of the business and manufactures, or any branch or branches of the same, in this State that said charter authorizes them to engage in or carry on in the State of Alabama." On January 2, 1884, the Alabama and Georgia Manufacturing Company executed a trust deed, conveying property, situate partly in Georgia and partly in Alabama, but practically only a single plant, to J. J. Robinson, W. C. Yancey and W. T. Huguley, as trustees, to secure the payment of sixty-five thousand dollars of the mortgage bonds. There is nothing in the trust deed to indicate whether it was executed by the Alabama corporation or the Georgia corporation, except it be the mention of West Point, Georgia, as the location of the company's office.

On February 28, 1890, the Huguley Manufacturing Company was incorporated under the laws of the State of Alabama, and subsequently acquired by purchase all the property included within the trust deed. Default having been made in the payment of interest on the bonds, Robinson, one of the trustees and a citizen of Alabama, on January 21, 1891, filed a bill of foreclosure in the Circuit Court of the United States for the Northern District of Georgia against the Alabama and Georgia Manufacturing Company, the Huguley Manufacturing Company, each of which was alleged to have been created under the laws of the State of Georgia and a resident and citizen of that State, and against W. T. Huguley, also averred to be a citizen of the State of Georgia, and all three residing within the Northern District of Georgia. In the bill the plaintiff alleged that Yancey, one of the trustees, was dead; that Huguley, the other trustee, was interested adversely to the bondholders, and that plaintiff was, therefore, the only one authorized to bring the suit. A vast amount of litigation concerning the property has followed the commencement of this foreclosure suit, as partially appears from the following references: *Robinson* v. *Alabama & G. Mfg. Co.*, 48 Fed. Rep. 12 (1891); *Robinson* v. *Alabama & G. Mfg. Co.*, 51 Fed. Rep. 268 (1892); *Alabama & G. Mfg. Co.* v. *Robinson*, 56 Fed. Rep. 690 (1893); *Robinson* v. *Alabama & G. Mfg. Co.*, 67 Fed. Rep. 189 (1894); *Alabama & G. Mfg. Co.* v. *Robinson*, 72 Fed. Rep. 708 (1896); *Robinson* v. *Alabama & G. Mfg. Co.*, 89 Fed. Rep. 218 (1898); *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 94 Fed. Rep. 269 (1899); *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 175 U. S. 726 (1899); *Riverdale Cotton Mills* v. *Alabama & G. Mfg. Co.*, 111 Fed. Rep. 431 (1901); *Huguley Mfg Co.* v. *Galeton Cotton Mills*, 184 U. S. 290 (1902); *In re The Huguley Mfg. Co.*, 184 U. S. 297 (1902); *Alabama & G. Mfg. Co.* v. *Riverdale Cotton Mills*, 127 Fed. Rep. 497 (1904).

On May 2, 1901, the Alabama and Georgia Manufacturing Company of Alabama and the Huguley Manufacturing Com-

pany of the same State filed their bill in the Chancery Court of the First District of the Northeastern Division of the State of Alabama, in which they alleged that the plaintiff, the Alabama and Georgia Manufacturing Company, was at one time the owner of the property included within the trust deed hereinbefore referred to; that it executed that deed to the parties named as trustees; that a foreclosure suit was commenced by one of the trustees, J. J. Robinson, in the United States Circuit Court for the Northern District of Georgia; that the parties named as defendants therein were the Alabama and Georgia Manufacturing Company, alleged to be a corporation organized under the laws of Georgia, the said Huguley Manufacturing Company, and W. T. Huguley. The bill set out with some detail the proceedings in the Circuit Court of Georgia, but alleged that they were null and void so far as concerns the title of the plaintiffs in that suit. The bill sought to redeem the property described from the lien of the bonds and trust deed. On June 10, 1891, this petitioner, a corporation which had acquired all the title to the property described in the trust deed passing under the foreclosure proceedings hereinbefore referred to, filed in the Circuit Court for the Northern District of Georgia an ancillary bill to restrain the further prosecution of the suit in the state court in Alabama. A temporary injunction was issued, which on final hearing was made perpetual. Thereupon defendants took an appeal to the Circuit Court of Appeals for the Fifth Circuit, which reversed the decree of the Circuit Court and ordered that the case be remanded to that court with instructions to dismiss the bill. The case was then brought here on certiorari.

Mr. Louis D. Brandeis, with whom *Mr. Thomas H. Watts* and *Mr. William H. Dunbar* were on the brief, for petitioner.

Mr. Marion Erwin, with whom *Mr. John T. Morgan*, *Mr. John M. Chilton*, *Mr. William S. Thorington* and *Mr. Robert Porter Shiek* were on the brief, for respondents.

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

For over ten years, from January 21, 1891, the date of the filing of the original bill, litigation was carried on in the Circuit Court of the United States for the Northern District of Georgia, and in appellate courts, in the foreclosure of a trust deed executed by the Alabama and Georgia Manufacturing Company. In the course of that litigation decrees were entered and reversed, sales were made and set aside, possession of property was transferred and retransferred, accountings had as to the proceeds of property in possession, and when it seemed that at last litigation was at an end, the foreclosure consummated and the title established in the purchaser, we are told that it all amounted to nothing; that parties, lawyers and courts have been spending their time and labor in simply beating the air, the title to the property conveyed by the trust deed being exactly where it was before the litigation commenced, and the party which had acquired possession by that litigation subject to an obligation to account as a mortgagee in possession.

Upon what is this contention based? The respondents say that the property conveyed by the trust deed was all in Alabama, although the deed recites that part of it was in Georgia; that it originally belonged to the Alabama company; that that company executed the trust deed, although the resolution incorporated in the trust deed purports to have been passed at a meeting of the directors held at the office of the company in West Point, Georgia; that the Alabama company was not made a party to the foreclosure proceedings and could not have been, because the plaintiff was a citizen of Alabama, and making the Alabama company a defendant would have ousted the court of jurisdiction; that the subsequent owner of the property, another Alabama company, was also not made a party to those proceedings, and that therefore they were *res inter alios acta*, and in no way binding upon either Alabama company. It is also insisted by the respondents that the so-

called ancillary bill filed by the petitioner was not in any sense of the term an ancillary but in fact an original bill, and that under section 720, Rev. Stat., the Federal court had no power to restrain the further proceedings in the state Chancery Court.

Prima facie, the United States Circuit Court had jurisdiction of the foreclosure bill. Diverse citizenship was alleged and admitted, and the relief sought was the foreclosure of a trust deed covering property partially in Georgia and partially in Alabama. The bill in the state court challenged the decree in the United States Circuit Court, denied its efficacy to transfer title, on the ground that the Alabama and Georgia Manufacturing Company (the grantor in the trust deed and the original owner of the property) and the Huguley Manufacturing Company (a purchaser and subsequent owner) were both corporations of Alabama and citizens of the same State with the plaintiff, whereby a case was presented of which the Federal courts could not take jurisdiction. The specific allegations were these:

"That a corporation, known as the 'Alabama and Georgia Manufacturing Company,' alleged to be a corporation organized under the laws of Georgia only, and said Huguley Manufacturing Company, together with the said W. T. Huguley, were the sole defendants to said bill, said W. T. Huguley being made defendant as co-trustee, alleged to be interested adversely. The Alabama and Georgia Manufacturing Company, originally chartered and organized as a corporation under said act of the general assembly of the State of Alabama, never has been made a defendant thereto, and never appeared as a party to said cause, the president of said corporation, to wit, W. H. Huguley, himself likewise a citizen and resident of the county of Chambers, State of Alabama, never having been served with notice either of said alleged default of interest, as expressly required under the terms of the trust deed, or notice of said suit of foreclosure against said Alabama and Georgia Manufacturing Company. No attempt was made, by either

direct or ancillary proceedings, to subject the property lying in the State of Alabama to this suit. A portion of the property was erroneously described in the said mortgage as lying within the county of Harris, in the State of Georgia, while the orators aver that all of said property was and is situated within the county of Chambers, in the State of Alabama.

"The property was not advertised in the State of Alabama, nor was any sale or pretense of sale conducted in said State."

And again —

"The Huguley Manufacturing Company, a corporation, avers that it purchased and acquired all the property herein above described subject to said mortgage, and is now the owner of the same, subject to said mortgage."

The answer filed to the ancillary bill alleges that both plaintiffs in the state court were corporations chartered under the laws of Alabama. It further states:

"That while said Alabama and Georgia Manufacturing Co. may have been incorporated in the State of Georgia, it was also incorporated in the State of Alabama prior to the incorporation in the State of Georgia. And these respondents aver that there never was, by the action of the State of Georgia and Alabama, any merger or consolidation of said two corporations. They, therefore, allege that said Alabama and Georgia Manufacturing Company, incorporated under the laws of Alabama, was a distinct and separate legal entity from the Alabama and Georgia Manufacturing Company incorporated under the laws of Georgia.

* * * * * * * *

"That while said Huguley Manufacturing Company was alleged in said bill to have been incorporated under the laws of Georgia, the defendants aver that as a matter of fact it was never so incorporated."

It also avers that the property is all in the State of Alabama. The case was submitted on bill and answer.

It thus appears that a party carries on a litigation in a Federal court on its merits, and when beaten in that court goes

into a state court and claims that, by reason of his own untruthful admission of citizenship, the Federal court assumed a jurisdiction which in fact it could not take, and that all the proceedings in that court must go for naught. Under such circumstances there can be no doubt that the Federal court may inquire and determine whether its proceedings were a nullity, and such inquiry is not an original proceeding, but ancillary to those which have already been had. In other words, a Federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed. It may protect the title which it has decreed as against every one a party to the original suit and prevent that party from relitigating the questions of right which have already been determined. *French, Trustee,* v. *Hay,* 22 Wall. 250; *Cole* v. *Cunningham,* 133 U. S. 107; *Root* v. *Woolworth,* 150 U. S. 401. In this case, on page 410, it was said:

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading, 9th ed., § 338: 'A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution.' . . .

"The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties, is well settled. Story's Eq. Jur. § 959; *Kershaw* v. *Thompson,* 4 Johns. Ch. 609, 612; *Schenck* v. *Conover,* 13 N. J. Eq. [2 Beasley] 220; *Buffum's Case,* 13 N. H. 14; *Sheperd* v. *Towgood,* Tur. & Rus. 379; *Davis* v. *Black,* 6 Beav. 393. In *Kershaw* v. *Thompson,* the authorities are fully reviewed by Chancellor Kent, and need not be reëxamined here."

See also *Julian* v. *Central Trust Company,* 193 U. S. 93,

which is very much in point. There, after a suit in a Federal court for foreclosure of a mortgage resulting in decree, sale, confirmation and delivery of possession to the purchaser, a state court attempted to subject the property to a judgment rendered in that court against the mortgagor on a cause of action arising subsequently to the delivery of possession under the foreclosure proceedings. And it was held within the competency of the Federal court to restrain the action in the state court in order to protect the title it had conveyed by the foreclosure proceedings. In the opinion it was said (p. 112):

"If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because in the view of the state court it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal court and to render effectual its decree. *Central Trust Co. of New York* v. *St. Louis, Arkansas &c. Railroad Co.*, 59 Fed. Rep. 385; *Fidelity Ins. Trust & Safe Deposit Co.* v. *Norfolk & W. R. R. Co.*, 88 Fed. Rep. 815; *State Trust Co.* v. *Kansas City &c. R. R. Co.*, 110 Fed. Rep. 10.

"In such cases where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon* v. *Terry*, 36 Fed. Rep. 337, per Mr. Justice Field; *French* v. *Hay*, 22 Wall. 250; *Deitzsch* v. *Huidekoper*, 103 U. S. 494."

It must be borne in mind in this connection that the Huguley Manufacturing Company was made a party defendant and appeared in the original foreclosure suit, and also that it had purchased the property and owned it subject to the trust deed. So the bill in the state court specifically avers, and the record of the proceedings in the foreclosure suit shows that it took an active part in the litigation. It admitted in that litigation that it was a citizen of Georgia. It now goes into a state court

and, averring that it is a citizen of Alabama, the State of which the plaintiff was a citizen, contends that the United States court in Georgia had no jurisdiction; but having been in that United States court litigating the case on its merits and its rights there determined, that court has power to protect its decree as against any action which such litigant may take in any other court.

It must also be remembered that the trust deed described the property conveyed as situated partly in Georgia and partly in Alabama. The Federal court sitting in Georgia had jurisdiction to foreclose that trust deed. *Muller* v. *Dows*, 94 U. S. 444. Even if there were errors or irregularities in the proceedings they would not affect the matter of jurisdiction, and as those proceedings have been sustained on appeal we may assume that they were free from errors.

Where parties litigate in a Federal court, whose jurisdiction is invoked on the ground of diverse citizenship, and that diverse citizenship is alleged and admitted, the judgment or decree which is entered is conclusive and cannot be upset by either of them in any other tribunal on the mere ground that there was in fact no diverse citizenship. *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Hancock* v. *Holbrook*, 119 U. S. 586. In *Des Moines Navigation Company* v. *Iowa Homestead Company*, 123 U. S. 552, 557, we said:

"It was settled by this court, at a very early day, that, although the judgments and decrees of the Circuit Courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different States from the defendants, yet that they were not nullities, and would bind the parties until reversed or otherwise set aside."

In *Dowell* v. *Applegate*, 152 U. S. 327, the validity of a decree rendered by a Federal court was challenged on the ground of a want of jurisdiction. In the opinion the question was thus stated (p. 337):

"If the Federal court erred in assuming or retaining jurisdiction of Dowell's suit—a question not necessary to be examined—would it follow that its final decree, being unmodified and unreversed, can be treated as a nullity when assailed collaterally by one who was a party to the suit in which it was rendered?"

And after quotations from several authorities the conclusion was reached (p. 340):

"This disposes of the first objection urged against the decree in the Federal court under which Dowell purchased. That decree cannot be treated, in this suit, as void for want of jurisdiction."

See also *Evers* v. *Watson*, 156 U. S. 527.

Some of these cases, as appears from the quotations, go to the extent of holding that, although on the face of the record, jurisdiction does not appear, yet the judgments or decrees are binding upon the parties thereto and cannot be assailed collaterally. *A fortiori*, must it be true that when on the face of the record jurisdiction appears the judgment or decree must be held conclusive against a collateral attack by either of the parties thereto. The Huguley Manufacturing Company was, as is conceded in these ancillary proceedings, a party to the original litigation, and cannot now be permitted to challenge the jurisdiction of the Federal court on the ground that its admission of citizenship was an error, and that a correct statement would have disclosed a lack of jurisdiction.

As appears from the record, the Huguley Manufacturing Company was the owner of the equity of redemption at the time the foreclosure suit was instituted. It, therefore, was unnecessary to make the original grantor in the trust deed a party to the litigation. All that could be accomplished by its presence would be a decree putting at an end all question of its interest, and, possibly, if a sale did not pay the debt, a judgment over for the deficiency. But neither of these results would affect the jurisdiction of the court, so far as the owner of the equity of redemption is concerned, or impede

the transfer of the title by foreclosure and sale to the purchaser.

Under the averments of the ancillary bill and answer it must be accepted that there were two corporations under the same name, the Alabama and Georgia Manufacturing Company, one chartered in Alabama, and the other in Georgia. It is doubtless true that, for the purposes of jurisdiction in the Federal courts, these corporations are deemed to be citizens of the States in which they were organized. It is also true that there was no formal merger of the two corporations into one; that they remained in law two separate legal persons, and that each was entitled to corresponding rights. But courts will sometimes look beyond the formal and corporate differences. Especially is this true of courts of equity. Substantial rights will be regarded rather than the mere matter of organization. *Lehigh Mining & Manufacturing Company* v. *Kelly*, 160 U. S. 327, illustrates this. There it appeared that the Virginia Coal and Iron Company was a corporation organized under the laws of Virginia, and therefore a citizen of that State; that it claimed title to certain lands in Virginia in the possession of the defendant, also a citizen of Virginia. There being no diversity of citizenship, an action could be maintained only in a court of the State. To avoid this and to place the litigation in the Federal court the stockholders of the coal and iron company organized under the laws of Pennsylvania the Lehigh Mining and Manufacturing Company. The former company thereupon conveyed all its rights to the latter, which brought its action for the recovery of the property in the United States Circuit Court for the District of Virginia. While it was conceded that the purpose with which a party makes a conveyance does not affect the title of his grantee, and while it was not doubted that the two corporations were separate entities, yet it was also held that, inasmuch as the stockholders in each were the same, and the organization of the Pennsylvania company was only for the purpose of getting the litigation into the Federal court, it was a fraud on the jurisdiction of that

court, and its order dismissing the action for want of jurisdiction was affirmed. It was said in the opinion (p. 339):

"The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—*and no other purpose is stated or suggested*—of creating a case for the Federal court, must he regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case."

In the case before us there were also two corporations—distinct legal entities—yet bearing the same name, the Alabama and Georgia Manufacturing Company. It may well be doubted whether any injustice has been done to the Alabama company by the long litigation. In the brief of one of the counsel for respondents, after stating the organization of the Alabama company, it is said:

"In order to carry out the general plans and purposes of the incorporators and organizers of the said *Alabama* company, thus already organized and established, it was deemed necessary and important that these same original incorporators and organizers of the said Alabama corporation and their successors should control the water rights of the Chattahoochee River, not only through the riparian rights already granted them on the western or Alabama side of the river by the State of Alabama, but through those of the State of Georgia on the *eastern* side of the river as well, *i. e.*, at the point on the eastern bank opposite where their manufacturing plant in Alabama had already been located. These incorporators had in view the then purpose of utilizing, if not immediately, at least at some future time, the recognized fine water power of the intervening Chattahoochee River, by the proposed acquisition of other lands on the eastern or Georgia side of the river, and the erection thereon of another *independent* manufacturing plant, and

in such event, of using Columbus, or La Grange, Georgia, for *its* offices and shipping points. To that end the said incorporators did not elect to ask the legislature of Georgia for any express statutory license authorizing the *preëxisting Alabama* company to exercise in Georgia the same powers and rights which had been given it by the parent State of its creation (Alabama), *i. e.*, that it be '*domesticated*' in Georgia by the laws of that State, but the application was for the creation of a *separate* and *independent* corporation under the same name; and on March 21, 1866, 'The Alabama and Georgia Manufacturing Company,' as a second, distinctly independent corporation, was granted a charter by the legislature of the State of Georgia."

Whatever may have been within the scope of the ulterior purpose of the Georgia incorporation, the immediate purpose was the development of a single plant, and that purpose was carried into effect. By the charters the office of the Alabama company was located in Alabama and that of the Georgia company in Georgia. When the trust deed was executed it was executed in the name which was common to both corporations, but in pursuance of resolutions passed at an office in Georgia. It would be unjust to impute to these incorporators a design to mislead the holders of the indebtedness of the company by giving to them a security which rested alone upon the inconsiderable fraction of property then located in Georgia, when, on the face of the instrument, it purported to convey the entire plant. Evidently the proceedings were had on the supposition that there was but a single entity. That entity was indebted, and it gave the trust deed as security therefor. When the foreclosure suit was filed it would be also an unjust imputation to suppose that the owners of the property carried on the litigation for years, knowing that the proper parties were not present in court and that the outcome of that litigation meant nothing. Evidently this defense, springing from the existence of two corporations, was an afterthought, when all other resources had failed, and equity may well say that to

sustain the present contention would give judicial sanction to inexcusable trifling with courts. It is always to be understood that Federal tribunals are not moot courts, and that parties having substantial rights must when brought before those tribunals present those rights or may lose them.

The judgment of the Court of Appeals is reversed and that of the Circuit Court is

Affirmed.

HOLDEN *v.* STRATTON.

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

No. 209. Submitted April 6, 1905.—Decided May 8, 1905.

The statute of the State of Washington, Laws of 1897, p. 70, exempting proceeds or avails of all life insurance from all liability for any debt, is not in conflict with the constitution of that State as construed by its highest court and exempts the proceeds of paid-up policies, and endowment policies, payable to the assured during his lifetime.

Courts will not read into a broadly expressed state statute of exemption limitations which do not exist therein because they do exist in similar statutes of other States or because they deem the limitations equitable. To do so would not be construction of the statute but legislation; and the broad terms of the statute show an intention of the legislature of the State to adopt broader and more comprehensive exemptions than those adopted by the other States.

Policies of insurance which are exempt under the law of the State of the bankrupt are exempt under § 6 of the bankrupt act of 1898, even though they are endowment policies payable to assured during his lifetime and have cash surrender values, and the provisions of § 70*a* of the act do not apply to policies which are exempt under the state law.

It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to exemption laws of the States.

SEPARATE proceedings in bankruptcy were begun in the District Court of the United States for the District of Washington, Northern Division, against Daniel N. Holden and

Lizzie Holden, his wife. They were consolidated. Both the parties were adjudicated to be bankrupt, and J. A. Stratton became the trustee of both estates.

All the liabilities of the bankrupts were contracted between the first day of September and the first day of December, 1900, and the creditors of each were the same. There were two policies upon the life of Daniel N. Holden, one for $2,000, the other for $5,000, issued by the same company. Both bore date June 15, 1894, having been issued as the result of an arrangement by which the insured and his wife as the beneficiary surrendered a policy for $10,000, dated May 21, 1890.

The policy for $2,000 was a full-paid, non-participating one, and the amount became due only upon the death of the insured, and was then payable to the wife, or in the event she did not survive her husband, to his executors, administrators or assigns. The policy for $5,000 was on what was termed the semi-tontine plan. An annual premium of $233.80 was required to be paid for ten years from the date of the previous policy, which had been surrendered, that is, until May 21, 1900, and therefore at the date when the bankrupts contracted the debts set forth in their schedules and at the date of the adjudications in bankruptcy, this period had expired and no further payment of premiums was necessary. Upon the death of the insured the amount of the policy was to be paid to the wife as the beneficiary, or, in the contingency of her prior decease, to the executors, administrators or assigns of the insured. It was provided, however, that upon the completion of the tontine dividend period of twenty years—on May 21, 1910—if the insured was then alive, he or his assigns, if creditors, might surrender the policy and receive its full cash value, or a non-participating policy, payable to the original beneficiary, or if she was not alive, to the executors, administrators or assigns of the insured, or the option was given to keep the policy in force and to withdraw the surplus to the credit of the policy in cash, or use the same to purchase additional insurance.

The bankrupts made application to have these policies set

aside to them, because, it was asserted, they were exempt by the law of the State of Washington. This was resisted by the trustee upon the ground that the policies had a cash surrender value of $2,200, which it was the duty of the bankrupts to pay to the trustee as a condition precedent to the exemption of the policies. The referee sustained the claim of the trustee. His ruling was reversed by the District Court. On a petition for revision the Circuit Court of Appeals held that the bankrupts were obliged to pay the cash surrender value as asserted by the trustee. 113 Fed. Rep. 141. An appeal was prosecuted to this court and was dismissed. 191 U. S. 115. This writ of certiorari was then allowed. 193 U. S. 672.

Mr. P. P. Carroll and *Mr. John E. Carroll* for petitioners:

The absolute and unqualified rule of exemption as declared in § 6 of the bankruptcy law is negatived by the proviso in § 70, and the policies are exempt. *Steele* v. *Buel*, 104 Fed. Rep. 968; *Pulsifer* v. *Hussey*, 54 Atl. Rep. 1076; *Lockwood* v. *Exchange Bank*, 190 U. S. 294. *Re Scheld*, 104 Fed. Rep. 870; *Re Lange*, 91 Fed. Rep. 361, do not apply. Exemption statutes are to be liberally construed. *Packing Co.* v. *Jeff*, 11 Washington, 466; *Re Kane*, 127 Fed. Rep. 552.

The state law must, independently of other authority, control the decision in this case. *Re Wilson*, 123 Fed. Rep. 20. For definition of cash surrender value see *Pulsifer* v. *Hussey*, *supra*, and *Re Welling*, 113 Fed. Rep. 189.

Congress has no power to abrogate state exemptions. *Re Heilbron*, 14 Washington, 536; Cooley's Const. Lim. 29, 61; *Re Beckerford*, 1 Dillon, 45.

Mr. Frederick Bausman and *Mr. Hugh A. Garland* for respondent:

Supposing these not to be cash surrender policies they are property capable of passing to the trustee. Section 70*a*, bankrupt act; *Page* v. *Edmunds*, 187 U. S. 596; *Fuller* v. *N. Y. Fire Ins. Co.*, 184 Massachusetts, 12.

As to whether policies paid up like these, and yet not im-

mediately cash surrender policies, pass to the trustee, see *In re Slingluff*, 106 Fed. Rep. 154; *In re Welling*, 113 Fed. Rep. 189; *In re Diack*, 100 Fed. Rep. 770; *Ladd* v. *Union Insurance Company*, 116 Fed. Rep. 878; *In re Boardman*, 103 Fed. Rep. 783; *In re Martens*, 131 Fed. Rep. 972; *Gould* v. *N. Y. Life Ins. Co.*, 132 Fed. Rep. 927.

If the policies are of the cash surrender sort, § 70*a*, which would hold them for the trustee, does not give way to the state exemption clause. Compare *In re Welling*, 113 Fed. Rep. 189, with *In re Boardman*, 103 Fed. Rep. 783.

Supposing the estate exemption clause applicable, the Washington law does not mean that endowment policies are exempt to the insured debtor in his own lifetime, and that any kind of policy whatever is exempt from the creditors of a beneficiary also.

The law should receive a sensible construction. *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Kirby*, 7 Wall. 482; *Heydenfeldt* v. *Mining Co.*, 93 U. S. 634; *Scott* v. *Deweese*, 181 U. S. 202, affirming 89 Fed. Rep. 843; *Lee Kan* v. *United States*, 62 Fed. Rep. 914; *Chinese Merchants' Case*, 13 Fed. Rep. 605; *Lau Ow Bew* v. *United States*, 144 U. S. 47.

Thirty-five States and Territories have passed laws exempting life insurance, of which twenty-four have exempted the insurance as a fund, not for the insured, but for the beneficiary.

When this Washington statute was passed, twenty-four of these thirty-five statutes did not intend that the insured should endow himself with life insurance for his own uses while living, and the same statutes, while making the insurance exempt to *the wife*, as against his creditors, made no such provision as that she might have creditors too and hold the proceeds free. These statutes are: Arkansas, Sandels and Hills Code, 1894. § 4944; Delaware, Code, 1893, ch. 76, § 3; Dist. of Col., Code, 1902, § 1162; Florida, Rev. Stat., 1892, § 2347; Hawaii, Civil Laws, 1897, § 1903; Illinois, 2 S. & C. Ann. Stat., 1896, p. 2259, ch. 73, § 189; Indian Territory, Stat., 1899, § 3023; Maryland, 1 Gen. Laws, §§ 5, 8, 9, p. 803; Michigan, Comp. Laws,

1897, § 8695; Mississippi, Ann. Code, 1892, § 1964; Missouri, Rev. Stat., 1899, § 7895, p. 1842; New Jersey, 2 Gen. Stat., 1896, p. 2019; New Mexico, Comp. Laws, 1897, § 2042; New York, Rev. Stat., 1 Code and Gen. Laws, 3d ed., Birdseye, p. 1046; Domestic Relations Law, Art. 3, § 22; Pennsylvania, 1 Pepper & Lewis Dig., 1896, § 91, col. 2383; Ohio, 2 Bates' Ann. Statutes, 2d ed. §§ 3628, 3629; Oklahoma, 1 Stat., 1903, p. 795; Rhode Island, Pub. Stat., ch. 166, § 21; South Dakota, Rev. Code Civil Pro., 1903, § 347, p. 929; South Carolina, 1 Code, 1902, § 1824; Tennessee, Ann. Code, 1 Grayson, 1895, § 2294; Vermont, Stat., 1894, § 2653; West Virginia, Code, 1887, ch. 66, § 456.

Of these States some further restricted the thing by making such exemption to the beneficiary only when a wife, others only to a small sum, a few hundred dollars, under any circumstances.

See in comparison the sweeping monstrosity possible under a liberal interpretation of the Washington law, "the proceeds or avails of all life insurance." To the insured while he lives if he wants to endow himself, to the insured bankrupt from others if they choose to endow him, no limit either, in any amount.

The other eleven States afford no precedent for this. Five of them: Connecticut, Rev. Stat., 1902, § 4548; Kentucky, Stat., 1894, § 654; Massachusetts, 2 Rev. Laws, 1902, ch. 118, § 73, p. 1154; New Hampshire, Pub. Statutes, 1901, ch. 171, § 1; Wisconsin, Stat., 1898, § 2347, exempt the policy in the wife's favor only against creditors of the husband, like the other States, or of the person paying the premium. North Carolina and Georgia, are too obscure to be made out upon this point at all. Alabama, 1 Code, 1896, § 2607; Iowa, Code, 1897, § 1805; Kansas, Gen. Stat., 1901, § 3463; Maine, Rev. Stat., 1903, ch. 49, § 106. In Maine the exemption amounts to only $150. And see *Smealey* v. *Felt*, 43 Iowa, 607; *Murray* v. *Wells*, 53 Iowa, 256.

As life insurance is a fund realizable by death and not by

any one during his lifetime, the term excludes endowment policies payable during life of insured. *Talcott* v. *Field*, 52 N. W. Rep. 400.

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

The law of the State of Washington upon which the bankrupts relied to sustain the exemption of the policies was originally enacted in 1895 (Laws of Washington, 1895, p. 336), and was reënacted in 1897. Laws of 1897, p. 70. The original act provided "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt," and the amendment of 1897 enlarged this act by making it also applicable to accident insurance.

The Circuit Court of Appeals held that the policies were not exempt, even although embraced by the state exemption, because of the requirements of section 70 of the bankrupt act of 1898. This was sustained upon the theory that section 6 of the bankrupt act, adopting the exemption laws of the several States, was modified, as to life insurance policies, by a proviso found in section 70*a*. In addition, in this court it is insisted on behalf of the trustee that, even although the construction of the bankrupt act adopted by the Circuit Court of Appeals was a mistaken one, nevertheless the policies were not exempt, first, because the law of Washington making the exemption was in conflict with the constitution of that State; and, second, because the law, even if valid, did not authorize the exemption of policies of the character of those here involved.

As section 6 of the bankrupt act gives effect to the exemptions allowed by the state law, it follows that the contentions that there was no valid state law exempting insurance policies, or that the exemption here claimed is not embraced within the state law, if such law be valid, lie at the threshold of the case, and must be disposed of before we come to consider the true interpretation of the bankrupt law.

To decide the contentions involves purely state and not Federal considerations. No decision of the Supreme Court of the State of Washington holding the exemption law to be invalid because repugnant to the state constitution has been referred to. On the contrary, in *In re Heilbron's Estate*, 14 Washington, 536, the exemption law in question was considered and upheld by the Supreme Court of Washington. In that case the court maintained the contention that to cause the provisions of the statute to retrospectively apply to debts which had been contracted prior to the passage of the act would render the act unconstitutional, both from the point of view of the Federal as well as the state constitution, and therefore that the law must be construed as having only a prospective operation. All the reasoning, however, of the opinion of the court by which the conclusion referred to was reached assumed as a matter of course that the law, if operating prospectively, was not an unconstitutional exercise of power by the legislature. And it is also worthy of remark that the amendment including accident insurance was adopted by the legislature of Washington subsequent to the decision in *In re Heilbron's Estate*. Of course, as the question of the repugnancy of the statute to the constitution of Washington upon the grounds now asserted was not presented in that case, the decision cannot be said to be conclusive of the question. But it has its due persuasive force.

Considering the contention, however, as an original question, we think its unsoundness is quite clear. The fallacy which the proposition embodies consists in presupposing that because the constitution of the State of Washington provides that the legislature "shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families," thereby a limitation was imposed upon the general power of the legislature to determine the amount and character of property which should be exempt. Two cases are referred to as supporting the contention. *In re How*, 59 Minnesota, 415; *Skinner* v. *Holt*, 9 S. Dak. 427. But those

cases were based upon constitutional provisions widely different from the one here relied upon. To the contrary, in California, where a constitutional provision obtains identical with the one we are considering (const. Cal. article XVII, sec. 1), it has been decided that the character and amount of property which shall be exempt from execution is "purely a question of legislative policy." *Spence* v. *Smith,* 121 California, 536. And it is further to be observed that the legislature of California has acted under that assumption, and has in effect exempted life insurance policies from execution. Thus it is provided in the Civil Code of California as follows:

"SEC. 3470. Property exempt.—Property exempt from execution and insurances upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares as intention that they should pass thereby. En. March 21, 1872."

Conceding the constitutionality of the statute, it is next insisted that it does not embrace an exemption of the avails of the policies in question. The arguments supporting this contention are somewhat involved, but are all embraced in the following propositions: First, life insurance, it is said, in its strictest and technical sense, relates only to a fund realizable by death, and therefore the words "all life insurance," in the Washington statute, must be given that restricted meaning, hence the statute is inapplicable to one of the policies which partakes of the nature of an endowment. Second, exemptions of life insurance policies, it is asserted, do not generally protect the avails of insurance from pursuit by creditors of the insured, where the proceeds of the policies are payable to his estate, nor do they protect the avails of insurance from pursuit by the creditors of the wife of the insured or other beneficiary. The application of these propositions is based upon the fact that in both of the policies the wife—one of the bankrupts—was named as a beneficiary in the event of surviving her hus-

band, and in one of the policies the husband was entitled, if he survived the twenty years' period, to surrender the policy and receive its cash value.

To support the propositions the law of many States, limiting the exemption of the proceeds of life insurance policies to the cases specified, are referred to, and the argument is that, because in such States there are such statutes, a similar limitation should be read by construction into the Washington statute. But the error in the argument is manifest. It is not to be doubted that the broad terms of the statute, as ordinarily understood, embraced both of the policies, and it would not be construction but legislation to restrict the meaning of the statute in accord with narrower legislation in other States, because in the judgment of a court it might be deemed equitable to do so. The wide departure from the legislation of many of the other States, shown by the unrestricted terms of the Washington statute, instead of manifesting the intention of the legislature of that State to narrow the exemption to conform to the statutes of other States, on the contrary conclusively shows the intention of the Washington legislature to adopt a broader and more comprehensive exemption. And light upon the intention to give a broad and popular meaning to the term life insurance is shown by the amendment exempting the avails of accident policies, which ordinarily, in the event death does not result, is payable to the insured. And it may also be observed in this connection that the policies considered by the Supreme Court of Washington in *In re Heilbron's Estate, supra,* were payable on the death of the insured to his executors, and no intimation was given in the opinion that policies of that character were not within the terms of the exempting statute.

The policies then being exempt by the state law, we are brought to consider the question whether they were exempt under the bankrupt act of 1898.

As we have said, section 6 of the act adopts, for the purposes of the bankruptcy proceedings, the exemptions allowed by the

laws of the several States. The language so providing is as follows:

"SEC. 6. Exemptions of Bankrupt.—*a*. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

It is beyond controversy that if the section just quoted stood alone the policies in question would be exempt under the bankrupt act. The contention that they are not arises from what is assumed to be a limitation imposed upon the terms of section 6 by a proviso found in section 70*a* of the act. We quote that section in full, italicising the provision which it is deemed operates to take the proceeds or avails of policies of insurance out of the control of section 6:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interest in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold,*

own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Conflicting views as to the operation upon section 6 of the proviso in section 70*a* referred to have been expounded by the Circuit Courts of Appeal. Two of the leading cases are *Steele* v. *Buel*, 104 Fed. Rep. 968, holding that the proviso does not qualify the exemptions accorded by section 6, and the other decision by the Court of Appeals of the Ninth Circuit, in *In re Scheld*, 104 Fed. Rep. 870, holding that the effect of the proviso was to limit, as to policies of insurance, the broad terms of section 6, adopting the state exemption laws.

Considering the matter originally, it is we think apparent that section 6 is couched in unlimited terms, and is accompanied with no qualification whatever. Even a superficial analysis of section 70*a* demonstrates that that section deals not with exemptions, but solely with the nature and character of property, title to which passes to the trustee in bankruptcy. The opening clause of the section declares that the trustee after his appointment shall be vested "by operation of law with the title of the bankrupt, . . . except in so far as it is to property which is exempt," and this is followed by an enumeration under six headings, of the various classes of property which pass to the trustee. Clearly, the words "except in so far as it is to property which is exempt," make manifest that it was the intention to exclude from the enumeration property exempt by the act. This qualification necessarily controls all the enumerations, and, therefore, excludes exempt property from all the provisions contained in the respective enumerations. The meaning now sought to be given to the proviso cannot in reason be affixed to it without holding that the words "except in so far as it is to property

which is exempt," do not control and limit the proviso. But to say this is to read out of the section the dominant limitation which it contains, and, therefore, to segregate the proviso from its context and cause it to mean exactly the reverse of what, when read in connection with the context, it necessarily implies.

It is, however, argued that unless the proviso be given the import attributed to it, and be treated as not subject to the limitation implied by the words creating the exception as to exempt property, that it becomes meaningless, and hence, under the rule of construction which commands that effect must be given if possible to all parts of a statute, the proviso must be construed as wholly disconnected from the clause as to exempt property. The premise upon which this proposition rests is a mistaken one. As section 70*a* deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso, would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve.

And the meaning which we deduce from the text and context of the proviso is greatly fortified by obvious considerations of public policy. It has always been the policy of Con-

gress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws. This was cogently pointed out by Circuit Judge Caldwell, in delivering the opinion in *Steele* v. *Buel*, where he said (104 Fed. Rep. 972):

"From the organization of the Federal courts under the judiciary act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the State. Judiciary act of 1789, 1 Stat. 93, c. 21; *Wayman* v. *Southard*, 10 Wheat. 1, 32, 6 L. ed. 253; *Lamaster* v. *Keeler*, 123 U. S. 376; *S. C.*, 8 Sup. Ct. 197, 31 L. ed. 238; *Dartmouth Sav. Bank* v. *Bates* (C. C.), 44 Fed. Rep. 546. . . . The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867 (section 5045, Rev. Stat.) but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule observed from the creation of our Federal system should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction."

There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words cash surrender value as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867, *In re Newland*, 6 Ben. 342; *In re McKinney*, 15 Fed. Rep. 535, and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence

that construction may have, as the question is not necessarily here involved, we do not expressly decide it.

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

MR. JUSTICE MCKENNA took no part in the decision of this cause.

HARRIS *v.* BALK.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 191. Argued April 4, 1905.—Decided May 8, 1905.

A citizen of North Carolina who owed money to another citizen of that State, was, while temporarily in Maryland, garnisheed by a creditor of the man to whom he owed the money. Judgment was duly entered according to Maryland practice and paid. Thereafter the garnishee was sued in North Carolina by the original creditor and set up the garnishee judgment and payment, but the North Carolina courts held that as the situs of the debt was in North Carolina the Maryland judgment was not a bar and awarded judgment against him. *Held*, error and that:

As under the laws of Maryland the garnishee could have been sued by his creditor in the courts of that State he was subject to garnishee process if found and served in the State even though only there temporarily, no matter where the situs of the debt was originally.

Attachment is the creature of the local law, and power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues. A judgment against a garnishee, properly obtained according to the law of the State, and paid, must under the full faith and credit clause of the Federal Constitution, be recognized as a payment of the original debt, by the courts of another State, in an action brought against the garnishee by the original creditor.

Where there is absolutely no defense and the plaintiff is entitled to recover, there is no reason why the garnishee should not consent to a judgment impounding the debt, and his doing so does not amount to such a voluntary payment that he is not protected thereby under the full faith and credit clause of the Constitution.

While it is the object of the courts to prevent the payment of any debt

twice over, the failure on the part of the garnishee to give proper notice to his creditor, of the levying of the attachment, would be such neglect of duty to his creditor, as would prevent him from availing of the garnishee judgment as a bar to the suit of the creditor, and thus oblige him to pay the debt twice.

THE plaintiff in error brings the case here in order to review the judgment of the Supreme Court of North Carolina, affirming a judgment of a lower court against him for $180, with interest, as stated therein. The case has been several times before the Supreme Court of that State, and is reported in 122 N. Car. 64; again, 124 N. Car. 467; the opinion delivered at the time of entering the judgment now under review, is to be found in 130 N. Car. 381; see also 132 N. Car. 10.

The facts are as follows: The plaintiff in error, Harris, was a resident of North Carolina at the time of the commencement of this action in 1896, and prior to that time was indebted to the defendant in error, Balk, also a resident of North Carolina, in the sum of $180, for money borrowed from Balk by Harris during the year 1896, which Harris verbally promised to repay, but there was no written evidence of the obligation. During the year above mentioned one Jacob Epstein, a resident of Baltimore, in the State of Maryland, asserted that Balk was indebted to him in the sum of over $300. In August, 1896, Harris visited Baltimore for the purpose of purchasing merchandise, and while he was in that city temporarily on August 6, 1896, Epstein caused to be issued out of a proper court in Baltimore a foreign or non-resident writ of attachment against Balk, attaching the debt due Balk from Harris, which writ the sheriff at Baltimore laid in the hands of Harris, with a summons to appear in the court at a day named. With that attachment, a writ of summons and a short declaration against Balk (as provided by the Maryland statute), were also delivered to the sheriff and by him set up at the court house door, as required by the law of Maryland. Before the return day of the attachment writ Harris left Baltimore and returned to his home in North Carolina. He did not contest the garnishee

process, which was issued to garnish the debt which Harris owed Balk. After his return Harris made an affidavit on August 11, 1896, that he owed Balk $180, and stated that the amount had been attached by Epstein of Baltimore, and by his counsel in the Maryland proceeding Harris consented therein to an order of condemnation against him as such garnishee for $180, the amount of his debt to Balk. Judgment was thereafter entered against the garnishee and in favor of the plaintiff, Epstein, for $180. After the entry of the garnishee judgment, condemning the $180 in the hands of the garnishee, Harris paid the amount of the judgment to one Warren, an attorney of Epstein, residing in North Carolina. On August 11, 1896, Balk commenced an action against Harris before a justice of the peace in North Carolina, to recover the $180 which he averred Harris owed him. The plaintiff in error, by way of answer to the suit, pleaded in bar the recovery of the Maryland judgment and his payment thereof, and contended that it was conclusive against the defendant in error in this action, because that judgment was a valid judgment in Maryland, and was therefore entitled to full faith and credit in the courts of North Carolina. This contention was not allowed by the trial court, and judgment was accordingly entered against Harris for the amount of his indebtedness to Balk, and that judgment was affirmed by the Supreme Court of North Carolina. The ground of such judgment was that the Maryland court obtained no jurisdiction to attach or garnish the debt due from Harris to Balk, because Harris was but temporarily in the State, and the *situs* of the debt was in North Carolina.

Mr. George W. S. Musgrave, with whom *Mr. Sylvan Hayes Lauchheimer* was on the brief, for plaintiff in error:

Garnishee judgment was properly entered so far as practice in Maryland is concerned. *Cockey* v. *Leister,* 12 Maryland, 124; *Garner* v. *Garner,* 56 Maryland, 127; *Buschman* v. *Hanna,* 72 Maryland, 1, 5; Maryland Code, Art. IX, § 34.

As to the question of the *situs* of a debt, there has been much controversy and a great diversity of opinion, but the weight of authority is that the position taken by the Supreme Court of North Carolina was wrong.

A debt is something which (in the absence of some written evidence) exists only in contemplation of law. It is merely the right one person has to ask or demand of another a certain amount of money or other property; an incorporeal right, invisible, intangible and without substantive existence.

The *situs* of a debt for the purposes of garnishment is not only at the domicil of the debtor, but in any State in which the garnishee may be found, provided the municipal law of the State permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance, or by actual service of process upon him within the State. Minor on Conflict of Laws, § 125.

This is supported by a long line of cases, the most important of which are the following: *Chi., R. I. & Pac. R. R.* v. *Sturm*, 174 U. S. 710; *Tootle* v. *Coleman*, 107 Fed. Rep. 41; *Mooney* v. *Buford Mfg. Co.*, 72 Fed. Rep. 32; *Morgan* v. *Neville*, 74 Pa. St. 52; *Savin* v. *Bond*, 57 Maryland, 228; *Nat. Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468; *Harvey* v. *Railroad*, 50 Minnesota, 405; *Wyeth* v. *Lang*, 127 Missouri, 242; *Lancashire Ins. Co.* v. *Corbetts*, 165 Illinois, 592; *Embree* v. *Hanna*, 5 Johns. 101; *C., B. & Q. Ry.* v. *Moore*, 31 Nebraska, 629; *Hull* v. *Blake*, 13 Massachusetts, 153; *Blake* v. *Williams*, 6 Pick. 286; *Harwell* v. *Sharp*, 85 Georgia, 124; *Neufelder* v. *Ins. Co.*, 6 Washington, 341; *Mooney* v. *Railroad Co.*, 60 Iowa, 346; *Howland* v. *Railroad Co.*, 134 Missouri, 474; *Railroad Co.* v. *Thompson*, 31 Kansas, 180; *Railroad Co.* v. *Crane*, 102 Illinois, 249; *Fithian* v. *Railroad Co.*, 31 Pa. St. 114; *Wabash* v. *Dougan*, 142 Illinois, 248; *Berry* v. *Davis*, 77 Texas, 191; *Nichols* v. *Hooper*, 61 Vermont, 295; *Samuel* v. *Agnew*, 80 Illinois, 553; *Richardson* v. *Lester*, 83 Illinois, 55; *B. & O. S. W. Ry.* v. *Adams*, 60 L. R. A. 396; *Campbell* v. *Home Ins. Co.*, 1 S. C. N. S. 158; *Glover* v. *Wells*, 40 Ill. App. 350; *Roche* v. *Ins. Co.*, 2 Ill. App.

360; *Moore* v. *C., R. I. & P. Ry.*, 43 Iowa, 385; *Cochran* v. *Fitch*, 1 Sandf. Ch. 142; *Mahany* v. *Kephart*, 15 W. Va. 609; *Holland* v. *M. & O. Ry.*, 84 Tennessee, 414; *Pomeroy* v. *Rand, McNally & Co.*, 157 Illinois, 176; *Cole* v. *Flitcraft*, 47 Maryland, 312; *Bank* v. *Merchants' Bank*, 7 Gill (Md.), 415; *Brengle* v. *McClellan*, 7 G. & J. (Md.) 434; *Newland* v. *Reilly*, 85 Michigan, 151; *Felt Mill* v. *Blanding*, 17 R. I. 297; *Cohoon* v. *Morgan*, 38 Vermont, 236; Black on Judgments, §§ 593, 857, 859, 923; Rood on Garnishment, §§ 242, 245.

Mr. John H. Small for defendant in error:

The Maryland court, in the garnishment proceeding of *Epstein* v. *Balk* and Harris, garnishee, was without jurisdiction, and the judgment can be collaterally attacked in the courts of North Carolina.

The jurisdiction of the Maryland court may be attacked in this action, even to the extent of contradicting the recital contained in the record. *Thompson* v. *Whitman*, 18 Wall. 457; *Knowles* v. *Gaslight & Coke Co.*, 19 Wall. 58; *Kilbourn* v. *Thompson*, 103 U. S. 198; *Noble* v. *Union River Logging Co.*, 147 U. S. 173; 1 Greenleaf on Evidence (Lewis edition), § 548. If Balk had no property in that State the Maryland court was without jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714.

Facts essential to establish the jurisdiction of the State court must appear affirmatively by allegation or affidavit before the process of the court can issue authorizing the attachment or garnishment of the *res*.

While the debtor (the defendant) and the garnishee are both non-residents, no garnishment process can issue against such non-resident temporarily in the State at the instance of a plaintiff domiciled in the State. A non-resident cannot be held as garnishee. Rood on Garnishment, p. 21, note 5, § 15.

One who is only temporarily in a State and in which he does not reside cannot be subjected to garnishment. Waples on Attachment and Garnishment, 227; Drake on Attachment, 5th ed., § 474; *Everett* v. *Conn. &c. Co.*, 4 Colo. App. 513.

Where personal jurisdiction cannot be acquired over the defendant on account of his being a non-resident the plaintiff cannot garnishee a non-resident while temporarily within the State. 14 Am. & Eng. Ency. Law, 2d ed., 803, note 2; and as to custom of London, see p. 815, note 2; *Peters* v. *Rogers*, 5 Mason, 555.

A state court cannot issue garnishment process against a non-resident temporarily in the State, and if such process is issued the court is without jurisdiction unless it is made to appear that he has in his possession tangible property of the defendant or is bound to pay the defendant money or deliver him property within the State. *Penna. R. R. Co.* v. *Rogers*, 52 W. Va. 250; *S. C.*, 62 L. R. A. 178, and notes p. 182–187.

That the garnishee is a non-resident and only temporarily within the State is a jurisdictional question and not personal to the garnishee. Shinn on Attachment and Garnishment, 860, § 491; *Rindge* v. *Green*, 52 Vermont, 204. So as to service of summons. *Goldey* v. *Morning News*, 156 U. S. 518.

As to effect of collusive and voluntary payment by garnishee see *Baldwin* v. *Gt. Nor. Ry. Co.*, 51 L. R. A. 640; *S. C.*, 64 L. R. A. 625. Garnishment statutes are strictly construed as against the party resorting to the remedy. *State Bank* v. *Hinton*, 1 Dev. Law (12 N. C.), 397. A garnishee who has paid under an invalid judgment cannot plead the same in bar. *Merriam* v. *Rundlett*, 13 Pick. (Mass.) 511; Rood on Garnishment, § 208.

The Maryland court could not garnishee a non-resident temporarily within the State. See act of legislature of Maryland, 1868, ch. 471, § 211, under which a citizen of Maryland cannot sue a non-resident and garnishee a foreign corporation doing business in Maryland when the cause of action or contract of insurance was not consummated in Maryland. *Myer* v. *Insurance Co.*, 40 Maryland, 595; *Cromwell* v. *Insurance Co.*, 49 Maryland, 366. *Chicago &c. Ry.* v. *Sturm*, 174 U. S. 710, does not apply.

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

The state court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is, whether it did not thereby refuse the full faith and credit to such judgment which is required by the Federal Constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation, because the garnishee, although at the time in the State of Maryland, and personally served with process therein, was a non-resident of that State, only casually or temporarily within its boundaries; that the *situs* of the debt due from Harris, the garnishee, to the defendant in error herein was in North Carolina, and did not accompany Harris to Maryland; that, consequently, Harris, though within the State of Maryland, had not possession of any property of Balk, and the Maryland state court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that State provide for an attachment of this nature, if the debtor, the garnishee, is found in the State and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the state court obtains no jurisdiction over the garnishee if he be but temporarily within the State,

proceed upon the theory that the *situs* of the debt is at the domicil either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another State, and the garnishee has no possession of any property or credit of the principal debtor in the foreign State.

We regard the contention of the plaintiff in error as the correct one. The authorities in the various state courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the State providing for and permitting the attachment it cannot be levied there. If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that State. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the State where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues. *Blackstone* v. *Miller*, 188 U. S. 189, 206. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the *situs* of the debt was originally. We do not see the materiality of the expression "*situs* of the debt," when used in connection with attachment proceedings. If by *situs* is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the *situs* thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as

much bound to pay his debt in a foreign State when therein sued upon his obligation by his creditor, as he was in the State where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign State casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign State after personal service of process therein, just as well as by the courts of the domicil of the debtor. If the debtor leave the foreign State without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other State where the debtor might be found. In such case the *situs* is unimportant. It is not a question of possession in the foreign State, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the State where the attachment is laid. His obligation to pay to his creditor is thereby arrested and a lien created upon the debt itself. *Cahoon* v. *Morgan*, 38 Vermont, 234, 236; *National Fire Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468, 483. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that State and its laws permitted the attachment.

There can be no doubt that Balk, as a citizen of the State of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several States, one of which is the right to institute actions in the courts of another State. The law of Maryland provides for the attachment of credits in a

case like this. See sections 8 and 10 of Article 9 of the Code of Public General Laws of Maryland, which provide that, upon the proper facts being shown (as stated in the article), the attachment may be sued out against lands, tenements, goods and credits of the debtor. Section 10 particularly provides that "Any kind of property or *credits* belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Sections 11, 12 and 13 of the abovementioned article provide the general practice for levying the attachment and the proceedings subsequent thereto. Where money or credits are attached the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. *Buschman* v. *Hanna*, 72 Maryland, 1, 5, 6. Section 34 of the same Maryland Code provides also that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.

It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there; it also appears that the municipal law of Maryland permits the debtor of the principal debtor to be garnished, and therefore if the court of the State where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the State, then the judgment entered is a valid judgment. See Minor on Conflict of Laws, section 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the State is but temporary. See pp. 289, 290. This is the doctrine which is also adopted in *Morgan* v. *Neville*, 74 Pa. St. 52, by the

Supreme Court of Pennsylvania, per Agnew, J., in delivering the opinion of that court. The same principle is held in *Wyeth Hardware &c. Co.* v. *Lang*, 127 Missouri, 242, 247; in *Lancashire Insurance Co.* v. *Corbetts*, 165 Illinois, 592; and in *Harvey* v. *Great Northern Ry. Co.*, 50 Minnesota, 405, 406, 407; and to the same effect is *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101; also *Savin* v. *Bond*, 57 Maryland, 228, where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there; that as his debt to the appellant was payable wherever he was found, and process had been served upon him in the District of Columbia, the Supreme Court of the District had unquestioned jurisdiction to render judgment, and the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case in 138 N. Y. 209, *Douglass* v. *Insurance Co.*, is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the State of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the State of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that State. The general principle laid down in *Embree* v. *Hanna*, 5 Johns. (N. Y.) 101, was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled.

It seems to us, however, that the principle decided in *Chicago, R. I. &c. Ry. Co.* v. *Sturm*, 174 U. S. 710, recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely a temporary one in the State where the process was served. In that case it was said: "'All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; 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.' 2 Parsons on Contracts, 8th ed., 702 (9th ed., 739). The debt involved in the pending

case had no 'special limitation or provision in respect to payment.' It was payable generally, *and could have been sued on in Iowa, and therefore was attachable in Iowa.* This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose." The case recognizes the right of the creditor to sue in the State where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign State, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign State is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign State his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the State where the attachment was sued out permits it.

It seems to us, therefore, that the judgment against Harris in Maryland, condemning the $180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the State of Maryland.

It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment. It is objected, however, that the payment by Harris to Epstein was not under legal compulsion.

Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defense to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defense, there was no reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here.

But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of *Morgan* v. *Neville*, 74 Pa. St. 52, and is spoken of in *Railroad Co.* v. *Sturm*, *supra*, although it is not therein actually decided to be necessary, because in that case notice was given and defense made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee. In this case, while neither the defendant nor the garnishee appeared, the court, while condemning the credits attached, could not, by the terms of the Maryland statute, issue the writ of execution unless the plaintiff gave bond or sufficient security before the court awarding the execution, to make restitution of the money paid if the defendant should, at any time within a year and a day,

appear in the action and show that the plaintiff's claim, or some part thereof, was not due to the plaintiff. The defendant in error, Balk, had notice of this attachment, certainly within a few days after the issuing thereof and the entry of judgment thereon, because he sued the plaintiff in error to recover his debt within a few days after his (Harris') return to North Carolina, in which suit the judgment in Maryland was set up by Harris as a plea in bar to Balk's claim. Balk, therefore, had an opportunity for a year and a day after the entry of the judgment to litigate the question of his liability in the Maryland court and to show that he did not owe the debt, or some part of it, as was claimed by Epstein. He, however, took no proceedings to that end, so far as the record shows, and the reason may be supposed to be that he could not successfully defend the claim, because he admitted in this case that he did, at the time of the attachment proceeding, owe Epstein some $344.

Generally, though, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice.

The judgment of the Supreme Court of North Carolina must be reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE DAY dissented.

HARLEY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 195. Argued April 6, 1905.—Decided May 8, 1905.

In order to give the Court of Claims jurisdiction under the act of March 3, 1887, the demand sued on must be founded on a convention between the parties—a coming together of minds—and contracts or obligations implied by law from torts do not meet this condition. *Russell* v. *United States*, 182 U. S. 516, 530.

An employé of the Bureau of Printing and Engraving, who at his own cost and in his own time perfected and patented a device for registering impressions in connection with printing presses, which with his knowledge and consent was used for many years by the Bureau, under orders of the Secretary of the Treasury, and who during that period never made any demand for royalties, cannot, under the circumstances of this case, recover such royalties in the Court of Claims on the ground that a contract existed between him and the Government, because, prior to the use of the device by the Government, the Chief of the Bureau promised to have his rights to the invention protected.

APPELLANT sued in the Court of Claims to recover the sum of $102,000, for the use, during the six years preceding the commencement of the suit, of a device invented by the appellant for registering impressions in connection with printing presses. The Court of Claims dismissed the petition. The findings of the Court of Claims are as follows:

"II. In November, 1869, the Secretary of the Treasury determined that certain valuable securities should not be printed in the Bureau of Engraving and Printing until proper and reliable registers should be attached to the presses. While the Chief of the Bureau was endeavoring to devise and procure a trustworthy form of register, the claimant brought to him the drawings of a device which he had invented, being substantially the device described in the foregoing letters patent. The Chief of the Bureau ordered a register to be immediately made after the claimant's device. At the time of giving such order he understood that the device was the claimant's invention.

"The register so ordered being completed, and tried and found satisfactory, the Chief of the Bureau proposed to take the claimant to the Secretary of the Treasury that he might

explain it to him. The claimant thereupon objected that the invention was not yet patented, and that he wished, before exhibiting it, to obtain a patent for his individual protection. The Chief of the Bureau replied, 'Certainly; I will see that you are protected.' The claimant, then tacitly consenting, was taken before the Secretary, and explained to him the operation of the register, and the Secretary was at the same time informed that this was the register which the claimant had invented. The Secretary approved the form of register, and directed that such registers be made and attached to the presses in the Bureau.

"Before such registers were manufactured the claimant remonstrated to the effect that he wished first to secure a patent. The Chief of the Bureau replied that he would see the claimant protected and would get him a patent attorney who would explain the law to him. This the Chief of the Bureau did, and the attorney so selected proceeded to procure the patent before set forth, the claimant, not the defendants, paying him and the costs and expenses thereof. The attorney so selected at the same time informed the claimant that the manufacture and use of registers in the Bureau would not interfere with or prevent the procurement of the patent.

"After being so advised, the claimant raised no further objection to the registers being manufactured and used, and tacitly acquiesced in the same.

"There was no agreement or understanding between the parties in regard to royalty or the payment of remuneration for the use of the claimant's invention in the Government's printing and engraving other than such as may be inferred from the preceding conversations. On the part of the claimant it was supposed and understood that he would be entitled to compensation, and that it would be allowed and paid by the Secretary of the Treasury. But on the part of the Secretary and Chief of the Bureau it was supposed and understood that the claimant, being an employé of the Treasury Department, would neither expect nor demand remuneration.

"III. That ever since the issuance of said letters patent the defendant has constructed, and has used continuously, from the date of said letters patent, to wit, March 1, 1870, upon and in connection with plate printing presses used by the defendant in the Bureau of Engraving and Printing and in the Treasury building, the device aforesaid, so patented to the claimant, for the purpose of registering the number of impressions made by the various plate-printing presses, both hand and steam, employed and used by the defendant in the said Bureau of Engraving and Printing and in the Treasury Department building.

"IV. The claimant at the time of the making of his invention before described was assistant master machinist in the Bureau of Engraving and Printing. He was never assigned to the duty of making inventions, and it was not a part of his duty to do so; and the invention before described was made within his own time and exclusively at his own cost, and was a completed invention, properly and sufficiently set forth in drawings when first brought to the Chief of the Bureau, as set forth in finding II.

"V. The defendants were in the undisturbed use of the claimant's invention from July 24, 1878, to July 24, 1884, by attaching such registers to a great number of their presses. During that period the claimant made no objection to such use of his invention, and failed to give notice to the Secretary of the Treasury or the Chief of the Bureau of Engraving and Printing that he would demand royalty or remuneration therefor.

"VI. The average number of presses with claimant's device used by the defendants between July 24, 1878, and July 24, 1884, was 200 per day, covering 1,802 working days."

Mr. W. W. Dodge and *Mr. A. A. Hoehling, Jr.*, for appellant: There were parties competent to contract and there was proper subject matter for contract. Under § 2, act of July 11, 1862, 12 Stat. 532; § 3577, Rev. Stat., the Secretary of the

Treasury had full authority to act through agents or subordinate officers, as indeed the various executive officers must do in such matters from the very nature of the case. The findings of the court below show that the Secretary approved the form of register and directed that such registers be made and attached to the presses in the Bureau.

Thus it appears that this was the immediate and direct act of the Secretary of the Treasury in his official capacity, and with full knowledge of claimant's rights in the premises and within his statutory powers.

Before appellant consented to show his device to the Secretary, and again after he had so shown it (under an assurance of protection), but before consenting to the use of the registers, appellant demanded protection, and declared that he wanted first to secure his patent. Not until protection was a second time promised did he assent to use of his invention. Since then the United States has constructed and used continuously from the date of appellant's patent, the device so patented to him, and was, throughout the entire period covered by this claim, in the undisturbed use of his invention.

A party is not under obligation to renew or repeat notice of his rights. The patent is itself notice to all the world. The rule is the same as in a suit based upon infringement of a patent, instead of upon an implied license to use the patent. *Stearns-Roger Mfg. Co.* v. *Brown,* 114 Fed. Rep. 939, 944; *Sessions* v. *Romadka,* 145 U. S. 29.

There is no pretense of lack of knowledge of appellant's rights, or of lack of notice from him and demand for protection and the protection demanded was against the use of his invention without compensation by the Government and not protection against private parties.

The law implies compensation for property taken to the use of the Government, just as it does in the case of property taken or used by an individual without specific agreement as to compensation. 2 Blackstone, 443; *United States* v. *Burns,* 12 Wall. 246; *Carmmeyer* v. *Newton,* 94 U. S. 225; § 22, Patent

Act, now § 4884, Rev. Stat.; *United States* v. *McKeever*, 14 C. Cl. 396, aff'd by this court without opinion. See 14 Brodix's Pat. Cas. 414, 437; *James* v. *Campbell*, 104 U. S. 356; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *Great Falls Mfg. Co.* v. *United States*, 124 U. S. 581; *Hollister* v. *B. & B. Mfg. Co.*, 113 U. S. 59; *United States* v. *Palmer*, 128 U. S. 262; *United States* v. *Fire Arms Co.*, 156 U. S. 552; *United States* v. *Lynah*, 188 U. S. 445; *Russell* v. *United States*, 182 U. S. 516.

If a demand for compensation was not made in terms, appellant was by coercion prevented from so making it. The command of a superior to an inferior may amount to coercion. 3 Wash. C. C. 209, 220; 12 Metc. (Mass.) 56; 1 Blatch. C. C. 549; 13 How. 115.

The command of a master to his servant or a principal to his agent may amount to coercion. 13 Missouri, 246; 13 Missouri, 137, 340; 3 Cush. (Mass.) 279; 11 Metc. (Mass.) 66; 5 Mississippi, 304; 14 Alabama, 365; 22 Vermont, 32; 2 Den. (N. Y.) 341; 14 Johns (N. Y.), 119.

A party who fails to make direct demand under such coercion is no more to lose his right to compensation than is he bound to perform a contract procured under like coercion.

That claimant was in Government employ does not alter the case. *Solomons* v. *United States*, 137 U. S. 342; *Gill* v. *United States*, 160 U. S. 426.

Inventing or devising such a register was no part of appellant's duty. He was not assigned to such duty. He did it wholly out of working hours; at his own home; at his own expense, and patented it at his own expense.

The facts found bring the case clearly within the doctrine of the cases cited. The cases relied upon by defendant, and the cases cited by the court below, do not sustain the decision rendered herein. *McClurg* v. *Kingsland*, 1 How. 202; *Pitcher* v. *United States*, 1 C. Cl. 7; *Solomons* v. *United States*, 137 U. S. 342; *McAleer* v. *United States*, 150 U. S. 424; *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193; *Schillinger* v. *United States*, 155 U. S. 163; *Keyes* v. *Eureka Mining Co.*, 158 U. S. 150;

Kelton v. *United States*, 32 C. Cl. 314; *Gill* v. *United States*, 160 U. S. 426, 437, can all be distinguished.

Mr. Special Attorney Charles C. Binney, with whom *Mr. Assistant Attorney General Pradt* was on the brief, for the United States.

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

The question in the case is whether, on these facts, a contract arose between the United States and the appellant, whereby the United States promised to pay him for the use of his device.

We held in *Russell* v. *United States*, 182 U. S. 516, 530, that in order to give the Court of Claims jurisdiction, under the act of March 3, 1887, 24 Stat. 505, c. 359, defining claims of which the Court of Claims had jurisdiction, the demand sued on must be founded on "a convention between the parties—'a coming together of minds.'" And we excluded, as not meeting this condition, those contracts or obligations that the law is said to imply from a tort. *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552.

In the case at bar the Court of Claims finds that the appellant "supposed and understood that he would be entitled to compensation, and that it would be allowed and paid by the Secretary of the Treasury;" but it also finds that "on the part of the Secretary and Chief of Bureau (Engraving and Printing) it was supposed and understood that the claimant (appellant) being an employé of the Treasury Department would neither expect nor demand remuneration." That there was "a coming together of minds" is therefore excluded by the findings. And the use of the device cannot give a right independent of the understanding under which it was used. The appellant should have been explicit in his demand. He con-

tends that he was, but manifestly he was not, or the curious opposition between his expectation and that of the Secretary of the Treasury and Chief of Bureau could not have occurred. And we cannot assent to the suggestion that he "was by coercion prevented" from making a demand "in terms" by his subordinate position. How long must we suppose such coercion lasted and that he could have permitted a misunderstanding of his purpose? Six years passed, and the Chief of Bureau with whom the negotiations were made went out of office; another succeeded. No demand was made of either for compensation. Further time passed, and other Chiefs of Bureau succeeded. There was a succession of Secretaries of the Treasury; no demand was made of any of them. His first demand was the petition in this case, over fourteen years from his first interview with the Secretary of the Treasury. This delay cannot be overlooked or interpreted favorably to appellant's contention. He sues for $102,600, and this does not include the royalties that he contends he was entitled to for the first six years the device was used. He claims a royalty of twenty-five cents a day on an average of two hundred machines—that is, $50 a day. He was an employé of the Government at a modest salary, and we cannot conceive there was no inducement in $50 a day to an explicit demand of his rights, or that he was willing to wait, or felt himself coerced to wait, for their realization for fourteen years, and even to lose compensation for six years by the operation of the statute of limitations. The rights of the Government are obvious. The contention of the appellant forces on it a liability that it might not have taken. It was given no election of the terms upon which it would use the register, or whether it would use it at all. Of course, this argument is based on the fact that there was no coming together of the minds of the parties, or, as expressed by the findings of the Court of Claims, that "it was supposed and understood" by the officers of the Government that appellant "would neither expect nor demand remuneration." And this fact distinguishes the case from *Mc-*

Keever v. *United States*, 14 C. Cl. 396, affirmed by this court; also from *United States* v. *Lynah*, 188 U. S. 445, and the other cases cited by appellant.

Judgment affirmed.

MR. JUSTICE PECKHAM dissents.

BOARD OF TRADE OF THE CITY OF CHICAGO *v.* CHRISTIE GRAIN AND STOCK COMPANY.

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

L. A. KINSEY COMPANY *v.* BOARD OF TRADE OF THE CITY OF CHICAGO.

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

Nos. 224, 280. Argued April 20, 24, 25, 1905.—Decided May 8, 1905.

The Chicago Board of Trade collects at its own expense quotations of prices offered and accepted for wheat, corn and provisions in its exchange and distributes them under contract to persons approved by it and under certain conditions. In a suit brought by it to restrain parties from using the quotations obtained and used without authority of the Board, defendants contended that as the Board of Trade permitted, and the quotations related to, transactions for the pretended buying of grain without any intention of actually receiving, delivering or paying for the same, that the Board violated the Illinois bucket shop statute and there were no property rights in the quotations which the court could protect, and that the giving out of the quotations to certain persons makes them free to all. *Held*, that

Even if such pretended buying and selling is permitted by the Board of Trade it is entitled to have its collection of quotations protected by the law, and to keep the work which it has done to itself, nor does it lose its property rights in the quotations by communicating them to certain persons, even though many, in confidential and contractual relations

to itself, and strangers to the trust may be restrained from obtaining and using the quotations by inducing a breach of the trust.

A collection of information, otherwise entitled to protection, does not cease to be so because it concerns illegal acts, and statistics of crime are property to the same extent as other statistics, even if collected by a criminal who furnishes some of the data.

Contracts under which the Board of Trade furnishes telegraph companies with its quotations, which it could refrain from communicating at all, on condition that they will only be distributed to persons in contractual relations with, and approved by, the Board, and not to what are known as bucket shops, are not void and against public policy as being in restraint of trade either at common law or under the Anti-Trust Act of July 2, 1890.

THE facts are stated in the opinion.

Mr. Henry S. Robbins for petitioner in No. 224 and respondent in No. 280:

It is not a good defense to these suits that most of the transactions, out of which the quotations arise are gambling transactions. The violation by a plaintiff of a criminal statute of one State does not debar him from maintaining suits to protect his property in a Federal court in another State. Penal laws do not reach, in their effect, beyond the jurisdiction of where they are established. *Commonwealth* v. *Green*, 17 Massachusetts, 540, 674; *Logan* v. *United States*, 144 U. S. 263, 303; *State* v. *Pelican Ins. Co.*, 127 U. S. 265, 289; *The Antelope*, 10 Wheat. 66, 123; *Folliott* v. *Ogden*, 1 H. Blacks. 123, 135; *Fuller* v. *Berger*, 120 Fed. Rep. 274. And see also *City of Chicago* v. *Stock Yards*, 164 Illinois, 224, 238; *Bateman* v. *Fargason*, 4 Fed. Rep. 32; *Ansley* v. *Wilson*, 50 Georgia, 421; *Langdon* v. *Templeton*, 66 Vermont, 173; 1 Pom. Eq. § 399.

Petitioner's misconduct, if any, respecting the transactions upon its exchange, prejudicially affects these respondents only as it does the public at large.

The general dissemination of these quotations is conceded to be highly beneficial to legitimate commerce. Respondents' answer so admits. So the Illinois Supreme Court has also held. *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153.

The Board of Trade's conduct with respect to the quotations, is not at all reprehensible. It gives them to all persons desiring them for lawful purposes, and only withholds them, as it lawfully may, from bucket shops.

As to the Illinois bucket shop law, see *Soby* v. *People*, 134 Illinois, 66. It does not apply to exchanges.

Market news, whose dissemination is helpful to commerce, is not to be deemed infected with illegality or beyond judicial protection, because the owner of this news maintains an exchange, where parties to most of the *transactions* it records do not contemplate actual delivery. The existence of a property right in news depends upon its source, rather than the character or utility of the news itself. *Brooks* v. *Martin*, 2 Wall. 79; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 499.

As matter of fact it is not true that most of the trades, whose prices these quotations record, are gambling transactions.

As to the principle and legality of the systems of offsetting or elimination of trades which will be found in most commercial exchanges, see *Clews* v. *Jamieson*, 182 U. S. 461; *Lehman* v. *Feld*, 37 Fed. Rep. 852; *Irwin* v. *Williar*, 110 U. S. 499; *Bibb* v. *Allen*, 110 U. S. 500.

The Board of Trade should not be held responsible for what gambling there is upon its exchange, and on that account be deprived of its right to sue to protect its property in its quotations.

There is a property right in the quotations which equity will protect by injunction.

Both in England and this country market news thus distributed as are these quotations, is a species of property, which a court of equity will protect by injunction. *Exchange Tel. Co.* v. *Gregory*, L. R. (1896), 1 Q. B. 147; *Dodge Co.* v. *Construction Co.*, 183 Massachusetts, 62; *Kiernan* v. *Manhattan Tel. Co.*, 50 How. Pr. 194; *Nat. Tel. News. Co.* v. *West. Un. Tel. Co.*, 119 Fed. Rep. 294; *Illinois Com. Co.* v. *Cleveland Tel. Co.*, 119 Fed. Rep. 301; *Cleveland Tel. Co.* v. *Stone*, 105

Fed. Rep. 594; *Board of Trade* v. *Hadden-Krull Co.*, 103 Fed. Rep. 902; *S. C.*, 109 Fed. Rep. 705; this case below 116 Fed. Rep. 944.

Board of Trade quotations are a species of property. *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153.

That this market news is too evanescent to derive any protection from the Copyright Act, a perusal of that statute will show. *Nat. Tel. News Co.* v. *West. Un. Tel. Co., supra; Clayton* v. *Stone*, 2 Payne, 382; *S. C.*, Fed. Cas. 2872.

As to the protection of literary property, apart from the statutory provisions of copyright law, see *Millar* v. *Taylor*, 4 Burr, 2303; *Donaldson* v. *Becket*, 4 Burr, 2408; *Wheaton* v. *Peters*, 8 Pet. 591; *Holmes* v. *Hurst*, 174 U. S. 82; *Tompkins* v. *Halleck*, 133 Massachusetts, 32; *Palmer* v. *DeWitt*, 47 N. Y. 532. See other cases applying the same principle to dramas, exhibition of paintings, etc. *Macklin* v. *Richardson*, Ambl. 694; *Crowe* v. *Aiken*, 2 Biss. 208; *S. C.*, Fed. Cas. No. 3441; *Albert* v. *Strange*, 2 DeG. S. & M. 652; *Turner* v. *Robinson*, 10 Irish Ch. 121. And in the case of lectures. *Abernethy* v. *Hutchinson*, 1 Hall. & Tw. 28; *Caird* v. *Simes*, L. R. (1887) 12 H. L. 326. See also *Bartlette* v. *Chittenden*, 4 McLean, 300; *S. C.*, Fed. Cas. No. 1082.

The contracts between the Board of Trade and the telegraph companies are not illegal and are not in restraint of trade under the common law or any state or Federal statute, and as to duty of the Board to give out the quotations see *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153; and *contra*, *Ladd* v. *F. C. P. & M. Co.*, 53 Texas, 172; *Delaware R. R. Co.* v. *Central Co.*, 45 N. J. Eq. 50; *State* v. *Ass'd Press*, 159 Missouri, 424; *Re Renville*, 46 App. Div. N. Y. 37; *Central Exch.* v. *Board of Trade*, 196 Illinois, 396; *Smith* v. *West. Un. Tel. Co.*, 84 Kentucky, 664; *Bryant* v. *West. Un. Tel. Co.*, 17 Fed. Rep. 825; *Bradley* v. *West. Un. Tel. Co.*, 9 Con. Law Bull. 223; 27 Am. & Eng. Ency of Law, 2d ed., 1039, 1094; Gray on Telegraphs, 19; Rev. Stat. Missouri, 1889, § 2338; Bucket Shop Statute of Illinois; *State* v. *Bell Tel. Co.*, 23 Fed. Rep.

539; *Am. Tel. Co.* v. *Conn. Tel: Co.*, 49 Connecticut, 352; *Sullivan* v. *Post. Tel. Co.*, 123 Fed. Rep. 411; *Wilson* v. *N. Y. Comm. Tel. Co.*, 3 N. Y. Supp. 633. Nor is it a violation of the Sherman Act, or illegal at common law to impose restrictions as to use of quotations. *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454; *Mitchell* v. *Reynolds*, 1 Poere Williams, 181; *Elliman* v. *Carrington*, L. R. 1901, 2 Ch. Div. 275; *Fowle* v. *Park*, 131 U. S. 88; *Bement* v. *Nat. Harrow Co.*, 186 U. S. 70; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 338; *Hopkins* v. *United States*, 171 U. S. 578, 600; *Anderson* v. *United States*, 171 U. S. 604, 615; *United States* v. *Joint Traffic Association*, 171 U. S. 558; *Alexander* v. *State*, 86 Georgia, 246.

The anti-bucket shop acts were in force when the Sherman Act was passed. They promote public welfare. They were passed in the exercise of the State's police power. Doubtless that power must yield, when necessary, to the paramount power of Congress to regulate commerce; but this court should not, in the absence of clear language, assume that Congress intended by this act to nullify these state statutes, if indeed it lawfully might do so. *Sherlock* v. *Alling*, 93 U. S. 99; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Patterson* v. *Kentucky*, 97 U. S. 501; *Nashville Ry.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299.

Is it not a more reasonable construction of this act that Congress did not intend to cover this subject or invade this field at all, and that States may still, under their police power, prevent the transmission of quotations into a State for use there in a bucket shop?

Mr. James H. Harkless and *Mr. W. H. Rossington*, with whom *Mr. Chester H. Krum*, *Mr. Charles S. Crysler*, *Mr. Clifford Histed*, *Mr. Charles Blood Smith* and *Mr. J. S. West* were on the brief, for respondent in No. 244.

Mr. Lloyd Charles Whitman and *Mr. E. D. Crumpacker*, with whom *Mr. Jacob J. Kern*, *Mr. John A. Brown* and

Mr. Peter Crumpacker were on the brief, for the petitioner in No. 280.

The quotations are not property and cannot be impressed with a right of property by the Board of Trade. *Sayre* v. *Moore*, 1 East. Rep. 361; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; *Crowe* v. *Aiken*, 2 Bissell, 214; *Thompson* v. *Hubbard*, 131 U. S. 151; *Iolanthe Case*, 15 Fed. Rep. 442; *West. Pub. Co.* v. *Lawyers Coöp. Co.*, 64 Fed. Rep. 364; *Stowe* v. *Thomas*, Fed. Cas. No. 13,514, and cases cited by counsel for Board of Trade.

The Board of Trade has no property right or interest in or to the knowledge of the quotations, as they arise from the transactions of its members on the exchange. Cases cited *supra* and *Keene* v. *Wheatley*, Fed. Cas. No. 7644.

The right of property to mental or literary effort rests fundamentally upon the creative faculty which must have been exercised by the claimant or one through whom his title is derived.

Nothing can be the object of property which has not a corporeal substance. *Wheaton* v. *Peters*, 8 Pet. 591; nor be the object of property which is not capable of sole and exclusive enjoyment. *Millar* v. *Taylor*, 4 Burr, 2361; 2 Kent's Com. 320; Webster; Bouvier, sub. "Property"; Schouler's Personal Property, § 2; 1 Blackstone, 138; *Jones* v. *Van Zandts*, 4 McLean, 603. To be property it must be capable of distinguishable proprietary marks. *Jefferys* v. *Boosey*, 4 H. L. Cas. 869. The Board of Trade cannot alter the essential nature of the quotations. Its sole right of property is confined to the records themselves.

It has no property interest in quotations made up of transactions on its floor when the transactions are not based upon *bona fide* contracts of purchase and sale of the commodity dealt in. The cases in 127 Illinois and 103, 109 and 119 Fed. Rep., cited by counsel for the Board, are not determinative of this case.

The transactions on which the quotations are based are so

tainted with illegality that the Board cannot have a property right in them.

As to the illegality of transactions, where there is no intention of delivery of the commodity bought and sold, see *Counselman* v. *Reichert*, 103 Iowa, 430; *First Nat. Bank* v. *Oskaloosa Co.*, 66 Iowa, 41. As to methods of the Board of Trade see *Central Stock Exchange* v. *Board of Trade*, 196 Illinois, 396; *Higgins* v. *McCrea*, 116 U. S. 671. The testimony shows that no deliveries are intended in ninety five per cent of the transactions. The members of the Board occupy the relation of bucket shops to their customers and the Board is a bucket shop to the non-members. As to substitution of trade see *Clews* v. *Jamieson*, 182 U. S. 461, 471.

As to how transactions between members are to be determined as to the element of wager see *Irwin* v. *Williar*, 110 U. S. 499; *Melchert* v. *Am. Union Tel. Co.*, 11 Fed. Rep. 193; *Bernard* v. *Backhaus*, 9 N. W. Rep. 585, 596; *Dows* v. *Glaspel*, 60 N. W. Rep. 60; *Whitesides* v. *Hunt*, 97 Indiana, 191; *Edwards* v. *Hoeffinghoff*, 38 Fed. Rep. 639; *Embrey* v. *Jemison*, 131 U. S. 336; *Mohr* v. *Miseni*, 49 N. W. Rep. 862; *Pickering* v. *Chase*, 79 Illinois, 328.

The Board of Trade does not come into court with clean hands. It is violating the Illinois anti-bucket shop act of 1887. 1 Starr & Curtis Ann. Stat. 1304. That act was construed in *Soby* v. *People*, 134 Illinois, 68; *Weare Commission Company* v. *People*, 111 Ill. App. 116, affirmed 209 Illinois, 528. And see as to the protection of gambling transactions. *Beard* v. *Milmine*, 88 Fed. Rep. 868; *Schultze* v. *Holtz*, 82 Fed. Rep. 448.

The court will not protect trade-marks used to deceive the public or if the owner cannot otherwise come into court with clean hands. *Lawrence Co.* v. *Tennessee Co.*, 31 Fed. Rep. 776, 784; *Krauss* v. *Peebles*, 58 Fed. Rep. 585, 594; *Simonds* v. *Jones*, 82 Maine, 302; *Joseph* v. *Macowsky*, 96 California, 518; *Holman* v. *Johnson*, Cowp. 341; *Fetridge* v. *Wells*, 4 Abb. Pr. 144; *Hall* v. *Coppell*, 7 Wall. 542, 599.

The Board cannot restrict the publication; if it publishes the quotations it must publish for all. *Ladd* v. *Oxnard*, 75 Fed. Rep. 703; *Gottsberger* v. *Aldine Book Co.*, 33 Fed. Rep. 381; *Keene* v. *Wheatley*, Fed. Cas No. 7644.

The Board realizes the full avails of its property when it sells the quotations to the telegraph companies and the delivery to those companies is necessarily a publication to the world. *Bryant* v. *West. Un. Tel. Co.*, 17 Fed. Rep. 825, is not applicable; the distinction between restricted and general publication does not extend to matter of this kind. *Pierce & Bushnell* v. *Werckmeister*, 18 C. C. A. 431; *Tribune* v. *Ass'd Press*, 116 Fed. Rep. 126.

Assuming there ever was a right of property in the Board to these quotations they have by usage become impressed with a public use and the Board is estopped from discriminating with reference to such use. *Exchange* v. *Board of Trade*, 127 Illinois, 153; *Commission Co.* v. *Live Stock Exchange*, 143 Illinois, 239; *Board of Trade* v. *Central Exchange*, 196 Illinois, 396; *Munn* v. *Illinois*, 94 U. S. 126, and Rose's notes thereto; *State* v. *Gas Co.*, 34 Ohio St. 572; *Lindsey* v. *Anniston*, 104 Alabama, 261; *People* v. *King*, 110 N. Y. 418; *Rushville* v. *Gas Co.*, 132 Indiana, 575; *Zanesville* v. *Gas Co.*, 47 Ohio St. 1; *White* v. *Canal Co.*, 22 Colorado, 198; *Water Works Co.* v. *Schotter*, 110 U. S. 347; *Railroad Co.* v. *Wilson*, 132 Indiana, 517; *B. & O. Tel. Co.* v. *Bell Telephone Co.*, 23 Fed. Rep. 539; *Cotting* v. *Stock Yards Co.*, 183 U. S. 79. The conditions exacted of the public in the contract with the telegraph companies are unreasonable and tend to create a monopoly. *Kalamazoo &c. Co.* v. *Sootsma*, 84 Michigan, 194; *Railroad Co.* v. *Langlois*, 24 Pac. Rep. 209; *Lindsey* v. *Anniston*, 104 Alabama, 261; *Lough* v. *Outerbridge*, 143 N. Y. 277; *Railroad Co.* v. *Bowling Green*, 57 Ohio St. 345. Such contracts also violate the Sherman Anti-Trust Act. *Carter-Crume Co.* v. *Peurrung*, 86 Fed. Rep. 439. The business of telegraphing these quotations is interstate commerce. *Pensacola Tel. Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1; *West. Un. Tel. Co.* v. *Texas*,

105 U. S. 460; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *Addyston Pipe Case*, 175 U. S. 241; *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 210; *Brown* v. *Maryland*, 12 Wheat. 447; *Mobile* v. *Kimball*, 102 U. S. 691; *Bowman* v. *Chicago R. R. Co.*, 125 U. S. 490; *Ferry Co.* v. *Pennsylvania*, 114 U. S. 203; *Hopkins* v. *United States*, 171 U. S. 578, 590.

Mr. Julien T. Davies, *Mr. Abram I. Elkus* and *Mr. Garrard Glenn* by leave of the court, submitted a brief in behalf of Edwin Hawley and Frank H. Ray, solely on the nature of a wagering contract:

Contracts for purchase and sale of a commodity, not to be delivered but only to be performed by advancing and paying differences, are void at common law in the absence of statute. *Irwin* v. *Williar*, 110 U. S. 499; *Ball* v. *Davis*, 1 N. Y. St. Rep. 517; *Flagg* v. *Gilpin*, 17 R. L. Ired. 1, 10; *Rumsey* v. *Berry*, 65 Maine, 575; *Gregory* v. *Wendell*, 39 Michigan, 337; *Mohr* v. *Meisen*, 47 Minnesota, 228; *Brua's Appeal*, 55 Pa. St. 294; *Cunningham* v. *Bank*, 71 Georgia, 400; *Cothran* v. *Ellis*, 125 Illinois, 496.

The form of the contract is immaterial and the test is the actual intent of the parties at the time of making the contract. *Irwin* v. *Williar*, 110 U. S. 499; *Higgins* v. *McCrea*, 116 U. S. 671; *Embrey* v. *Jemison*, 131 U. S. 336; *Pierce* v. *Rice*, 142 U. S. 28; *Story* v. *Salomon*, 71 N. Y. 420; *Peck* v. *Doran-Wright Co.*, 57 Hun, 343; *Kenyon* v. *Luther*, 4 N. Y. Supp. 498; *Cover* v. *Smith*, 82 Maryland, 586; *Lester* v. *Buel*, 49 Ohio St. 240; *Rumsey* v. *Berry*, 65 Maine, 570; *Gregory* v. *Wendell*, 39 Michigan, 337; *Flagg* v. *Baldwin*, 38 N. J. Eq. 219; *Sharp* v. *Stalker*, 63 N. J. Eq. 596.

This intent may be proven by the circumstances surrounding the transactions and such proof is received with great liberality. *Kenyon* v. *Luther*, 4 N. Y. Supp. 498; *Ball* v. *Davis*, 1 N. Y. St. Rep. 517; *Dwight* v. *Badgely*, 60 Hun, 144; *Peck* v. *Doran-Wright Co.*, 57 Hun, 343; *Yerkes* v. *Salomon*, 11 Hun, 471; *Mackey* v. *Rausch*, 39 N. Y. St. Rep. 232; *In re*

Green, Fed. Cas. No. 5751; *Cobb* v. *Prell*, 15 Fed. Rep. 774; *In re Chandler*, Fed. Cas. No. 2590; *Mohr* v. *Meisen*, 47 Minnesota, 228; *Kirkpatrick* v. *Bonsall*, 57 Pa. St. 155; *Lowrey* v. *Dillmann*, 59 Wisconsin, 197; *Carroll* v. *Holmes*, 24 Ill. App. 453; *Hill* v. *Johnson*, 38 Mo. App. 383; *Croner* v. *Spencer*, 92 Missouri, 499; *Cothran* v. *Ellis*, 125 Illinois, 496.

Mr. Justice Holmes delivered the opinion of the court.

These are two bills in equity brought by the Chicago Board of Trade to enjoin the principal defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, which are collected by the plaintiff and which cannot be obtained by the defendants except through a known breach of the confidential terms on which the plaintiff communicates them. It is sufficient for the purposes of decision to state the facts without reciting the pleadings in detail. The plaintiff was incorporated by special charter of the State of Illinois on February 18, 1859. The charter incorporated an existing board of trade, and there seems to be no reason to doubt, as indeed is alleged by the Christie Grain and Stock Company, that it then managed its Chamber of Commerce substantially as it has since. The main feature of its management is that it maintains an exchange hall for the exclusive use of its members, which now has become one of the great grain and provision markets of the world. Three separate portions of this hall are known respectively as the Wheat Pit, the Corn Pit, and the Provision Pit. In these pits the members make sales and purchases exclusively for future delivery, the members dealing always as principals between themselves, and being bound practically, at least, as principals to those who employ them when they are not acting on their own behalf.

The quotation of the prices continuously offered and accepted in these pits during business hours are collected at the plaintiff's expense and handed to the telegraph com-

panies, which have their instruments close at hand, and by the latter are sent to a great number of offices. The telegraph companies all receive the quotations under a contract not to furnish them to any bucket shop or place where they are used as a basis for bets or illegal contracts. To that end they agree to submit applications to the Board of Trade for investigation, and to require the applicant, if satisfactory, to make a contract with the telegraph company and the Board of Trade, which, if observed, confines the information within a circle of persons all contracting with the Board of Trade. The principal defendants get and publish these quotations in some way not disclosed. It is said not to be proved that they get them wrongfully, even if the plaintiff has the rights which it claims. But as the defendants do not get them from the telegraph companies authorized to distribute them, have declined to sign the above-mentioned contracts, and deny the plaintiff's rights altogether, it is a reasonable conclusion that they get, and intend to get, their knowledge in a way which is wrongful unless their contention is maintained.

It is alleged in the bills that the principal defendants keep bucket shops, and the plaintiff's proof on that point fails, except so far as their refusal to sign the usual contracts may lead to an inference, but if the plaintiff has the rights which it alleges the failure is immaterial. The main defense is this. It is said that the plaintiff itself keeps the greatest of bucket shops, in the sense of an Illinois statute of June 6, 1887, that is, places wherein is permitted the pretended buying and selling of grain, etc., without any intention of receiving and paying for the property so bought, or of delivering the property so sold. On this ground it is contended that if under other circumstances there could be property in the quotations, which hardly is admitted, the subject matter is so infected with the plaintiff's own illegal conduct that it is *caput lupinum*, and may be carried off by any one at will.

It appears that in not less than three-quarters of the transactions in the grain pit there is no physical handing over of

any grain, but that there is a settlement, either by the direct method, so called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time, against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B five thousand bushels of May wheat, and B has sold the same amount to C, and C to D and D to A. Substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price. The Circuit Court of Appeals for the Eighth Circuit took the defendant's view of these facts and ordered the bill to be dismissed. 125 Fed. Rep. 161. The Circuit Court of Appeals for the Seventh Circuit declined to follow this decision and granted an injunction as prayed. 130 Fed. Rep. 507. Thereupon writs of certiorari were granted by this Court and both cases are here.

As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be

touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange. *Clews* v. *Jamieson*, 182 U. S. 461.

When the Chicago Board of Trade was incorporated we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the State of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then as now, a settlement would be made by the payment of differences, after the analogy of a clearing house. This naturally would take place no less that the contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence,

that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired.

Purchases made with the understanding that the contract will be settled by paying the difference between the contract and the market price at a certain time, *Embrey* v. *Jemison*, 131 U. S. 336, *Weare Commission Co.* v. *People*, 209 Illinois, 528, stand on different ground from purchases made merely with the expectation that they will be satisfied by set-off. If the latter might fall within the statute of Illinois, we would not be the first to decide that they did when the object was self-protection in business and not merely a speculation entered into for its own sake. It seems to us an extraordinary and unlikely proposition that the dealings which give its character to the great market for future sales in this country are to be regarded as mere wagers or as "pretended" buying or selling, without any intention of receiving and paying for the property bought, or of delivering the property sold, within the meaning of the Illinois act. Such a view seems to us hardly consistent with the admitted fact that the quotations of prices from the market are of the utmost importance to the business world, and not least to the farmers; so important indeed, that it is argued here and has been held in Illinois that the quotations are clothed with a public use. It seems to us hardly consistent with the obvious purposes of the plaintiff's charter, or indeed with the words of the statute invoked. The

sales in the pits are not pretended, but, as we have said, are meant and supposed to be binding. A set-off is in legal effect a delivery. We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights of their employers where the members buy as brokers we think it unnecessary to discuss.

In the view which we take, the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set-off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession, the less being needed the more rapid the circulation is.

But suppose that the Board of Trade does keep a place where pretended and unlawful buying and selling are permitted, which as yet the Supreme Court of Illinois, we believe, has been careful not to intimate, it does not follow that it should not be protected in this suit. The question whether it should be involves several elements which we shall take up in turn.

In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249, 250. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations

to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach. *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. D. 147; *F. W. Dodge Co.* v. *Construction Information Co.*, 183 Massachusetts, 62; *Board of Trade* v. *C. B. Thomson Commission Co.*, 103 Fed. Rep. 902; *Board of Trade* v. *Hadden-Krull Co.*, 109 Fed. Rep. 705; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294; *Illinois Commission Co.* v. *Cleveland Tel. Co.*, 119 Fed. Rep. 301.

The publications insisted on in some of the arguments were publications in breach of contract, and do not affect the plaintiff's rights. Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough.

If then the plaintiff's collection of information is otherwise entitled to protection, it does not cease to be so, even if it is information concerning illegal acts. The statistics of crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data. The Supreme Court of Illinois has recognized in the fullest terms the value and necessity of the knowledge which the plaintiffs control. It must have known, even if it did not have the evidence before it, as to which we cannot tell from the report, what was the course of dealing on the exchange. Yet it was so far from suggesting that the plaintiff's work was unmeritorious that it held it clothed with a public use. *New York & Chicago Grain & Stock Exchange* v. *Board of Trade*, 127 Illinois, 153.

The defendants lay hold of the declaration in the case last cited and say, with doubtful consistency, that this information is of such importance that it is clothed with a public use, and that, therefore, they are entitled to get and use it. In the case referred to it was held that the plaintiff, which had been re-

ceiving the continuous quotations, was entitled still to receive them on paying for them and submitting to all reasonable requirements in relation to the same. Perhaps the right of the plaintiff would have been more obvious if it had demanded an opportunity on reasonable conditions of collecting the information for itself, especially if the legislature had seen fit to provide by law for its doing so. But it is not necessary to consider whether we are bound by that decision, or, if not, should follow it, since in these cases the claim is not qualified by submission to reasonable rules or an offer of payment. It is a claim of independent rights and a denial that the plaintiff has any right at all. The Supreme Court of Illinois gave no sanction to such a claim as that.

Finally it is urged that the contracts with the telegraph companies violate the act of July 2, 1890, c. 647, 26 Stat. 209. The short answer is that the contracts are not relied on as a cause of action. They are stated simply to show that the only communication of its collected facts by the plaintiff is a confidential communication, and does not destroy the plaintiff's rights. But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Fowle* v. *Park*, 131 U. S. 88; *Elliman* v. *Carrington*, [1901] 2 Ch. 275. It is argued that the true purpose is to exclude all persons who do not deal through members of the Board of Trade. Whether there is anything in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved. A scheme to exclude bucket shops is shown and proclaimed, no doubt—and the defendants, with their contention as to the plaintiff, call this an attempt at a monopoly in bucket shops. But it is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work. *Central Stock & Grain Exchange* v.

Board of Trade, 196 Illinois, 396. We are of opinion that the plaintiff is entitled to an injunction as prayed.

Decree in No. 224 reversed. Decree in No. 280 affirmed.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE DAY dissent.

UNITED STATES *v.* JU TOY.

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

No. 535. Argued April 3, 1905.—Decided May 8, 1905.

Even though the Fifth Amendment does apply to one seeking entrance to this country, and to deny him admission may deprive him of liberty, due process of law does not necessarily require a judicial trial and Congress may entrust the decision of his right to enter to an executive officer.

Under the Chinese exclusion, and the immigration, laws, where a person of Chinese descent asks admission to the United States, claiming that he is a native born citizen thereof, and the lawfully designated officers find that he is not, and upon appeal that finding is approved by the Secretary of Commerce and Labor, and it does not appear that there was any abuse of discretion, such finding and action of the executive officers should be treated by the courts as having been made by a competent tribunal, with due process of law, and as final and conclusive; and in *habeas corpus* proceedings, commenced thereafter, and based solely on the ground of the applicant's alleged citizenship, the court should dismiss the writ and not direct new and further evidence as to the question of citizenship.

A person whose right to enter the United States is questioned under the immigration laws is to be regarded as if he had stopped at the limit of its jurisdiction, although physically he may be within its boundaries.

THE facts are stated in the opinion.

Mr. Assistant Attorney General McReynolds for the United States:

Congress by constitutional enactments has entrusted to executive officers as a special tribunal determination of all

questions of fact—including a claim of citizenship—relating to the right of Chinese to enter the United States; and a bare allegation of citizenship is not enough to support a petition for *habeas corpus* by one denied admission.

United States v. *Sing Tuck*, 194 U. S. 161, settled that a Chinaman seeking admission into the United States because of alleged birth therein must in the first instance submit his claim to the determination of immigration officers. Such officers have a right to decide upon all questions of fact, including that of citizenship. The applicant may not ignore them and appeal directly to the courts for determination of his rights. A writ of *habeas corpus* should not be granted until he has prosecuted an appeal to the Secretary of Commerce and Labor as provided by the statute. After the Secretary has, upon appeal, affirmed the action of immigration officers excluding a Chinaman a petition for *habeas corpus* should not be entertained unless the court is satisfied petitioner can make out a *prima facie* case; a mere allegation of citizenship is not enough.

Whether after final rejection by the Secretary, there ought to be a further trial upon *habeas corpus* upon a petition showing reasonable cause was not decided.

In behalf of Sing Tuck it was earnestly insisted that a claim of citizenship is a judicial question, determination of which is granted exclusively to the courts by Art. 3, § 2, of the Constitution, and Congress has no power to entrust it to executive officers; moreover, to require an applicant for admission to submit such a claim to an immigration officer violates the prohibition of the Fifth Amendment that no person shall be deprived of his liberty without due process of law. See also *Lem Moon Sing* v. *United States*, 158 U. S. 538, 546; *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200; *Japanese Emigrant Case*, 189 U. S. 86, 97. As to due process of law not always requiring a proceeding before a court and power of Congress to delegate matters to executive officers see *Murray* v. *Hoboken Co.*, 18 How. 272, 280; *Springer* v. *United States*, 102 U. S. 586, 594; *Hilton* v. *Merritt*, 110

U. S. 97, 107; *Robertson* v. *Baldwin*, 165 U. S. 275; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508; *Bushnell* v. *Leland*, 164 U. S. 684.

In both England and America the rule is that probable cause must first be shown to obtain the writ of *habeas corpus*, whether it be granted at common law or under the statute. Church on Hab. Corp., 2d ed., § 92; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Milligan*, 4 Wall. 2, 110; *Ex parte Royall*, 117 U. S. 250; *Ex parte Terry*, 128 U. S. 301.

Where the law has confided to a special tribunal authority to hear and determine matters arising in the course of its duties, a decision by it within the scope of its authority as to questions of fact is conclusive against collateral attack. Where the jurisdiction depends upon a question of fact which is the very gist of the controversy, the determination of that is generally final. *Gonzales* v. *United States*, 192 U. S. 1; *United States* v. *Arredondo*, 6 Pet. 691, 729; *Quimby* v. *Conlan*, 104 U. S. 420, 425; *United States* v. *California &c. Land Co.*, 148 U. S. 31, 43.

Where the decision of questions of fact is committed by Congress to the head of a Department, his decision thereon is conclusive; and even upon mixed questions of law and of fact, or of law alone, his action carries a strong presumption of its correctness and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing. Cases *supra* and *Foley* v. *Harrison*, 15 How. 447; *Rubber Co.* v. *Goodyear*, 9 Wall. 798; *Shepley* v. *Cowan*, 91 U. S. 340; *Moore* v. *Robbins*, 96 U. S. 535; *Steel* v. *Smelting Co.*, 106 U. S. 450; *Hadden* v. *Merritt*, 115 U. S. 25; *Lee* v. *Johnson*, 116 U. S. 51; *Heath* v. *Wallace*, 138 U. S. 585; *Burfenning* v. *Chi., St. P. &c. Ry.*, 163 U. S. 323; *Bushnell* v. *Leland*, 164 U. S. 684; *Gardner* v. *Bonesteel*, 180 U. S. 369; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106.

Where the jurisdiction of a tribunal of special or limited

authority may be said to depend upon the existence of a certain state of facts which it must pass upon, its decision thereon, if there was any evidence on which to base it, must be held final and conclusive in all collateral inquiries. Cooley's Const. Lim., 7th ed., 586, and authorities there cited; 17 Am. & Eng. Ency of Law, 2d ed., 1085, and authorities there cited; Church on Hab. Corp., 2d ed., 381, 517; *People ex rel. Tweed* v. *Liscomb*, 60 N. Y. 559, 568; *People's Bank* v. *Wilcox*, 15 R. I. 258; *Evansville &c. R. R. Co.* v. *Evansville*, 15 Indiana, 395; *Brittain* v. *Kinnaird*, 1 B. & B. 432; *Simmons* v. *Saul*, 138 U. S. 439, 452; *New Orleans* v. *Fisher*, 180 U. S. 185; *Wanzer* v. *Howland*, 10 Wisconsin, 8, 16; *Comstock* v. *Crawford*, 3 Wall. 402; *Thompson* v. *Whitman*, 18 Wall. 457, 468.

A *habeas corpus* proceeding is collateral to one the validity of which is attacked thereby. *In re Lennon*, 166 U. S. 548, 553; *Ex parte Watkins*, 3 Pet. 193.

The function of *habeas corpus* is to test the legality of confinement, and unless that appears contrary to law the writ should not be granted. Immigration officers are required to exclude every Chinaman who fails to show before them a right of entry. The detention necessary to secure return of an excluded one can not be illegal unless the exclusion resulted from fraud or mistake or from some illegal or unwarranted action by the officers in the proceedings before them.

The purpose of a writ of *habeas corpus* is to inquire into the legality of the confinement, and unless the court finds such confinement contrary to law the writ should be dismissed. *Ekiu* v. *United States*, 142 U. S. 651, 662; *Ex parte Curtis*, 106 U. S. 375; *Wales* v. *Whitney*, 114 U. S. 571; *Carter* v. *McClaughry*, 183 U. S. 381. Unless the return to a writ of *habeas corpus* is in some way traversed the facts therein stated must be taken as true. *Crowley* v. *Christensen*, 137 U. S. 94. The writ of *habeas corpus* can not properly be used to perform the function of a writ of error or appeal. *Ex parte Watkins*, 3 Pet. 201; *Wales* v. *Whitney*, 114 U. S. 571.

Mr. Hayden Johnson, with whom *Mr. Henry C. Dibble* and *Mr. Oliver Dibble* were on the brief, for appellee:

It appears that the District Court found as a fact, upon evidence taken contradictorily with the United States, that appellee was born in the United States and is a citizen of the United States.

The legal presumption is that this judgment was based upon sufficient legal evidence and that the judgment is valid, assuming that the court had jurisdiction to issue the writ and was not concluded from trying the matter by the previous adverse decision of the immigration officials, as contended by the Government.

Such persons as the appellee are citizens of the United States and are entitled to all the rights of citizenship. The Chinese exclusion and restriction laws do not apply to them. *United States* v. *Wong Kim Ark*, 169 U. S. 653. As citizens, they have the right to travel abroad and to return to the United States. If the contention of the Government in this behalf is sustained, they must do so at the peril of being excluded and deported by immigration officers appointed to deal with objectionable aliens, and they must be denied the right of appeal to the courts for a judicial determination of the claim of citizenship.

Citizenship is a right of incalculable value. It is a right of which a man cannot be deprived, constitutionally, except by due process of law. In this connection it is the exact equivalent of the right of liberty. Due process of law, in this regard, is judicial process—the right and opportunity to be heard in a judicial tribune of competent jurisdiction.

No act of Congress can be construed or understood to be a bar to a judicial hearing and determination of the question of citizenship. *Gee Fook Sing* v. *United States*, 49 Fed. Rep. 146.

The act of August 18, 1894, under which it is asserted by the Government in this proceeding that the immigration officials may finally pass upon the claim of a native Chinese to the right of citizenship, applies in terms to aliens only.

This court held in the case of *Sing Tuck*, 194 U. S. 160, that the immigration officials must determine in the first instance the claim of nativity when preferred by an arriving Chinese and that a writ of *habeas corpus* should not issue until such claim has been passed upon in an orderly manner by the Department of Commerce and Labor. The Government now seeks to obtain a decision that the determination by the Department as to the claim of nativity is and must be final. But Congress has not said that such decision shall be final. The act relied upon applies to aliens only, as already said. There is no rule of law under which it can be contended that such a decision is final. *Johnson* v. *Towsley*, 13 Wall. 83.

Due process of law in a matter affecting the right of a man to be free—the claim of the right to be and remain in one's native land and not to be deported therefrom, certainly involves the right of personal liberty—due process of law in this regard implies the right to have that right determined in a judicial proceeding by a constitutional court of justice. The proceeding may be never so summary, still, these fundamental rules and rights must be recognized and accorded.

Citizens of Chinese descent constitute a class of persons —a class of citizens. Can it be contended that Congress has the constitutional power to suspend the writ of *habeas corpus* or to deny the right of the writ to any class of citizens?

Habeas corpus is the proper and the only remedy in these cases. *In re Jew Wong Loy*, 91 Fed. Rep. 240; *In re Jung Ah Lung*, 25 Fed. Rep. 141, aff'd 124 U. S. 621.

Mr. Justice Holmes delivered the opinion of the court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the Steamship Doric for return to China, presented a petition for *habeas corpus* to the District Court, alleging that he was a native-born citizen of the United States, returning after a temporary

departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued and the United States made return, and answered showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive and that no abuse of authority was shown. These were denied, and the District Court decided seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the Circuit Court of Appeals alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

"First. Should a District Court of the United States grant a writ of *habeas corpus* in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who having recently arrived at a port of the United States made application to land as a native-born citizen thereof and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

"Second. In a *habeas corpus* proceeding should a District

Court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a *habeas corpus* proceeding in a District Court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein upon the ground that he was a native-born citizen thereof but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

We assume in what we have to say, as the questions assume,

that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of *United States* v. *Sing Tuck*, 194 U. S. 161, 170. "A petition for *habeas corpus* ought not to be entertained, unless the court is satisfied that the petitioner can make out at least a *prima facie* case." This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence or allege its effect. But as it was entertained and the District Court found for the petitioner it would be a severe measure to order the petition to be dismissed on that ground now, and we pass on to further considerations.

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in *United States* v. *Sing Tuck*, 194 U. S. 161, 167, that the act of August 18, 1894, c. 301, § 1, 28 Stat. 372, 390, purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in *The Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U. S. 86, 97, it was said: "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See also *Turner* v. *Williams*, 194 U. S. 279, 290, 291; *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200. In *Fok Young Yo* v. *United States*, 185 U. S. 296, 304, 305, it was held that the decision of the collector of customs on the right of transit

across the territory of the United States was conclusive, and, still more to the point, in *Lem Moon Sing* v. *United States*, 158 U. S. 538, where the petitioner for *habeas corpus* alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases and the language which we have quoted is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicil and the belonging to a class excepted from the exclusion acts. *United States* v. *Sing Tuck*, 194 U. S. 161, 167; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 546, 547. It also is established by the former case and others which it cites that the relevant portion of the act of August 18, 1894, c. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States* v. *Reese*, 92 U. S. 214, 221; *Trade-Mark Cases*, 100 U. S. 82, 98, 99; *Allen* v.

Louisiana, 103 U. S. 80, 84; *United States* v. *Harris*, 106 U. S. 629, 641, 642; *Virginia Coupon Cases*, 114 U. S. 269, 305; *Baldwin* v. *Franks*, 120 U. S. 678, 685–689; *Smiley* v. *Kansas*, 196 U. S. 447, 455. It necessarily follows that when such words are sustained they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. *In re Ross*, 140 U. S. 453, 464. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 660, and in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, before the authorities to which we already have referred. It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 546, 547; *Japanese Immigrant Case*, 189 U. S. 86, 100; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508, 509.

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered

that the writ should be dismissed, as it should have been dismissed in this case.

It will be so certified.

MR. JUSTICE BREWER, with whom MR. JUSTICE PECKHAM concurred, dissenting.

I am unable to concur in the views expressed in the foregoing opinion, and, believing the matter of most profound importance, I give my reasons therefor.

Ju Toy presented his petition to the United States District Court at San Francisco, alleging that he was a native-born citizen of the United States; that he was a resident of the United States, temporarily absent and returning to the city and State in which he was born; that the collector of the port of San Francisco refused to permit him to land, and that he was detained by the general manager of the steamship company in whose vessel he came to San Francisco for return to China. A writ of *habeas corpus* was issued, and thereupon the District Attorney, in behalf of the United States, answered, setting up the application for landing, a hearing and denial thereof by the immigration officer, an appeal to the Secretary of Commerce and Labor, and his action approving that of the immigration officer, and with the answer exhibited a copy of all the evidence offered upon the hearing and the orders by the officer and the Secretary. Thereupon a motion was made by the District Attorney to dismiss the writ, on the ground substantially that it did not appear that the immigration officer or the Secretary of Commerce and Labor abused the discretion vested in them by law or that their action was unlawful or that any error prejudicial to the petitioner was committed. This motion to dismiss was overruled and the cause referred to a referee to take evidence. Upon the testimony taken by him the referee reported that the petitioner was born in the United States and a citizen thereof. Exceptions to this report were filed by the District

Attorney, which were overruled by the court, and thereupon judgment was entered that the petitioner was illegally restrained of his liberty and that he be discharged from custody. An appeal from this order was taken to the Court of Appeals for the Ninth Circuit, which court certified to us the following questions:

"First. Should a District Court of the United States grant a writ of *habeas corpus* in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who having recently arrived at a port of the United States made application to land as a native-born citizen thereof, and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States, and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

"Second. In a *habeas corpus* proceeding should a District Court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to

the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a *habeas corpus* proceeding in a District Court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein upon the ground that he was a native-born citizen thereof, but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

The proposition presented by these questions is that unless the petitioner for a writ of *habeas corpus* shows that the immigration officers have been guilty of unlawful action or abuse of their discretion or powers, the writ must be denied and the petitioner banished from the country. In order to see what action is lawful I refer to the rules prescribed under the authority hereinafter referred to. Rule 6 declares that "immediately upon the arrival of Chinese persons . . . it shall be the duty of the officer . . . to adopt suitable means to prevent communication with them by any persons other than the officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their right to admission and to permit those proving such right to land." Rules 7, 8, 9, 10 and 21 are as follows:

"RULE 7. The examination prescribed in Rule 6 should be separate and apart from the public, in the presence of Government officials and such witness or witnesses only as the examining officer shall designate, and, if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal and his counsel should be permitted, after duly filing notice of appeal, to examine, but not make copies of, the evidence upon which the excluding decision is based.

"RULE 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

"RULE 9. Notice of appeal provided for in Rule 8 shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary; and, within three days after the filing of such notice, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge.

"RULE 10. Additional time for the preparation of cases after the expiration of three days next succeeding the filing of notice of appeal will be allowed only in those instances in which, in the judgment of said officer in charge, a literal compliance with Rule 9 would occasion injustice to the appellant or the risk of defeat of the purposes of the law, and the reasons for delay beyond the time prescribed shall in every instance be stated in writing in the papers forwarded to the Commissioner General of Immigration."

"RULE 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to or residence within the United States to establish such right affirmatively and satisfactorily to the appropriate Government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States Government."

It will be seen that under these rules it is the duty of the immigration officer to prevent communication with the Chinese seeking to land by any one except his own officers. He is to conduct a private examination, with only the witnesses present whom he may designate. His counsel, if under the circumstances the Chinaman has been able to procure one, is permitted to look at the testimony but not to make a copy of it. He must give notice of appeal, if he wishes one, within two days, and within three days thereafter the record is to be sent to the Secretary at Washington; and every doubtful question is to be settled in favor of the Government. No provision is made for summoning witnesses from a distance or for taking depositions, and if, for instance, the person landing at San Francisco was born and brought up in Ohio, it may well be that he would be powerless to find any testimony in San Francisco to prove his citizenship. It he does not happen to have money he must go without the testimony, and when the papers are sent to Washington (three thousand miles away from the port, which in this case was the place of landing) he may not have the means of employing counsel to present his case to the Secretary. If this be not a star chamber proceeding of the most stringent sort, what more is necessary to make it one?

I do not see how any one can read those rules and hold that they constitute due process of law for the arrest and deportation of a citizen of the United States. If they do in proceedings by the United States they will also in proceedings in-

stituted by a State, and an obnoxious class may be put beyond the protection of the Constitution by ministerial officers of a State proceeding in strict accord with exactly similar rules.

It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the contention of the Government, sustained by the judgment of this court, is that a citizen, guilty of no crime—for it is no crime for a citizen to come back to his native land—must by the action of a ministerial officer be punished by deportation and banishment, without trial by jury and without judicial examination.

Such a decision is to my mind appalling. By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind. In *Fong Yue Ting* v. *United States*, 149 U. S. 698, it was held by a majority of the court that the removal from this country of an alien was not a punishment, Mr. Justice Gray, speaking for that majority, saying (p. 730):

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."

But it was not suggested, and indeed could not be, that the deportation and exile of a citizen was not punishment. The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation or transportation, but by whatever name called it is always considered a punishment. In Black's Law Dictionary "banishment" is defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time,

or for life. It is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." The same author defines "exile" as banishment, and "transportation" as "a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." In Rapalje & Lawrence's Law Dictionary (vol. 1, page 109), "banishment" is called: "A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." In 4 Bl. Com. 377 it is said: "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation." Vattel Book 1, Sec. 228, declares: "As a man may be deprived of any right whatsoever by way of punishment—exile, which deprives him of the right of dwelling in a certain place, may be inflicted as a punishment; banishment is always one; for, a mark of infamy cannot be set on any one, but with a view of punishing him for a fault, either real or pretended."

President Madison, in his report on the Virginia resolutions concerning the alien and sedition laws, said (4 Elliott's Debates, 455), referring to the possibilities which attend a removal from the country, "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."

The twelfth section of the English Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty, enacted "that no subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors;

and that every such imprisonment is hereby enacted and adjudged to be illegal, . . . and the person or persons who shall knowingly frame, contrive, write, seal, or countersign any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison, or transport any person or persons, contrary to this act, or be any ways advising, aiding, or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick-upon-Tweed, or any of the islands, territories, or dominions thereunto belonging; and shall incur and sustain the pains, penalties, and forfeitures limited, ordained and provided in and by the statute of provision and *praemunire*, made in the sixteenth year of King Richard II.; and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them."

It is true in this case the petitioner was returning to San Francisco from China. Whether his absence from this country had been for a few weeks or a few years is not shown, nor does it matter. The right of a citizen is not lost by a temporary absence from his native land, and when he returns he is entitled to all the protection which he had when he left.

In *Gonzales* v. *Williams*, 192 U. S. 1, the petitioner, held in custody by the immigration officers, sued out a *habeas corpus* on the ground that she was not an alien immigrant. The Circuit Court decided against her, but on appeal we discharged her from custody, saying (p. 7):

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

It is true, the facts were admitted. So placing that case

alongside of this the result is that if the United States admits that the petitioner is not an alien, he is entitled to his discharge. If he proves the fact, he is not entitled, but must be deported. It was not suggested in that case that the immigration officer had been guilty of any abuse of discretion or powers, the only complaint being that he had ordered the deportation of the petitioner, who was not an alien. That same fact is alleged here, but is now adjudged insufficient to prevent the deportation. In *Gee Fook Sing* v. *United States*, 49 Fed. Rep. 146, 148, the Court of Appeals of the Ninth Circuit held:

"That any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who on that ground applies to any United States court for a writ of *habeas corpus*, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination."

See also *In re Look Tin Sing*, 21 Fed. Rep. 905; *Ex parte Chan San Hee*, 35 Fed. Rep. 354; *In re Yung Sing Hee*, 36 Fed. Rep. 437; *In re Wy Shing*, 36 Fed. Rep. 553. In the first of these cases it was said by Mr. Justice Field (p. 910):

"Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of Congress."

In *Ex parte Tom Tong*, 108 U. S. 556, 559, Mr. Chief Justice Waite said:

"The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty."

In *United States* v. *Jung Ah Lung*, 124 U. S. 621, a petition for *habeas corpus* by a Chinese laborer, it was held that—

"The jurisdiction of the court was not affected by the fact that the collector had passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in a case of hardship."

By the Fifth Amendment to the Constitution no person can "be deprived of life, liberty or property without due process of law." It may be true, as decided in *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272, an action involving the validity of a distress warrant issued by the Solicitor of the Treasury, that the requirement of a judicial trial does not extend to every case, but as stated by Mr. Justice Curtis in that case (p. 284): "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." And in *Hager* v. *Reclamation District*, 111 U. S. 701, 708, it was held that "undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard." By Article III, sec. 2 of the Constitution, "the trial of all crimes, except in cases of impeachment, shall be by jury;" and by the Fifth Amendment, "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Summing this up, banishment is a punishment and of the severest sort. There can be no punishment except for crime. This petitioner has been guilty of no crime, and so judicially determined. Yet in defiance of this adjudication of innocence, with only an examination before a ministerial officer, he is compelled to suffer punishment as a criminal, and is denied the protection of either a grand or petit jury.

But, it is said, that he did not prove his innocence before

the ministerial officer. Can one who judicially establishes his innocence of any offense be punished for crime by the action of a ministerial officer? Can he be punished because he has failed to show to the satisfaction of that officer that he is innocent of an offense? The Constitution declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of invasion or rebellion the public safety may require it." There is no rebellion or invasion. Can a citizen be deprived of the benefit of that so much vaunted writ of protection by the action of a ministerial officer?

By section 8 of the act of September 13, 1888, 25 Stat. 476, the act prohibiting the coming of Chinese laborers, the Secretary of the Treasury was authorized to make rules and regulations to carry into effect the provisions of the statute. This authority by subsequent legislation has been vested in the Secretary of Commerce and Labor, by whom some sixty-one rules have been announced. In the second rule it is provided that "if the Chinese person has been born in the United States, neither the immigration acts nor the Chinese exclusion acts prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States apply to such person." Rule 46 reads: "The provisions of the laws regulating immigration, excluding those which prescribe payment of the head tax, apply to the residents and natives of Porto Rico and Philippine Islands, and, moreover, the provisions of the laws relating to the exclusion of Chinese apply to all such persons as are of the Chinese race, except those who are born in the United States." In other words, the department rules exclude from the jurisdiction of the immigration officers citizens of Chinese descent, and limit that jurisdiction to Chinese aliens. In *United States* v. *Wong Kim Ark*, 169 U. S. 649, it is stated (p. 653):

"It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese exclusion acts, prohibiting persons of the Chinese race, and especially Chinese

laborers, from coming into the United States, do not and cannot apply to him."

By the act of August 18, 1894, 28 Stat. 372, 390, it is provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." The same limitation of finality to the case of aliens is repeated in the act of March 3, 1903, 32 Stat. 1213. So it appears that this court discharged from the custody of the immigration officers a person of Chinese descent on the ground that he was a citizen of the United States, doing this upon the concession of the Government that if he was a citizen the exclusion acts had no application to him; that Congress in terms makes the decision of the immigration officer final only when the party is an alien, and that the rules prescribed by the proper department exclude from the operation of the law citizens of the United States of Chinese descent. Yet, in spite of all this, it is held that this citizen of the United States must, by virtue of the ruling of a ministerial officer, be banished from the country of which he is a citizen. And this upon the ground that such officer has a right to decide whether he is or is not a citizen, and his decision on the question excludes all judicial examination.

Let us see what have been the rulings of this court in other cases, and first in respect to judicial decisions. In *Thompson* v. *Whitman*, 18 Wall. 457, Thompson, a sheriff of a county in New Jersey, was sued by Whitman for taking and carrying away a sloop, the property of the plaintiff, and justified his action by the judgment of a court, which had ordered the sloop to be sold for violating a statute of New Jersey in reference to raking and gathering clams. There was thus a judicial determination of the liability of the sloop to seizure and condemnation. Notwithstanding this judicial determination this court held that the plaintiff might show, as a matter of fact,

that the sloop was not within the limits of the State of New Jersey, and therefore was not violating its statute. In the opinion, by Mr. Justice Bradley, this quotation was made from the opinion of Chief Justice Marshall in *Rose* v. *Himely*, 4 Cranch, 269:

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

Rose's "Notes on United States Reports" show that a multitude of cases, both state and Federal, rely upon *Thompson* v. *Whitman* as authority. Among them is *Scott* v. *McNeal*, 154 U. S. 34, in which it was held that a court of probate, having jurisdiction in the administration of deceased persons, had no jurisdiction to appoint an administrator of one who was alive, although he had been absent and not heard from for seven years, and that a sale made by the administrator appointed in such a case passed no title. It was cited approvingly in *Andrews* v. *Andrews*, 188 U. S. 14. There a decree of divorce, rendered by a South Dakota court in a case in which both parties were in court and in which the court found not only that there were sufficient grounds for divorce, but also that the plaintiff had been a *bona fide* resident of South Dakota for the statutory length of time, and therefore had the requisite status to give that court jurisdiction, could

be upset in Massachusetts by proof that the plaintiff was not in fact a *bona fide* resident of South Dakota. The same case was also relied upon as authority in *Bell* v. *Bell*, 181 U. S. 175, 177, where we said:

"No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce must have had a *bona fide* residence within the State for one year next before the filing of the petition. . . . The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. *Thompson* v. *Whitman*, 18 Wall. 457."

I have always supposed that a judgment of a court of competent jurisdiction was at least as conclusive as the finding of a ministerial officer, and that the right of personal liberty was as sacred in the eyes of the law as the title to a sloop.

Turning now to the action of ministerial or administrative officers, and what has been the uniform ruling of this court? Take the Land Department. Questions of fact within the undoubted jurisdiction of that Department are considered as settled by its rulings. But questions of fact upon which its jurisdiction rests are never so regarded. Thus, whether a tract of public land be swamp, mineral or agricultural, may be finally determined by the Department; but whether a tract is public land is not so determined, and in all the multitude of cases that have been presented to this court it has never even been suggested that a ruling of the Department that a tract was public land was conclusive unless it appeared that the Land Department was guilty of some abuse of its discretion or powers. The question, and the only question, has been was the tract public land or not? In *United States* v. *Stone*, 2 Wall. 525, it appeared that a tract of land adjacent to a military post had been at one time surveyed, and by that survey was included within the military reservation. Sub-

sequently a new survey was had, by which this tract was excluded, and thereafter it was, in due course of administration, patented. Thereupon this suit was brought to set aside the patent. It was not suggested that the Land Department had been guilty of any irregularity in administration, or had not proceeded in accordance with the established rules of procedure; yet the court unanimously held that the patent must be set aside, on the ground that the land was reserved to the United States as a part of the military reservation by the original survey. In *Smelting Company* v. *Kemp*, 104 U. S. 636, 641, we said:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide."

It would be an affectation to attempt to cite all the authorities in which this doctrine is announced. In *Doolan* v. *Carr*, 125 U. S. 618, decided in 1887, Mr. Justice Miller cites more than a dozen cases as directly in point. Since then the doctrine has been again and again restated.

Take also the matter of imports. The Secretary of the Treasury is charged with the collection of the duties on them, but has it ever been held or even suggested that a ruling of the custom house officers, approved by the Secretary of the Treasury, is a final determination that the article so passed upon was subject to duty and precluded the courts from inquiring

as to that fact? Certainly this court has wasted a great deal of time determining whether a given article was subject to duty or not if the decision of the custom house officers, approved by the Secretary of the Treasury, was a final decision of the question.

But it is said that the exclusion acts speak of Chinese persons, and that such term includes citizens as well as aliens, and, therefore, Congress has given power to the immigration officers to banish citizens of the United States if they happen to be of Chinese descent. But obviously the statutes refer to citizens of China and not to citizens of the United States. The treaty of 1894, 28 Stat. 1210, in execution of which most of these statutes were passed, speaks on the one hand of Chinese subjects in the United States and on the other of citizens of the United States in China. The treaty declared the rights and burdens of Chinese citizens in the United States, as well as the rights and burdens of citizens of the United States in China. The treaty then placing Chinese subjects over against American citizens must have had in mind citizenship and not race. The legislation carrying that treaty into effect must be interpreted in the light of that fact. The statutes of the United States expressly limit the finality of the determination of the immigration officers to the case of aliens. It has been conceded by the Government that these statutes do not apply to citizens, and this court made a most important decision based upon that concession. The rules of the Department declare that the statutes do not apply to citizens, and yet in the face of all this we are told that they may be enforced against citizens, and that Congress so intended. Banishment of a citizen not merely removes him from the limits of his native land, but puts him beyond the reach of any of the protecting clauses of the Constitution. In other words, it strips him of all the rights which are given to a citizen. I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the Constitution

guarantees, and if it did so intend, I do not believe that it has the power to do so.

MR. JUSTICE PECKHAM concurred in the foregoing dissent.

MR. JUSTICE DAY also dissented.

FIRST NATIONAL BANK OF CHICAGO *v.* CHICAGO TITLE & TRUST COMPANY.

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

No. 139. Argued January 19, 20, 1905.—Decided May 15, 1905.

The trustee in bankruptcy claiming the right of possession of certain merchandise of the bankrupt in storage, warehouse receipts for which he had hypothecated for loans, instituted summary proceedings for possession and directions for sale in the District Court. Claimants who were the warehousemen and holders of warehouse receipts objected to the jurisdiction but were overruled and thereafter the trustee and claimant stipulated for sale of the property and deposit of proceeds subject to further order of the court. The District Court held that claimants were entitled to the property. The trustee appealed and the claimants denied their right of appeal. The Circuit Court of Appeals reviewed the facts and found the trustee entitled to possession. On certiorari *held*, that:

As the proceeding was one in bankruptcy there was no appeal to the Circuit Court of Appeals and its jurisdiction was confined, under clause of § 24, to revision in matter of law on notice and petition.

The provisions as to revision in matter of law and appeal must be construed in view of distinctions recognized in §§ 23, 24 and 25, between steps in bankruptcy proceedings proper and controversies arising out of the settlement of estates.

The bankruptcy court is without jurisdiction to determine adverse claims to property not in the possession of the assignee in bankruptcy by summary proceedings, whether absolute title or only a lien is asserted, and suits by a trustee may only be brought in courts where they might have been brought by the bankrupt.

The fact that the claimants followed the case after their objections to the jurisdiction of the District Court had been overruled, did not amount

to a waiver of the objections or consent to the jurisdiction of the court, and the sale of the merchandise by court did not, under the circumstances of this case, change the situation or create a fund which conferred jurisdiction.

The Circuit Court of Appeals had no jurisdiction of the appeals and they should have been dismissed.

The District Court had no jurisdiction to go to judgment in the proceeding and on ascertaining that fact should have declined to retain it, and have entered a decree for the return of the money to the claimants without prejudice to the right of the trustee to litigate in a proper court.

Although it turns out that if the District Court has not jurisdiction it may proceed until that fact appears and may, on consent, direct a sale of perishable property involved, and on relinquishing jurisdiction an order returning the proceeds is equivalent to an order returning the property.

THE petition for certiorari represented:

"1. That for some years prior to the 10th day of May, 1901, Alexander Rodgers was a wholesale dealer in seeds in the city of Chicago, Illinois, and that on said day he was adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, and the Chicago Title and Trust Company, respondent herein, was duly appointed receiver, and subsequently trustee, of the estate of said bankrupt.

"2. That the National Storage Company, respondent, is a corporation organized under the laws of Illinois to do, and is engaged in doing, a warehousing business in the State of Illinois and elsewhere. That some months prior to said 10th day of May, said storage company issued to said Alexander Rodgers sundry warehouse receipts which were similar except as to the quantities and dates; one of which said receipts is in the words and figures following:

" 'Warrant No. 8401. Lot No. 1.

" 'The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in div. B, sec. 1, fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of

charges and delivery of this warrant, at its office in Chicago, duly endorsed.

" 'It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, skrinkage, accidental or providential causes, riots or insurrection, frost or change of weather, or from being perishable while in storage, and that this company shall, in the custody of the above property, be the agent of the holder of this warrant.

" 'Storage and charges as per contract on file with this company.

" 'Chicago, Aug. 31, 1900.' "

[Signed by the National Storage Company by its president and treasurer, and the corporate seal affixed.]

"That immediately thereafter said Rodgers endorsed and hypothecated thirteen of said receipts to your petitioner, the First National Bank of Chicago, to secure loans made by it to him aggregating about $12,000, and endorsed and hypothecated five of said receipts to your petitioner, H. W. Rogers & Brother, to secure a loan by them to him of $5,000, and that said loans are still unpaid and due to petitioners respectively, and said petitioners, at the time said Rodgers was adjudged a bankrupt, held and still hold said warehouse receipts as security for said loans respectively.

"3. That on the 13th day of May, 1901, said Chicago Title and Trust Company, as said receiver, filed in said District Court a petition reciting that it had taken possession of the seed mentioned in said warehouse receipts, and asking the court's directions in respect to a sale thereof. That to said petition each of these petitioners filed a special appearance, specially objecting to the jurisdiction of said District Court over said seed, and such petitioner, as did also said National Storage Company. That thereupon the court referred said petition to a referee to take proof and report his conclusions; that the referee took proof and reported that the seed covered

by said warehouse receipts was, at the time of the adjudication in bankruptcy, in the possession of said storage company, that the District Court was without jurisdiction, and recommending a dismissal of said petition.

"That subsequently exceptions to said report were heard by said District Court, and it confirmed the referee's finding as to possession, but overruled his finding as to jurisdiction, and held it had jurisdiction, and ordered (the petitioner, First National Bank, consenting) that said seed be sold and the proceeds thereof be deposited with said First National Bank, subject to the further order of said court; that said seed was sold, and the amount realized therefrom was in excess of the amounts of petitioners' said claims, and this money is still in the hands of the petitioner, the First National Bank.

"That said petitioners thereupon severally filed petitions in said court, asking payment of their said claims out of said proceeds. That said Chicago Title and Trust Company, as trustee, and the respondents, James A. Patten, and E. W. Bailey & Company as creditors, answered said petitions, denying the right of your petitioners to said fund; and thereupon said petitions were referred to said referee to take additional proof and report the same to the court, and the said matter again coming before the court upon the report of said referee and exceptions thereto, said petitions of your petitioners were consolidated, and the court confirmed said report of said referee, except so far as it found a lack of jurisdiction in said District Court, and adjudged that said District Court had jurisdiction; that said decree also found that said storage company was, at the time of the filing of the bankruptcy petition herein, in the possession of, and entitled to the possession of, said seed, and decreed that petitioner, First National Bank, retain out of said proceeds the sum of $9,854.15 on account of its claim, and pay therefrom to petitioners, H. W. Rogers & Brother, $5,000.

"That thereupon said Chicago Title and Trust Company, as trustee, and said James A. Patten severally perfected ap-

peals from said order or decree to the Circuit Court of Appeals of the Seventh Circuit.

"That thereafter said two appeals were duly filed in said Circuit Court of Appeals, and were there, by order of court, consolidated and heard as one case.

"That said Circuit Court of Appeals thereafter filed its opinion in said consolidated causes reviewing the question of fact whether the storage company was in possession of said seed at the time of the proceedings in bankruptcy, and held that said District Court had erred in deciding this question of fact, and overruled said District Court upon said question of fact, and decided that said storage company was not in possession of said seed, and remanded said cause with directions to enter a decree for said trustee.

"That thereafter these petitioners filed a petition for rehearing in said cause, which was subsequently denied.

"That your petitioners are advised by counsel that there existed in law no right of appeal by said trustee or said Patten from said order of said District Court, and that, if said alleged attempts to appeal should be treated strictly as appeals, said Circuit Court of Appeals was without jurisdiction of the subject-matter, and its said order reversing said decree of the District Court was null and void.

"That your petitioners are also advised by counsel that, if said appeals rightly could be, and were, treated by said Circuit Court of Appeals as in effect petitions for revision, said Circuit Court of Appeals, by the express terms of the bankruptcy statute, was limited in its jurisdiction to a revision of the decision of the District Court in matter of law, and that said Circuit Court of Appeals, in reversing said District Court upon the said question of fact, proceeded without jurisdiction, and in violation of the said statute." . . .

The granting of the writ was objected to, and it was stated that Alexander Rodgers, the bankrupt, filed his petition in bankruptcy May 8, 1901; that the Chicago Title and Trust Company was appointed receiver the same day; and that the

bankrupt turned over his property, including the seed in dispute, to the receiver. And it was insisted that the proceeding was a plenary suit, to the institution of which, in the District Court sitting in bankruptcy, the petitioners as adverse parties, had consented. Certiorari was granted, and thereafter a motion to quash the writ was filed on the ground that the matters involved and determined in the cause were controversies arising in bankruptcy proceedings as distinguished from proceedings in bankruptcy, and that the remedy was by error or appeal rather than by certiorari. Consideration of this motion was postponed to the hearing on the merits.

The case in the Circuit Court of Appeals is reported 125 Fed. Rep. 169.

Mr. Henry S. Robbins, with whom *Mr. Wallace Heckman* and *Mr. James G. Elsdon* were on the brief, for petitioners:

As to the jurisdiction of the courts below:

This case in the District Court was a proceeding in bankruptcy. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *In re Screen Door Co.*, 123 Fed. Rep. 249; and otherwise that court had no jurisdiction. The rule was the same under the act of 1867. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *Knight* v. *Cheney*, Fed. Cas. No. 7883; *In re Marter*, Fed. Cas. No. 9143; *In re Ballou*, Fed. Cas. No. 818; *In re Bonesteel*, Fed. Cas. 1627; *Barstow* v. *Peckham*, Fed. Cas. 1064; *Rogers* v. *Winsor*, Fed. Cas. No. 12,023.

The fact that, after the court had overruled their objections to jurisdiction, these petitioners followed the case—as, without a sacrifice, they could not otherwise do—does not amount to a waiver of these objections. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Re Baudouine*, 101 Fed. Rep. 574.

The District Court was not without jurisdiction *ab initio*. It necessarily must have jurisdiction to proceed up to the point of determining that there exists an adverse claim; that is, that the property is in the possession of an adverse claimant. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Lathrop* v.

Drake, 91 U. S. 516; *Mueller* v. *Nugent*, 184 U. S. 1; *In re Baird*, 116 Fed. Rep. 765; *In re Kane*, 131 Fed. Rep. 386.

The proceeding in the District Court being a proceeding in bankruptcy, the only jurisdiction which the Circuit Court of Appeals had thereof arose out of §§ 24*b*, 25*a*, of the bankruptcy act.

A judgment in a proceeding by or against a lien holder, which merely establishes or rejects the lien, and does not decide whether a claim is a provable debt in bankruptcy, is not a judgment allowing or rejecting the debt or claim within sec. 25*a*, 3. *In re Rouse, Hazard Company*, 91 Fed. Rep. 96; *In re Worcester County*, 102 Fed. Rep. 808; *In re Abraham*, 93 Fed. Rep. 767; *In re Whitener*, 105 Fed. Rep. 180; *Hutchinson* v. *Otis*, 190 U. S. 552.

It follows, then, that no appeal lay to the Circuit Court of Appeals nor can the appeal be treated as a petition for revision under § 24*b*. Cases *supra* and *Stickney* v. *Witt*, 23 Wall. 150; *Cleveland Insurance Co.* v. *Globe Insurance Co.*, 98 U. S. 366.

The Circuit Court of Appeals should, when this point of jurisdiction was raised, have dismissed the appeal. It should have done so even had counsel not raised the question. *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379.

Hence, that court acted without jurisdiction, and certiorari is proper to correct this. *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S. 277; *Kingman* v. *Manufacturing Co.*, 170 U. S. 675.

If the appeal were properly treated as a petition for revision, the Circuit Court of Appeals erred in not confining its action to revision in matter of law. *Chesapeake Shoe Co.* v. *Seldner*, 122 Fed. Rep. 593; *Re Screen Door Co., supra.*

Mr. Joseph E. Paden and *Mr. Newton Wyeth*, with whom *Mr. James H. Reed* and *Mr. James H. Beal* were on the brief, for respondents:

As to the jurisdiction of the courts below:

The District Court had jurisdiction. The sale of the merchandise was by consent and this constituted a fund held subject to the order of the court and the petitioners cannot object to the jurisdiction.

The case was properly heard and disposed of in the Circuit Court of Appeals, as an appeal; and in any event, the petitioners, having raised no objection to the form in which the case was heard by the Circuit Court of Appeals, cannot now question the right of that court so to hear and dispose of the case. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Re Jacobs*, 99 Fed. Rep. 539; *Plymouth Cordage Co.* v. *Smith*, 194 U. S. 311.

As the Court of Appeals had jurisdiction over the subject matter, and the objection now made relates only to the form in which the power of the court should be exercised, the petitioners having made no objection to the Circuit Court of Appeals hearing and determining the case as an appeal, are now estopped from making such objection. *Chesapeake Shoe Co.* v. *Seldner*, 122 Fed. Rep. 593.

If appeal is improper the same can be treated as petition for revision. *Re Richards*, 96 Fed. Rep. 935; *Re Abraham*, 93 Fed. Rep. 767; *Chesapeake Shoe Co.* v. *Seldner*, *supra*.

Hewit v. *Berlin Machine Works*, 194 U. S. 296, is in point for this case. See also *Jaquith* v. *Rowley*, 188 U. S. 620. The consent necessary is to the tribunal, and not to the form of procedure. Where a party appears and maintains the *bona fides* of the transfer, on a full hearing, answers on the merits and the like, he will be held to have consented. *In re Steurer*, 104 Fed. Rep. 976; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Hicks* v. *Knost*, 178 U. S. 241.

Consent is not a matter of words, so much as acts. *Booneville National Bank* v. *Blakey*, 107 Fed. Rep. 891.

If claimants elect to contest their rights further upon the merits in the District Court, after the assertion of jurisdiction in the court, they can consent so to do, and, under § 23*b*,

waive all question as to jurisdiction. *Mueller* v. *Nugent*, 184 U. S. 1, and cases *supra*.

Though all United States courts, except the Supreme Court, may be and are described as inferior courts, yet the District Courts, as courts of bankruptcy, are not inferior courts in the sense that jurisdiction must necessarily appear on the face of the record. *McCormick* v. *Sullivant*, 10 Wheat. 199; *Kennedy* v. *Bank*, 8 How. 586, 611.

These respondents carried the case by appeal to the Circuit Court of Appeals and obtained a review on questions of both fact and law. It was competent for the opposite parties to consent that an appealable case should be heard in the District Court. The appeal was properly heard in the Circuit Court of Appeals. *Elliott* v. *Toeppner*, 187 U. S. 327; *Duncan* v. *Landis*, 106 Fed. Rep. 839; *Booneville National Bank* v. *Blakey*, *supra*.

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

In the view we take of the case, the petition for certiorari sufficiently discloses the facts. If the proceeding in the District Court was a proceeding in bankruptcy and not an independent suit, no appeal lay to the Circuit Court of Appeals, and the jurisdiction of that court was confined to revision in matter of law "on due notice and petition" under clause *b* of section 24.

The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *Holden* v. *Stratton*, 191 U. S. 115; *Denver First National Bank* v. *Klug*, 186 U. S. 202; *Elliott* v. *Toeppner*, 187 U. S. 327, 333, 334.

This distinction existed under the prior bankruptcy law,

and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *In re Bonesteel*, 7 Blatch. 175, Mr. Justice Nelson; *Knight* v. *Cheney*, 14 Fed. Cases, 760, Mr. Justice Clifford; *In re Ballou*, 4 Ben. 135, Mr. Justice Blatchford, then District Judge; *In re Marter*, 16 Fed. Cases, 857, Mr. Justice Brown, then District Judge.

The present act was plainly framed in recognition of the principle of these cases. Subdivision 7 of section 2 confers jurisdiction on the District Courts as courts of bankruptcy to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and we held in *Bardes* v. *Bank*, 178 U. S. 524, that this exception referred to clause *b* of section 23 of the act, which provides: "Suits by a trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." And that the District Courts had no jurisdiction of such plenary suits without consent.

Petitioners asserted this express statutory limitation on jurisdiction and objected that the District Court could not proceed, but their objections were overruled. That they then did not abandon their claims did not amount to a waiver of their objections or to a consent to an exercise of jurisdiction against which they protested. *Louisville Trust Company* v. *Comingor*, 184 U. S. 18. In that case, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response, denying jurisdiction, which the

court refused to entertain, and he then participated in a hearing upon the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," he had assented to its jurisdiction. Upon petition for review the Circuit Court of Appeals reversed the bankruptcy court, and this court upon certiorari affirmed the Circuit Court of Appeals. We said:

"This brought the controversy within the ruling in *Bardes* v. *Bank*, 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there. . . .

"The proceeding was purely summary. . . .

"The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding. . . .

"In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.

"We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

And since, as elaborately expounded in *Bardes* v. *Bank*, the

District Court had no jurisdiction of an independent suit, it follows that the proceeding in that court could not be held to have been such, as, indeed, in form, on reason, and on authority, it manifestly was not. But, nevertheless, the District Court had jurisdiction to determine whether it could or could not proceed further. *Louisville Trust Company* v. *Comingor*, 184 U. S. 18; *Mueller* v. *Nugent*, 184 U. S. 1; *Schweer* v. *Brown*, 195 U. S. 171.

In the present case, the receiver filed a petition reciting that he had taken possession of the property. This was denied. The District Court adjudged that the receiver had not at the time of filing its petition the right of possession, and that the National Storage Company, at that date, and also at the time of the filing of the petition in bankruptcy, was entitled to possession and had possession. Nevertheless it retained jurisdiction and decreed payment to petitioners out of the proceeds of the sale.

The sale in the circumstances did not change the situation. The proceeds stood in place of the property and the order returning the proceeds was equivalent to an order returning the property. This it was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of petitioners on the merits. The Court of Appeals sustained the jurisdiction of the District Court upon the ground that it had acquired a fund and had jurisdiction to dispose of it, but we do not think that a court of bankruptcy can create a jurisdiction forbidden by statute. And in any view, the proceeding was a proceeding in bankruptcy. Being such, an appeal from the decree of the District Court under section 25*a* did not lie, and parties aggrieved could only invoke the supervisory power under section 24*b*. *Holden* v. *Stratton*, 191 U. S. 115; *Hutchinson* v. *Otis*, 190 U. S. 552.

But this was an appeal and not a petition for revision, and hence it was that the Circuit Court of Appeals reviewed the questions of fact and declined to accept the findings of the referee and the District Court. In the exercise of supervisory

power, it would have been confined to matter of law. We are clear that an appeal would not lie, and the decrees of the Circuit Court of Appeals must be reversed, with a direction to dismiss the appeals and remand the cause to the District Court for further proceedings in conformity with this opinion.

In our view the District Court should have declined upon its findings to retain jurisdiction, and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made.

Ordered accordingly.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY *v.* HANLEY.

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

No. 604. Submitted May 1, 1905.—Decided May 15, 1905.

Where the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship, it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as good pleading requires and where the case is not brought within this rule the decree of the Circuit Court of Appeals is final.

Where the jurisdiction of the Circuit Court has been invoked on the ground of diverse citizenship and plaintiff asserts two causes of action, only one of which involves a right under the Constitution, and the Circuit Court of Appeals decides against him on that cause of action and in his favor on the other, the judgment of that court is final and defendant cannot make the alleged constitutional question on which he has succeeded the basis of jurisdiction for an appeal to this court.

HANLEY brought this bill in equity in the Circuit Court of the United States for the District of Idaho, setting up diversity of citizenship as the ground of jurisdiction, and asserted owner-

ship of an undivided one-eighth interest, and of an undivided one-third interest, in the Skookum mining claim, Shoshone County, Idaho. As to the one-third interest, Hanley claimed under certain proceedings in the Probate Court of that county, which were, without notice to him as he said, set aside, and the interest conveyed to the Chemung Company, and by the latter to the Empire State &c. Mining Company. Hanley's title to the one-eighth interest was derived through mesne conveyances from the original grantee under a patent from the United States. This interest Hanley had conveyed to Sweeny and Clark by a deed deposited in the Exchange National Bank of Spokane, to be delivered on certain specified conditions, and he averred that Sweeny and Clark obtained possession of the deed wrongfully and contrary to the escrow agreement, and afterwards made a pretended deed of the interest to the Empire State Company.

On hearing, the Circuit Court decreed against Hanley as to both interests. Hanley carried the case to the Circuit Court of Appeals, which held that he was not entitled to relief as to the one-third interest, but that he was as to the one-eighth interest. The decree was therefore reversed and the cause remanded for further proceedings. 109 Fed. Rep. 712. The case went back and was referred to a master for an accounting as to the one-eighth interest, who reported a large amount of money as due to Hanley. The Circuit Court reduced the amount by deducting the cost of working the property while Hanley was excluded from the mine, and entered a decree quieting Hanley's title to the one-eighth interest and giving him judgment against the Empire State Company for the last named amount. Defendant appealed from this decree and filed a supersedeas bond with the American Bonding Company of Baltimore as surety, and Hanley prosecuted a cross appeal questioning the deduction. The Circuit Court of Appeals sustained the cross appeal and held that the Circuit Court erred in allowing defendants their working costs. 126 Fed. Rep. 97. The case was remanded with directions to modify the decree. This was

done and recovery of the original amount decreed, and also recovery on the bond of the amount it was given to secure, and another appeal was taken by the companies to the Court of Appeals, which affirmed the decree. The pending appeal having been subsequently allowed, was submitted on motion to dismiss.

Mr. W. B. Heyburn, Mr. George Turner and *Mr. F. T. Post,* for appellants:

Where the judgments of the Circuit Court of Appeals in cases where the jurisdiction depends on diverse citizenship, under the act of March 3, 1891, 26 Stat. 826, there is a right of appeal to this court if, in addition to the allegation of diverse citizenship, a distinct Federal question appears on the face of the complaint. *Spreckels Sugar Ref. Co.* v. *McLain,* 192 U. S. 397; *Nor. Pac. Ry. Co.* v. *Soderberg,* 188 U. S. 526; *Sugar Refining Co.* v. *New Orleans,* 181 U. S. 281; *Howard* v. *United States,* 184 U. S. 681; *Col. Cent. M. Co.* v. *Turck,* 150 U. S. 141.

In this case there is a Federal question which will give the Circuit Court jurisdiction in the first instance, as it arises under the Constitution or laws of the United States. Section 2, act of August 13, 1888, 25 Stat. 305.

Defendants, who are in possession of the property and mining its ore, found their right on the proceedings in the Probate Court. The Fourteenth Amendment applies to the action of the courts as well as to the action of the legislative and executive authorities of the States. *Noble* v. *Union River Logging Railroad,* 147 U. S. 175; *Scott* v. *McNeil,* 154 U. S. 34; *C., B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226; *Pennoyer* v. *Neff,* 95 U. S. 714; *Lennard* v. *Louisiana,* 92 U. S. 480; *Hagar* v. *Reclamation Dist.,* 111 U. S. 708; *United States* v. *Lee,* 106 U. S. 220.

The jurisdiction of the Circuit Court would have been maintained on the allegations of the complaint if there had been no averment of diverse citizenship because under these cases the complaint shows a deprivation of property without due process of law.

This court will look at the logical effect of the allegations of the complaint and if they show jurisdiction in the court below on another ground than diverse citizenship the appeal must be allowed, even though the Constitution, law or treaty involved be not mentioned. *Gold Washing Co.* v. *Keyes*, 96 U. S. 199; 1 Chitty Pl. 213; *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S. 526; *Warner* v. *Searle & Herath Co.*, 191 U. S. 195; §§ 5, 6, act of 1891. The cases cited by appellee can be distinguished.

A good ground of equity with reference to one part of a connected transaction gives the court power to adjudicate with reference to the entire case. Pomeroy's Equity Jurisprudence, 2d ed., §§ 181, 231, 242.

This principle applies as well to the constitutional and statutory jurisdiction of the Federal courts as to their equitable jurisdiction. It has been so applied on the Circuit. *Brooks* v. *Stolley*, 3 McLean, 523.

It has been applied by this court in cases where bills, original in the equitable sense, and therefore requiring diversity of citizenship for purposes of Federal jurisdiction, have been treated as ancillary and supplemental for the purpose of avoiding objection to the Federal jurisdiction. *Blossom* v. *Railroad Co.*, 1 Wall. 655; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Freeman* v. *Howe*, 24 How. 460; *Johnson* v. *Christian*, 125 U. S. 642; *Pac. R. R. of Mo.* v. *Mo. Pac. R. R. Co.*, 111 U. S. 505; *Keppendorf* v. *Hyde*, 110 U. S. 276. The whole case, then, may be said to have been governed by the constitutional question.

Mr. M. A. Folsom for appellee:

The jurisdiction of the Circuit Court depended entirely on diversity of citizenship. *Stevenson* v. *Fain*, 195 U. S. 165.

Allegations of a Federal question must appear in the complaint, and must be clear and distinct and must show a substantial Federal question. All doubts are to be resolved against the jurisdiction of the Circuit Court. *Grace* v. *Ameri-*

can Cent. Ins. Co., 109 U. S. 278; *Lampasas* v. *Bell*, 180 U. S. 276; *Western Union Tel. Co.* v. *Ann Arbor R. Co.*, 178 U. S. 239; *New Orleans* v. *Benjamin*, 153 U. S. 423; *York* v. *Texas*, 137 U. S. 15.

Plaintiff below could not claim to have been deprived of the interest until he established that he had acquired it. The constitutional question, if any was raised, was therefore conjectural. *Cosmopolitan Co.* v. *Walsh*, 193 U. S. 460; *Cornell* v. *Green*, 163 U. S. 75; *Ansbro* v. *United States*, 159 U. S. 695; *Ex parte Lennon*, 150 U. S. 393, 400; *Carey* v. *Houston Ry. Co.*, 150 U. S. 170.

The claim of the one-third interest was abandoned and if any constitutional question was based on it at any time it cannot be now resorted to. *Hill* v. *Chicago & Evanston R. Co.*, 140 U. S. 52; *Scriven* v. *North*, 134 U. S. 366. If sufficient allegations of the constitutional question with reference to the one-third interest were made in the complaint, the appellants here do not bear such a relation to the question as to entitle them to appeal to this court. *New Orleans* v. *Emsheimer*, 181 U. S. 153; *Anglo-Am. Provision Co.* v. *Davis*, 191 U. S. 376; *Lampasas* v. *Bell*, 180 U. S. 270.

The Bonding Company voluntarily appeared and made itself a quasi-party to the litigation. Judgment was rendered against that company upon a petition and notice in a method similar to that followed in *Woodworth* v. *Northwestern Ins. Co.*, 185 U. S. 354; *S. C.*, 119 Fed. Rep. 148; *Gordon* v. *National Bank*, 53 Fed. Rep. 471; *Meredith* v. *Santa Clara Co.*, 60 California, 617.

The right of the Bonding Company to an appeal depends upon the right of the Empire State Company to an appeal. *Gregory* v. *Van Ee*, 160 U. S. 643; *Carey* v. *Houston*, 161 U. S. 127.

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

We are of opinion that the jurisdiction of the Circuit Court was dependent entirely upon diversity of citizenship, and that

this appeal must be dismissed. Appellants' contention is that the allegations of Hanley's complaint as to the one-third interest amounted to the assertion that he had been deprived of that interest by the Probate Court without due process of law, and were sufficient to support the jurisdiction of the Circuit Court on this ground, irrespective of diversity of citizenship. We do not so regard the allegations. What Hanley asserted was that his title to the third interest was good because he had purchased it from the administrator under the decree of the Probate Court, and that the subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice, and for lack of evidence.

Granting that the Fourteenth Amendment applies to the action of the courts as well as of the legislative and executive authorities of the States, the averments of the complaint did not suggest that the courts of Idaho would hold the later proceedings of the Probate Court, if attacked by Hanley directly, effectual to overthrow his purchase; or charge that in such action as had been taken they had committed error so gross as to amount in law to a denial by the State of due process of law. Hanley's contention was in effect that the later proceedings were void for lack of jurisdiction, and he did not pretend that he could not have obtained redress by direct suit in the state courts.

The Constitution and laws of the United States were not mentioned in the complaint, nor any dispute or controversy raised as to the effect or construction of the Constitution or laws on the determination of which the result depended; nor was any title, right, privilege, or immunity specially set up or claimed under Constitution or law.

If this had been a writ of error to a state court, the averments would not have brought it within section 709 of the Revised Statutes. If it had been a direct appeal from the Circuit Court under section 5 of the act of March 3, 1891, it could not have been sustained because the construction or

application of the Constitution of the United States was not distinctly presented for decision in the court below.

And as an appeal from the Circuit Court of Appeals under section 6 of the act of 1891, it cannot be sustained because it falls within the settled rule that: "Where the jurisdiction of the Circuit Court is invoked on the ground of diverse citizenship it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as good pleading requires; and where the case is not brought within the rule the decree of the Circuit Court of Appeals is final." *Arbuckle* v. *Blackburn*, 191 U. S. 405; *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239.

If the allegation of diversity of citizenship had been omitted from the bill, the jurisdiction could not have been maintained.

The decisions of the courts below did not turn on any Federal question. The Circuit Court held that Hanley had no title to the one-third interest because the Idaho statute relating to probate sales had not been complied with; the Court of Appeals, that Hanley was not entitled to the aid of a court of equity, in respect of that interest, because of his conduct at the time of the transaction.

Appellants succeeded in their defense as to the one-third interest, and Hanley accepted the result on the second appeal. They now make a grievance of their own success and ask that the supposed constitutional question as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, it was in their favor. In our opinion this cannot be permitted. *Anglo-American Provision Company* v. *Davis Provision Company*, 191 U. S. 376; *Lampasas* v. *Bell*, 180 U. S. 276.

Appeal dismissed.

OLD DOMINION STEAMSHIP COMPANY *v.* VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 231. Argued April, 25, 26, 1905.—Decided May 15, 1905.

The general rule that tangible personal property is subject to taxation by the State in which it is, no matter where the domicil of the owner may be, is not affected by the fact that the property is employed in interstate transportation on either land or water.

Vessels registered or enrolled are not exempt from ordinary rules respecting taxation of personal property. The artificial *situs* created as the home port of a vessel, under § 4141, Rev. Stat., only controls the place of taxation in the absence of an actual *situs* elsewhere.

Vessels, though engaged in interstate commerce, employed in such commerce wholly within the limits of a State, are subject to taxation in that State although they may have been registered or enrolled at a port outside its limits.

On March 17, 1904, the Supreme Court of Appeals of the State of Virginia, in a matter appealed from a finding of the State Corporation Commission, entered the following findings and order:

"That the Old Dominion Steamship Company was a non-resident corporation, having been incorporated by the senate and house of representatives of the State of Delaware; that it was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic Ocean and communicating navigable waters, between the city of New York, in the State of New York, and Norfolk, and certain other ports within the State of Virginia. That said steamship company in the prosecution of its said transportation business owned and operated the vessel property above named; that these vessels, with the exception of the tug Germania, whose movements and use will be hereinafter stated, visited various ports or points within the State of Virginia, for the purpose of receiving freight and passengers, for which they

issued bills of lading and tickets to points outside the State of Virginia; that owing to the shallow waters where these vessels plied it was impossible in most instances for the larger ocean-going steamers of the company to be used; that in consequence the vessels above enumerated were used to receive the freight and passengers as aforesaid, giving the shipper of freight a bill of lading for the same, destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean-going vessels of the steamship company, and so the ultimate destination, namely, New York, and elsewhere outside of Virginia, was reached; that any other business transacted by the above-named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the State of Virginia, with the name and port of such enrollment painted on the stern of each of them; that the said vessels, though regularly enrolled and licensed for coastwise trade, were then used on old established routes upon navigable waters within Virginia, as follows, to wit:

"First. The steamer Hampton Roads, between Fort Monroe and Hampton and Norfolk.

"Second. The steamer Mobjack, between points in Mathews and Gloucester Counties and Norfolk.

"Third. The steamers Luray and Accomac, between Smithfield and Norfolk.

"Fourth. The steamer Virginia Dare, between Suffolk and Norfolk.

"Fifth. The steamers Berkeley and Brandon, between Richmond and Norfolk; and

"The steamers Berkeley and Brandon ply between Richmond and Norfolk. These two steamers were completed in the year 1901, or early in 1902, one of them having been constructed at the William R. Trigg shipyard in the city of Richmond, and the other outside of the State of Virginia. Early in the year 1902 they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steamers were placed upon this route and since that time, the Old Dominion Steamship Company has by public advertisement called attention to the fact that these two steamers were especially fitted in the matter of stateroom accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and have been regularly carrying freight and passengers between the said two points in Virginia as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied under the revenue laws of the State of Virginia for a license to sell liquor at retail on each of these steamers, and on July 1, 1902, there was granted through the commissioner of the revenue of the city of Richmond a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30, 1903. On or about the same time, the said steamship company complied with the revenue laws of the United States, and paid the necessary revenue tax through the custom house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903, the said steamship company, in order to obtain licenses to sell liquor at retail on each of these steamers, applied for the same in the city of Richmond and complied with the requirements of section 143 of the new revenue law, approved April 16, 1903, and so ob-

tained licenses for the years 1903–1904 to sell liquor at retail on each of these steamers on their route between the cities of Richmond and Norfolk, and likewise, on or about the same time, complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

"Sixth. The steam tug Germania, which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean-going steamers of the Old Dominion Steamship Company, and the transferring from different points in those waters freight from connecting lines destined to points outside of Virginia.

"And the court, having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal *situs* of the vessels and barges assessed for taxation by the finding of the state corporation commission is, for that purpose, within the jurisdiction of the State of Virginia, and that said property is amenable to the tax imposed thereon—notwithstanding the fact that said vessels and barges are owned by a non-resident corporation, that they may have been enrolled under the act of Congress at some port outside the State of Virginia, and that they are engaged, in part, in interstate commerce—and doth so decide and declare. Therefore it seems to the court here that the finding of the state corporation commission appealed from is without error, and said finding is approved and affirmed. It is further considered by the court that the appellee recover against the appellant thirty dollars damages and its costs by it about its defense expended upon this appeal."

To review this order the Old Dominion Steamship Company sued out this writ of error.

Mr. William H. White for plaintiff in error:

The State of Virginia cannot, consistently with Art. I, § 8, cl. 3, of the Constitution of the United States and the act of Congress pursuant thereto, lawfully tax vessels owned by

non-resident citizens, duly enrolled under the navigation laws of the United States licensed for and engaged in the coastwise trade. §§ 4141, 4313–4315 Rev. Stat.; *Transportation Co.* v. *Wheeling*, 99 U. S. 278; *Pullman Co.* v. *Twombly*, 29 Fed. Rep. 665; *Railroad Co.* v. *Maryland*, 21 Wall. 456; *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596. The steamboat property involved in this case, operated as described in the certificate of facts, is as clearly engaged in the business and commerce of the country upon its highways as was the property in the cases cited. They are neither owned by citizens or residents of Virginia, nor enrolled or registered in that State. The record does not show whether these vessels were actually taxed at their home port or not but that matters not as they are liable to taxation there and that answers the law. *Morgan* v. *Parham*, 16 Wall. 471; *Roberts* v. *Charlevoix*, 60 Michigan, 192; *Johnson* v. *De Bary Baya Line*, 37 Florida, 499.

If the principle contended for by the Commonwealth in this case is conceded it would follow that while she could equally tax the vessel property of her own citizens, she could equally tax the vessel property of the citizens of any of the other States, which might be found in her waters, and likewise expose the vessel property of her own citizens to be taxed by the other States in whose waters they might be found trading. The confusion and injustice following such a condition is more than an ample justification of the principle which permits such property to be taxable only at its legal *situs* or "home port" and not anywhere that it may be actually found trading in the waters of any State of the Union.

Mr. William A. Anderson, Attorney General of the State of Virginia, for defendant in error:

The general and unquestioned doctrine is that the State has the right to tax all property, movable as well as immovable, actually located within its confines.

And this is the law as to tangible property, without reference to the domicil of its owner.

The ancient fiction of the Roman law—*mobilia sequuntur personam*—does not apply to tangible movable personal property. *State Tax on Foreign-held Bonds*, 15 Wall. 300; Story Conflict of Laws, 7th ed., § 550; Judson on Taxation, § 393; 1 Cooley, Taxation, 3d ed., 22; *Transit Co.* v. *Lynch*, 177 U. S. 152.

The only limitation upon this power in the States is that it shall not be so exercised as to hinder or interfere with interstate or international commerce. The tax, therefore, cannot be levied upon the business of interstate commerce, but it can be levied upon property used in interstate commerce. A tax on ships does not violate the commerce clause of the Federal Constitution. The only question is whether they are properly within the jurisdiction of the State levying the tax. *Ravennel* v. *Charleston*, 4 Rich. L. 286.

A State may levy a tax on steamboats plying exclusively in its own waters, owned by its own citizens, although enrolled and licensed as coasting vessels, under the laws of the United States. *Lott* v. *Mobile Trade Co.*, 43 Alabama, 518; *Gloucester Ferry case*, 114 U. S. 206; *N. W. Lumber Co.* v. *Chehalis County*, 64 Pac. Rep. 909; *N. & W. Railway Co.* v. *Board of Public Works*, 97 Virginia, 23; *Mintun* v. *Hays*, 2 California, 590.

The fact that these vessels are engaged in interstate commerce, according to the repeated adjudications of this court, fails to give to the instruments and vehicles, which carry such traffic between the States, immunity from taxation by the State in whose jurisdiction such vehicles have their actual *situs*. *Perry* v. *Torrance*, 32 Am. Dec. 725; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 30; *Denver & R. G. Ry.* v. *Church*, 17 Colorado, 1; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Adams Express Co.* v. *Ohio*, 166 U. S. 185; *American Refrigerator Co.* v. *Hall*, 174 U. S. 70.

Cases cited by plaintiff in error can be distinguished as the vessels in those cases were only temporarily in the State where the taxation was held illegal.

The claim that these vessels, although habitually, continu-

ously and permanently within the jurisdiction of Virginia, and regularly engaged in carrying interstate and intra-state commerce, exclusively between Virginia ports, are immune from taxation in Virginia because their Delaware owner has had them enrolled in New York, or Delaware, or somewhere outside of Virginia cannot be sustained.

Although this question has been decided by the highest courts of several of the States, where it has arisen, in favor of the validity of the tax, it does not seem to have ever been directly adjudicated by this court; yet the reason and principles of the decisions by this court as to the liability of personal property generally, and particularly as to the liability of the vehicles of commerce upon land, to taxation by the State in whose jurisdiction they are actually located, fully sustain the legality and the rightfulness of the taxation of these vessels by Virginia.

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

The facts being settled, the only question is one of law. Can Virginia legally subject these vessels to state taxation? The general rule is that tangible personal property is subject to taxation by the State in which it is, no matter where the domicil of the owner may be. This rule is not affected by the fact that the property is employed in interstate transportation. *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U. S. 18, in which Mr. Justice Gray, speaking for the court, said (p. 23):

"It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

See also *Cleveland &c. Railway Co.* v. *Backus*, 154 U. S. 439, 445; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1, 14.

This is true as to water as well as to land transportation. In *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196,

217, Mr. Justice Field, in delivering the opinion of the court, after referring to certain impositions upon interstate commerce, added:

"Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption."

See also *Passenger Cases*, 7 How. 283, in which Mr. Justice McLean said (p. 402):

"A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens."

The same doctrine is laid down in the same case by Mr. Chief Justice Taney (p. 479). See also *Transportation Company* v. *Wheeling*, 99 U. S. 273. That the service in which these vessels were engaged formed one link in a line of continuous interstate commerce may affect the State's power of regulation but not its power of taxation. True, they were not engaged in an independent service, as the cabs in *Pennsylvania Railroad Company* v. *Knight*, 192 U. S. 21, but, being wholly within the State, that was their actual *situs*. And, as appears from the authorities referred to, the fact that they were engaged in interstate commerce does not impair the State's authority to impose taxes upon them as property. Indeed, it is not contended that these vessels, although engaged in interstate commerce, are not subject to state taxation, the contention being that they are taxable only at the port at which they are enrolled. In support of this contention the two principal cases relied upon are *Hays* v. *The Pacific Mail Steamship Company*, 17 How. 596, and *Morgan* v. *Parham*, 16 Wall. 471. Registry and enrollment are prescribed by sections 4141 and 4311, Rev. Stat., for vessels of the United States engaged in foreign and domestic commerce. Section 4141 reads:

"SEC. 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

By sections 4131 and 4311 vessels registered or enrolled are declared to be deemed vessels of the United States. As stated by Chancellor Kent, in his Commentaries, vol. 3, p. *139:

"The object of the registry acts is to encourage our own trade, navigation, and ship-building, by granting peculiar or exclusive privileges of trade to the flag of the United States, and by prohibiting the communication of those immunities to the shipping and mariners of other countries. These provisions are well calculated to prevent the commission of fraud upon individuals, as well as to advance the national policy. The registry of all vessels at the custom house, and the memorandums of the transfers, add great security to title, and bring the existing state of our navigation and marine under the view of the General Government. By these regulations the title can be effectually traced back to its origin."

This object does not require and there is no suggestion in the statutes that vessels registered or enrolled are exempt from the ordinary rules respecting taxation of personal property. It is true by sec. 4141 there is created what may be called the home port of the vessel, an artificial *situs*, which may control the place of taxation in the absence of an actual *situs* elsewhere, and to that extent only do the two cases referred to go.

In *Hays* v. *Pacific Mail Steamship Company, supra,* ocean steamers owned and registered in New York and regularly plying between Panama and San Francisco and ports in Oregon, remaining in San Francisco no longer than was necessary to land and receive passengers and cargo and in Benicia only for repairs and supplies, were held not subject to taxation

by the State of California. In the course of the opinion, by Mr. Justice Nelson, it was said (p. 599):

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

Clearly the ruling was that these steamers had acquired no actual *situs* within the State of California; that occasionally touching at ports in the State did not make them incorporated with the other personal property of the State. Hence, having no *situs* in California they were not subject to taxation there, but were subject to state taxation at the artificial *situs* established by their registry.

In *Morgan* v. *Parham, supra,* it appeared that a steamship was registered in New York, under the ownership of the plaintiff; that she was employed as a coasting steamer between Mobile and New Orleans; that she was regularly enrolled as a coaster in Mobile by her master and received a license as a coasting vessel for that and subsequent years. It was held that she was not subject to taxation by the State of Alabama. Mr. Justice Hunt, in delivering the opinion of the court, said (pp. 474, 476):

"The fact that the vessel was physically within the limits of the city of Mobile, at the time the tax was levied, does not decide the question. Thus, if a traveler on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either of these persons would be subject to taxation as property within the city. It is conceded by the respective counsel that it would not have been.

"On the other hand this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steam-

boat, or a post-coach engaged in a local business within a State may be subject to local taxation, although it carry the mail of the United States. The commerce between the States may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. . . . It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only."

In other words, here as in the prior case, there was no actual *situs* of the vessel. She had not become commingled with the general property of the State and was therefore subject to taxation at the artificial *situs*, the port of her registry.

In *Transportation Company* v. *Wheeling*, *supra*, Mr. Justice Clifford concludes his discussion with this statement (p. 285):

"From which it follows, as a necessary consequence, that the enrollment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property."

Of course, if the enrollment does not exempt vessels from taxation as other personal property, the place of enrollment, whether within or without the State in which the property is actually situated, is immaterial, for other like property is taxable at its actual *situs*.

So far as the state authorities are concerned reference may be made to *Lott, Tax Collector*, v. *Mobile Trade Company*, 43 Alabama, 578; *National Dredging Company* v. *The State*, 99 Alabama, 462; *Northwestern Lumber Company* v. *Chehalis County*, 25 Washington, 95.

Our conclusion is that where vessels, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a State, they are subject to taxation in that State, although they may have been registered or enrolled at

a port outside its limits. The conclusion, therefore, reached by the Court of Appeals of Virginia was right, and its judgment is

Affirmed.

THOMPSON *v.* DARDEN.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 159. Argued March 3, 1905.—Decided May 15, 1905.

Congress has power to permit, and by the act of 1789 and § 4235, Rev. Stat., has permitted, the several States to adopt pilotage regulations, and this court has repeatedly recognized and upheld the validity of state pilotage laws. The Virginia pilot law is not in conflict with § 4237, Rev. Stat., prohibiting discriminations because it imposes compulsory pilotage on all vessels bound in and out through the capes, and does not impose it on vessels navigating the internal waters of the State; nor can this objection be sustained on the ground that the navigation of the internal waters of Virginia is more tortuous than that in and out of the capes.

If a state pilot law does not conflict with the provisions of the Federal statutes in regard to pilotage this court cannot avoid its provisions because it deems them unwise or unjust.

This court will not investigate or decide a proposition which was not raised in the court below and is based upon conjecture, even though the facts suggested might have existed.

THE facts are stated in the opinion.

Mr. Robert M. Hughes for plaintiff in error:

This statute violates Art. I, § 9, cl. 6, U. S. Const., which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. This clause applies both to Federal and state legislation. *Passenger Cases*, 7 How. 414; *The Lizzie Henderson*, Fed. Cas. No. 17,726*a*.

Under § 1965, Virginia Stat., every vessel inward bound

from sea must take a Virginia pilot; and under § 1963 it is made a crime for any person not a Virginia pilot, or for a Virginia pilot after removing from the State, to conduct a vessel to or from sea.

The statute works a discrimination in favor of voyages between Virginia ports and Maryland ports. No pilot fee is imposed for such a voyage, and yet a pilotage fee is imposed for all vessels coming from sea to a Maryland port, which includes all vessels coming from other States. Therefore, under this law, a vessel plying between a Virginia port and a Maryland port is exempt from pilotage, unless it voluntarily chooses to employ a pilot, and a vessel coming from the port of any other State to a Maryland port is required to pay pilotage. *Guy* v. *Baltimore*, 100 U. S. 434; *Brewing Co.* v. *McGillivray*, 104 Fed. Rep. 258; *The John M. Walsh*, 2 Fed. Rep. 364; *Booth* v. *Lloyd*, 33 Fed. Rep. 593.

The law is in conflict with § 4237, Rev. Stat., which prohibits discriminations. *Spraigue* v. *Thompson* 118 U. S. 90; *The Undaunted*, 37 Fed. Rep. 662; *Atlee* v. *Union Packet Co.*, 21 Wall. 396.

Section 4237 applies as well to cases where pilotage is voluntary as to cases where it is compulsory, under § 1963 of the Virginia pilot law.

This court will take judicial notice that there are no sea ports on the outside Virginia coast and the commerce is handled from the bay ports. *Brown* v. *Piper*, 91 U. S. 37; *Minnesota* v. *Barber*, 136 U. S. 313, 330.

Thus the question in this case reduces itself simply to the issue whether a State can do indirectly what it is forbidden to do directly; whether it can word a statute in such a way as to apply ostensibly to waters where it has no ports as an excuse for making it apply to other States having ports. *Minnesota* v. *Barber*, *supra*; *Wright* v. *Wright*, 141 U. S. 62; *Brimmer* v. *Rebman*, 138 U. S. 78.

The law violates § 4236, Rev. Stat., under which a master in boundary waters can take the pilot of either State. Chesa-

peake Bay is a boundary between Maryland and Virginia and under this law a master must take a Virginia pilot and cannot take a Maryland pilot. As to the Delaware cases in which has been held a boundary between Delaware and Pennsylvania involving similar question, see *The Clymene*, 9 Fed. Rep. 164; *S. C.*, 12 Fed. Rep. 346; *Abercorn*, 26 Fed. Rep. 877; *S. C.*, 28 Fed. Rep. 384; *South Cambria*, 27 Fed. Rep. 525.

Mr. D. Tucker Brooke and *Mr. John W. Daniel*, with whom *Mr. R. C. Marshall* and *Mr. Fred Harper* were on the brief, for defendant in error:

Olsen v. *Smith*, 195 U. S. 332, covers this case and the act is constitutional. Art. I, § 9, cl. 6, of the Constitution of the United States is not violated. *Passenger Cases*, 7 How. 283, 406, 414; *Munn* v. *Illinois*, 94 U. S. 135; *Morgan* v. *Louisiana*, 118 U. S. 467; *Johnson* v. *Chicago*, 119 U. S. 400; Black's Const. Law, 303; Miller's on Const., 576.

The law does not violate the Revised Statutes.

For history of pilot laws, state and Federal, see 2 Henning's St. at L. 39; Virginia act of 1775; 6 Henning's St. at L. 490; *Ex parte McNeil*, 13 Wall. 238; *The Chase*, 14 Fed. Rep. 854; act of Congress of 1789; Virginia Code of 1887, p. 495, § 1965; Virginia Code of 1873, ch. 91, § 12, p. 772; act of April 21, 1882, p. 392.

The map of Virginia disproves the assertion that there is any discrimination in the Virginia statutory law as to "*rates of pilotage*" in navigation, outward or inward bound, from or to the Chesapeake Bay and the sea. Indeed, there is no discrimination of any kind as between "vessels sailing between the ports of one State" (Virginia), as one class, and "vessels sailing between ports of different States," as another class.

Seacoast and inward pilotage is required by Virginia from any vessel "inward bound from sea" through the Cape channel to inland ports, no matter from what port it comes over seas, and no matter to what port it is bound inward. The "Sea" or "Ocean" means the great mass of waters that surround or

encompass the land; and "The High Seas" means the unenclosed waters of the ocean. They include the waters on the seacoast which are without and seaward of low-water mark on the seacoast. Bouvier's Law Dictionary, High Seas and Sea. Coastwise voyages are on the sea.

The pilotage systems require diversities or plans to meet local necessities, and are local, not national, in their nature.

In *Cooley* v. *Port Wardens*, 12 How. 299, the statute did not apply to ports "within the River Delaware," showing that the Pennsylvania legislature differentiated inland pilotage from that which related to waters over which vessels coursed to sea, just as the Virginia legislature has done, and covering, indeed, all the principles that are pertinent to this case and as to the constitutionality of our composite system of pilotage, which intermingles Federal and state statutes, or as to the power of the States under it to differentiate the plans adopted to meet the local necessities arising as to particular "bays, inlets, rivers, harbors, and ports," see *Ex parte McNeil*, 13 Wall. 236; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Spraigue* v. *Thompson*, 118 U. S. 90; *Oslen* v. *Smith*, 195 U. S. 332.

Pilotage laws should be liberally construed. *Smith* v. *Swift*, 8 Metc. 332. *The Charlton*, 8 Asp. M. C. 29. There are no discriminatory features in the act and plaintiff in error errs in his analysis of the law.

Mr. Justice White delivered the opinion of the court.

The law of the State of Virginia imposes compulsory pilotage on all vessels inward bound from sea through the Virginia capes, other than coasting vessels having a pilot's license, no matter to what port or point the vessel may be bound, and likewise imposes compulsory pilotage on all vessels outward-bound through the capes. The compulsory pilotage inward bound from the sea extends no further than to Newport News, Smith's Point, Yorktown or Norfolk, and the compulsory pilotage outward bound through the capes commences at said

points respectively. In the inland waters of Virginia above the points named compulsory pilotage does not prevail, but pilotage is regulated and rates therefor are provided, the duty being imposed, except where the statutes otherwise provide, of using only a licensed Virginia pilot if the services of a pilot are taken. Virginia Code of 1887, §§ 1963, 1965, 1966, 1978 and 1900. Reference is made in the brief of counsel for the defendant in error to Virginia colonial legislation, (1775), imposing compulsory pilotage on vessels inward bound from sea through the capes, accompanied with the statement, which is unchallenged, that from that time to the present date there has been no period when compulsory pilotage regulations of a like nature have not prevailed in Virginia. The contentions of the plaintiff in error arising on this record assail the validity of the pilotage laws now in force. The controversy thus arose.

In August, 1902, the schooner William Neely, engaged in the coastwise trade between New England and Virginia, Abram P. Thompson, master, when bound in from sea to Norfolk, was offered by Joseph J. Darden, a licensed Virginia pilot, his services, which were declined. Thereupon Darden, the pilot, sued Thompson, the master, in the court of law and chancery of Norfolk, for his pilotage charge. Thompson demurred on the ground that the Virginia statutes as to pilotage were void because repugnant to the Constitution and laws of the United States, for various reasons, which were specified in the demurrer. The trial court sustained the demurrer. Darden, taking the record to the Court of Appeals of Virginia, applied for a writ of error, which was not a matter of right. The court allowed the writ, heard the cause, and, for reasons expressed in a full and careful opinion, reversed the judgment and remanded the cause for a new trial. 101 Virginia, 635. At the new trial Thompson reiterated, by way of offers of evidence and other proceedings, the objections which had been expressed in the demurrer, and preserved his rights by exceptions taken to the action of the trial court which adjudged

against him. He then carried the record to the Court of Appeals and applied for a writ of error, which was refused, and thereupon this writ was sued out.

In the argument at bar seven grounds of error are stated, and in referring to them generally many minute suggestions are made concerning the pilotage statutes, by way of indicating that discrimination arises from them. They mainly relate to the statutes regulating pilotage in the internal waters. Whilst we have given these suggestions our attention, we content ourselves with saying that we deem them to be devoid of merit. The more so because in the written argument the discussion is expressly limited to the first, second and fifth grounds of alleged error. These we proceed to consider.

1st. "This statute violates Article 1, section 9, clause 6, of the Federal Constitution, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." In effect this proposition denies the power of Congress to permit the several States to adopt pilotage regulations, despite the recognition of that authority by Congress as early as 1789, Rev. Stat. 4235, and the repeated adjudications of this court recognizing and upholding the practice on the subject which has obtained from the beginning. *Olsen* v. *Smith*, 195 U. S. 332, and authorities there cited.

2d. "The Virginia pilot law is in conflict with section 4237 of the United States Revised Statutes." The section in question was quoted and commented on in *Olsen* v. *Smith, supra*, and avoids the provisions of all state regulations making "any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States." It cannot be said that the pilotage charge for vessels bound in and out through the capes is in and of itself discriminatory, since it imposes a like compulsory pilotage charge upon all vessels

bound in and bound out. Speaking of the requirements of the statute, the Supreme Court of Appeals of Virginia said in its opinion in this case:

"By the provisions of the sections of the Code quoted all vessels (except coastwise vessels with a pilot license) inward bound from the sea to Smith's Point, Yorktown, Newport News or Norfolk, or any intermediate point, and all such vessels outward bound to the sea from Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, are subject to the compulsory regulations and rates therein provided. All vessels are subject to the same regulations, and, under the same circumstances and conditions, are required to pay the same fees."

The arguments made to support the assertion that the pilot laws conflict with the act of Congress are twofold. First. As the State of Virginia has no appreciable commerce from her own ports inward bound through the capes, therefore there is discrimination. Second. As Virginia has chosen by her legislation not to subject commerce on her internal waters to a compulsory charge for pilotage, therefore there is a discrimination in favor of commerce on the internal waters of Virginia and against commerce bound in and out through the capes from and to the sea. In other words, the proposition is that the State of Virginia was without power to make an undiscriminating regulation as to pilotage for ships bound in and out through the capes, unless a like regulation was made applicable to all the internal waters within the State. This is attempted to be sustained by contending that the navigation of the internal waters of Virginia is more tortuous than is the navigation in and out of the capes, and other suggestions of a kindred nature.

But the unsoundness of the proposition is made manifest from its mere statement. In effect, it but denies the power of Virginia to regulate pilotage, and presupposes that courts are vested with authority to avoid the pilotage regulations adopted by the States, which do not discriminate as to com-

merce to which they apply, simply because it is deemed they are unwise or unjust. As pointed out in *Olsen* v. *Smith*, an objection based on the assumed injustice of a pilotage regulation does not involve the power to make the regulation. Objections of this character, therefore, if they be meritorious, but concern the power of Congress to exercise the ultimate authority vested in it on the subject of pilotage.

3d. "The pilot law violates section 4236 of the Revised Statutes, which provides: 'The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the law of either of the States bounded on such waters, to pilot the vessel to or from such port.'" It is said that whilst it may be difficult to say that the waters of the Chesapeake Bay between the capes constitute a boundary, still it is possible to so conclude. We observe concerning this contention that it does not appear to have been raised in the courts below. It is accompanied with no suggestion that the State of Maryland has ever attempted to regulate pilotage between the capes of Virginia, to which the Virginia statute relates, or that any Maryland pilot offered his services. The proposition, therefore, rests upon a series of mere conjectures, which we cannot be called upon to investigate or decide.

Judgment affirmed.

HARDING v. HARDING.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 222. Argued April 20, 1905.—Decided May 15, 1905.

Pursuant to the statutes of Illinois, a wife living apart from her husband, both being citizens of Illinois, sued for separate maintenance alleging that she was so living on account of the husband's cruelty and adultery and without any fault on her part. The suit was contested, and, after much evidence had been taken, the husband filed a paper admitting that the evidence sustained the wife's contention, and consenting to a decree pro-

viding for separation and support on certain terms; and the wife filed a paper accepting the terms offered by the husband if the decree found that her living apart from her husband was without fault on her part. Such a decree was entered. Subsequently the husband removed to California and commenced a suit for divorce on the ground of desertion. The wife contested and pleaded the Illinois judgment as an estoppel, but the California court declined to recognize it on the ground that the issues were not the same, and also because it was entered on consent. The wife then defended on the merits and judgment was entered in favor of the husband. Reversed on writ of error and *held* that;

Under the circumstances the wife did not waive her right to assert the estoppel of the judgment by defending on the merits.

The issues involved in the Illinois case and the California case were practically the same and under the full faith and credit clause of the Constitution the California court should have held that the Illinois judgment was an estoppel against the assertion of the husband that the wife's living apart from him was through any fault on her part or amounted to desertion.

As under the Illinois statutes the judgment entered in favor of the wife was necessarily based on a judicial finding that her living apart was not through her fault the papers filed were to be regarded as consents that the testimony be construed as sustaining the wife's contention and not as mere consents for entry of judgment.

As a judgment in Illinois entered on consent has the same force as a judgment entered *in invitum*, and is entitled to similar faith and credit in the courts of another State.

THE facts are stated in the opinion.

Mr. Pliny B. Smith, with whom *Mr. John S. Miller* was on the brief, for plaintiff in error:

This court has jurisdiction to review the ruling of the Supreme Court of California upon this writ of error. *Andrews* v. *Andrews*, 188 U. S. 14; *Atherton* v. *Atherton*, 181 U. S. 155; *Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Lynde* v. *Lynde*, 181 U. S. 183; *Water Co.* v. *Railroad Co.*, 172 U. S. 475; *Bank* v. *Stevens*, 169 U. S. 432; *Huntington* v. *Attrill*, 146 U. S. 657; *Gt. W. Tel. Co.* v. *Purdy*, 162 U. S. 329.

This case comes within the second clause of § 709, because there is drawn in question the validity of an authority exercised by the Supreme Court of California, on the ground of its being repugnant to the Constitution and laws of the United States. It makes no difference by what department of the

State the authority was exercised the validity of which is called in question. *Railroad Co.* v. *Chicago*, 166 U. S. 226, 233, 234.

If the decision of the Federal question was necessarily involved in the state court, and the case could not have been determined without deciding such question, this is sufficient. Cases cited *supra* and *Chapman* v. *Goodnow*, 123 U. S. 540. It is sufficient that it appears from the record that such rights were specially set up in such manner as to bring it to the attention of that court, *Green Bay &c. Co.* v. *Patent Paper Co.*, 172 U. S. 58, 67, or that it was the necessary effect of the judgment. *Roby* v. *Colehorn*, 146 U. S. 153. *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Lynde* v. *Lynde*, 181 U. S. 183.

Here the Federal question was in fact the only question decided by the Supreme Court of California. And see also *Chicago L. I. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake* v. *Yuba County*, 116 U. S. 410; *Arrowsmith* v. *Harmoning*, 118 U. S. 195; *Kaukauna County* v. *Green Bay &c. Co.*, 142 U. S. 257, 271; *Railroad Co.* v. *Adams*, 180 U. S. 28; *Railroad Co.* v. *Osborn*, 193 U. S. 17, 28; *Laing* v. *Rigney*, 160 U. S. 531.

The opinion of the state court may be examined for the purpose of determining whether the Federal question was presented and decided. *Phil. Fire Assn.* v. *New York*, 119 U. S. 110, 116.

Under the Fourteenth Amendment, proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process. *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

Jurisdiction of the subject matter in actions of divorce depends upon domicil, and without such domicil there was no authority to decree a divorce. Cases cited *supra*.

A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, can not be again drawn into question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different. Black on Judges, § 504;

Stockton v. *Ford*, 18 How. 414; *Hopkins* v. *Lee*, 6 Wheat. 109; *Smith* v. *Kernochan*, 7 How. 198; *Young* v. *Black*, 7 Cranch, 565; *Gaines* v. *Miller*, 111 U. S. 395; *Eldred* v. *Bank*, 17 Wall. 575; *Marine Ins. Co.* v. *Young*, 1 Cranch, 332; *Thompson* v. *Roberts*, 24 How. 233; *Goodrich* v. *Chicago*, 5 Wall. 566; *Foster* v. *The Richard Busteed*, 100 Massachusetts, 412.

A final decree in chancery is as conclusive as a judgment at law. *Shriver* v. *Lynn*, 2 How. 43; *Bridge Co.* v. *Stewart*, 3 How. 413; *Pennington* v. *Gibson*, 16 How. 65; *Nations* v. *Johnson*, 24 How. 195; *Bryan* v. *Bennett*, 113 U. S. 179.

The issues in the California case and in the Illinois case were identical, and they were treated as identical by the California court. The fact that the two actions were different in form makes no difference as respects the faith and credit clause of the Constitution.

The California court was bound by the adjudication by the Illinois court, and, in disregarding the Illinois decree the California court deprived plaintiff in error of a right under the Federal Constitution and statutes. Const. U. S., Art. IV, § 1; Rev. Stat. § 905.

The clause referred to applies to decrees of divorce, *Atherton* v. *Atherton*, 181 U. S. 155, and means that the court of a State must allow to a judgment of a sister State the same effect that it has in the State where rendered. *Mills* v. *Duryee*, 7 Cranch, 481; *Renaud* v. *Abbott*, 116 U. S. 277; *Hilton* v. *Guyot*, 159 U. S. 113, 181.

While this court, on writ of error to the Supreme Court of a State, will not take judicial notice of the law of another State, yet where the court, whose decision is under review, does take judicial notice of the law of another State, this court will do the same. *Renaud* v. *Abbott*, 116 U. S. 277; *Hanley* v. *Donoghue*, 116 U. S. 1.

The Illinois judgment was not a consent decree. The judgment speaks for itself. *Campbell* v. *Wilson*, 195 Illinois, 284; *Armstrong* v. *Cooper*, 11 Illinois, 540.

Even if the decree were a consent decree it would have the

same binding effect as though it were a decree *in invitum*. *Knoblock* v. *Mueller*, 123 Illinois, 554, 565; *O'Connell* v. *Railway Co.*, 184 Illinois. 308, 325; *Lagerquist* v. *Williams*, 74 Ill. App. 17.

A judgment upon a *cognovit* concludes the parties.

A judgment entered, where upon trial a party waives proof of and formally admits a fact, is conclusive. A judgment rendered upon an admission of fact or by consent, is conclusive on the parties to the same extent as though rendered upon a contest. Black on Judgments, § 705; *Railway Co.* v. *United States*, 113 U. S. 261; *Burgess* v. *Seligman*, 107 U. S. 20; *Thomson* v. *Wooster*, 114 U. S. 104; *Bank* v. *Higginbottom*, 9 Pet. 48; *United States* v. *Parker*, 120 U. S. 89. The rule also applies to judgments by default. *Harshman* v. *Knox Co.*, 122 U. S. 306. Also to judgment on demurrer. *Gould* v. *Railroad Co.*, 91 U. S. 526; *Bissell* v. *Springvalley*, 124 U. S. 225.

The Supreme Court of California misconceived the Illinois decisions and rule. *Wadhams* v. *Gay*, 73 Illinois, 415, and *Farwell* v. *Gt. West. Tel. Co.*, 161 Illinois, 522, distinguished.

The rule in California is, that in the absence of proof, the courts of California will presume that law of another State to be the same as the law of California. *Shumway* v. *Leskey*, 67 California, 458. The presumption is even extended to the statute law of California. *Cavallaro* v. *Railroad Co.*, 110 California, 348. Applying the rule of California, a judgment by stipulation is conclusive as to all matters within the issue. *McCreery* v. *Fuller*, 63 California, 30; *Partridge* v. *Shepard*, 71 California, 470.

The State of California never was the matrimonial domicil of the parties, and, therefore, the courts of California had no jurisdiction of their matrimonial *status*, and the decree of the California court was consequently for this reason also, erroneous.

Mrs. Harding had always, since her marriage, lived in Illinois. California had never been the matrimonial domicil of the parties and it is to be presumed her residence, the *status*

and the matrimonial domicil remained in Illinois. Cal. Civ. Code Proc. § 1693, par. 32.

A suit for a divorce is a proceeding *in rem*. The *status* of the parties is the *res*. In a proceeding *in rem* the jurisdiction of the court over the *res* must affirmatively appear.

The matrimonial *status*—the *res*—was created and established in Illinois, it not appearing that this *status* had ever been removed to California, the California courts had no jurisdiction of the suit. In a proceeding *in rem* the court will not presume that the *res* existed within the jurisdiction of the court, but it must be averred and proved.

This court has not, as yet, directly passed upon the points made in this division of the brief, but in several cases it has especially reserved the question. *Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Andrews* v. *Andrews*, 188 U. S. 14, 40.

Mr. William H. Barnum for defendant in error:

The Illinois decree and the decree as modified was not final, irrevocable and immutable, but the allowances thereby made were subject to alteration, reduction and even extinguishment. *Audubon* v. *Shufeldt*, 181 U. S. 575; *Welty* v. *Welty*, 195 Illinois, 345; *Cutler* v. *Cutler*, 88 Ill. App. 464.

It is doubtful whether any decree so alterable, revocable, interlocutory or non-final in its nature can be in any case successfully pleaded as a bar or estoppel.

Neither the decree, the modified decree, nor the stipulation, nor all combined, created a bar or estoppel against the prosecution of the California divorce suit, nor against proving therein the truth of the charge of willful desertion, nor against proving any fact whatever essential or material to the establishment of said charge.

The stipulation to the effect that she was living apart without her fault is to be treated not as a statement made because it was true, or from any conviction of its truth, but only as a convenient assumption for the purpose in hand, the ending

of litigation and adjustment of family differences; hence neither the stipulation nor decree based on it can be held as an estoppel. Greenleaf, Ev. § 204; *Succession of Harris*, 39 La. Ann. 443.

The decree, so entered, was not a judicial determination, but absolutely void, and not entitled to respect in any other tribunal, as an estoppel or otherwise. *Windsor* v. *McVeigh*, 93 U. S. 274; *Gay* v. *Parport*, 106 U. S. 679.

The issues in the two cases were not identical, hence there was no estoppel. *Wahle* v. *Wahle*, 71 Illinois, 513; *Umlauf* v. *Umlauf*, 117 Illinois, 584; Freeman on Judgments, § 258; *Burlen* v. *Shannon*, 3 Gray, 387; *Sawyer* v. *Woodbury*, 7 Gray, 502; *Megerle* v. *Ashe*, 33 California, 74, 84; *Howe* v. *Lockwood*, 17 N. Y. Supp. 817; *Pearce* v. *Frantum*, 16 La. Ann. 414.

Mr. Harding, while entitled if he chose to make the wife's willful desertion after it had continued two years a distinct issue in the maintenance case by filing an answer and prosecuting a cross bill distinctly and directly making it such an issue and praying for a divorce on that ground, was not obliged to do so; but might confine his defense wholly to the charge made by his wife, without thereby losing or surrendering his reserved right to ask for a divorce on the ground of willful desertion or any other statutory ground. *Cromwell* v. *Sac County*, 94 U. S. 351, 371; *Watts* v. *Watts*, 160 Massachusetts, 464.

Further, there was no identity of the question raised under the Illinois statute in the Illinois court—even if that question had been litigated and judicially determined—with the question raised by the pleadings in divorce case. *Russell* v. *Place*, 94 U. S. 606; *Beronio* v. *Ventura Lumber Co.*, 129 California, 236.

To constitute estoppel by matter of record there must be entire identity of the issue decided and the issue to which the estoppel is sought to be applied, and for additional illustration of the rule, see *Freeman* v. *Barnum*, 131 California, 386; *McDonald* v. *B. R. &c. M. Co.*, 15 California, 145; *Williams*

v. *Williams*, 63 Wisconsin, 58; *Aspen* v. *Parker*, 2 Burr. 666.

Further the estoppel fails because the finding in the present case does not relate to the same time as the finding in the former case, and hence the estoppel lacks the identity required. *King* v. *Chase*, 15 N. H. 16; Coke upon Littleton, L. 3, c. 12, § 567; Bigelow on Estoppel, 3d ed., 578, and p. 77; *People* v. *Frank*, 28 California, 507; *Brown* v. *Mayer*, 66 N. Y. 385; *Blair* v. *Bartlett*, 75 N. Y. 150; *Nemetty* v. *Moylin*, 100 N. Y. 562; *Orr* v. *Mercer County Ind. Co.*, 114 Pa. St. 367.

Findings outside the issues have no effect as to estoppel. *Lillis* v. *Erie Ditch Co.*, 95 California, 858; *Russell* v. *Place*, 94 U. S. 606.

Only upon issues upon which judgment depends are parties estopped. 1 Greenleaf, § 528; *McDonald* v. *Black Co.*, 15 California, 145; *Gray* v. *Dougherty*, 25 California, 272; *Bozquit* v. *Crane*, 51 California, 505; *Sawyer* v. *Boyle*, 21 Texas, 28; *Lentz* v. *Williams*, 17 Pa. St. 412; *Lewis* v. *Nelson*, 67 Pa. St. 153; *Ford* v. *Ford's Adm.*, 68 Alabama, 41; *Car* v. *Buehler*, 120 Pa. St. 341; *Williams* v. *Williams*, 63 Wisconsin, 58; *People* v. *Johnson*, 38 N. Y. 63; 2 Smith's L. Cas., 10th ed., 2013; *Murdock* v. *Memphis*, 20 Wall. 590.

Mr. Justice White delivered the opinion of the court.

The law of Illinois (Laws of Illinois, 1877, p. 115) provided as follows:

"That married women who, without their fault, now live or hereafter may live, separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands for a reasonable support and maintenance while they so live separate or have so lived separately and apart; and in determining the amount to be allowed the court shall have reference to the condition of the parties in life, and the circumstances of the respective cases; and the court may grant allowance to enable the wife to prosecute her suit, as in cases of divorce."

On February 3, 1890, Adelaide M. Harding filed her bill in the Circuit Court of the county of Cook against her husband, George F. Harding.

It was alleged that the parties were residents of the city of Chicago. In substance, in the bill and an amendment, it was charged that, without her fault and in consequence of the cruel treatment of her husband and of his adultery, the plaintiff had been obliged to live apart from him. It was prayed that the court decree that she was so living apart without her fault, that it would award her the custody of certain of the children of the marriage, and that the defendant be decreed to provide for the separate maintenance of the complainant and the support of the children. The answer and an amendment thereto admitted the marriage, the birth of the children and the residence in Chicago, denied the charges of cruelty and other misconduct, and averred that the complainant was living apart solely through her own fault, and that she had refused to return after repeated requests, which were reiterated in the answer.

We shall hereafter, as far as possible, refer to the parties to that litigation, who are the parties to this suit, as the wife and the husband, respectively.

The court, by an interlocutory order, fixed a sum to be paid by the husband for the fees of the solicitors of the wife, for the maintenance of the wife during the pendency of the cause, and for the support of the minor children.

The case was put at issue and much testimony was taken. With this testimony extant and nearly three years after the commencement of the suit, on January 3, 1893, a document was filed in the papers of the cause signed by the husband and by his solicitor. In substance the paper recited that at the time of the commencement of the suit the wife had in her hands a considerable amount of property and money belonging to the husband which was applicable to her maintenance, and that when this sum was expended the husband would feel it his duty to furnish further money to support the wife,

whatever might be the result of the cause. That the husband was confident of making a successful defense to the suit, but that it seemed to him it was best for the sake of peace and to avoid scandal to put an end to the litigation by consenting to a decree in favor of the wife for a separate maintenance, the paper further stating:

"Hence, I give my consent that a decree for separate maintenance shall be entered in favor of the plaintiff without finding or trial of the issue in this case. That this consent is not collusive is sufficiently shown by the length and character of the litigation. I further offer and stand ready to make such other or further or different stipulation by an amendment of the pleadings or otherwise, as may, in the opinion of your honor, be required to make it unnecessary for the court to hear and decide upon the issues in evidence in this case after a long and expensive hearing. To this end I declare my willingness to stipulate and I do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance. This is the same offer which I have made by way of an attempt at compromise ever since the commencement of this suit, in which effort at compromise I have not hesitated to offer double the amount that in my opinion should be allowed for her separate maintenance by the court."

The wife, on January 17, 1893, filed a counter statement. She in substance declared that she had no previous knowledge of the intention of her husband to file the paper which he had submitted to the court; that she had always been confident of the justice of her cause and of maintaining the same, and that the testimony then taken in the cause gave her great certainty of the establishment of her rights; that she had always been willing to adjust the amount to be allowed for her separate maintenance, provided there was a "finding and

decree of this court thereon that she was, at the time of the filing of the bill herein, living separate and apart from the defendant without fault on her part and has been so living ever since." The statement then referred to certain negotiations which had been pending between the husband and wife on the subject of the amount of separate maintenance to be allowed, enumerated previous offers made by the husband on this subject, which she had been unwilling to accept, because the husband had insisted on either the dismissal of her suit, a decree in his favor or an agreement which would not preclude him from suing for a divorce for desertion arising from her having separated from him. It was then stated, in substance, that, as interpreted by the wife, the paper filed by the husband waived the conditions which he had previously insisted upon and assented to a decree finding that the separation was without her fault, and she was willing for the sake of preventing further scandal, to accept the amount previously offered by the husband, although deeming the sum inadequate to her condition of life, "upon the decree finding that complainant was living separate and apart from defendant without fault on her part, being now promptly entered such as the said voluntary stipulation of the defendant justifies." No action appears to have been taken by the court upon these two papers except in so far as may be inferred from the statements which follow.

In May, 1893, the court entered an order referring the cause to a master to take further evidence as to the amount of alimony, etc., to be awarded, "and upon other issues herein than the question as to whether complainant at the time of the commencement of this suit was, and since that time has been and is, living separate and apart from her husband, the defendant, without her fault, said defendant having admitted upon the record herein, and now admitting in open court, that the complainant was living separate and apart from him without fault on her part."

Nearly three years after the matter had been thus referred

to the master the order of reference was amended *nunc pro tunc*, as of the date of the previous order, by substituting for the words "and now admitting in open court" the words "as by his written stipulation filed herein on January 3, 1893, and for the purpose of this trial only." A few months thereafter the master filed his report. Therein he stated his conclusions deduced from the evidence taken prior to 1894 on the subject of the right of the wife to her separate maintenance, and found as a matter of fact that her right was established by the proof. He also found that the wife was entitled to a stated sum for her separate maintenance and an additional sum for the support of the children. Exceptions were filed to the report, which were heard by the court, and a final decree was rendered on July 26, 1897. It was recited, among other things, in this decree that the court, "doth find that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived, and is now living, separate and apart from her husband, the said defendant, without her fault, and that the equities of this cause are with the complainant." The decree awarded to the wife sums for her separate maintenance and for the support of the children up to the time of their becoming of age, and a further sum for the fees of the solicitors of the wife and other expenses of the litigation. The decree made no reference to the admission contained in the paper filed by the husband, nor was any statement made which limited the effect of the decree as a final adjudication of the rights of the parties. An exception, on behalf of the husband, was taken to each and every finding of the decree, and sixty days were allowed to prepare a certificate of evidence.

It would seem from the certificate of evidence, which was made several months afterwards, that on the settlement of the decree a controversy arose as to its terms, the wife requesting the court to state in the decree that all the charges made in the complaint and the amended complaint as to cruelty, adultery, etc., had been established by the proof; the

husband insisting, to the contrary, that the charges had not been proven, and further asserting that it was not necessary to so find because of his admission of record. The court said that it did not pass upon the question as to whether all the charges made in the complaint were true, because it regarded it as unnecessary "in view of the said paper of the defendant filed herein January 3, 1893."

The husband prosecuted an appeal to the Appellate Court of Illinois for the First District. But before this appeal was perfected, and on August 31, 1897, he commenced in the Superior Court of San Diego, California, this suit against his wife for divorce. The marriage in 1855 and the residence in Chicago were alleged, but it was averred that ever since May 15, 1895, the plaintiff had been a resident of the State of California. The sole ground alleged for granting the divorce was willful desertion by the wife in the month of February, 1890. The answer of the wife denied that the husband was a resident of California, and in a separate paragraph there was specially pleaded the proceedings and the decree of the Illinois court and the admission of the husband on the record therein as to the separation being without the fault of the wife, all of which it was asserted established by the thing adjudged that her living apart was justified and did not constitute desertion.

In the meanwhile, before the trial of the cause, the appeal prosecuted in the Illinois case by the husband was decided against him in the Appellate Court, and he took an appeal to the Supreme Court of Illinois, in which court the judgment was affirmed, with a modification as to the amount of the allowance for alimony, and the trial court changed the amount of its decree accordingly. The wife then by an amended answer again set up the decree in Illinois as amended as *res judicata*.

On the trial the wife introduced in evidence a certified copy of the record of the Illinois suit. The husband introduced, over the wife's objection and exception, a portion of the certificate of evidence, which had been prepared for the pur-

pose of the appeal from the final decree in Illinois as originally entered. The court made findings of fact to the effect that the parties had been married in Illinois, that the husband was a *bona fide* resident of California, and that on the first day of February, 1890, the wife had deserted her husband without just cause. As a conclusion of law it was deduced that the husband was entitled to a divorce, but that the court was without power in any way to limit or affect the decree for separate maintenance rendered by the Illinois court. After the refusal of a new trial the wife appealed to the Supreme Court of California, and that court affirmed the decree. 140 California, 690.

The question is, Did the Supreme Court of California fail to give due faith and credit to the decree for separate maintenance rendered in favor of the wife in Illinois, which was pleaded by the wife as *res judicata*.

It is suggested in argument that that question cannot be passed upon, as the wife, besides pleading and relying upon the Illinois decree, defended on the merits, and by so doing waived the benefits of the alleged estoppel arising from the Illinois decree. The want of merit in the contention is at once demonstrated by the statement that the Supreme Court of the State of California, in its opinion in the cause, treated the question of estoppel by the Illinois judgment as being open, and actually determined it.

The Supreme Court of California decided that the Illinois decree was not conclusive in California as to the question of desertion, for the following reasons: That decree, the court held, was a consent decree, and being of that character it was not a bar in the State of Illinois. As it was held that the Illinois decree was only entitled in California, under the due faith and credit clause, to the effect which it would have in Illinois, it was hence decided that the Illinois decree did not constitute an estoppel in the courts of California. But we are of opinion that the premise upon which the Supreme Court of California proceeded was a mistaken one and its conclusion

based thereon was erroneous, even if the correctness of the premise be conceded for the sake of the argument.

The conclusion of the Supreme Court of California, that the Illinois decree was solely based on the consent of the parties, and was consequently not the result of the action of the court, was based on the following: 1. The paper filed by the husband on January 3, 1893. 2. The recital in the amended order of reference that the admission that the wife was without fault had been made for the purpose of the trial only. 3. The statement of the trial judge, made in the certificate of evidence, that in view of the admission on the record he had not found it necessary to pass upon all the charges made in the complaint.

But the conclusion drawn by the court from these matters assumed that a decree for separate maintenance under the Illinois statute could have been a mere matter of consent, and did not require the ascertainment by the court of the facts made essential by the statute to justify such a decree. That this was a mistaken conception of the Illinois law has been clearly pointed out by the Supreme Court of that State. In *Johnson* v. *Johnson*, 125 Illinois, 510, an appeal from a decree for separate maintenance, the court said (p. 514):

"To maintain her bill, it was necessary for the complainant to show, not only that she had good cause for living separate and apart from her husband, but also that such living apart was without fault on her part. At common law, the husband was liable, in an action at law at the suit of any person furnishing to the wife necessaries suitable to her condition in life, if the wife was residing apart from him because of his willful and improper treatment of her, or by his consent. 2 Kent's Com. 146; *Evans* v. *Fisher*, 5 Gilman, 571. No right of action existed in the wife, courts of equity refusing to take cognizance at her suit, and enforce the legal obligation of the husband to maintain her. 2 Story, Eq. Jur. § 1422. The statute was passed to remedy this defect in the law, and gave the right to the wife to maintain her bill for separate maintenance, but

restricted the right to cases where the living separate and apart from the husband was without her fault. The 'fault' here meant and contemplated is a voluntary consenting to the separation, or such failure of duty or misconduct on her part as 'materially contributes to a disruption of the marital relation.' If she leave the husband voluntarily, or by consent, or if her misconduct has materially induced the course of action on the part of the husband upon which she relies as justifying the separation, it is not without her fault, within the meaning of the law. *No encouragement can be given to the living apart of husband and wife. The law and good of society alike forbid it.* But a wife who is not herself in fault is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, person or health, nor where the husband pursues a persistent, unjustifiable, and wrongful course of conduct towards her, which will necessarily and inevitably render her life miserable, and living as his wife unendurable. Incompatibility of disposition, occasional ebullitions of passion, trivial difficulties, or slight moral obliquities, will not justify separation. If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions. And if he so intended, her leaving him would, in the case put, be desertion on his part, and not by the wife."

In the second place, even if the rule of public policy enunciated by the Supreme Court of Illinois be put out of view, the assumption that the Illinois decree was a consent decree, merely registering an agreement of the parties, disregards the form of that decree, and cannot be indulged in without failing to give effect to the very face of the decree, which adjudged that the separation of the wife from the husband was without her fault. This was an express finding by the court, and one which the law required to be judicially made.

In the third place, if it be conceded that the express terms of the decree could be overcome by considering matters contained in the record, but outside of the decree, the conclusion drawn by the Supreme Court of California from the consideration of such matters was, we think, a mistaken one. As we have said in stating the facts, after the bringing of the suit for separate maintenance, in which charges of the gravest character were made against the husband as to cruelty, adultery, etc., much testimony had been taken with regard to the charges. And it was in this state of the case that the *ex parte* stipulation of the husband was filed, in which he admitted that the wife was living separate and apart from him without her fault. The declaration in the statement that it was not collusively made eliminates the conception that the admission was made regardless of its truth and independently of the facts shown by the testimony which had theretofore been taken in the cause. When it is observed that shortly following the filing of this paper the statement of the wife was filed accepting her husband's admission as conceding that the proof established that the separation was not caused by her fault, and stating that she had refused the solicitation of the husband to discontinue the cause and accept an allowance to be made by him for her separate maintenance upon an agreement that so doing should not prejudice him if he sued for a divorce on the ground of desertion, it becomes impossible to hold that the decree was a mere registering of an agreement between the parties, and not the judicial action of the court. Certainly, when the papers filed by the husband and wife are considered, there is no room for the contention that a judicial finding was not made. True, the paper filed by the husband expressed his desire to avoid such a finding, but, instead of consenting to his proposition, the paper filed by the wife insisted that she was entitled to the finding, that she had always refused to waive it, and that she demanded it. The court obviously considered that the wife was entitled to the right which she thus claimed, since it made the very finding upon which the wife insisted, and which the

paper filed by the husband sought to avoid, and the conduct of the husband, in excepting to the finding as made by the court, demonstrates that he regarded it as a judicial determination of the issue of absence of fault on the part of the wife. And the modified order of reference gives rise but to the inference that in view of the admission of the husband it was not deemed necessary, for the purpose of the *trial*, to take further testimony in respect to the conceded fact, or for the master to report in detail concerning the evidence as to the misconduct of the husband which led to the separation. This also explains the statement of the judge, made in the certificate of evidence, as to the controversy regarding the terms of the decree, and his refusal to find that *all* the charges made in the bill had been proven. This view of the matters relied upon by the California court was the one expressly adopted by both the Appellate Court and by the Supreme Court of Illinois in deciding the appeal taken by the husband. On that appeal, as we have said, he complained of the action of the court, including the finding that the wife was living separate without fault on her part. 79 Ill. App. 590; 180 Illinois, 481.

Both of the Illinois courts, in considering the objection that the trial court was without power to make a finding concerning the absence of fault on the part of the wife because of the consent manifested by the paper filed by the husband, treated that paper not as a mere consent to a decree in relation to that subject, but as an admission concerning the state of the proof in the record, which, whilst it rendered it unnecessary for the court to analyze the proof, did not deprive it of the power to make a judicial finding of the fact. It is to be observed also that both courts held that on the issue as to the custody of the minor children and the sum to be allowed for separate maintenance, the inquiry into the conduct of the husband was relevant and required an analysis of the testimony, an analysis which embraced necessarily those elements of proof which entered into the question of the causes of the separation.

But if it be considered that in any aspect the decree under

review was a consent decree, we are of opinion that the cases relied upon by the Supreme Court of California, *Wadhams* v. *Gay*, 73 Illinois, 417; *Farwell* v. *Great Western Tel. Co.*, 161 Illinois, 522, are not authoritative upon the proposition that such decree would not in the courts of Illinois have the effect of *res judicata*. The first of the cases—considered by this court in *Gay* v. *Parpart*, 106 U. S. 689 *et seq.*—dealt merely with the right of a court of equity to refuse to lend its aid to enforce an incomplete and ineffective decree in partition proceedings, because to do so would be inequitable. In the second of the cases it was but decided that a fraudulent decree might be set aside in a court of equity.

The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree *in invitum*. *Knobloch* v. *Mueller*, 123 Illinois, 554; *O'Connell* v. *Chicago Terminal R. R.*, 184 Illinois, 308, 325. Thus, in *Knobloch* v. *Mueller*, the court said (123 Illinois, 565):

"Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent in an amicable suit, has been held to have an additional claim to be considered final. *Alleson* v. *Stark*, 9 Adol. & E. 255. Decrees so entered by consent cannot be reversed, set aside, or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not, in fact, given, or something was inserted as by consent that was not consented to. 2 Daniell, Ch. Pr. 1576; *Webb* v. *Webb*, 3 Swanst. 658; *Thompson* v. *Maxwell*, 95 U. S. 391; *Armstrong* v. *Cooper*, 11 Illinois, 540; *Cronk* v. *Traubbe*, 66 Illinois, 432; *Haas* v. *Chicago Building Society*, 80 Illinois, 248; *Atkinson* v. *Mauks*, 1 Cow. 693; *Winchester* v. *Winchester*, 121 Massachusetts, 127; *Alleson* v. *Stark*, 9 Adol. & E. 225; *Earl of Hopetoun* v. *Ramsay*, 5 Bell's App. Cas. 69. See also, note to *Duchess of Kingston's Case*, 2 Smith Lead. Cas. *826 *et seq.* It is the general doctrine that such a decree is not reversible upon an appeal or writ of

error, or by bill of review for error. *Armstrong* v. *Cooper*, 11 Illinois, 540."

And the assertion that the particular matters relied upon in this cause are of such a character as to take this case out of the rule just stated, is conclusively shown to be without merit by the decision of the Appellate Court and the Supreme Court of Illinois, affirming the decree of separation and the finding therein made.

In the argument at bar there is a ground taken which was not referred to in the opinion of the Supreme Court of California, which it is insisted shows that that court was right in its decision, although the reasoning of its opinion may be conceded to have been erroneous. That ground is this. In Illinois it is contended it has been settled that a decree in a suit for separate maintenance is not *res judicata* in a suit for divorce on the ground of desertion, and *vice versa*, therefore the Illinois decree should not have been given in California any greater effect. Two cases are relied upon. *Wahle* v. *Wahle*, 71 Illinois, 510, and *Umlauf* v. *Umlauf*, 117 Illinois, 580. But these cases do not sustain the proposition based on them. In the *Wahle case* the husband had sued his wife for divorce on the ground of abandonment, and she, in addition to answering, had filed a cross bill charging the husband with cruelty and adultery, and praying for separate maintenance. The principal cause was first heard and decided adversely to the husband. Subsequently the cross bill was heard and a decree of dismissal was rendered. This was alleged to be error, on the ground that the verdict of the jury on the issue of divorce, in favor of the wife, was a judicial determination, establishing the facts alleged in her cross bill, and justifying her in living apart from her husband. But the Supreme Court of Illinois held that as the verdict of the jury in the divorce suit was general, and did not indicate upon what particular finding it was based, the court could not know upon what fact the jury were induced to find as they did, and that in consequence the bill did not necessarily establish that the separation of the

parties was without fault on the part of the wife, since the verdict might have proceeded upon either of the following grounds: 1, that the abandonment was for less than two years; 2, that it was by mutual consent; or, 3, that it was induced by the acts of the husband, whatever might have been the fault of the wife.

In *Umlauf* v. *Umlauf*, the wife filed a bill for separate maintenance but failing to establish her right the bill was dismissed. Subsequently the husband filed a bill for divorce, charging willful desertion by the wife from the date of the filing of her bill against him for separate maintenance. Upon the hearing of the divorce case the court admitted in evidence against the objection of the wife the pleadings and the decree against her in the suit for separate maintenance, and also excluded all evidence on her part tending to disprove the charge of desertion. From a judgment granting the divorce the wife appealed. The Supreme Court of Illinois prefaced its consideration of the question with the following statement (p. 584):

"No principle is better settled than that where a question, proper for judicial determination is directly put in issue, and finally determined in a legal proceeding by a court having competent authority and jurisdiction to hear and determine the same, such decision and determination of the question will be deemed final and conclusive upon the parties and their privies in all future litigation between them in which the same question arises, so long as the judgment remains unreversed or is not otherwise set aside."

But the court held that these elementary principles did not apply, because the decree against the wife in the separate maintenance suit was general and might have been entered solely upon the ground that the wife was not without fault, leaving undecided the question whether the husband was in any way at fault, and, therefore, there was not identity, and resulting *res judicata*.

The inappositeness of these cases to the present one be-

comes obvious when it is recalled that in this case there was a decree not against but in favor of the wife in the maintenance suit, which decree necessarily conclusively settled that the separation was for cause and was without fault on the part of the wife, and therefore was not a willful desertion of the husband by the wife, which is the precise issue in the divorce case now here.

In the brief of counsel it is stated that under the law of California, if a wife is living apart from her husband under circumstances which do not constitute desertion, yet such living apart may become desertion if the husband in good faith invites the wife to return and she does not do so. In this connection reference is made to certain requests proffered by the husband for the wife to return, which it is urged caused the separation to become desertion under the California law. But conceding, without deciding, that the California law is as asserted, the proposition of fact upon which the argument rests amounts simply to denying all effect to the Illinois decree. This follows, because all the requests to return referred to were made in Illinois before the entry of the final decree in the suit for separate maintenance, were referred to in the answer in that case, and were adversely concluded by the judgment which was rendered. *Johnson* v. *Johnson*, 125 Illinois, 510.

Having thus disposed of all the contentions based upon the assumed consent under the decree for separate maintenance or the asserted limitations to such a decree, based upon the law of Illinois, we are brought to consider the final question which is, Was the decree in favor of the wife for separate maintenance entered in the Illinois case conclusive upon the husband in the courts of California of the issue of willful desertion? That the issue of willful desertion present in the divorce action was identical with the issue of absence without fault presented in the Illinois maintenance suit, is manifest. The separation asserted by the wife in her bill for separate maintenance to have been without her fault was averred to have taken place on February 1, 1890, and such separation

was stated by the husband in his answer to the bill to have been an abandonment and desertion of him. The willful desertion charged in the complaint in this action for divorce was averred to have been committed "on or about the month of February, 1890, and to have been continuous thereafter." And the identity between the two is further demonstrated by the circumstance that the evidence taken in the Illinois case bearing upon the cause for the separation was used upon the trial in this case. The question in each suit, therefore, was whether the one separation and living apart was by reason of the fault of the wife. From the standpoint of a decree in favor of the wife in the suit for separate maintenance the issues raised and determined were absolutely identical.

The controversy before us is, in some respects, like that which was considered in *Barber* v. *Barber*, 21 How. 582. There a bill was filed in a Federal court in Wisconsin to enforce judgment for alimony under a decree of separation *a mensa et thoro*, rendered against a husband in New York. It was shown by the evidence that to avoid the payment of the alimony the husband had left the State of New York, the matrimonial domicil, and taken up his residence in the State of Wisconsin, where he obtained a decree of divorce on the ground of desertion by the wife. Whilst this court refrained from expressing an opinion as to the legality of the Wisconsin decree of divorce obtained under these circumstances, it enforced the New York judgment for alimony, and held it to be binding. And that it was considered that the judgment in New York legalizing the separation precluded the possibility that the same separation could constitute willful desertion of the wife by the husband, plainly appears from the following excerpt from the opinion —italics mine (p. 588):

"It also appears, from the record, that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce case in New York; and that, *contrary to the truth, verified by that record,* he

asks for the divorce on account of his wife having willfully abandoned him."

So also the courts of Massachusetts have held the fact to be that a separation legalized by judicial decree was a conclusive determination that the same separation was not willful desertion. Thus in *Miller* v. *Miller*, 150 Massachusetts, 111, explicitly approved in *Watts* v. *Watts*, 160 Massachusetts, 464, after holding that an adjudication of a probate court that a wife is living apart from her husband for justifiable cause, was a bar to an action by the husband for divorce on the ground of utter desertion, the court, speaking of the decree of the probate court, said:

"The fact determined by it is inconsistent with the necessary allegation in the libel, that the libellee previously had utterly deserted the libellant, and was then continuing such desertion. Utter desertion, which is recognized by the statute as a cause for divorce, is a marital wrong. Because the deserter is a wrongdoer, the law gives the deserted party a right to a divorce. If a wife leaves her husband for a justifiable cause, it is not utter desertion within the meaning of the statute, and a wife who has utterly deserted her husband, and is living apart from him in continuance of such desertion cannot be found to be so living for justifiable cause. *Pidge* v. *Pidge*, 3 Metc. 257, 261; *Fera* v. *Fera*, 98 Massachusetts, 155; *Lyster* v. *Lyster*, 111 Massachusetts, 327.

"The court should have ruled as requested by the libellee, that the decree of the probate court was a bar to the maintenance of this libel. Exceptions sustained."

We are of opinion that the final decree of July 26, 1897, entered in the Circuit Court of Cook County, Illinois, in legal effect established that the separation then existing and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a willful desertion by the wife of the husband. From these conclusions it necessarily follows that the issue presented in

this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case it follows that the Supreme Court of California in affirming the judgment of divorce failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the Constitution of the United States.

The judgment of the Supreme Court of California must therefore be reversed, and the cause be remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE BROWN concurs in the result.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 208. Argued April 10, 1905.—Decided May 15, 1905.

A tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and therefore no tax can be levied upon the corporation issuing the stock which includes property that is otherwise exempt.

The same rule that requires the exclusion from the assessment of valuation of capital stock of tangible personal property permanently situated out of the State applies to property sent out of the State to be sold and which is actually out of the State when the assessment is made.

As a State cannot directly tax tangible property permanently outside the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of a corporation which arises from the value of property beyond its jurisdiction.

While an appraisement of value is in general a decision on a question of fact and final, where it is arrived at by including property not within the jurisdiction of the State, it is absolutely illegal as made without jurisdiction.

The collection of a tax on a corporation on its capital stock based on a valuation which includes property situated out of the State would amount

to the taking of property without due process of law and can be restrained by the Federal courts.

In assessing the value of the capital stock of a corporation of Pennsylvania under the act of that State of June 8, 1891, coal which is owned by the corporation, but at the time of the assessment situated in another State not to be returned to Pennsylvania, should not be included.

THE plaintiff in error brings this case here to review the judgment of the Supreme Court of Pennsylvania, 206 Pa. St. 645, in favor of that State on a question raised by the plaintiff in error as to its liability to taxation by the State, upon certain coal of the value of $1,702,443, belonging to the plaintiff in error, which had been mined in Pennsylvania, and which, prior to the appraisement of the value of the capital stock of the company, pursuant to the Pennsylvania statute, for taxation in Pennsylvania, had been transported to and was situated in other States awaiting sale.

The case arises under proceedings provided for by the Pennsylvania statute for appraising, for the purposes of taxation, the value of the capital stock of corporations, such as the plaintiff in error, for the year ending in November, 1899. The statute under which the appraisement was made was passed June 8, 1891 (amendment of act of 1889), printed on page 229 *et seq.* of the Laws of Pennsylvania for that year. The sections of the act in question are four and five, and are reproduced in the margin.[1]

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[1] Sections of the act of June 8, 1891.

SEC. 4. That hereafter, except in the case of banks, savings institutions and foreign insurance companies, it shall be the duty of the president, chairman, or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws of any other State or Territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or

In appraising the value of the capital stock of the plaintiff in error, pursuant to that statute, it is contended by it that the appraising officers should have deducted from the value

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persons, or in any other manner, to make a report in writing to the auditor general, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.

Second. Total authorized number of shares.

Third. Number of shares of stock issued.

Fourth. Par value of each share.

Fifth. Amount paid into the treasury on each share.

Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following-named officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary, and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity, and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the auditor general a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: *Provided*, That if the auditor general and state treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession or that shall come into their possession,

of the stock the value of the coal mined in Pennsylvania by the company and owned by it, but situated in other States, there awaiting sale, and beyond the jurisdiction of the State

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and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership, for a period of sixty days, to make the report and appraisement to the auditor general as herein provided, it shall be the duty of the auditor general and state treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal.

SEC. 5. That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth, annually, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock, of all kinds, including common, special and preferred, as ascertained in the manner prescribed in said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of the settlement of the account by the auditor general and state treasurer: *Provided*, That for the purposes of this act, interests in limited partnerships or joint-stock associations shall be deemed to be capital stock and taxable accordingly: *Provided also*, That corporations, limited partnerships and joint-stock associations, liable to tax on capital stock under this section, shall not be required to make report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right; but corporations, limited partnerships and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further*, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations, organized exclusively for manufacturing purposes and actually carrying on manufacturing within the State, excepting companies engaged in the brewing and distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain: *Provided further*, In case of fire and marine insurance companies the tax imposed by this section shall be at the rate of three mills upon each dollar of the actual value of the whole capital stock.

of Pennsylvania at the time the appraisement was made. This contention was overruled by the state courts.

The facts upon which the judgment rests were found by the court, and are as follows:

"1. The Delaware, Lackawanna and Western Railroad Company was organized under the special act of the general assembly of Pennsylvania approved March 11, 1853, by the consolidation of the Liggetts Gap Railroad Company, incorporated under the act of April 7, 1832, whose name was, by the act of April 14, 1851, changed to Lackawanna and Western Railroad Company, and the Delaware and Cobbs Gap Railroad Company, incorporated by the act of April 7, 1849. Into the Delaware, Lackawanna and Western Railroad Company as formed by the merger of the Lackawanna and Western Railroad Company and the Delaware and Cobbs Gap Railroad Company were merged, December 27, 1865, the Keyser Valley Railroad Company; August 12, 1870, the Nanticoke Coal and Coke Company, and June 17, 1870, the Lackawanna and Bloomsburg Railroad Company. The company, as authorized by special act of Pennsylvania legislature, has its general office and treasury in the city and State of New York, though its corporate home is in Pennsylvania. It is authorized by law to own coal lands in Pennsylvania, and to mine, buy and sell coal and convey the same to market; and, in addition to its business of owning and operating an extensive system of railroads, is engaged in the business of mining, buying and selling coal. The proper officers of the company returned and appraised its capital stock as of the actual value, between the first and fifteenth days of November, 1899, of $48,470,000, and in making up the claim of the State for taxes for said year, the auditor general made no deductions whatever, but charged tax at five mills upon said aggregate valuation of $48,470,000, the said tax amounting to $242,350. Amongst other property in addition to its railroad, the company owned coal located at points outside of Pennsylvania in New York, Illinois and other States of the value of $1,702,443, and, as already stated,

no deduction was made by the auditor general in his statement of account against the company for or with respect to this coal. All taxes assessed against the company for 1899 in other States, on coal located there, have been paid, according to the belief and so far as the secretary of the company can now, May 25, 1901, recall.

"There were other items in dispute in addition to the coal, and they were covered by defendant's appeal, but the attorney general, on behalf of the Commonwealth, and counsel for the defendant, entered into an agreement in writing as follows, viz.:

" 'And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct and not include in its verdict any tax upon $1,702,444, being the value of coal held and owned at points in States other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made final judgment shall be entered upon the verdict of the jury in favor of the Commonwealth and against the defendant. The question of defendant's liability to the Commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned and stored at points in States other than Pennsylvania is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the Commonwealth of Pennsylvania upon coal thus held, owned and stored at points in States other than Pennsylvania, then judgment shall be entered in favor of the Commonwealth and against the defendant for the further sum of $8,512.21, being five mills upon the said $1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of five per cent, either of the parties to be at liberty to file exceptions to, and appeal from, the decision of the court upon the said reserved

point with like effect as if the case had been tried by the court without a jury under the act of April 22, 1874.'

"3. The case having been submitted to the jury, a verdict was rendered as follows, viz.:

Tax	$111,250 00
Less five mills on coal, $1,702,443.00	8,512 21
	$102,737 79
Less payment on account	100,000 00
	$2,737 79
Add attorney general's commission of 5 per cent.	136 88
Verdict for	$2,874 67

"The judgment entered upon said verdict has been paid by defendant, leaving open only the one question submitted to the court as aforesaid of the defendant's liability to taxation with respect to capital stock invested in coal located outside of Pennsylvania.

"4. The facts agreed upon by counsel for the Commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz.:

"'Under powers conferred by special charter previous to the adoption of the present constitution of Pennsylvania, the Delaware, Lackawanna and Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said State and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other States, and is not kept or held in stock in said other States longer than is necessary for the purpose of transferring possession from this company to the purchaser; but at certain points in other States, as, for instance, at Buffalo, N. Y., and at Chicago, Ill., the company

keeps constantly on hand a stock of coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than $1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other States, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other States, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the States of New York, Illinois, and other States outside of Pennsylvania is sold, the proceeds are returned to the company's treasury in the city and State of New York.

" 'In 1899 the company sold and delivered coal at points outside of the State of Pennsylvania of the aggregate value of not less than $18,587,258, but this was either contracted for before it left the mines or delivered upon, or within a comparatively short time after its arrival at the points in other States to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.'

"5. The corporation defendant is authorized by law to transact business and to hold lands in other States for depot, wharfage and coal-yard accommodations and to make such agreements and contracts with corporations and individuals of other States as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business, and to hold its stock-

holders' meeting, in the State of New York, and to have as president, directors and other officers non-residents of the State of Pennsylvania. The company is taxable upon the value of the property represented by its capital stock, and not upon the amount of the latter."

Mr. M. E. Olmsted, with whom *Mr. W. W. Ross* and *Mr. A. C. Stamm* were on the brief, for plaintiff in error:

The tax claimed is a tax on property. *Pennsylvania* v. *N. Y., Penna. & O. R. R. Co.*, 188 Pa. St. 169; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 145.

It was not within the intent or power of the legislature to impose a tax on tangible property without the territorial limits, and protection of the laws, of the State. *Commonwealth* v. *Del., L. & W. Ry. Co.*, 145 Pa. St. 96; *Commonwealth* v. *Mining Co.*, 5 Pa. County Ct. Rep. 89, and other cases in note thereto; *Commonwealth* v. *Westinghouse Co.*, 151 Pa. St. 265; *Commonwealth* v. *Dredging Co.*, 122 Pa. St. 386.

The coal involved in this case was permanently located and actually taxed in other States. *Commonwealth* v. *Coal Co.*, 197 Pa. St. 351.

This coal is exempt in Pennsylvania as it is taxable in other States under *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517; *Coal Co.* v. *Balis*, 156 U. S. 577; *United States* v. *Knight*, 156 U. S. 1, 13; *Kelley* v. *Rhoads*, 188 U. S. 1; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Finley* v. *Philadelphia*, 32 Pa. St. 381.

Taxing property having its *situs* in another State violates the Federal Constitution. It violates interstate comity and interstate commerce. *McCulloch* v. *Maryland*, 4 Wheat. 316, 429; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Hays* v. *Pacific Mail*, 17 How. 596; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* v. *Ohio*, 165

U. S. 194; *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 224; *Am. Refrigerator Co.* v. *Hall*, 174 U. S. 70.

Mr. Hampton L. Carson, Attorney General of the State of Pennsylvania, with whom *Mr. Frederic W. Fleitz* was on the brief, for defendant in error:

The tax claimed is not a tax directly laid upon tangible property situate outside of the State, but is a capital stock tax imposed directly upon the capital stock of a Pennsylvania corporation at a fixed rate of five mills upon each dollar of the actual value of the whole capital stock, including bonds, mortgages, moneys at interest, owned by the company, franchises and property of other kinds. *Commonwealth* v. *Railroad Co.*, 188 Pa. St. 185; *Commonwealth* v. *Coal Co.*, 197 Pa. St. 553; Laws of Pennsylvania, 1891, 229.

The legislature has a general power of taxation which is necessary for the existence and preservation of the government.

It may be exercised to any extent to which the State may choose to carry it, not in violation of the powers granted to the Federal Government or the restrictions set forth in the state constitution. *Sharpless* v. *Philadelphia*, 21 Pa. St. 160.

The legislature may tax the same subject once, twice or oftener. Such power is not prohibited by the constitution, the only feature required being that the intention must be clear. *Commonwealth* v. *Coal Co.*, 156 Pa. St. 488; *Commonwealth* v. *Lehigh C. & N. Co.*, 162 Pa. St. 603.

Conceding that instrumentalities of interstate commerce cannot be taxed by the State where the taxation interferes with the commerce itself it is a well settled principle as to tangible property that at times it is to be treated as practically intangible because of its roving character. Vessels engaged in foreign or interstate commerce have their *situs* at their port of registry and are taxable there, and shares of stock in national banks, located in this State, owned by non-residents of this State are taxable here. Vessels, if unregistered, have

their *situs* for taxation in the State which is the domicil of their owner. *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119; *Pullman Co.* v. *Commonwealth*, 107 Pa. St. 156; aff'd *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18; *Commonwealth* v. *Dredging Co.*, 122 Pa. St. 386; *Commonwealth* v. *D., L. & W. R. R. Co.*, 145 Pa. St. 96; *Commonwealth* v. *Coal Co.*, 197 Pa. St. 551.

The principal subjects of corporate taxation in Pennsylvania are capital stock, shares and franchises. The tax on capital stock of corporations has always been levied upon capital stock according to the value of the property which it represents. *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119; Whitworth on Tax. of Corp. in Pennsylvania, ch. I, § 14, pp. 59–140.

The capital stock tax claimed is not a tax laid, or sought to be laid, directly upon tangible property beyond the territorial limits of Pennsylvania or the protection of her laws. Deductions from the value of the capital stock of a Pennsylvania corporation cannot be allowed for property which has not acquired a foreign *situs*, because of its return in value to the treasury of the company. It is the value of the stock that is taxed and not the property representing that value. *Commonwealth* v. *Mining Co.*, 5 Pa. County Ct. Rep. 89; *Commonwealth* v. *Coal Co.* 197 Pa. St. 551.

We do not concede that the coal in question was permanently located and actually taxed in States other than Pennsylvania; nor do we concede the pertinency of the case of *Brown* v. *Houston*, 114 U. S. 622, and the authorities cited in support and confirmation thereof.

Before the coal had started on its journey, the right of Pennsylvania to tax capital stock, into the value of which the value of the coal had entered, had attached and could not be divested.

The cases cited by plaintiff in error as to state taxes on goods in course of transportation are inapplicable to this case.

There is no Federal question. *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *People* v. *Commissioners*, 104 U. S. 466.

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

The Supreme Court of Pennsylvania bases its decision in this case on the authority of *Commonwealth* v. *Pennsylvania Coal Co.*, 197 Pa. St. 551, which it regards as controlling upon the question involved. The right to include the value of the coal in question in the valuation of the capital stock of the company is based upon the construction given by the Supreme Court of Pennsylvania to the Pennsylvania statute of 1891, and this court is concluded by that construction. *People* v. *Weaver*, 100 U. S. 539, 541.

The only question for this court to determine is whether, in refusing to deduct the value of the coal mined in Pennsylvania, and which at the time of the appraisement was situated outside the jurisdiction of the State, from the value of the capital stock, the state court denied any right of the plaintiff in error, which was protected by the Federal Constitution.

The coal itself, when the appraisement of the value of the capital stock was made, was concededly beyond the jurisdiction of the State of Pennsylvania. It was taxable (and in fact was taxed) in the States where it rested for the purpose of sale, at the time when the appraisement in question was made. *Brown* v. *Houston*, 114 U. S. 622. In that case the court held that the coal was properly taxed by the State of Louisiana, though it had but lately arrived from the State of its origin, Pennsylvania, and was at the time of the taxation awaiting sale in Louisiana, and was, in fact, soon thereafter sold and taken out of the country to a foreign State. It was said that the coal, on arrival at New Orleans for the purpose of sale, at once became intermingled with the general property of the State of Louisiana and was taxable like any other tangible property therein. In *Coe* v. *Errol*, 116 U. S. 517, the question was relative to the validity of the tax on the lumber imposed in the State of its origin, as that State had taxed the lumber before it had actually left the State, although it was

intended for transportation to another State for sale. It was held that the tax was proper, so long, and so long only, as such transportation had not yet actually commenced. After that the State had no right to tax it. In the case at bar the coal had been transported to and was actually resting in another State for sale when the appraisement was made, and under the foregoing cases it was then intermingled with property in the foreign State where it rested and was at that time liable to taxation therein. The right of the foreign State to tax under such circumstances was again upheld in *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577, where the coal was taxed while awaiting sale in such State. See *Kelley* v. *Rhoads*, 188 U. S. 1; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82. We must, therefore, take it as plain, under the foregoing decisions, that this coal, at the time of the appraisement of the value of the capital stock for taxation by Pennsylvania, had become intermingled with the mass of property in the other States, to which portions of it had respectively been sent, and that it was a proper subject for taxation for both state and local purposes in such States. Where the proceeds of the sale might go when the coal was sold, whether into the treasury of the company at its offices in New York City, or indirectly to the State of its incorporation, is not important. The coal had not been sold when the appraisement of the value of the capital stock was made, and at that time it was outside the jurisdiction of the State of Pennsylvania. A tax on that coal, *eo nomine*, or specifically, could not then be laid by that State, as counsel concede.

Now, was this tax, in substance and effect, laid upon the coal which was beyond the jurisdiction of Pennsylvania? The Supreme Court of Pennsylvania has held that a tax on the value of the capital stock is a tax on the property and assets of the corporation issuing such stock. *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119, 145; *Fox's Appeal*, 112 Pa. St. 337; *Commonwealth* v. *Delaware &c. R. R. Co.*, 165 Pa. St. 44. This court has also frequently held that a tax on the

value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence no tax can thus be levied which includes property that is otherwise exempt. *Bank of Commerce* v. *New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 25; *Fargo* v. *Hart*, 193 U. S. 490, 498, 499.

The cases of the taxation upon the value of the capital stock of the banks, or on a valuation equal to the amount of their capital stock paid in or secured to be paid in, as reported in 2 Black and 2 Wall., *supra*, involved the question of the taxation of United States bonds and other securities of the United States, in which the capital of the banks was invested, which were exempt from taxation; but the holding of the court was that those bonds and securities were in fact taxed by a tax upon the value of the capital of the bank, which was invested in such bonds and securities. Of course, the distinction between the capital stock of a corporation, and the shares into which it may be divided and held by individual shareholders, is borne in mind and recognized, and nothing herein affects that distinction. The question here is simply as to the value of the capital stock with reference to the assessment and taxation upon the corporation itself which issues it, and has nothing to do with the individual shareholder. *Van Allen* v. *Assessors*, 3 Wall. 573; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.

Counsel for defendant in error find no fault with the principle stated in *Brown* v. *Houston*, *supra*, and that line of cases, nor with the general proposition laid down in the other cases cited, that a tax on the value of the capital stock is a tax on the property of the corporation in which the capital is invested. They deny, however, their applicability to the facts of this case. They concede that the courts of Pennsylvania have held that tangible property, permanently located outside of the State, for the use and benefit of the corporation, and owned by it, is exempt from taxation under this statute.

They also concede that it was never within the intent or the power of the legislature to impose a tax upon tangible property when held outside of the territorial limits of the State; but they insist that this tax is not *eo nomine* or specifically upon tangible property outside the State, and they contend that the State has the right to consider the value of the coal as having entered into the value of the capital stock as soon as it was mined, and that the State then had the right to treat the coal as one of the items that went into the value of the capital stock, just the same as they contend for the right to so treat the money realized from the coal upon its sale in the foreign State when it has been returned to the State and has gone into the surplus fund. The position of the defendant in error, then, is this: The tax in question is not a tax upon coal, treated as tangible property and a tangible asset specifically subject to tax, but is a tax upon the value of the capital stock of the Pennsylvania corporation at the fixed rate of five mills for each dollar of the actual value of the whole capital stock, including bonds, mortgages, moneys at interest, franchises, and property of other kinds, and that the statute in question does not impose a tax on the coal itself. Counsel do not contend that a tax on the value of the capital stock of a corporation is not a tax on its property in a certain sense, but they contend that while a tax on capital stock is a property tax, yet the property of the corporation, for the purpose of taxation, is reached through the tax imposed *directly* upon the stock (197 Pa. St. 553), and that there is a distinction between a tax on capital stock and a direct tax on personal property. Therefore tangible property situated outside the State, under the circumstances set forth in this case, is not directly taxed by a tax on the value of the capital stock, or at least there is no specific tax upon it, and the tax is not illegal. It is also said that by reason of the alleged transitory character of the coal it has never, in law, lost its original domicil, which still remains in Pennsylvania and is subject to be there included in the value of the capital stock of the corporation.

The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, never to return in kind, but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth* v. *American Dredging Co.*, 122 Pa. St. 386. That property consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual *situs* beyond the jurisdiction of the State itself. However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign States for purposes of taxation, and in truth it was there taxed. We regard this tax as in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it. This is not a question as between direct or indirect taxation, such as arises under the Federal Constitution when Congress lays and collects taxes by virtue of the power given it by that instrument. No question of uniformity or apportionment of taxes arises here. The question now discussed is simply whether, under this statute of the State, property of the corporation is in substance and effect taxed while it is beyond the jurisdiction of the State and is never to return. When the Federal Constitution says no tax or duty shall be laid on articles exported from any State, such articles cannot be taxed, directly or indirectly, and a tax on foreign bills of lading is void because it in effect is a tax on exports. *Fairbank* v. *United States*, 181 U. S. 283, 289.

So, if the State cannot tax tangible property permanently outside the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the

capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State.

We think the state court is right in deducting, as it does, the value of the tangible property, when permanently held in another State, and we think that for the same reason the same rule should obtain in the case of tangible property situated, as this coal was. We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, *eo nomine*, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock or something else, which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock.

Although the coal may have entered into the value of the capital stock when mined, the question is whether the value of the stock in November, 1899, when the appraisement was directed by the statute to be made, should not be decreased by deducting the value of the coal therefrom which was not in the State at the time of the appraisement. We think it should; otherwise the tax amounts in substance to a specific tax on the coal. Taking the different prices of the stock at different times in the year, and the average price thereof, and otherwise following the provisions of the statute, simply makes a way of finding the value of the stock between the first and fifteenth of November in each year. That is the material

time when the value is to be ascertained, and at that time this coal was not in the State. An appraisement thus made, which includes such property, is to that extent without jurisdiction and illegal. It is true that in general an appraisement of, or an assessment of a tax upon, value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is immaterial, and the decision of the former is final. But where the appraisement is arrived at by including therein tangible property, which is beyond the jurisdiction of the State, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the statute), such an appraisement or assessment is absolutely illegal, as made without jurisdiction.

The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment. In *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, the ferry company was operating a ferry across the Ohio River between Jeffersonville in Indiana and Louisville in Kentucky, under two franchises, one granted by the proper authorities of Indiana for maintaining a ferry across that river from the Indiana shore to the Kentucky shore, and the other granted by the State of Kentucky to carry on a ferry business from the Kentucky to the Indiana shore. The tax was laid by Kentucky upon the company, a part of which the company insisted was a tax upon it by reason of its ownership of the Indiana franchise, which it contended was property situated in Indiana and beyond the jurisdiction of Kentucky. The courts of Kentucky held that, under the statute, "the board of valuation and assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio River. But under certain sections of the Kentucky statutes it assessed

the value of appellant's franchise, which is its intangible property. The board did not assess, or attempt to assess, the property, either tangible or intangible, which it owned in the State of Indiana." This court stated: "It thus appears from the admitted facts and from the opinion of the court below that the state board, in its valuation and assessment of the franchise derived by that company from Kentucky, included the value of the franchise obtained from Indiana for a ferry from its shore to the Kentucky shore. In short, as stated by the Court of Appeals, the value of the franchise of the ferry company was fixed 'as if it conducted all its business in the territorial limits of the State of Kentucky,' making no deduction for the value of the franchise obtained from Indiana." It was held that the franchise granted by Indiana to maintain a ferry from the Indiana shore was wholly distinct from the franchise obtained from Kentucky to maintain the ferry from the Kentucky shore, although the enjoyment of both was essential to a complete ferry right for transportation of persons and property across the river both ways And each franchise was property entitled to the protection of the law. After holding that the privilege of maintaining a ferry in Kentucky from the Indiana shore to the Kentucky shore was a franchise derived from Indiana, and as that franchise was a valuable right of property, the question arose whether it was within the power of Kentucky to tax it, directly or indirectly, and this court said: "It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the board of valuation and assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been

the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise." And again: "We recognize the difficulty which sometimes exists in particular cases in determining the *situs* of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs* in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana." And in conclusion it was said: "We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana."

It is plain that in the case at bar the coal had lost its *situs* in Pennsylvania by being transported from that State to foreign States for the purposes of sale, with no intention that it should ever return to its State of origin. It was, therefore, as much outside the jurisdiction of the State of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the value of the franchise created

by Indiana. Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amendment, which prevents the taking of its property in that way.

The judgment of the Supreme Court of Pennsylvania is reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

The CHIEF JUSTICE dissented.

CLARK *v.* NASH.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 218. Argued April 19, 20, 1905.—Decided May 15, 1905.

Whether the statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining, is or is not a condemnation for public use and, therefore, a valid enactment under the Constitution, depends upon considerations relating to the situation of the State and its possibilities for agricultural and mining industries.

The rights of a riparian owner in and to the use of water flowing by his land, are not the same in the arid and mountainous western States as they are in the eastern States.

This court recognizes the difference of climate and soil, which render necessary different laws in different sections of the country, and what is a public use largely depends upon the facts surrounding the subject, and with which the people and the courts of the State must be more familiar than a stranger to the soil.

While private property may not in all cases be taken to promote public interest and tend to develop the natural resources of the State, in view of the peculiar conditions existing in the State of Utah, and as the facts appear in this record, the statute of that State permitting individuals to enlarge the ditch of another and thereby obtain water for his own land, is within the legislative power of the State, and does not in any way violate the Federal Constitution.

THIS action was brought by the defendant in error Nash, to condemn a right of way, so called, by enlarging a ditch for the conveying of water across the land of plaintiffs in error, for the purpose of bringing water from Fort Canyon Creek, in the county and State of Utah, which is a stream of water flowing from the mountains near to the land of the defendant in error, and thus to irrigate his land.

The plaintiffs in error demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action against them. The demurrer was overruled, and the defendants then waived all time in which to answer the complaint and elected to stand on the demurrer. Thereafter there was a default entered against the defendants, and each of them, for failing to answer, and the case was under the practice in Utah then tried and evidence heard on the complaint of the plaintiff, showing the material facts as stated in the complaint. The trial court found the facts as follows:

"That the plaintiff during all the times mentioned in said complaint, to wit, from the first day of January, 1902, down to the present time inclusive, was, has been and now is the owner of, in possession of and entitled to the possession of the south half of the northwest quarter of section 24, in township 4 south of range 1, east of Salt Lake meridian, in Utah County, State of Utah.

"That Fort Canyon Creek is a natural stream of water flowing from the mountains on the north of plaintiff's said land, in a southerly direction to and near to plaintiff's said land.

"That said land of plaintiff above described is arid land and will not produce without artificial irrigation, but that with artificial irrigation the same will produce abundantly of grain, vegetables, fruits and hay.

"That the defendants own land lying north of and adjacent to plaintiff's said land, and said defendants have constructed and are maintaining and jointly own a water ditch which diverts a portion of the said waters of the said Fort Canyon Creek on the west side of said creek (being the side on which

the plaintiff's said land is situated) at a point about one mile north of plaintiff's said land in section 13 of said township, down to a point within a hundred feet of plaintiff's said land, which said ditch is begun on the defendants' land and runs in a southerly direction over said defendants' land and on to and over the lands of the said defendants to said point about a hundred feet of plaintiff's said land.

"The plaintiff is the owner of and entitled to the use of sufficient of the remainder of the flow of the waters of the said Fort Canyon Creek to irrigate his said land, and that the irrigation of said land by the waters of said creek and the uses of the said waters in the irrigation of the said lands of the defendant is under the laws of this State declared to be, and the same is a public use.

"That the said waters of said Fort Canyon Creek cannot be brought upon the said plaintiff's said land by any other route except by and through the ditch of the defendants, owing to the canyon through which said ditch runs being such as to only be possible to build one ditch.

"That plaintiff has no other way of irrigating his said land except by the use of the waters of said Fort Canyon Creek and that unless plaintiff is allowed to enlarge the ditch of the defendants and have a right of way through said ditch for the flow of the waters of said Fort Canyon Creek, down to the plaintiff's said land, that said land of plaintiff will be valueless and the waters of said Fort Canyon Creek will not be available for any useful purpose.

"That said ditch of defendants is a small ditch about 18 inches wide and about 12 inches deep; that if the plaintiff is permitted to widen said ditch one foot more it will be sufficient in dimensions to carry plaintiff's said water to which he is entitled to his said land and the same can and will be put to a beneficial and public use, in the irrigation of the soil on plaintiff's said land hereinbefore described.

"That on the sixteenth day of January, 1902, and while the said defendants were not in the actual use of their said ditch,

and while the widening of said ditch at said time would not in any manner interfere with said defendants, other than the act of widening of same, the plaintiff requested of the said defendants the right to so widen the said ditch of the said defendants so to make it one foot wider, for the purpose of using the same to carry the water of the plaintiff onto his said land from said creek, and at said time and place offered to pay to said defendants all damages which the said defendants might suffer by reason of said enlargement, and offered to pay his proportion of the maintenance of keeping the same in repair, and asked of said defendants a right to continue the use of said ditch in common with said defendants, and to use the same so as not to interfere with the use of said ditch by said defendants, and it further appearing to the court that the said plaintiff is now and has ever since been willing to pay said damage and all damage incident thereto—and to pay his just proportion of the cost of maintaining said ditch. That the said defendants then and there and ever since have refused to permit plaintiff to enlarge said ditch or to use the same, or in any manner to interfere with the same.

"And it further appearing to the court that the said defendants would suffer damages by reason of the enlarging of said ditch one foot in width, in the sum of $40.00, and no more. And that the said plaintiff has deposited with the clerk of this court to be paid to the order of the said defendants the sum of $40.00, in full payment of such damages. That the land of the defendants not sought to be condemned by plaintiff would suffer no injury or damage.

"And it further appearing from said evidence that said ditch of the defendants can be widened by the plaintiff one foot more without injury to defendants or to said ditch, and that said widening of said ditch and the use thereof by the plaintiff will not in any manner interfere with the free and full use thereof by the defendants for the carrying of all waters of the said defendants."

Upon these facts the court found the following—

"*Conclusions of Law.*

"The court finds and decides that the plaintiff is entitled to a decree of this court condemning a right of way through defendants' said ditch, to the extent of widening said ditch one foot more than its present width and to a depth of said ditch as now constructed through the entire length thereof down to plaintiff's said land, for the purpose of carrying his said waters of said Fort Canyon Creek to the land of the plaintiff for the purpose of irrigation, and is entitled to an easement therein to the extent of the enlarging of said ditch and for the purposes aforesaid, and to have a perpetual right of way to flow waters therein to the extent of the said enlargement.

"That the defendants are entitled to have and recover from the said plaintiff the sum of $40.00 damages for injury sustained by reason of the enlargement and improvement above stated and such right of way and easement.

"That the plaintiff is required to contribute to the cost and expense of maintaining and keeping the said ditch in repair in an amount and proportion bearing the same relation to the whole amount of cost and expense as the waters he flows therein bears to the whole amount flowed therein both by the plaintiff and defendants.

"That the plaintiff recover no costs herein and judgment is hereby ordered to be entered accordingly."

Judgment having been entered upon these findings, the defendants appealed to the Supreme Court of the State, where, after argument, the judgment was affirmed. 27 Utah, 158.

Mr. J. W. N. Whitecotton for plaintiffs in error:

The taking not being a public use, plaintiffs in error are deprived of their property without due process of law in violation of the Fourteenth Amendment. As to what is a private and not a public use see *Taylor* v. *Porter*, 4 Hill, 140; *Re Eureka Basin Co.*, 96 N. Y. 42, 48; *Re Tuthill*, 163 N. Y. 133, and see authorities under this case in 49 L. R. A. 781; *Nesbitt* v. *Trumbo*, 39 Illinois, 110; *Sholl* v. *Coal Co.*, 118 Illinois, 427.

This taking may greatly injure the present owner of the ditch. This is not public irrigation. *Lorenz* v. *Jacobs*, 63 California, 73; *Lindsay Irrigation Co.* v. *Mehrtens*, 97 California, 680. The term "public use" is an expression of indefinite significance and its application to any particular case is to be determined by evidence. *Fallsbuy Co.* v. *Alexander*, 61 L. R. A. 129; *Gayland* v. *Sanitary District*, 204 Illinois, 576; *Lumber Co.* v. *Morris*, 63 L. R. A. 820; *Railway Co.* v. *Nebraska*, 164 U. S. 403, 416.

Water rights are not made public use by the constitution of Utah. Article I, § 22, and Art. 17, const. Utah; § 3588, Rev. Stat. Utah, 1898, subsec. 5, 6, 10; also §§ 1277, 1278; see also "Public" and "Private" as defined in Anderson's, Standard and Webster's Dictionaries.

Private property shall not be taken or damaged for public use without just compensation. Constitution of Utah, Art. I, § 22.

This constitutional provision means that private property cannot be taken against the will of the owner for a private use under any circumstances. So that the only question to be determined is, Is the use for which this condemnation is allowed a public use within the meaning of the Fourteenth Amendment? See *Bankhead* v. *Brown*, 25 Iowa, 540; *Matter of Albany Street*, 11 Wend. 151; *Railroad Co.* v. *Greeley*, 17 N. H. 47, 55; *Bloodgood* v. *M. & H. R. Ry. Co.*, 18 Wend. 9; *Beckman* v. *Railway Co.*, 3 Paige, 73; *Witham* v. *Osborn*, 4 Oregon, 318; *Helburn's case*, 3 Bland (Md.), 95; *Hoy* v. *Swan's Lessee*, 5 Maryland, 237, 244; *Dunn* v. *Charleston*, Harper (S. Car)., 189; *Osborn* v. *Hart*, 24 Wisconsin, 89; *Tyler* v. *Beacher*, 44 Vermont, 648; *Dickey* v. *Tennison*, 27 Missouri, 373; *Clark* v. *White*, 2 Swan, 540; *Sadley* v. *Langham*, 34 Alabama, 311; *Valley City Salt Co.* v. *Brown*, 7 W. Va. 191; *New Central Coal Co.* v. *Coal & Iron Co.*, 37 Maryland, 537; *Varner* v. *Martin*, 21 W. Va. 534; *Railroad Co.* v. *McComb*, 60 Maine, 290; *McChandless' Appeal*, 70 Pa. St. 210; *Embury* v. *Connor*, 3 N. Y. 511; *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694,

726; *Robinson* v. *Swope*, 12 Bush (Ky.), 21, 27; *Harding* v. *Funk*, 8 Kansas, 315, 323; *Jenal* v. *Green Island Draining Co.*, 12 Nebraska, 163; *Waddell's Appeal*, 84 Pa. St. 90; *Brown* v. *Beatty*, 34 Mississippi, 227, 240; *Mining Co.* v. *Parket*, 59 Georgia, 419; *McQuilton* v. *Hallon*, 42 Ohio St. 202.

No appearance for defendant in error.

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

The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to the plaintiffs in error, for that purpose. They argue that, although the use of water in the State of Utah for the purpose of mining or irrigation or manufacturing may be a public use where the right to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone, even where there is, as in this case, a state statute permitting it.

In some States, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the State and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded

upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which in all probability would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material, such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situation and amount of the arid land, or of the mines themselves, might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others.

These, and many other facts not necessary to be set forth

in detail, but which can easily be imagined, might reasonably be regarded as material upon the question of public use, and whether the use by an individual could be so regarded. With all of these the local courts must be presumed to be more or less familiar. This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a State, as also its courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the State, and that such knowledge and familiarity must have their due weight with the state courts. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159. It is true that in the *Fallbrook case* the question was whether the use of the water was a public use when a corporation sought to take land by condemnation under a state statute, for the purpose of making reservoirs and digging ditches to supply land owners with the water the company proposed to obtain and save for such purpose. This court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation.

We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the state statute, which provides, under the circumstances stated in the act for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a

public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other land owners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding or that a company should be formed to obtain the water which the individual land owner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law.

The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated.

We are of opinion, having reference to the above peculiarities which exist in the State of Utah, that the statute permitting the defendant in error, upon the facts appearing in this record, to enlarge the ditch and obtain water for his own land, was within the legislative power of the State, and the judgment of the state court affirming the validity of the statute is therefore

Affirmed.

Mr. Justice Harlan and Mr. Justice Brewer dissented.

UNITED STATES v. WINANS.

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

No. 180. Argued April 3, 4, 1905.—Decided May 15, 1905.

This court will construe a treaty with Indians as they understood it and as justice and reason demand.

The right of taking fish at all usual and accustomed places in common with the citizens of the Territory of Washington and the right of erecting temporary buildings for curing them, reserved to the Yakima Indians in the treaty of 1859, was not a grant of right to the Indians but a reservation by the Indians of rights already possessed and not granted away by them. The rights so reserved imposed a servitude on the entire land relinquished to the United States under the treaty and which, as was intended to be, was continuing against the United States and its grantees as well as against the State and its grantees.

The United States has power to create rights appropriate to the object for which it holds territory while preparing the way for future States to be carved therefrom and admitted to the Union; securing the right to the Indians to fish is appropriate to such object, and after its admission to the Union the State cannot disregard the right so secured on the ground of its equal footing with the original States.

Patents granted by the United States for lands in Washington along the Columbia River and by the State for lands under the water thereof and rights given by the State to use fishing wheels are subject to such reasonable regulations as will secure to the Yakima Indians the fishery rights reserved by the treaty of 1859.

THE facts are stated in the opinion.

The Solicitor General for the United States:

The fishery involved is and always has been a famous one. It is a "usual and accustomed place" and one of the best, if not the best place, on the Columbia River. The Yakima Indians have resorted to it above all others and depended on it for the supply of fish which was their steady subsistence. The treaty was negotiated with distinct recognition of this right.

The Indians objected to the transfer of their lands until assured by the Government as to the fishery rights.

Fish wheels are very destructive. They catch salmon by the ton, are not only rapidly diminishing the supply but will soon totally destroy it. But whether or not the wheels are unjustifiable *per se* and should be removed on the Indian's complaint, their grievance is greater; they are not allowed to fish at all. They do not claim exclusive rights, but rights in common with citizens. The defendants claim exclusive rights, and that if the Indians can fish at all, they must do so at other points along this stretch as these lands have been patented, and are owned by the defendants. The Indians cannot cross the lands to reach the fishery and are without any right whatever except what the defendants allow as a matter of grace. They are allowed no real rights.

The Government has always striven against disparity between our promises when obtaining treaties and the actual meaning of the instrument as it is sought to be construed when the greed of white settlers is aroused. The treaty involved was not merely one of peace and amity, or of "friendship, limits and accommodation," but a treaty of cession of lands by accurate description and on considerations duly expressed, one of which was the fishery rights now contended for.

As to the spirit in which Indian treaties should be construed see *Worcester* v. *Georgia*, 6 Pet. 515, 581; *Fletcher* v. *Peck*, 6 Cr. 87; *Johnson* v. *McIntosh*, 8 Wheat. 543; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *United States* v. *Cook*, 19 Wall. 591; *Choctaw Nation* v. *United States*, 119 U. S. 1.

Defendants' title rests on patents and on contracts with the State of Washington. Before they acquired title they knew of the Indian claims. There was always notice and actual knowledge by reason of the treaty provisions, by reason of the notorious Indian use of this fishery. The patents never gave absolute title, and the fee was always conditional. The treaty gave the right. Congress has never divested the Indians

of the right. An executive officer mistakenly issuing a patent without proper reservations under such circumstances cannot thus divest valid vested rights.

This is an old controversy, and has been fully adjudicated in favor of the Indians by the Washington courts. *United States* v. *Taylor*, 3 Wash. Ty. 88. And this adjudication has been recognized by the Federal courts. *United States* v. *Taylor*, 44 Fed. Rep. 2. *Alaska Packers' Assn. case*, 79 Fed. Rep. 152, was against us on the ground that the private title and the operation of fish traps under state licenses necessarily confer exclusive rights. *The James G. Swan*, 50 Fed. Rep. 108, distinguished. We are not seeking to impress a broad and vague servitude on all patented lands along the Columbia, but only a clear and limited one on this particular small tract. Under English and American rules exclusive rights to fisheries are not favored. 2 Bl. Com. 39, 40, 417 *et seq.; Weston* v. *Sampson*, 8 Cush. 346, 352; *Carson* v. *Blazer*, 2 Bin. 475; *Yard* v. *Carman*, 2 Pen. (N. J.) 681, 686; *Melvin* v. *Whiting*, 7 Pick. 79; 1 Pingrey on Real Property, 107, 108; Washburn on Easements and Servitudes, 533; *Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R. 71; *Bickel* v. *Polk*, 5 Harr. (Del.) 325; *Hogg* v. *Beerman*, 41 Ohio St. 81; *Sloan* v. *Biemiller*, 34 Ohio St. 492. So far as the right may be exclusive, belonging to the riparian owner (in non-navigable waters), the State may restrain and regulate. *Waters* v. *Lilley*, 4 Pick. 145; *Commonwealth* v. *Chapin*, 5 Pick. 199. In either aspect, viz.: of a common right or one incident to dominion of the soil, the Indian claim here is good, because it was shared with citizens and was recognized by the Government in respect to its public dominion and title long before the private grants by patent were made. The States control navigable waters, including the soil under them and the fisheries within their limits, subject only to the rights of the General Government under the Constitution in the regulation of commerce. *Smith* v. *Maryland*, 18 How. 71; *Manchester* v. *Massachusetts*, 139 U. S. 240; *Shively* v. *Bowlby*, 152 U. S. 1; *Martin* v. *Waddell*,

16 Pet. 367; *McCready* v. *Virginia*, 94 U. S. 391. *Eisenbach* v. *Hatfield*, 2 Washington, 236, shows how the courts of the State of Washington construe the scope of state control. But nevertheless the state power here is subject to fundamental limitation, viz.: the organic acts affecting Washington as a Territory and a State. Act of August 14, 1848, 9 Stat. 323; act of March 2, 1853, 10 Stat. 172; act of February 2, 1889, 25 Stat. 676; and the constitution of the State of Washington, Arts. XVII, XXVI, taken together and construed in the light of the principle established in *Shively* v. *Bowlby*, *supra*, mean that the state right and claim to control, as by the sale of shore lands and the issue of licenses for fish wheels, are subject to all rights granted or reserved when the Federal power was in full control, during the territorial status. This doctrine embraces the grant or reservation to the Indians of these fishery rights assured by the United States under treaty stipulations, soon after that region passed from the Indian country status into the territorial condition and long before it became a State.

The Indian claim is not merely meritorious and equitable; it is an immemorial right like a ripened prescription. *Barker* v. *Harvey*, 181 U. S. 481, distinguished. A mistake in fact was made in issuing the patents, but the ground of equitable intervention is not technically that of mistake or fraud, nor does the Government endeavor, contrary to statutory limitations, to vacate and annul patents, *e. g.*, act of March 3, 1891, 26 Stat. 1093, to set aside and cancel a patent on the ground of mistake or fraud. The court will recognize the justice of the Indian claim and declare and establish by its equity powers the trust for the Indians which at all times has been an essential ingredient of private title to these lands. A patent does not invariably and inevitably convey an absolute title beyond all inquiry and free of every condition. *Eldridge* v. *Trezevant*, 160 U. S. 452. See also *Ruch* v. *New Orleans*, 43 La. Ann. 275; *Barney* v. *Keokuk*, 94 U. S. 324; *Packer* v. *Bird*, 137 U. S. 372; *Shively* v. *Bowlby*, 152 U. S. 1.

Ward v. *Race Horse*, 163 U. S. 504, recognized, as if it foresaw this case, the doctrine for which we are contending.

A decree for appellants must consider the reasonable rights of both parties; restricting the fish wheels if they can be maintained at all, as to their number, method and daily hours of operation. Nor can the Indians claim an exclusive right, and it may be just to restrict them in reasonable ways as to times and modes of access to the property and their hours for fishing. But by some proper route, following the old trails, and at proper hours, with due protection for the defendants' buildings, stock and crops, free ingress to and egress from the fishing grounds should be open to the Indians, and be kept open.

Mr. Charles H. Carey, with whom *Mr. Franklin P. Mays* was on the brief, for respondents:

Upon the acquisition of the original Oregon Territory now including Oregon, Washington, and parts of other States, the United States became invested with the fee of all the lands and waters included therein. The "Indian title" as against the United States was merely a right to perpetual occupancy of the land, with the privilege of using it as the Indians saw fit, until such right of occupancy had been surrendered to the Government; and the Indian title to the reservations was of no higher character. *United States* v. *Alaska Packers' Assn.*, 79 Fed. Rep. 157; *Spalding* v. *Chandler*, 160 U. S. 394, 407.

The Indian title, even to the lands included in their reservation, is subject to the paramount control and power of Congress in the enactment of laws for the sale and disposal of the public lands. Cases *supra* and *Missouri, K. & T. Ry. Co.* v. *Roberts*, 152 U. S. 114.

Under the treaty of 1859, the Indians neither reserved nor did they acquire a title by occupancy to the lands bordering their usual and customary fishing grounds. They acquired merely an executory license or privilege, applying to no certain and defined places, and revocable at will of the United

States, to fish, hunt, and build temporary houses upon public lands, in common with white citizens, upon whom the law has conferred no title by occupancy whatever. Cases *supra* and *Ward* v. *Race Horse*, 163 U. S. 504.

The treaty of 1859 imposed no restraint upon the power of the United States to sell the lands in controversy, and such a sale under the settled policy of the Government, was a result naturally to come from the advance of the white settlements along the river, and it cannot be assumed that the Government intended by general expressions in the treaty to tie up the development of the fishing industry through a long stretch of the waters of the Columbia.

The grant of the lands bordering the Columbia River at such fishing places deprived the white citizens of all rights to go over, across, or upon them for the purpose of fishing or erecting buildings or other purposes, and the Indian rights being of no higher nature were likewise revoked and extinguished. Cases *supra* and *The James G. Swan*, 50 Fed. Rep. 108.

Upon the admission of the State of Washington into the Federal Union, "upon an equal footing with the original States," she became possessed, as an inseparable incident to her dominion and sovereignty, of all the rights as to sale of the shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original States.

The title to the shore and lands under water is incidental to the sovereignty of a State,—a portion of the royalties belonging thereto,—and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States; and it depends upon the law of such State to determine to what extent the State has prerogatives of ownership. Control and regulation shall be exercised subject only to the paramount authority of Congress with regard to public navigation and commerce. *Hardin* v. *Jordan*, 140 U. S. 371; *Shively* v. *Bowlby*, 152 U. S. 1.

Evidence of Indians present at the time of the execution of the treaty between the representatives of the United States

Government and the federated bands of Indians known as the Yakima Nation in 1855 is incompetent and inadmissible when such evidence would tend to vary the plain stipulations of the treaty. *Anderson* v. *Lewis*, 1 Freem. Ch. (Miss.) 178; *Little* v. *Wilson*, 32 Maine, 214.

Where rights of fishing and hunting on the then vacant public lands of the United States were reserved to the whites and Indians "in common," both whites and Indians could use such implements and methods of fishing and hunting in the exercise of their common rights as they saw fit, and the use of fish wheels by the whites in the customary runways of the fish which did not exclude the Indians from fishing elsewhere, would not deprive the Indians of their common right.

Mr. Justice McKenna delivered the opinion of the court.

This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights and privileges on the Columbia River in that State, claimed under the provisions of the treaty between the United States and the Indians, made in 1859.

There is no substantial dispute of facts, or none that is important to our inquiry.

The treaty is as follows:

"Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. . . .

"Article II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries: . . . .

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians as an Indian reservation; nor shall any white man, excepting those

in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

"Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. . . .

"Article III. *And provided* That, if necessary for the public convenience, roads may be run through the said reservation; and, on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. . . .

"Article X. *And provided,* That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the 'Wenatshapam fishery,' which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." 12 Stat. 951.

The respondents or their predecessors in title claim under patents of the United States the lands bordering on the Columbia River and under grants from the State of Washington to the shore land which, it is alleged, fronts on the patented land. They also introduced in evidence licenses from the State to maintain devices for taking fish, called fish wheels.

At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.

The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. Before filing their answer respondents demurred to the bill. The court overruled the demurrer, holding that the bill stated facts sufficient to show that the Indians were excluded from the exercise of the rights given them by the treaty. The court further found, however, that it would "not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing." 73 Fed. Rep. 72. The injunction that had been granted upon the filing of the bill was modified by stipulation in accordance with the view of the court.

Testimony was taken on the issues made by the bill and answer, and upon the submission of the case the bill was dismissed, the court applying the doctrine expressed by it in *United States* v. *Alaska Packers' Assn.*, 79 Fed. Rep. 152; *The James G. Swan*, 50 Fed. Rep. 108, expressing its views as follows:

"After the ruling on the demurrer the only issue left for determination in this case is as to whether the defendants have interfered or threatened to interfere with the rights of the Indians to share in the common right of the public of taking fish from the Columbia River, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands, to which a perfect absolute title has been acquired from the United States Government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the State of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise the defendants have not molested the Indians nor threatened to do so. The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice

which looks only to the substance of the right without regard to technical rules." 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States

and its grantees as well as against the State and its grantees.

The respondents urge an argument based upon the different capacities of white men and Indians to devise and make use of instrumentalities to enjoy the common right. Counsel say: "The fishing right was in common, and aside from the right of the State to license fish wheels the wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail." But the result does not follow that the Indians may be absolutely excluded. It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common. In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does. Besides, the fish wheel is not relied on alone. Its monopoly is made complete by a license from the State. The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess.

The construction of the treaty disposes of certain subsidiary contentions of respondents. The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty as to the other laws of the land.

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the

paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby,* 152 U. S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

"Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true."

* * * * * * * *

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. *American Ins Co.* v. *Canter,* 1 Pet. 511, 542; *Benner* v. *Porter,* 9 How. 235, 242; *Cross* v. *Harrison,* 16 How. 164, 193; *National Bank* v. *Yankton County,* 101 U. S. 129, 133; *Murphy* v. *Ramsey,* 114 U. S. 15, 44; *Mormon Church* v. *United States,* 136 U. S. 1, 42, 43; *McAlister* v. *United States,* 141 U. S. 174, 181."

Many cases were cited. And it was further said:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international

obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory."

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

The license from the State, which respondents plead to maintain a fishing wheel, gives no power to them to exclude the Indians, nor was it intended to give such power. It was the permission of the State to use a particular device. What rights the Indians had were not determined or limited. This was a matter for judicial determination regarding the rights of the Indians and rights of the respondents. And that there may be an adjustment and accommodation of them the Solicitor General concedes and points out the way. We think, however, that such adjustment and accommodation are more within the province of the Circuit Court in the first instance than of this court.

Decree reversed and the case remanded for further proceedings in accordance with this opinion.

MR. JUSTICE WHITE dissents.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 198. Submitted April 6, 1905.—Decided May 15, 1905.

The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensations, subject only to limitation of ascertaining the rate by average weight of mails.

There is nothing in § 4002, Rev. Stat., which requires the abrogation of a prior contract when an extension is made beyond the terminal of an established route or which precludes provision for the extension alone.

While a contract may not be forced upon a railway it may accept and become bound by the action of the Post Office Department.

THE facts are stated in the opinion.

Mr. George R. Peck, *Mr. W. W. Dudley* and *Mr. L. T. Michener* for appellant.

Mr. Assistant Attorney General Pradt and *Mr. John Q. Thompson*, Special Attorney, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellant, a Wisconsin corporation, filed a petition in the Court of Claims, August 25, 1896, which it amended July 19, 1900, and by which it sought recovery from the United States of the sum of $9,101.08, for compensation for carrying the mails from Milwaukee, Wisconsin, to Republic, Michigan, and thence to Champion, Michigan.

The services were rendered by the Milwaukee and Northern Railroad Company. Appellant's ownership was derived from that company, as alleged in the petition, as follows:

"Your petitioner further avers that on the 30th day of September, 1890, it became the purchaser, and thereupon it

became the lawful owner, by assignment and transfer, of all of the capital stock of the said Milwaukee and Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee and Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee and Northern Railroad Company; that from the 30th day of September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate organization and in the name of the Milwaukee and Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee and Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee and Northern Railroad Company, and all its rights, privileges and corporate franchises connected with or relating to such railroad or to the construction, maintenance, use or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee and Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort."

The United States demurred to the petition on the grounds that (1) "The claim came to the claimant, if at all, by a pretended assignment which as to the United States was void; (2) the allegations of the amended petition did not state facts sufficient to constitute a claim against the United States." The demurrer was sustained and the petition dismissed, whereupon this appeal was taken.

The demurrer presented the questions of the validity of the assignment and the merits of the claim. We rest our decision

on the latter. We express no opinion of the validity of the assignment.

The Milwaukee and Northern Railroad ran from Milwaukee, Wisconsin, to Republic, Michigan, a distance of 255.37 miles. Under the authority given him by law, "to arrange the railway routes on which mail is carried," (section 3997 of the Revised Statutes of the United States), the Postmaster General designated the road from Milwaukee to Republic as Postal Route No. 139,016, and compensation was fixed for carrying the mails thereon. On February 4, 1890, the road was extended to Champion, Michigan, a distance of 8.89 miles. Provision was made for the extension by an order dated February 4, 1890, which directed that service should be extended from Republic to Champion, increasing distance 9.16 miles, less .27 miles, making a net increase of 8.89 miles, "in accordance with distance circular, and with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order in accordance with law."

On December 1, 1890, the following order was made and directed to the general manager of the railroad:

"SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Milwaukee, Wis., and Champion, Mich., has been fixed from Sept. 23, 1890, to June 30, 1891, (unless otherwise ordered) under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles.

"From February 24 to Sept. 22, 1890, pay is allowed at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension between Republic and Champion, Mich.

"This adjustment is subject to future orders and to fines and deductions."

It will be observed that this order purports to fix the compensation on route 139,016 between Milwaukee and Champion. The dates designated are somewhat confusing. However,

in two days another order was issued and directed to the company, which reads as follows:

"SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Republic and Champion, Mich., has been fixed from February 24, 1890, to June 30, 1891 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension.

"This adjustment is subject to future orders and to fines and deductions."

The first order revoked the compensation for carrying the mails from Milwaukee to Republic, which had been fixed, and was manifestly a mistake. The second order was intended to correct the mistake and confine the adjustment to the extension from Republic to Champion.

The contention of appellant is that the Postmaster General had no power to issue the second order, but was required by section 4002 of the Revised Statutes of the United States to fix compensation for the whole route as extended. The appellant urges in support of the contention not only the provision of the section, but the practice and usage of the Post Office Department. Section 4002 is as follows:

"The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

"First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails.

"Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole

length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars; and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

The section does not sustain the appellant's contention. The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitation on its exercise, expressed in section 4002, is as to the manner of ascertaining the rate, which is to be by the average weight of the mails. There is nothing in the section which requires the abrogation of prior contracts when an extension is made beyond the terminal of an established route or precludes provisions for the extension alone. A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department. *Eastern Railroad* v. *United States*, 129 U. S. 391. The record does not show any protest against the order of December 3. Its terms were unmistakable, and, as counsel for the Government observes, "it may be justly inferred" that the railroad company "viewed the order of December 3 in the same light and as having the same force and effect as intended by the postal authorities."

Judgment affirmed.

BIRRELL *v.* NEW YORK AND HARLEM RAILROAD COMPANY.

KIERNS *v.* NEW YORK AND HARLEM RAILROAD COMPANY.

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

Nos. 202, 203. Argued April 27, 28, 1905.—Decided May 15, 1905.

Muhlker v. *Harlem R. R. Co.*, 197 U. S. 544, followed.

THE facts are stated in the opinion.

Mr. Alfred B. Cruikshank for plaintiffs in error.

Mr. Ira A. Place and *Mr. Edward Winslow Paige*, with whom *Mr. Thomas Emery* was on the brief, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiffs in error are owners of property on Park avenue in the city of New York, and brought these actions in the Supreme Court of the county of New York against the defendants in error for damages for the erection, and for an injunction against the continuance of, the viaduct described in *Muhlker* v. *New York & Harlem Railroad Company*, 197 U. S. 544. The Supreme Court found that the viaduct and the operation of trains thereon were and had been from certain dates which were mentioned, a continuous trespass upon the easements of light, air and access appurtenant to the property of plaintiffs in error, and that they sustained damages, respectively, as follows: Birrell in the sum of $3,360, depreciation in the rental value of her property, and the sum of $7,050 damages to the fee; Patrick Kierns, as executor and trustee of

John Kierns, deceased, in the sum of $1,296, depreciation of rental value of his property, and $2,525 injury to the fee. Money judgments were entered for the depreciation of the rental value of the respective properties, and it was decreed that unless the right was acquired by the defendants to maintain the structure and operate the railroad by the payment of the sums awarded for the damages to the fee, injunctions should become operative against the structure and railroad. The judgments were affirmed by the Appellate Division, but were reversed by the Court of Appeals. Upon the return of the cases to the Supreme Court judgments were entered dismissing the complaints and these writs of error were then sued out.

In the *Birrell case* the Court of Appeals contented itself with a simple reversal of the judgment; in the *Kierns case* a *per curiam* opinion was filed as follows:

"Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *New York & Harlem R. R. Co.*, 169 N. Y. 270, and *Muhlker* v. *New York & Harlem R. R. Co.*, 173 N. Y. 549."

Judge Vann filed a concurring opinion, which he concluded as follows:

"I concurred in the dissenting opinion of Judge Cullen in the *Fries case* and should have concurred in that of Judge Bartlett in the *Muhlker case* had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal."

The *Muhlker case* came to this court and was reversed, 197 U. S. 544. There are some differences in the facts in the cases at bar from that case, but none in our judgment which withdraw them from the principles there expressed. And, as we have seen, a substantial identity in the cases was pronounced by the courts of New York.

Counsel, it is true, have submitted some additional considerations based on the act of 1892 under which the viaduct was erected, and on other laws of New York, to which con-

siderations we have given due attention, but we do not think they demand or would justify a change of our ruling.

It follows, therefore, that the judgments should be and they are hereby reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE, MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE HOLMES dissent.

SAVANNAH, THUNDERBOLT AND ISLE OF HOPE RAILWAY *v.* SAVANNAH.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 238. Argued April 28, 1905.—Decided May 15, 1905.

There is no foundation for the jurisdiction of this court to review the judgment of the highest court of a State refusing to restrain the collection of a tax the imposition of which is not authorized by any law of the State. *Barney* v. *City of New York*, 193 U. S. 430.

A classification which distinguishes between an ordinary street railway, and a steam railroad, making an extra charge for local deliveries of freight brought over its road from outside the city, *held*, under the facts of this case, not to be such a classification as to make the tax void under the Fourteenth Amendment because it denies the street railway the equal protection of the law, or deprives it of its property without due process of law.

Where none of the expressions in a contract between a street railway company and the municipality in regard to the extension of company's tracks for the better advantage of, and affording more facilities to, the public, import any exemption from taxation, the subsequent imposition of a tax, otherwise valid, is not invalid under the impairment of obligation clause of the Constitution.

THE facts are stated in the opinion.

Mr. David C. Barrow, with whom *Mr. George A. King* was on the brief, for plaintiff in error:

This tax is imposed on the plaintiff in error because it does business in the city of Savannah, and for the use of the streets

of the city in doing it. The railway is both within the city limits and outside of the city. The Central of Georgia Railway Company, a steam railroad, is engaged in business within the limits of the city, using a total of five miles of the streets. Its lines also extend outside of the city of Savannah. The business carried on by the plaintiff in error and the business carried on by the Central of Ga. R. R. Co. are both local, from one point within the city limits to another point within the city limits. The only differences between the two are that plaintiff in error operates by electricity and in the business done in the city of Savannah transports freight and passengers while the Central of Ga. R. R. Co. operates by steam and in the business done in the city of Savannah transports freight.

The difference between these two corporations is not sufficient to justify a classification which puts the electric railway in one class and imposes a burden on it of $100 per mile per annum and puts the commercial railway in a separate class and exempts it from any tax. This court recognizes the definition of the class as contained in the taxing act and the classification must be justified under such definition. *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283, 296; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339.

In order to sustain a classification based not upon the kind of business carried on, but upon the special privileges granted, the enjoyment of the privileges places the person taxed in a separate and distinct class by reason of such privilege. The taxing power can not base its classification on the privilege granted and impose a burden therefor without going further and seeing to it that no one is omitted from the burden, whatever their business may be or they may be called, who enjoy the same privileges. *Gulf, Colorado & Santa Fé Ry.* v. *Ellis*, 165 U. S. 150, 157; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 465.

In this case the city has failed to treat all persons alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. *Hayes* v. *Missouri*, 120

U. S. 68, 71; *Soon Hung* v. *Crowley*, 113 U. S. 703, 709; *Billings* v. *Illinois*, 188 U. S. 97.

This court has recognized the principle that in determining whether or not corporations belonged to the same class it is necessary to consider whether they are held by the taxing power as equally responsible and liable in other matters relating to their business. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205, 210; *Minn. & St. Louis Ry.* v. *Beckwith*, 129 U. S. 26, 29.

The prohibition of the Constitution against the impairment of the obligations of contracts applies to implied as well as express contracts. *Fisk* v. *Jefferson Police Judge*, 116 U. S. 131; *Construction Co.* v. *Fitzgerald*, 137 U. S. 98, 112.

The whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intentions they have manifested in forming them. *O'Brien* v. *Miller*, 168 U. S. 287, 297; *Goddard* v. *Foster*, 17 Wall. 123, 142; *Black* v. *United States*, 91 U. S. 267.

Where the court from all the circumstances surrounding the contract and the consideration and acts of the parties implies certain stipulations it does not thereby vary the contract or introduce new terms into it, but declares that certain acts unexplained by the compact impose certain duties and that the parties had stipulated for their performance. *Ogden* v. *Saunders*, 12 Wheaton, 341, 342.

The city having accepted the benefits under the contract with the plaintiff in error, this ordinance imposing a tax for the privilege of using those streets named in the contract, impairs the obligations of the same. *Chicago* v. *Sheldon*, 9 Wall. 50; *St. Louis* v. *West. Union Tel. Co.*, 63 Fed. Rep. 68; *Iron Mountain R. Co.* v. *Memphis*, 96 Fed. Rep. 113; *Mercantile Trust Co.* v. *Collins Park & B. R. Co.*, 101 Fed. Rep. 347.

An ordinance of a city council providing for an extension of the tracks of a street railway and fixing the rate of fare constitutes a contract which is impaired in violation of the Constitution of the United States by a subsequent ordinance

which undertakes to reduce the rate of fare. *Detroit* v. *Street Railway Company*, 184 U. S. 368; *Cleveland* v. *Railway Company*, 194 U. S. 517.

This ordinance being void on this ground in so far as it relates to a part of the route, the entire ordinance is void as it is impossible to separate the illegal portion of the tax from the legal portion—admitting for the sake of argument that it is otherwise legal.

Where a tax assessment includes property not legally assessable and the part of the tax assessed upon the latter property can not be separated from the other part, the entire tax assessment is invalid. *Santa Clara* v. *So. Pac. R. R.*, 118 U. S. 394, 415; *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 29, 45; *Central Pacific R. R.* v. *California*, 162 U. S. 163.

Mr. William Garrard for defendants in error:

The ordinance is valid under the local law, and the classification is proper. *Savannah* v. *Weed*, 84 Georgia, 683; *Savannah* v. *Crawford*, 75 Georgia, 35; *Goodwin* v. *Savannah*, 53 Georgia, 410. It is a business tax and not a tax on property. *Home Ins. Co.* v. *Augusta*, 50 Georgia, 530; *Loan Assn.* v. *Stewart*, 109 Georgia, 80; *Weaver* v. *Georgia*, 89 Georgia, 642; *Davis* v. *Macon*, 64 Georgia, 128.

The contract for extension contained no exemption from taxes and if it did the municipality had no power to make the exemption. *Factory* v. *Augusta*, 83 Georgia, 734; *Savannah* v. *Crawford*, 75 Georgia, 35; *Wells* v. *Savannah*, 107 Georgia, 2; *S. C.*, 181 U. S. 539; *Railway Co.* v. *New Orleans*, 143 U. S. 192.

The Constitution of the United States does not profess in all cases to protect property from unjust taxation by the States. That is a matter for state protection. *Los Angeles* v. *So. Pac. Ry. Co.*, 64 California, 433; *Wyandotte* v. *Corrigan*, 10 Pac. Rep. 99; *Railroad Co.* v. *Columbia*, 32 S. E. Rep. 408; Dillon, Mun. Corp., 4th ed., § 789; *Denver* v. *Street Railway*, 29 L. R. A. 610. If the tax is not authorized by a state

law there is no Federal question. *Hamilton* v. *Hamilton*, 146 U. S. 258, 266; *Barney* v. *City of New York*, 193 U. S. 430; *W. U. Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *Savannah* v. *Holst*, 132 Fed. Rep. 901; *Watson* v. *Nevin*, 128 U. S. 582; *Mobile* v. *Kimball*, 102 U. S. 691.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by the plaintiff in error to restrain the collection of a municipal tax by the defendants. The bill sets forth, among other grounds, that the tax impairs the obligation of a contract, and also is an attempt to take the plaintiff's property without due process of law, contrary to the Constitution of the United States. According to the bill and the fifth assignment of error there is no law of the State of Georgia which authorizes the imposition of the tax. Were this true the foundation of our jurisdiction would be gone and this writ of error should be dismissed. See *Barney* v. *City of New York*, 193 U. S. 430. But although the plaintiff has taken inconsistent positions and has confused questions for the state court alone with those which may be brought here, still, since it has shown a clear intent to raise the Federal question from the beginning, since the bill in another place alleges that the tax is an authority exercised under the State of Georgia and other assignments of error present the points, and since the state court has decided that the tax was authorized, we shall not stop the case at the outset. See *Hamilton Gas Light & Coke Co.* v. *Hamilton*, 146 U. S. 258.

The tax is imposed under an ordinance of March 22, 1899, providing by way of amendment to one of the year before, that "street railroad companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city and for the use of the streets of the city, at the rate of $100 per mile or fraction of a mile of track used in the city of Savannah by said railroad company." The plaintiff is a street railroad company, commonly known as

such, and the great part of its business and revenue is due to the use of the streets of Savannah by its electric passenger street cars. One of its grounds of attack is that the Central of Georgia Railway Company, a steam railway, is not subjected to the tax and yet that it also does business in the streets of the city by transporting freights from its regular station to various side tracks, and charges an additional or local price. The plaintiff contends that a classification which distinguishes between an ordinary street railway and a steam railroad making an extra charge for local deliveries of freight brought over its road from outside the city, is contrary to the Fourteenth Amendment and void.

The other ground on which the validity of the tax is denied is a contract made between the plaintiff and respondent on November 4, 1897, amended in April, 1898, and on July 27, 1898. It is contended that this contract implies that the plaintiff is to have the use of the streets without further charges than those which it imposes.

The trial court refused a preliminary injunction, and its decree was affirmed by the Supreme Court, 112 Georgia, 164, which decided that this was a business tax, lawfully imposed, and that the plaintiff did not stand like the Central of Georgia Railway, which, as was held in *City Council of Augusta* v. *Central Railroad*, 78 Georgia, 119, is subject to taxation by the State alone. On final hearing a verdict was directed for the defendant, and a decree was entered making the same the decree of the court. This also was affirmed by the Supreme Court. 115 Georgia, 137. The case then was brought here.

The merits of the case are pretty nearly disposed of by the statement. The argument on the first point is really a somewhat disguised attempt to go behind the decision of the state court that the tax is a tax on business, and to make out that it is a charge for the privilege of using the streets. We see no ground on which we should criticise or refuse to be bound by the local adjudication. The difference between the two railroads is obvious, and warrants the diversity in the mode

of taxation. The Central of Georgia Railway may be assumed to do the great and characteristic part of its work outside the city, while the plaintiff does its work within the city. If the former escapes city taxation it does so only because its main business is not in the city and the State reserves it for itself.

As to the contract, if the city had attempted to bargain away its right to tax, probably it would have been acting beyond its power. *Augusta Factory* v. *City Council of Augusta*, 83 Georgia, 734, 743. However, it made no such attempt. It is enough to say that it uses no language to that effect, or words which even indirectly imply that exemption for the future was contemplated. *Wells* v. *Savannah*, 181 U. S. 531, 539, 540; *S. C.*, 107 Georgia, 1; *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192. But we will go a little more into detail.

The contract was made on a petition of the plaintiff stating its desire to make changes in its lines of track "for the purpose of operating its railroad more economically and to better advantage and at the same time affording more adequate facilities to the public." Various changes were agreed on in the way of moving old tracks and laying down new ones. Among other particulars the railroad agreed to convey or cause to be conveyed certain lands in Bolton Street and Whitaker Street, "preserving of course the easement of the said street railway company over said land for its railway purposes." In the last amendment to the contract an extension is agreed to, "and the right to lay down, construct, maintain and operate said railway through said streets as before stated is granted subject to the control and regulation of the said mayor and aldermen, the same as other lines of railway as provided in said contract of November 4th, 1897." It is said that these phrases exempt at least so much of the road as they cover, and that therefore the tax is void as a whole, because it does not appear what proportion of it is attributable to unexempted portions.

This kind of argument seems to assume that the tax is a tax on the right to use the streets and not a tax on the business. But a sufficient answer is that none of the expressions quoted import any exemption from taxation whatever, if it was within the power of the city to grant it. See *New Orleans City & Lake Railroad* v. *New Orleans*, 143 U. S. 192. We are of opinion that the plaintiff's case fails on every ground.

Decree affirmed.

CIMIOTTI UNHAIRING COMPANY *v.* AMERICAN FUR REFINING COMPANY.

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

No. 192. Argued March 17, 1905.—Decided May 15, 1905.

A greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, although the last and successful step, in the art theretofore partially developed by other inventors in the same field.

The patent involved in this case for the unhairing of seal and other skins, while entitled to protection as a valuable invention, cannot be said to be a pioneer patent.

In making his claim the inventor is at liberty to choose his own form of expression and, while the courts may construe the same in view of the specifications and the state of the art, it may not add to or detract from the claim.

As the inventor is required to enumerate the elements of his claim no one is the infringer of a combination claim unless he uses all the elements thereof.

Where the patent does not embody a primary invention but only an improvement on the prior art the charge of infringement is not sustained if defendant's machines can be differentiated.

THIS action was begun in the Circuit Court of the United States for the District of New Jersey for the purpose of enjoining the alleged infringement of certain letters patent of the United States, issued to John W. Sutton, and bearing date of May 22, 1888, number 383,258, for a certain new and useful invention or improvement upon machines for plucking furs.

In the Circuit Court a decree was rendered granting an injunction, 120 Fed. Rep. 672; upon appeal to the Circuit Court of Appeals for the Third Circuit this judgment was reversed, and the cause was remanded to the Circuit Court with directions to dismiss the bill. 123 Fed. Rep. 869.

The case was brought here upon writ of certiorari to review the judgment of the Circuit Court of Appeals.

Mr. Louis C. Raegener for petitioners.

Mr. Henry Schreiter for respondents.

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

The patent in controversy has been frequently sustained in the Federal courts (95 Fed. Rep. 474; 108 Fed. Rep. 82; 115 Fed. Rep. 498 and 507), and its validity is not contested here. The question presented to us is one of infringement. The invention which is the subject matter of the controversy relates to machinery for unhairing pelts, and particularly and perhaps, exclusively, so far as practical use is concerned, sealskins or "coney" skins. The latter are skins of French or Belgian rabbits, which, under the name of "electric" sealskins, have been put upon the market, and have been largely sold and used as substitutes for the genuine sealskins. It is said that only an expert can tell the difference between the finished coney and the genuine sealskin.

It is disclosed in the testimony that sealskins, before they are fit for the market, are required to be submitted to a process by which the long hairs, sometimes called "water hairs," are separated from the fur and clipped or plucked from the pelt. Up to about the year of 1881 the removal of such hairs was effected by hand, the pelt being stretched over the finger; by blowing down on the fur a part was made, and the hairs were clipped out by means of scissors. This was necessarily a slow

and laborious process. An improvement was made in this art by the Cimiottis, predecessors of the petitioner, by the introduction of an air blast for the purpose of separating the fur, which invention was the subject of a patent to them, number 240,007, under date of April 12, 1881. In 1888 the Sutton patent in suit was issued, in which was introduced a rotating brush apparatus for the purpose of separating the fur, as will be hereinafter more particularly shown. Of his invention, Sutton said in the specifications:

"This invention relates to an improved machine for plucking sealskins and other furs, so as to remove the stiff water-hair therefrom without injuring the soft hair or wool of the same.

"The machine is more especially designed with a view to overcome some of the defects and insufficiencies of the plucking-machines heretofore in use, and produce the plucking of the skins at the lower parts of the neck and shoulders, where the hairs point outwardly and backwardly and are the most difficult to pluck, as they lie down close to the skin when the same is drawn over the stretcher-bar.

"My invention is further designed to dispense with a blast-fan or other air-forcing devices, and produce the removing of the water-hairs entirely by mechanical means, which are operated by power, so that a quick and uniform plucking of the skin takes place.

"The invention consists of a machine for plucking seal and other skins, which comprises a fixed stretcher-bar, means for stretching and intermittently feeding the skin over said stretcher-bar, a fixed card above the stretcher-bar near the edge of the same, a rotary separating-brush that is intermittently moved up in front of the stretcher-bar, an oscillating guard below the stretcher-bar, a rotary cutting-knife and a vertically-reciprocating cutting-knife working in conjunction with the rotary knife for cutting off the stiff projecting hairs, said rotary cutting-knife being provided with a card supported back of the knife, all of which parts are operated from a com-

mon driving-shaft, so as to produce for each rotation of the same the cutting off or plucking of the hairs projecting from that part of the skin in front of the stretcher-bar."

The invention was illustrated by certain drawings, some of which are here given, which, together with the description, illustrate the operation of the machine, so far as necessary for the purposes of this case.

Fig: 1.

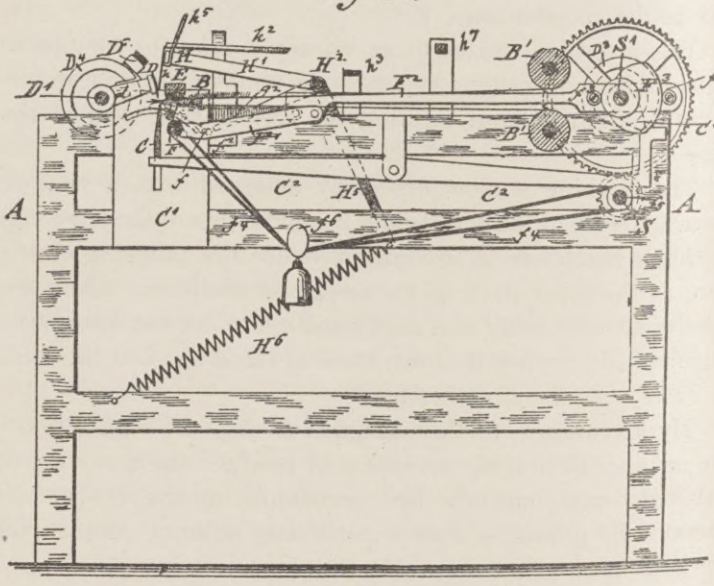


Fig: 2.

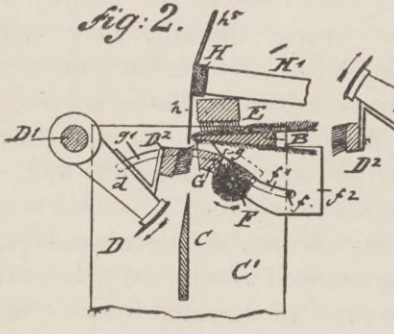
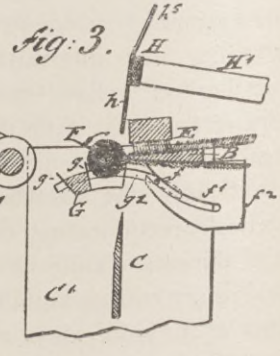


Fig: 3.



Referring to the drawings, the inventor says (in part):

"A represents the supporting-frame of my improved machine for plucking seal and other skins. On the frame A is supported a fixed transverse stretcher-bar, B, which is tapered to a narrow edge, over which the skin to be plucked is stretched. The skin is applied by tapes to the rollers B^1 B^1, which are intermittently actuated by gear-wheels operated by a pawl-and-ratchet-wheel mechanism from the driving-shaft S, as customary in plucking machines of this class. By the gear-wheels and the pawl-and-ratchet mechanism the skin is fed intermittently for a small portion of its length over the front edge of the stretcher-bar, it being unwound from the upper and wound up on the lower feed-roller. Below the edge of the stretcher-bar is arranged a vertically-reciprocating knife C, which moves in slots or ways of fixed guide-plates C^1, and which is operated by fulcrumed levers C^2, the rear ends of which are engaged by cams C^3 on a cam-shaft, S^1, that is supported above the driving-shaft S in suitable bearings of the frame A.

"In front of and at some distance from the stretcher-bar B is supported a shaft, D^1, in bearings of the frame A, said shaft being provided with radial arms *d d*, to which the rotary knife D is attached, which, in conjunction with the vertically-reciprocating knife C, serves to cut off the water-hairs projecting from that part of the skin in front of the edge of the stretcher-bar B. To the arms of the rotary knife D, and at some distance back of the latter, is applied a carding-brush, D^2, which acts on that part of the skin that is fed forward over the edge of the stretcher-bar immediately after the hairs of the next preceding section of the skin have been cut off. The shaft D^1 of the cutting-knife D is rotated from the cam-shaft S^1, by means of an intermediate longitudinal shaft, S^2, and two sets of miter-wheels, D^3, D^4.

"Immediately above the stretcher-bar B is arranged a stationary card, E, which is attached to the ends of the stretcher-bar B by means of thumb-screws. (Not shown in drawings.)

The points of the teeth of the card E are close to but do not touch the surface of the skin, so that the hair and fur are both straightened as the skin is fed forward. The teeth of the card E hold down the fine fur, but permit the stiff hairs to stand up between the teeth, owing to the slow forward movement of the skin, which gives the hairs sufficient time to so adjust themselves.

"Below the stretcher-bar B is arranged a rotary separating-brush, F, which is supported in oscillating arms F^1, that are guided by pins f, in arc-shaped slots f^1 of fixed guide-plates f^2, as shown clearly in Figs. 1, 2, and 3, the oscillating arms F^1 being pivoted to horizontally-reciprocating connecting-rods F^2, which are provided with yokes f^3, having anti-friction rollers at their rear ends and acted upon by cams F^3 on the cam-shaft S^1, the cams being so shaped and timed that the forward and upward motion of the brush F takes place at the proper time.

"The brush F receives rotary motion from two belts, f^4, which pass over pulleys f^5 on the shaft S^1 and the brush shaft, and which are kept taut by weighted idlers f^6, as shown clearly in Fig. 1.

"The brush F is made of soft bristles and is rotated at a speed of one hundred and fifty revolutions per minute. The soft bristles allow the stiff hairs to stand, while the quick motion of the brush bends the soft hair in downward direction and brushes it below the stretcher-bar, so that it can be taken up and held in position by the soft-rubber wipers g of an oscillating guard-bar, G, which moves in arc-shaped slots g^1 of the guide-plates C^1."

The operation of the machine is thus described:

"The skin is placed in the machine by being attached to the feed-rollers and drawn tightly over the edge of the stretcher-bar, so as to lie close to the upper and lower surface of the same. The skin is put in in such a manner that the head end is foremost. The stiff hairs in sealskins point toward the tail, except at the lower part of the neck and shoulders. These

parts are at the sides of the head end of the skin, as the skin is split open at the under side. At these parts of the skin the hairs point outwardly and backwardly and are the most troublesome to cut or pluck, as they lie down close to the skin when it is drawn over the stretcher-bar. A sharp and quick rub over these parts of the skin from the edge toward the center of the skin is therefore necessary, so as to straighten up the hairs and present them to the action of the cutting-knives. When the skin is in place, the stationary card E is drawn backward a few times over that part of the skin that is upon the stretcher-bar B, so as to card back the fur and hair and produce thereby a parting of the fur at that part of the skin then covering the edge of the stretcher-bar. One-half of the fur upon that section of the skin will by the parting be kept above and the other half below the edge of the stretcher-bar. This permits the hair upon that section of the skin in front of the edge of the stretcher-bar to rise through the fur and keep its place with less trouble than when more fur is acted upon. When the fur and hair have been carded back by the card E, the same is fastened to the stretcher-bar by thumb-screws. The card is set back from the edge of the stretcher-bar to a distance a little more than one-half of the length of the fur for the purpose of holding the fur and preventing it from moving forward until the forward motion of the skin takes place. The card at the back of the rotary knife passes then over the skin in front of the edge of the stretcher-bar and draws out all the fur and hair on that section, so that the fur and hairs so drawn out assume their natural positions—that is, the positions which they would have if the skin were drawn over the edge of the stretcher-bar without anything for holding back the fur and hair. As soon as the card at the back of the rotary knife has passed over the section of the skin in front of the stretcher-bar the rubbers are quickly moved over the same toward the center, whereby the hairs that lie down sidewise are raised and pointed outwardly, causing them to stand upright. The rotary separating-brush is then quickly

moved upward and forward and revolved in front of the skin at the edge of the stretcher-bar, so as to separate the fur from the hairs, brushing down the former, and leaving the stiff hair standing out. The rotary separating-brush is then quickly moved backward and downward, so as to carry with it the separated fur, which is then held in position by the oscillating guard that follows the brush and carries the fur still farther back and holds it in position, while the vertical knife is raised and shears off, in conjunction with the rotary knife, the forward-projecting hairs, as shown in Fig. 1. The separating-brush, after it has accomplished its work, is lowered sufficiently so as not to touch the skin at all, except when it is in front of the working-edge of the stretcher-bar. The next section of the skin is now moved by the feed-rollers over the edge of the stretcher-bar, and the same operation of the parts produced by the next rotation of the driving-shaft, and so on until the skin is finished."

The great merit of this invention is said to consist in the use of the brush, applied by means of the mechanism shown, so as to brush down the fur, and permit the long hairs, which should be removed, and which rise at the edge of the stretcher-bar, when the pelt is drawn over it to be acted upon by the knives, when the fur is brushed away, so as not to be injured.

In determining the construction to be given to the claim in suit, which is alleged to be infringed, it is necessary to have in mind the nature of this patent, its character as a pioneer invention or otherwise, and the state of the art at the time when the invention was made. It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, may be the last and successful step, in the art theretofore partially developed by other inventors in the same field. Upon this subject it was said by this court, *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537, quoted with approval in *Singer Co.* v. *Cramer*, 192 U. S. 265:

"To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a 'pioneer.' This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before. Most conspicuous examples of such patents are: The one to Howe of the sewing machine; to Morse of the electric telegraph; and to Bell of the telephone. The record in this case would indicate that the same honorable appellation might safely be bestowed upon the original air-brake of Westinghouse, and perhaps also upon his automatic brake. In view of the fact that the invention in this case was never put into successful operation, and was to a limited extent anticipated by the Boyden patent of 1883, it is perhaps an unwarrantable extension of the term to speak of it as a 'pioneer,' although the principle involved subsequently and through improvements upon this invention became one of great value to the public."

While it may be admitted that the Sutton patent was a distinct step in the art, and is entitled to protection as a valuable invention, nevertheless it cannot be said to be a pioneer patent in any just sense. In the English Lake patent of 1881, of which more will be said hereafter, there is doubtless a suggestion of the use of brushes for the purpose of separating the fur from the long hair to be removed. And so in the Covert patent of 1884, which was the subject of consideration by Judge Wheeler in the case of *Cimiotti Unhairing Co.* v. *Mischke*, 98 Fed. Rep. 297. In that case it was said that Covert's patent had been mechanically but not commercially successful, and that in lieu of a rotating separating brush, shown in Sutton's patent, Covert used a revolving cloth-covered cylinder, and it was held that this was not equivalent to the separating brush, and Sutton's invention was an advance upon anything

theretofore shown. Of the Covert patent Judge Cox, in the course of an able opinion sustaining the Sutton patent, *Cimiotti Unhairing Co.* v. *American Machine Co.*, 115 Fed. Rep. 498, 502, said:

"Covert came nearer than any one else to a successful machine. He had but one more step to take and here he became bewildered and went astray. He missed the apparently simple arrangement of the rotary brush which alone was necessary. It will not do to say that the prior art showed such a brush. Every element of the combination in controversy was unquestionably old, but there was nothing in the prior art to suggest a rotary brush working in the environment shown in the Sutton patent. There was nowhere a rotary brush making a 'part' on a keen-edged stretcher-bar and brushing the fur down and out of the reach of the cutting-knives during the moment necessary for the removal of the stiff hairs. It is the presence of this element in the combination which produces a new result and entitles its originator to protection."

In the same case, Judge Wallace (p. 505), in his concurring opinion, says:

"I do not think the machine of the Sutton patent a prodigious advance upon that of the prior Covert patent, and I think a higher degree of merit has been attributed to it than it deserves; but it was enough of an advance to be patentable and to deserve protection against an infringing machine which appropriates it."

Furthermore, it appears that while the Cimiottis acquired an exclusive license under the Sutton patent in 1888, the same was not put into commercial use until the introduction of coney skins as a substitute for sealskins, about the year 1890. During this time the Cimiottis were unhairing a large number of skins and preferred to continue to use the air-blast machine of their own invention while paying tribute to Sutton. It was the introduction of the coney industry in 1890 that gave stimulus to the use of such mechanisms as those used by the Cimiottis and the respondent in this case. We think it fair

to say that this record discloses an invention of merit entitled to some range of equivalents in determining the question of infringement, but it is not one of those broad, initiative inventions where original thought has been embodied in a practical mechanism, which the courts have been ever zealous to protect, and to which a wide range of equivalents has been accorded.

Due weight is given to the Sutton patent when it is given credit for dispensing with the plate which Covert had in addition to the brush, and which he supposed would carry down the fur away from the cutting mechanism, but which Sutton has accomplished in giving, in a measure at least, this added function to the brush of not only parting the fur, but carrying it down and away in preparation for the clipping by the knives. Any one who accomplishes the same purpose by substantially the same mechanism, using the elements claimed in Sutton's patent, may be held to be an infringer.

Sutton has taken the step which marks the difference between a successfully operating machine and one which stops short of that point, and that advance entitles him to the protection of a patent.

The argument here is confined, as to the alleged infringement, to the eighth claim of the Sutton patent, which is as follows:

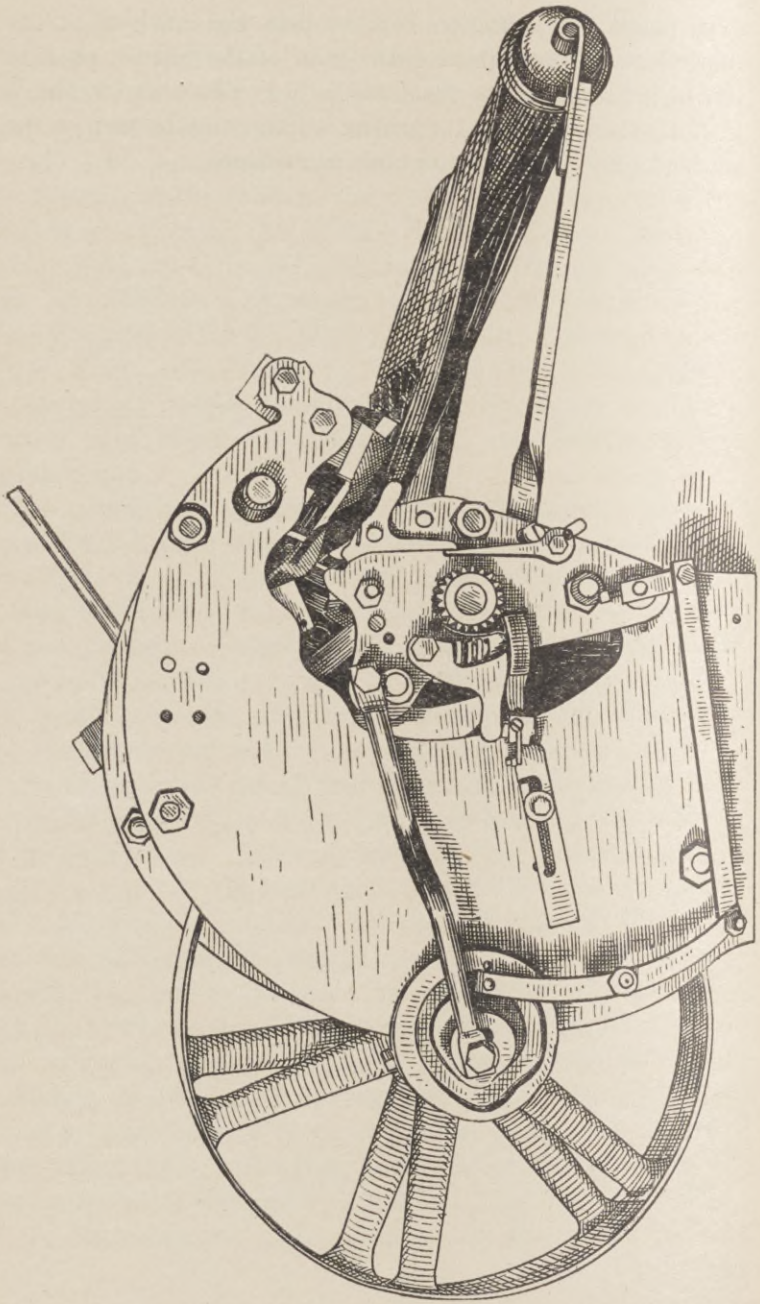
"8. The combination of a fixed stretcher-bar, means for intermittingly feeding the skin over the same, a stationary card above the stretcher-bar, a rotary separating-brush below the same, and mechanism, substantially as described, whereby the rotary brush is moved upward and forward into a position in front of the stretcher-bar, substantially as set forth."

The elements of this claim are five in number: 1, a fixed stretcher-bar; 2, means for intermittently feeding the skin over the same; 3, a stationary card above the stretcher-bar; 4, a rotary separating brush below the same; 5, mechanism whereby the rotary brush is moved upward and forward into a position in front of the stretcher-bar, "substantially as set forth."

In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof. *Shepard* v. *Carrigan*, 116 U. S. 593, 597; *Sutter* v. *Robinson*, 119 U. S. 530, 541; *McClain* v. *Ortmayer*, 141 U. S. 419, 425; *Wright* v. *Yuengling*, 155 U. S. 47; *Black Diamond Co.* v. *Excelsior Co.*, 156 U. S. 611, 617; Walker on Patents, § 349. This principle is particularly important when we come to consider the "stationary card above the stretcher-bar," an element of the eighth claim.

The anticipating mechanism set up in this case is the so-called English Lake patent of October, 1881. This patent has been the subject of much adverse comment in the cases involving a consideration of it. And it appears to have lapsed for non-payment of taxes in June, 1885, and not to have been a successful machine. It may be the fact that the patent is not distinctly worded, and that the drawing and specifications are somewhat confused. It does appear, however, without contradiction in the record, that the machine now used by the respondents was made in a large measure from the drawings of the Lake patent. Mischke, one of the respondents, was put upon the stand by the petitioners, and testified that he made the changes in a short time from the Lake patent, which resulted in the alleged infringing machine. The Lake patent showed two brushes, whereas the respondents' machine has dispensed with one and changed the position of the other. He also admits to have changed the position of the cam and shortened the crank arm as shown in the Lake machine. It seems to be the position of the petitioners' expert that Mischke made the changes in the Lake patent necessary to convert it into an operative machine by adopting the controlling features of the Sutton patent. But whatever are the defects of the

Lake patent, the question here is, does the machine of the respondents infringe the eighth claim of the Sutton patent? One of the respondents' machines is in evidence and we have carefully examined it. Its general outline may be seen in the annexed copy of the photograph in evidence:



The operation of the alleged infringing machine is such that when the power is applied for moving the stretcher-bar it is carried forward to the revolving brush, and after the brush has separated the fur from the hair, carried upwardly, to be acted upon by the cutting knives. The reciprocating motion of the stretcher-bar from the brush to the knives is produced by the action of the crank (operating with the cam) on the main shaft, as shown in the photograph At the same time the mechanism for feeding the machine is in operation, actuated by the same application of power. This mechanism (shown in the photograph at the side of the respondents' machine) consists of the pawl (attached to the main frame) and the ratchet-wheel (attached to the moving frame), turning when the pawl engages therein, and acting with the worm gearing shown, to turn the roll which is part of the feeding mechanism. The operation is such that when the stretcher-bar is carried from the knives to the brush in the return motion, the action of the pawl upon the ratchet-wheel, with the worm gearing, causes the roll to turn and the pelt to be carried forward, the extent of the feed being regulated by the adjustment of the pawl. By this means the necessity of an independently acting mechanism for the feeding apparatus is avoided and the operation simplified.

The Sutton device, as we have seen, has a stationary stretcher-bar; the respondents' mechanism has a movable stretcher-bar. The fixed stretcher-bar, about which the other mechanism acts, is made a distinct feature of the eighth claim. It is not present in the respondents' mechanism, unless it is true, as argued, that the one is substantially the equivalent of the other. It is said to make no difference whether the knife and brush are carried to the stretcher-bar or the stretcher-bar is carried to the knife and brush. This might be true if the mechanisms were substantially the same, and there was a mere transposition or substitution of parts. Such changes would amount to an infringement. But in determining infringement we are entitled to look at the practical operation

of the machines. The other elements of the eighth claim are to be used in connection with the apparatus shown in the Sutton patent, substantially as described. If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided. *Brooks* v. *Fiske*, 15 How. 212, 221; *Union Steam Pump Co.* v. *Battle Creek Steam Pump Co.*, 104 Fed. Rep. 337, 343. In the latter case Judge Severens, who delivered the opinion of the court, after recognizing the doctrine that mere change of the location of parts, if the parts still perform the same function, did not take the structure without the bounds of the patent, said:

"If, however, such changes of size, form, or location effect a change in the principle or mode of operation such as breaks up the relation and coöperation of the parts, this results in such a change in the means as displaces the conception of the inventor, and takes the new structure outside of the patent."

And see *Kokomo Fence Machine Co.* v. *Kitselman*, 189 U. S. 8, in which case it was held that where the patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machines can be differentiated, the charge of infringement is not sustained.

In the case under consideration the respondents have dispensed with the fixed stretcher-bar and have adopted a movable one, operated by an entirely different mechanism, capable of accomplishing a much larger amount of work within a given time. In the Circuit Court of Appeals it was said to result in a double working capacity and product. It does not seem to us to be a mere transposition or substitution of parts; in the Sutton patent, the stretcher-bar being stationary, there are several mechanisms used for operating the movable brushes and the clipping knives; a different mechanism is used for operating the different parts which are to be brought to the fixed stretcher-bar in carrying out the operation intended. In the respondents' machine the same application of power moves the stretcher-bar and, by the coöperation of the feeding ap-

paratus as above outlined, feeds the machine by bringing the pelt forward, at the same time actuating the knives, in practically one operation. This seems to us to be a distinct mechanical departure, as well as an advance upon the Sutton machine, when considered in view of the results accomplished.

Moreover, if infringement could be otherwise sustained, the decree must be affirmed, because the eighth claim has made the stationary card, shown at "E" in the drawing, an essential part of the mechanism described. It may be that this card is unnecessary, and that it was dropped from the later patents issued to Sutton, but it is in this claim, and as was said by Judge Wallace in his dissenting opinion in *Cimiotti Unhairing Co.* v. *Nearseal Unhairing Co.*, 115 Fed. Rep. 507, 510, "the patent industriously makes the stationary card, substantially as described, an element of the claim." Of this card the inventor said:

"Immediately above the stretcher-bar B is arranged a stationary card, E, which is attached to the ends of the stretcher-bar B by means of thumb-screws. (Not shown in the drawings.) The points of the teeth of the card E are close to but do not touch the surface of the skin, so that the hair and fur are both straightened as the skin is fed forward. The teeth of the card E hold down the fine fur, but permit the stiff hairs to stand up between the teeth, owing to the slow forward movement of the skin, which gives the hairs sufficient time to so adjust themselves."

He also says: "The card is set back from the edge of the stretcher-bar to a distance a little more than one-half of the length of the fur, for the purpose of holding the fur and preventing it from moving forward until the forward motion of the skin takes place."

While it is said that the card does not touch the surface of the skin so that the hair and fur are both straightened as the skin is fed forward, it is true that the teeth of the card in some measure hold down the fine fur, and it is insisted that the mechanical equivalent of this card is found in respondents'

machine in the compression bar, which also acts to hold down the fur before it is carried to the separating brush. But this bar has no carding feature to it, and cannot be made to perform the functions of a card; it has no separate teeth, and is not a card or the mechanical equivalent of one shown and described and made a part of the eighth claim.

We think the Circuit Court of Appeals was right in the conclusion that the mechanism of the respondents was so materially different from the Sutton patent as to avoid the infringement alleged; and that an essential element of the eighth claim of the Sutton patent was not used by the respondents.

Decree affirmed.

LEONARD *v.* VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 233. Argued April 26, 27, 1905.—Decided May 29, 1905.

The rule reiterated that persons may by their acts, or omissions to act, waive rights which they might otherwise have under the Constitution and laws of the United States; and the question whether they have or have not lost such rights by their failure to act, or by their action, is not a Federal question.

The judgment in this case rested on grounds broad enough to sustain it independent of any Federal question.

THIS was an action of ejectment brought, in 1896, by the Vicksburg, Shreveport and Pacific Railroad Company in the First Judicial District Court, Caddo Parish, Louisiana, against certain possessors, for whom Smith, Leonard and others were substituted as defendants, to recover 178.80 acres of land in that parish less 35.18 acres theretofore recovered by Smith and others in another action.

Defendants, both by plea and answer, set up that they, being either the heirs of W. W. Smith, or parties privy, brought suit in the Circuit Court of the United States for the Western

District of Louisiana against one Turner, asserting ownership to the entire tract, and praying to be restored to possession of about forty acres thereof, alleged to be illegally held by Turner. That Turner disclaimed title and averred that he was a tenant of the Vicksburg, Shreveport and Pacific Railroad Company, and thereupon the railroad company answered, claiming possession and ownership of the entire tract known as Silver Lake.

That a judgment was rendered in said suit in favor of the heirs of W. W. Smith (in 1886), decreeing them to be the owners of the parcel of land possession of which was sought in that suit, and they were put in possession of the same; and that the judgment was final and had the force and effect of *res judicata*, as against all parties to that suit, and as against the claims of plaintiffs in this suit.

The copy of complaint in *Smith* v. *Turner*, attached, showed that diversity of citizenship was set up as the ground of jurisdiction.

And answering, defendants averred that the State of Louisiana sold to W. W. Smith, on the fourteenth of May, 1853, the tract of land claimed by plaintiff, for the price of $1.25 per acre, which was paid into the treasury of the State by Smith, and was never returned to him; that, on the twenty-fourth of February, 1855, the State of Louisiana, through its constituted authorities, issued a patent to said tract of land to Smith;

That the State of Louisiana claimed and acquired the said tract of land as swamp and overflowed land, granted to the State of Louisiana by the acts of Congress of 1849 and 1850, known as the swamp land grants, and that the State sold the lands to Smith as swamp and overflowed lands;

That all sales of land in Louisiana made as swamp and overflowed land, whether made by the United States or by the State of Louisiana, and whether the land sold was of that character or not, were confirmed by the act of Congress approved March 2, 1855, entitled "An act for the relief of purchasers and locators of swamp and overflowed lands;"

That that act of Congress was extended so as to protect sales after its passage, by the act of Congress of March 3, 1857, to confirm all selections of swamp and overflowed lands by the several States under the acts of Congress of 1849 and 1850;

That the act of March 2, 1855, confirmed the title of the said W. W. Smith to the tract of land, whether it belonged to the State of Louisiana, under the swamp land grant of Congress, or whether it belonged to the United States, and that Smith thus acquired title to the land, both by purchase from the State of Louisiana and by confirmation by Congress.

Thereupon J. H. McCormick, receiver for the Vicksburg, Shreveport and Pacific Railroad Company, filed his plea and exception of *res judicata* to defendants' answer and plea therein of ownership of the said lands, averring that, in a suit entitled *State of Louisiana* v. *W. W. Smith et al.*, brought in 1857 in the District Court of Caddo Parish, Louisiana, defendant Smith put at issue the validity and legality of his title to the land, and, upon final hearing, a judgment was rendered in that suit decreeing the certificate and patent under which Smith claimed to be null and void, and directing their cancellation, and that they be delivered to the State of Louisiana. That defendants appealed to the Supreme Court, which appeal was thereafterwards dismissed; and that said judgment is *res judicata*, and a perpetual bar to defendants' right of action.

The Caddo District Court, Watkins, J., found that on the trial of the cause of *Smith* v. *Turner*, in the Circuit Court, in which case recovery of only 35.18 acres out of the tract of 178.80 acres, known as "Silver Lake," was sought, though title to the entire tract was asserted on one side and denied on the other, the railroad company had offered to prove the value of the whole tract at ten thousand dollars, but that Smith had objected on the ground that only the possession of 35.18 acres was in issue, and the Circuit Court had, therefore, declined to admit the evidence, and that, the case having gone to judgment, a writ of error from the Supreme Court of the United States was dismissed on motion of defendants in

error, because the possession of the 35.18 acres was not worth over $2,000. 135 U. S. 195.

The District Court held that as the same parties, who now contended that the judgment in *Smith* v. *Turner* constituted the thing adjudged as to the entire tract, had successfully insisted in that case that nothing was therein in issue except the right of possession of 35.18 acres, the court was not required to adjudge that the legal effect of that judgment extended to cover the entire tract. As to the judgment in favor of the State, in *State* v. *Smith*, the court recapitulated the facts, finding that the return of the money paid by Smith to obtain the patent was lawfully tendered December 3, 1857; the grounds on which the judgment proceeded; that this judgment was rendered November 24, 1860, in favor of the State, cancelling the Smith entry; that Smith prosecuted an appeal, which, after delay by reason of the Civil War, was dismissed by the state Supreme Court, August 11, 1869; and that because of defective certificates, the Circuit Court was led to believe in *Smith* v. *Turner*, that the case of *State* v. *Smith* had not been disposed of. The District Court further found for reasons given that the title of the railroad company in and to the land was perfect. The court gave judgment in favor of the railroad company and the case was carried to the Supreme Court of Louisiana. 112 Louisiana, 51.

Dealing with defendants' pleas of *res judicata* and estoppel, the Supreme Court held that the general rule that a judgment as to the ownership of a portion of a tract of land is conclusive between the same parties, claiming under the same titles, as to the ownership of the whole tract, should not be applied in the circumstances detailed, which in its opinion operated to confine the effect of the judgment to the particular parcel for which recovery was sought. Those pleas were overruled as to all of the tract except 35.18 acres, but the court sustained plaintiff's plea of *res judicata* predicated on the judgment in *State* v. *Smith*, and thus continued:

"This conclusion disposes of the contention that W. W.

Smith bought the land in question as swamp or overflowed land, since the State, in the suit just referred to, distinctly alleged that it was not so sold, and its position was sustained by the judgment therein rendered. But if it had been sold as land acquired under the acts of Congress of 1849 and 1850 (9 Stat. 352, 519), the result would be the same, since it belonged to that class of land which, under the act of the general assembly, No. 247, p. 306, of 1855, could only have been sold after having been surveyed; and one of the causes of action set up by the State in its suit against Smith, and maintained by the judgment therein rendered, was that it had not been surveyed.

"Finally, it is argued that, under the acts of Congress of 1849 and 1850, title *in præsenti* to all swamp and overflowed lands within its limits vested in the State of Louisiana without regard to selection or approval, that the land in question was of that character, and that the State acquired it under those acts, and hence that the United States could not have granted, and the State (or railroad company) could not have acquired it under the act of June 3, 1856 (11 Stat. 18).

"The acts of 1849 and 1850 were clearly not intended to operate against the will of the State. On the contrary, they distinctly left it to the State to select, subject to the approval of the Secretary of the Interior, the lands which it might consider within the terms of the grant.

"Whether the State might have selected the tract in question, and whether such selection might or would have been approved, need not be here considered In point of fact, not only was the selection not made and the approval not given, but the grantor and the grantee concurred in the view that the tract fell within the terms of the act of 1856, and was granted to and acquired by the State of Louisiana, as the trustee of the V., S. & P. R. R. Co., for the purpose of aiding in the construction of the railroad which that company was to build."

And the court quoted the headnotes of *Rogers Locomotive*

Machine Works v. *American Emigrant Co.*, 164 U. S. 559, to the effect that the swamp land act of 1850 gave an inchoate title to the State; that the identification of the lands by the Secretary of the Interior was necessary before the title became perfect; that the certificate of the Secretary, in 1858, that certain lands enured to the State under the railroad act of 1856, was a decision that they were not embraced by the swamp land act of 1850; that the acceptance by the State of lands certified to it by the Secretary is conclusive upon the State, and that a contract with a county for swamp and overflowed lands gives no better right than the county had to the lands which had been previously certified to the State.

The court then stated that, apart from these defenses, there appeared to be no objection to plaintiff's title.

The judgment of the District Court was affirmed, and this writ of error allowed. Motions to dismiss or affirm were submitted and their consideration postponed to the hearing on the merits.

Mr. A. H. Leonard and *Mr. William P. Hall* for plaintiffs in error.

Mr. Harry H. Hall and *Mr. Frank P. Stubbs*, with whom *Mr. W. H. Wise* was on the brief, for defendant in error.

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

We assume from the errors assigned, and no other grounds are indicated by the record, that Federal questions in two aspects are relied on to justify this writ of error.

First. The construction and application of the acts of Congress of 1849, 1850 and 1856, taken with other acts referred to.

But as to this it should be pointed out in the first place that the state court adjudged the Smith title invalid on the independent ground, among others, of non-compliance with an

act of the general assembly of Louisiana; and, in the second place, that the Federal question thus suggested had been so explicitly foreclosed by previous decisions as to leave no room for real controversy. *Rogers Locomotive Works* v. *American Emigrant Company*, 164 U. S. 559; *Michigan Land Company* v. *Rust*, 168 U. S. 589; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308.

Second. That the Supreme Court of Louisiana, by its judgment in this case, denied a right specially set up or claimed under the Constitution of the United States, or an authority exercised under the United States, that is to say, that such a right was asserted, and was denied by the state Supreme Court, in declining to give collateral effect to a judgment, under certain circumstances, rendered by a court of the United States in Louisiana.

We inquire then whether, when the state court, while holding the defense good as to the 35.18 acres by reason of the judgment in *Smith* v. *Turner*, held that, in the circumstances detailed, defendants could not be permitted to insist that the thing adjudged in that case determined the title to the entire tract, that ruling presented a Federal question.

Generally speaking, questions of this sort are not Federal questions. In *Pierce* v. *Somerset Railway*, 171 U. S. 641, 648, we said: "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one." *Eustis* v. *Bolles*, 150 U. S. 361; *Rutland Railroad Company* v. *Central Vermont Railroad Company*, 159 U. S. 630, and *Seneca Nation* v. *Christy*, 162 U. S. 283, were cited.

In *Eustis* v. *Bolles*, the state court held that by accepting his dividend under insolvency proceedings, Eustis had waived his legal right to claim that the discharge obtained under subsequent laws impaired the obligation of a contract, and this court held that whether that view of the case was sound or not,

it was not a Federal question, and therefore not within the province of this court to inquire into.

In *Seneca Nation* v. *Christy*, it was held by the state court that even if there were a right of recovery on the part of plaintiffs in error because a certain grant was in contravention of the Constitution of the United States, yet that such recovery was barred by the New York statute of limitations.

In *Gillis* v. *Stinchfield*, 159 U. S. 658, and *Speed* v. *McCarthy*, 181 U. S. 269, it was ruled that the application of the doctrine of estoppel to mining locations did not raise Federal questions.

In the present case, the Supreme Court of Louisiana applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings.

In its view, Smith, having insisted in *Smith* v. *Turner*, that, notwithstanding the railroad company had come in as defendant, and each party asserted title to the entire tract, the title to the 35.18 acres was alone in issue, and that the value of the whole tract was, therefore, not involved, and the railroad company having been thereby deprived of its writ of error, must be confined in this suit to the specific recovery obtained in that, so far as the effect of that judgment was concerned. That was a question of estoppel or quasi-estoppel and not a Federal question. Whether it was sound or not, it is not for us to inquire. It was broad enough to support the judgment without reference to any Federal question.

Writ of error dismissed.

BOARD OF TRADE OF CITY OF CHICAGO *v.* HAMMOND ELEVATOR COMPANY.

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

No. 215. Argued April 13, 1905.—Decided May 29, 1905.

The authorities, holding that the right of appeal to this court from the Circuit Court, under § 5 of the act of March 3, 1891, is limited to cases where the jurisdiction of the Federal court as a Federal court is put in issue and that questions of jurisdiction applicable alike to the state and the Federal courts are not within its scope, apply to questions arising after a valid service has been made and not to the question of whether jurisdiction has or has not been acquired by proper service.

This court can review by appeal under § 5 a judgment of the Circuit Court dismissing the bill on the sole ground that jurisdiction had never been acquired over the defendant, a foreign corporation, for lack of proper service of process.

A Delaware corporation having its principal office in Indiana, and continuously carrying on a grain and stock brokerage business through the same persons in Illinois under an arrangement practically equivalent to agency, *held*, under the circumstances of this case, and in view of the statutes of Illinois as to service on foreign corporations, to be carrying on business in Illinois, and that service on such persons of process in a suit against it in the Circuit Court of the United States for Illinois was sufficient.

THIS is an appeal directly to this court from a decree of the Circuit Court dismissing for want of jurisdiction a bill filed by the Board of Trade of the City of Chicago, an Illinois corporation, against the Hammond Elevator Company, a Delaware corporation, and a citizen of that State.

The basis of the bill was that the appellant had a property right in the quotation of prices in transactions made within its exchange; that the defendant had entered into a conspiracy with others to steal, and was using such quotations, and prayed an injunction. A subpœna was issued in the usual form, requiring the Hammond Elevator Company to appear and answer the bill, and was afterwards returned by the marshal as

served within the Northern District of Illinois by delivering a copy of the same "to Albert M. Babb, agent for the Hammond Elevator Company at Peoria," and also "by reading the same to and within the presence and hearing of John L. Dickes, a member of the firm of Battle & Dickes, agents of said company," as well as upon Battle. On the day following the service the elevator company entered a special appearance, and moved the court to set aside the service of the subpœna by the marshal, on the ground that the return was untrue in fact and insufficient in law, and prayed judgment of the court whether it should be compelled to appear or plead to the bill of complaint, because it had not been served with process, and because the defendant was not at the date of filing the bill, or at any other time, within the State of Illinois; that it is not a resident of such State, but is a Delaware corporation, and its principal place of business is outside the State of Illinois.

This motion of the elevator company was referred to a master to take testimony, and report the same with his conclusions of law. The master filed his report in the Circuit Court, recommending that the motion of the defendant to quash the service of process be sustained; whereupon counsel for plaintiff stated in open court that he was unable to make any other or different service upon the defendant, and it was ordered that the bill be dismissed as to the Hammond Elevator Company. The bill was also dismissed as to the Western Union Telegraph Company, which had been made a party by an amendment to the original bill. Thereupon appellant appealed to this court upon the same question of jurisdiction, praying that the appeal be allowed and said question be certified, which was done.

Mr. Henry S. Robbins for appellant:

The record presents a question of jurisdiction within § 5 of the act of 1891. *O'Neal* v. *United States*, 190 U. S. 36.

This court has uniformly upheld its jurisdiction to review,

upon direct appeal or writ of error under section 5, *any* question of jurisdiction—whether of the subject matter; *Wetmore* v. *Rymer*, 169 U. S. 115; *Huntington* v. *Laidley*, 176 U. S. 668; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, or of the person of the defendant. *Shepard* v. *Adams*, 168 U. S. 618; *Societe Fonciere* v. *Milliken*, 135 U. S. 304; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Goldey* v. *Morning News*, 156 U. S. 518. Conversely the Circuit Courts of Appeals declined to entertain such cases. *Compress Co.* v. *American Co.*, 125 Fed. Rep. 196.

As to the phrase "in such cases the question of jurisdiction alone shall be certified," see act of April 29, 1802, ch. 31, § 6; § 652 of the Rev. Stat., act of June 1, 1872, which required the question certified upon a disagreement of the judges to be a single and specific question of law and not questions of fact, and the certificate was required to state the facts or parts of the record necessary to properly present that question. *California Paving Co.* v. *Molitor*, 113 U. S. 609. The certificate was the only record in this court and was required to be complete in itself, subject to the right of this court to order up the record itself.

At first the expressions of this court seemed to indicate that § 5 of the act of 1891 contemplated this kind of a certificate. *Maynard* v. *Hecht*, 151 U. S. 324. Then a difference was noted between requiring a certificate, which should state the question to be decided and all of the case that was necessary to decide it, and one whose only purpose was to establish a fact, upon which this court's jurisdiction depended.

Congress by § 5 undoubtedly contemplated only a certificate of the second kind.

This court, under § 5, has not only reviewed jurisdictional cases involving questions of fact, and of mixed law and fact, *Wetmore* v. *Rymer*, 169 U. S. 115; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Geer* v. *Same*, 190 U. S. 428, but has also held that there need not in some cases be any certificate at all; but that the question may appear either "by the terms

of the decree appealed from and of the order allowing the appeal, or by a separate certificate of the court below;" and that, where the judgment was for defendant upon a preliminary defense of a want of jurisdiction,—the question of jurisdiction being thus the only one involved,—and the appeal is allowed upon this question alone, no certificate is necessary. *United States* v. *Jahn*, 155 U. S. 109; *In re Lehigh Min. & Mfg. Co.*, 156 U. S. 322; *Shields* v. *Coleman*, 157 U. S. 168; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *Smith* v. *McKay*, 161 U. S. 355; *Huntington* v. *Laidley*, 176 U. S. 668; *Excelsior Co.* v. *Pacific Co.*, 185 U. S. 282; *Arkansas* v. *Schlierholz*, 179 U. S. 598; *Courtney* v. *Pradt*, 196 U. S. 89.

This record, as already shown, more than meets the requirements of these cases, as respects the certification of the question of jurisdiction.

The service in this case was adequate.

The undisputed facts show that, at the time of the service of process, the Hammond Company was, in contemplation of the law, transacting business in Illinois through these correspondents as its agents, so as to make service upon either of them a valid service upon it.

The question is what is the real relation of the parties to each other and the business. *Italian-Swiss Colony* v. *Pease*, 194 Illinois, 98; *Conn. Mut. Ins. Co.* v. *Spratley*, 172 U. S. 602, 615; *Norton* v. *Atchison R. R. Co.*, 61 Fed. Rep. 200; *Smith* v. *West. Un. Tel. Co.*, 84 Kentucky, 664; *Central Stock Exchange* v. *Board of Trade*, 196 Illinois, 396; *Cone* v. *Tuscaloosa Co.*, 76 Fed. Rep. 891.

Under the circumstances public policy will not permit the defendant to claim that these correspondents are not its agents, thus enabling it to enjoy the privileges of extending its business into Illinois, without incurring a corresponding liability to be sued there.

To constitute a legal service of *mesne* process on a corporation of another State (1) the writ must be personally served within the jurisdiction, upon its officer or agent, and (2) the

company must, within the contemplation of the law, be doing business within the State.

As a foreign corporation enters a State only by comity and not by right, *Paul* v. *Virginia*, 8 Wall. 168, the Illinois statute, Rev. Stat., ch. 32, § 26, is a lawful enactment and authorizes service of process upon any agent, *C. & R. I. R. R.* v. *Fell*, 22 Illinois, 333. It differs from the statutes of some States, which require service upon the "general," or "managing," or "business," agent. This statute applies to foreign corporations. *Midland Pac. Ry. Co.* v. *McDermid*, 91 Illinois, 170.

Liability to be sued and served like a home corporation, is one of the liabilities that Illinois, by § 26, imposes upon foreign corporations as a condition of doing business in the State. *Wilson Packing Co.* v. *Hunter*, 8 Biss. 429; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100.

By availing itself of the privilege of doing business in a State, a foreign corporation impliedly assents to be there sued and served in the mode provided by the state statute, provided this does not violate the fundamental principle that requires notice of a suit before a party can be bound by it. *St. Clair* v. *Cox*, 106 U. S. 350; *Railroad Company.* v. *Harris*, 21 Wall. 65, 81; *Ex parte Schollenberger*, 96 U. S. 369; *Merchants' Manufacturing Co.* v. *Grand Trunk Ry. Co.*, 13 Fed. Rep. 358; *Amy* v. *Watertown*, 130 U. S. 301; *Shepard* v. *Adams*, 168 U. S. 618.

In admiralty suits,—which, like equity cases, are not within the statute requiring conformity with the state practice,—service upon a foreign corporation under the state law is sufficient. *In re Louisville Underwriters*, 134 U. S. 488; *Doe* v. *Springfield B. & M. Co.*, 104 Fed. Rep. 684. In chancery cases service of process under the state law is sustained. *Evansville Courier Co.* v. *United Press*, 74 Fed. Rep. 918; *McCord Lumber Co.* v. *Doyle*, 97 Fed. Rep. 22.

As to the other requisite of a legal service which is that the foreign corporation must be doing business within the State,

and what is a sufficient doing of business within the State, see *St. Clair* v. *Cox*, 106 U. S. 350; *Connecticut Ins. Co.* v. *Spratley*, 172 U. S. 615; *In re Hohorst*, 150 U. S. 653; *Block* v. *Railroad Co.*, 21 Fed. Rep. 529; *Denson* v. *Chattanooga Assn.*, 107 Fed. Rep. 777; *U. S. Savings & L. Co.* v. *Miller*, 47 S. W. Rep. 17; *Van Dresser* v. *Oregon R. & N. Co.*, 48 Fed. Rep. 202; *Palmer* v. *Chicago Herald Co.*, 70 Fed. Rep. 886; *Locke* v. *Chicago Chronicle Co.*, 107 Iowa, 390. Furthermore the Hammond Company is transacting business in Illinois, because its bets with these traders are Illinois contracts.

An offer becomes a contract, as soon as the acceptance is committed to the regular mail, or a telegraph company. But, according to the better reasoned cases, the rule is otherwise when the acceptor commits his acceptance to his own agent or an agency within his control. *In re London & Northern Bank*, L. R. (1900) 1 Ch. Div. 220; *Thayer* v. *Middlesex Mut. Fire Ins. Co.*, 27 Massachusetts, 325; *Bryant* v. *Booze*, 55 Georgia, 438.

See cases holding mail contracts with insurance companies to be contracts of the State of the applicant, despite recitals in the policies seeking to make them contracts of the State of the company's home office. *Equitable Life Assurance Soc.* v. *Clements*, 140 U. S. 226, 232; *Wall* v. *Equitable Life Assurance Soc.*, 32 Fed. Rep. 273; *Hicks* v. *National Life Ins. Co.*, 60 Fed. Rep. 690; *Equitable Life Assurance Soc.* v. *Winning*, 58 Fed. Rep. 541; *Berry* v. *Knight Templars*, 46 Fed. Rep. 439; *Fletcher* v. *N. Y. Life Ins. Co.*, 13 Fed. Rep. 526; *Mut. Ben. Life Ins. Co.* v. *Robinson*, 54 Fed. Rep. 580. See also *Ransome* v. *State*, 91 Tennessee, 716; *Boyd Co.* v. *Coates*, 24 Ky. L. R. 730; *Central Stock Exchange* v. *Bendinger*, 109 Fed. Rep. 926, which are on "all fours" with this case.

Mr. Lloyd Charles Whitman, with whom *Mr. Jacob J. Kern* and *Mr. John A. Brown* were on the brief, for appellee:

The order of February 23, 1904, dismissing the bill as to the Western Union Telegraph Company without prejudice

is not such a final order as to be reviewable upon appeal by this court. *Davis* v. *Geisler*, 162 U. S. 290; *Fowler* v. *Hamill*, 139 U. S. 549.

The appeal from the order of February 23, 1904, dismissing the bill as to the Western Union Telegraph Company, when the appellee, Hammond Elevator Company, was out of court, does not in any way involve or authorize a review by this court of the order of February 23, 1904, dismissing the bill as to appellee, Hammond Elevator Company, and this notwithstanding the certificate of the trial judge.

In the absence of any showing in the record other than the statement of complainant in open court recited in the order of dismissal of the bill as to the Hammond Elevator Company, the order of December 21, 1903, was a voluntary non-suit and is not reviewable upon appeal.

Under the law and the evidence the court properly adjudged the service of subpœnas herein insufficient to confer jurisdiction of appellee, the Hammond Elevator Company, and therefore granted appellee, Hammond Elevator Company's motion to quash service of process herein. Hurd's Rev. Stat. Ill., 1903, ch. 32, p. 475, § 26; ch. 32, § 673, p. 486; ch. 110, § 5, p. 1400; 3 Starr & Curtis Ann. Ill. Stat., ch. 110, § 5, p. 2986; *Mineral Point R. R. Co.* v. *Keep*, 22 Illinois, 16; *Chicago & Rock Island Ry. Co.* v. *Fell*, 22 Illinois, 337; *Peoria Ins. Company* v. *Warner*, 28 Illinois, 433; *Union Pacific Ry. Co.* v. *Miller*, 87 Illinois, 45; *Midland Ry. Co.* v. *McDermid*, 91 Illinois, 170; *Hannibal & St. Joe R. R. Co.* v. *Crane*, 102 Illinois, 349; *Italian-Swiss Colony Co.* v. *Pease*, 194 Illinois, 98, 106; *March-Davis Co.* v. *Strowbridge Lith. Co.*, 79 Ill. App. 683; *Havens & Geddes Co.* v. *Diamond et al.*, 93 Ill. App. 557; *Wall* v. *Chesapeake C. & O. R. R. Co.*, 95 Fed. Rep. 398; *Blake* v. *Railroad Co.*, 21 Fed. Rep. 529.

Under the averments, if true, of the motion to quash, the Circuit Court had no jurisdiction of appellee, Hammond Elevator Company, by virtue of the alleged service of process.

Federal courts in common law actions follow the statutes

of the respective States in regard to service on corporations under the statute which provides for conformity with the state practice in actions at law. 2 Foster's Fed. Prac., 3d ed., pp. 806, 810.

The practice in equity cases is not dictated by statute, but in such cases the state practice merely furnishes a code which the Federal courts are apt to follow. 1 Foster's Fed. Prac., 3d ed., p. 254.

The state statute must be reasonable and the service provided for be only upon such agents as may properly be deemed representatives of the foreign corporations. *St. Louis Wire Mill Co.* v. *Consolidated Barb Wire Co.*, 32 Fed. Rep. 802; *Good Hope Co.* v. *Railway Barbed Fencing Co.*, 22 Fed. Rep. 635; *Goldey* v. *Morning News*, 156 U. S. 518; *D'Arcey* v. *Ketchum*, 11 How. 165.

Three conditions must occur. First, the corporation must be carrying on its business in such foreign State or district. Second, such business must be transacted or managed by some agent or officer appointed by and representing the corporation in such State. Third, there must be some local law making such corporation amenable to suit there as a condition expressed or implied of doing business in the State. *United States* v. *Am. Bell Telephone Co.*, 28 Fed. Rep. 17, 35; *Midland Ry. Co.* v. *McDermid*, 91 Illinois, 173.

For general discussion of principles involved see *St. Clair* v. *Cox*, 106 U. S. 350.

The averments of the motion to quash are, under the evidence, true. The transactions shown by the evidence do not show a doing of business by the Hammond Elevator Company within the State of Illinois or said district, and the relations between Battle & Dickes and Babb and the Hammond Elevator Company do not amount, in law, to such an agency as is contemplated by law for the service of process upon a non-resident foreign corporation. Cases *supra* and *Maxwell* v. *A., T. & S. F. R. Co.*, 34 Fed. Rep. 286; *N. K. Fairbanks Co.* v. *Cincinnati, N. O. & T. R. Ry. Co.*, 54 Fed. Rep. 420; *Evansville*

Courier v. *United Press*, 74 Fed. Rep. 918; *Wall* v. *C. & O. R. R. Co.*, 95 Fed. Rep. 398; *Doe* v. *Springfield Boiler & Mfg. Co.*, 104 Fed. Rep. 684; *Municipal Telegraph & Stock Co.* v. *Ward*, 133 Fed. Rep. 70.

The ultimate findings of the master form the evidentiary facts. *Municipal Tel. & Stock Co.* v. *Ward, Collector*, 133 Fed. Rep. 70, 72.

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

The Circuit Court dismissed this appeal upon the ground that it had never acquired jurisdiction over the Hammond Elevator Company by the service of process upon Albert M. Babb and the members of the firm of Battle & Dickes, because they were not officers of the Elevator Company, which was a Delaware corporation, and had its principal place of business in the State of Indiana.

1. There is, however, a preliminary question in this court, that is, whether we can lawfully entertain this appeal under section 5 of the act of March 3, 1891, which provides that an appeal shall lie directly to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The proper construction of this section has been the subject of frequent consideration in this court, and it has been definitely settled that it must be limited to cases where the jurisdiction of the Federal court, as a Federal court, is put in issue, and that questions of jurisdiction applicable to the state courts, as well as to the Federal courts, are not within its scope.

The earliest reported case on this subject is that of the *World's Columbian Exposition*, 18 U. S. Appeals, 42, in which the Circuit Court, sitting in equity, granted an injunction to prevent the opening of the Exposition grounds on Sunday. On appeal to the Circuit Court of Appeals the Chief Justice held that as

the power of the Circuit Court to hear the cause was not denied, the appellant contending only that the United States had not made a case cognizable in a court of equity, the jurisdiction of the Circuit Court was not in issue within the intent and meaning of the act. In *Smith* v. *McKay*, 161 U. S. 355, it was held, following the prior case, that the question whether the remedy was at law or in equity did not involve the jurisdiction of the Federal court as such, and the case was dismissed. A similar ruling was made in *Blythe* v. *Hinckley*, 173 U. S. 501.

The cases were fully reviewed in *Louisville Trust Company* v. *Knott*, 191 U. S. 225, in which the question involved was the respective rights of a receiver appointed by the state court and one appointed by the Circuit Court of the United States. It was held that the question was not one of jurisdiction within the meaning of the act of March 3, 1891, the court observing: "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

In *Bache* v. *Hunt*, 193 U. S. 523, Hunt, as receiver, filed an intervening petition for the reimbursement of certain amounts paid by him as receiver in the extinguishment of prior claims, which certain railroad bonds and stocks had been deposited to secure. A decree was made in his favor, and an appeal was taken to this court. It was said that "the jurisdiction of the Circuit Court was only questioned in respect to its general authority as a judicial tribunal, and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved." The appeal was dismissed.

In *Courtney* v. *Pradt*, 196 U. S. 89, a citizen of Wisconsin,

duly qualified as an executor in that State, was sued as such in Kentucky. Pradt demurred on the ground that the court had no jurisdiction, and the Circuit Court of the United States, to which the case had been removed, sustained the demurrer and dismissed the suit. It was said that the court had power to so adjudicate, and that the question decided was not one of the jurisdiction of the Circuit Court as a court of the United States, but one with respect to the law of Kentucky. The case was dismissed.

There is a distinction, however, between these cases which turn upon questions arising *after* a valid service of process upon the defendant, with respect to the mode of procedure, or the conflicting claims of the state and Federal courts, and certain other authorities which turn upon the validity of the service of process itself upon the defendants; in other words, which involve the jurisdiction of the court in any form over the defendant. The leading case is that of *Shepard* v. *Adams*, 168 U. S. 618. This case turned upon the validity of the service of the summons whereby the defendant was required to appear within ten days after such service, when by the law of the State he was allowed thirty days. The question was whether Rev. Stat. sec. 914, assimilating the practice, pleadings, forms and modes of proceedings in civil causes in the Federal courts to those obtaining in the state courts, applied to the time within which the defendant was required to appear in obedience to a summons. It was held that, as the rule of the Federal court was adopted in conformity with the rules then in force in the state courts, it was not bound to alter its rules every time the state courts saw fit to alter their rules, and that the Federal courts were at liberty to continue their rules without subservience to such changes. The point was made that the question involved was not the jurisdiction of the Federal court as such, and in reply to that suggestion Mr. Justice Shiras observed: "The present case differs from *Smith* v. *McKay*, in the essential feature that the contention is that the court below never acquired jurisdiction at all over

the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court."

That paragraph is doubtless broader than the exigency of the case required, as the question involved was the validity of the service of process in the Federal court as distinguished from the state court, but in the recent case of *Remington* v. *Central Pacific Ry. Co.*, *ante*, p. 95, it was accepted as applicable to the case of the validity of a summons from a state court, served upon a director of a railroad company in a State other than that in which the company was incorporated. The court denied a motion to set the service aside, whereupon the case was removed into the Circuit Court of the United States, and the defendant renewed its motion to set aside the summons. The motion was granted, and the action was dismissed for want of jurisdiction of the defendant. It was held, upon the authority of *Shepard* v. *Adams*, that this court had authority to review the judgment on writ of error.

While the case under consideration is distinguishable from *Shepard* v. *Adams*, we think it is concluded by the case last cited, and therefore hold that we have jurisdiction to review the action of the Circuit Court in dismissing this bill.

2. The merits in the case are contained in the certificate of the District Judge, and involve the jurisdiction of the Circuit Court over the Hammond Elevator Company, by reason of the service in the State of Illinois upon Babb or Battle & Dickes, as agents of such company, and whether the service of process upon them gave the court jurisdiction over the company.

By the law of Illinois, Rev. Stat. ch. 32, sec. 26, "foreign corporations, and the officers and agents thereof, *doing business in this State*, shall be subjected to all the liabilities" of domestic corporations; and by chap. 110, sec. 5, "may be served with process by leaving a copy thereof with . . . any agent of said company found in the county."

The facts showing the relations between the parties served and the elevator company are substantially as follows:

The company maintains a place of business at Hammond, Indiana, and had under lease from the Western Union Telegraph Company the exclusive use during business hours of certain telegraph wires running from Hammond to certain offices in different cities in Illinois, including Peoria and Aurora, where the parties served with process lived. In the lease of these wires, signed by defendant, the offices of these "correspondents" are designated as offices of the defendant, and are contained upon regular printed forms prepared by the company. The cost or rental of these wires was paid to the telegraph company by the defendant. Over these wires the defendant caused to be transmitted continuous market quotations of the New York Stock Exchange to persons standing in relation of Babb and Battle & Dickes, who are called "correspondents," and who posted these quotations upon blackboards in their respective offices.

Customers resorting to the correspondents' offices, and desiring to trade in any one of the sixty different stocks whose quotations are posted, give a verbal or written order to buy or sell certain grain or stocks, which is transmitted by the correspondent in his own name over the private wire of the correspondent running into his office from the office of the defendant at Hammond, as an offer by the correspondent to buy from or sell to the defendant. Sometimes the price is mentioned by the customer, and sometimes not. In the latter case it is understood that the trade is to be at whatever the market is. When the order is given the correspondent exacts from the customer such margin as he sees fit, unless the customer already has money on deposit with the correspondent, or is of known financial responsibility. Defendant accepts these orders when the state of the market justifies, by return message over the same wire, the contents of which are communicated by the correspondent to the customer. The individuality of each trade is preserved throughout by a number

given to it by the correspondent's operators at the outset. The correspondent upon receipt of this return message gives the trader a memorandum showing the trade and the price to which his margin carries it, and, except in case of a losing trade, where he has failed to protect himself by securing from the customer a sufficient margin, the correspondent neither participates in the loss nor the profit incurred in the trade. He derives as his compensation a fixed sum, whether the trade results in a profit to the defendant or to the customer. Through daily statements and daily settlements of the balance shown thereby, the correspondent remits to the defendant, through its local bank, whatever amounts are shown to be due from him to the defendant for margins, wire service, etc. When the trader wishes to close a trade thus opened the correspondent in like manner receives and transmits the order over his wire to the Hammond Company, giving to the telegram the number of the order already given to the trade. The order is executed at Hammond the same way as the opening order.

It is admitted by the defendant's counsel that the defendant does not desire to be subject to suit before the state and Federal courts of every State and District where it has correspondents, and that it has endeavored to arrange and conduct its business so as to avoid such contingency.

The relations of the correspondent with the elevator company are in each case fixed by formal contract, to the effect that the parties shall deal as principals, and that the relations of principal and agent shall neither exist or be held to exist. There is no evidence that the correspondents Babb and Battle & Dickes have claimed or represented themselves to be agents of the defendants.

The fact, however, that the relations between the defendant and its correspondents are, as between themselves, expressly disclaimed to be those of principal and agent, is not decisive of their relations so far as third parties dealing with them upon the basis of their being agents are concerned. *Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602. As was said

in this case, of the agents whose authority to receive service of process was denied by the defendants (p. 615): "In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him. The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made, notwithstanding a denial of authority on the part of the other officers of the corporation. . . . In the absence of any express authority, the question depends upon a review of the surrounding facts and upon the inference that the court might properly draw from them." See also *Italian-Swiss Colony* v. *Pease*, 194 Illinois, 98; *Commercial Ins. Co.* v. *Ives*, 56 Illinois, 402; *Union Ins. Co.* v. *Chipp*, 93 Illinois, 96; *Ind. Ins. Co.* v. *Hartwell*, 123 Indiana, 177; *Planters' Ins. Co.* v. *Meyers*, 55 Mississippi, 479; *Sprague* v. *Ins. Co.*, 69 N. Y. 128.

In this connection it was found by the master that "There can be no question that towards the customer the correspondent bears the relation of agent to his principal. The customer knows that the correspondent is not selling the stocks to him, or buying stocks from him, but is merely taking his orders for transmission. Hence, the correspondent's charge to the customer for his services is properly called a commission. The customer does not direct the correspondent from whom he is to purchase, or to whom he is to sell, as the latter is at libetry to purchase from or sell to the defendant, or elsewhere, as he chooses. In point of fact, perhaps, because of the facilities offered by the private wire, he almost invariably does purchase from or sell to the defendant."

The defendant has undoubtedly taken great pains to foreclose the idea that its correspondents are agents in any such sense as to render it liable for their acts, or to validate the service of process upon them as such agents. Each day the defendant enters upon his statement which he that day sends to the correspondent each trade it has that day accepted from

such correspondent. If the statement shows a debit balance, the correspondent deposits an approximate amount in a bank in his city to the credit of the defendant, which thus maintains an active bank account in each of such banks. If the statement results in a balance to the credit of the correspondent, a check of the defendant payable to the correspondent, and usually drawn upon the same local bank, where the deposits are made to defendant's credit, accompanies the statement. As a general thing the balance due on each day's transactions, as between the defendant and the correspondent, is approximately settled the next day. The defendant looks only to the correspondent in all trades. In case of a loss, if the correspondent has failed to secure sufficient margin from the customer, and is unable to collect the amount from him, the correspondent must stand the loss. The defendant charges up and retains the amount of its charge for wire services, in any event, as well as all losses of the correspondent on trades. The daily statements by defendant are made upon printed blanks, which contain the statement: "We have no agents." And upon the back is a printed statement to the effect that upon consideration of the defendant consenting to deal and contract with him as principal in buying and selling commodities, he agrees:

"'First. In all cases where I shall purchase from or contract to purchase from or shall sell to, or contract to sell to said Hammond Elevator Company any commodity, I will receive and pay for the commodity purchased, or contracted to be purchased from it, and will deliver the commodity sold, or contracted to be sold, to it.'

"'Seventh. That I am not, and will not, represent myself as being agent for said Hammond Elevator Company, but will represent that I have no authority to act for it. It is not responsible for anything that may be done by me.'

"But the defendant knows nothing of the customer. All its orders come from the correspondent in his own name. All funds received by him are sent to it through the bank by the

correspondent. All its statements are rendered to the correspondent. All its charges are made against, and all its credits entered in favor of, the correspondent. Indeed, so far as the evidence shows, there is no ground for claiming that the defendant knows that the correspondent has any customers, or that he is not dealing solely on his own account."

Notwithstanding these protestations and excessive precautions used to prevent the correspondent being held as agent, the method of business shows that the party really interested in the transaction is the defendant, and that the correspondents are compensated as if they were agents, and not principals. The correspondent charges his customers a commission of one-eighth of a cent a bushel on grain. The defendant keeps a regular book account with its correspondents, and in addition to charging up the margin against him, it makes an arbitrary charge on each deal, which is called on the statement of the correspondent "wire service," meaning a charge for the use of the private wire. This charge for wire service is a regular fixed percentage of the commission charged by the correspondent, which indicates that it is a commission under the guise of wire service, and such a charge upon any transaction of magnitude would be an exorbitant charge for use of the wire. An ordinary charge for wire service would depend upon the length of the message and distance transmitted, wholly irrespective of the amount of the transaction. But in this case, when a charge is made on a transaction involving a hundred shares, the charge is ten times greater than for a trade involving ten shares. This indicates something more than a charge made for the actual use of the wire, the amount of the service being the same in each case. The significance of this wire service is the more marked by the fact of the defendant company paying a fixed sum of $50 per month for the use of the wire.

The findings, moreover, show that while the correspondent takes the orders from his customers, he transmits them directly to the defendant, and no trade is effected until the return mes-

sage is received by the correspondent. While the identity of the customer is not disclosed to the elevator company, it is preserved by a number appropriate to each order; and there can be no doubt that any legal liability of the trader arising out of the transaction could be enforced by the defendant against the customer as soon as his identity was discovered. It is apparent from these transactions that the real trading is done between the customer and the elevator company, and that the functions of the correspondents are really those of agents and not of principals. There must be two principals, and only two, in every such transaction. Obviously the customer is one of them. We think it equally obvious that the elevator company is the other one, and that the profits appropriate to the transaction belong to the elevator company, and not to the correspondent, who is paid a commission for his services. If the correspondent be not the principal in this transaction, he must be the agent of one party or the other, and as his office is continuously open for the transaction of business, where he receives and executes orders, collects margins and deposits them to the credit of the defendant in a local bank, and apparently his transactions are entirely with the defendant, it would seem that he was rather the agent of the elevator company than of the customer, a conclusion which is fortified by the fact that the correspondent is compensated by a percentage of the amount charged the customer under the name of commission for the privilege of trading.

The real transaction in this case is undoubtedly artfully disguised, but notwithstanding the fact that the order is made and accepted at Hammond, and the margin is charged up at Hammond against the correspondent, and the profits or losses made there, we are of the opinion that in receiving, transmitting and reporting orders to the customers, receiving their margins, and settling with them for the profits of losses incident to each transaction, the correspondent is really "doing business" as the agent of the elevator company in Illinois, and may be properly treated as its agent for the service of

process. It is evident that if these correspondents be not regarded as agents in these transactions, it is possible for the defendant to establish similar correspondents in a dozen cities in at least a dozen States of the Union, and an enormous business be built up, in which the defendant company is the real principal, with no possibility of being sued except in the States of Indiana and Delaware.

If these correspondents were admitted to be agents of the elevator company it is not perceived how their methods of doing business would be materially changed. They would maintain an office in their own cities; would receive and transmit to their principals offers for trades made to them and report their acceptance or refusal, as is frequently done with respect to policies by agents of insurance companies; would receive and deposit the margins and attend to the settlement of differences. In fact, their position is analogous to that of an ordinary insurance agent, with power to receive applications and premiums, deliver policies and settle losses, and whose acts are binding on the principal, notwithstanding a provision in the application for the policy declaring such party shall be the agent of the insured.

It results that the decree dismissing the bill as to the Hammond Elevator Company must be reversed, and the case be remanded for further proceedings.

The Chief Justice, Mr. Justice Harlan and Mr. Justice Day dissented upon the first point.

LAVAGNINO *v.* UHLIG.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 120. Argued January 12, 1905.—Decided May 29, 1905.

Where the necessary effect of the ruling of the state court is to deny to a locator of a mineral claim the protection of the relocation provisions of § 2324, Rev. Stat., if that section justified the claim based upon it, or if the record shows that the trial court considered that the plaintiff specially claimed and was denied rights under § 2326, Rev. Stat., authorizing an adverse of an application for a patent to mineral lands, a Federal question is involved and the motion to dismiss the writ of error will be denied.

Under § 2326, Rev. Stat., where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, the person who made the relocation of such forfeited claim has not the right in adverse proceedings to assail the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim.

A senior locator possessed of paramount rights in mineral lands may abandon such rights and cause them to enure to the benefit of the applicant by failure to adverse, or after adverse, by failure to prosecute such adverse.

The provisions of § 2326, Rev. Stat., as construed in this case, so qualify §§ 2319 and 2324, Rev. Stat., as to prevent mineral lands of the United States which have been the subject of conflicting locations, from becoming *quoad* the claims of third parties unoccupied mineral lands, by the mere forfeiture of one of such locations.

Quære, Whether a deputy mineral surveyor is prohibited by § 452 Rev. Stat. from making the location of a mining claim not decided.

Uhlig and McKernan, two of the defendants in error, by locations alleged to have been made on January 1, 1889, asserted ownership of two adjacent mining lode claims, designated respectively as the Uhlig No. 1 and the Uhlig No. 2, situated in the West Mountain mining district, in Salt Lake County, State of Utah. In the month of August, 1898, the parties named filed in the proper land office an application for patent for said claims. During the publication of notice of the filing of the application, Giovanni Lavagnino, plaintiff in error—as the alleged owner of a mining lode claim called the Yes You Do—filed an adverse claim to a portion of the land embraced in each of the Uhlig locations, which it was asserted

overlapped the Yes You Do. Thereupon, pursuant to the requirements of section 2326 of the Revised Statutes, this action was brought in a District Court of Salt Lake County, Utah, to determine in whom was vested the title and right of possession to the conflicting areas, which in the case of the Uhlig No. 1 claim amounted to 6.374 acres and in the No. 2 to 1.441 acres.

In substance, Lavagnino alleged in his complaint that at the time of the location of the Uhlig claims there was a subsisting valid location known as the Levi P. lode claim, which included within its areas the land in dispute in the action; that the necessary labor required by the statutes of the United States was performed upon the claim up to and including the year 1896; that no actual labor or improvements were made upon the claim for the year 1897, and in consequence all the land included within the Levi P. location became forfeited and acquired the status of unoccupied and mineral lands of the United States, and that while such was the status of the land, on January 1, 1898, one J. Fewson Smith, Jr.,—the grantor of Lavagnino—relocated the Levi P. claim as the Yes You Do, and that thereafter all the requirements necessary to be done had been performed, and the Yes You Do was then a valid and subsisting location.

Subsequently the St. Joe Mining Company was substituted in the stead of Uhlig, as a party defendant.

On the trial it was shown that at the time Smith located the Yes You Do claim he was a deputy mineral surveyor for the district in which such mining claim was situated, and that he made the survey and plat for the protest which had been filed in the land office against the Uhlig application for patent. On the offer, as evidence for the plaintiff, of the notice of location of the Yes You Do claim and the deed from Smith to Lavagnino, objection was made to their admission and the offered evidence was excluded upon the ground that the asserted location by Smith of the Yes You Do was not valid, because at the time of the making thereof Smith was a deputy

mineral surveyor, and was prohibited by the terms of section 452 of the Revised Statutes of the United States from making the location of a mining lode claim. For the same reason the trial court sustained an objection to evidence offered on behalf of the plaintiff tending to show that at the time the Uhlig claims were located the ground covered by such locations was then covered by prior locations made at an earlier hour on the same day, and was consequently not subject to location as unoccupied mineral lands of the United States. That one of said locations—the Levi P.—embraced the premises in dispute, and was a subsisting location until forfeited by failure to perform the annual work for the year 1897; that the relocation of said claim as the Yes You Do was made on January 1, 1898; and that the annual work and other steps required by law to be done in connection with the claim had been performed.

Following the introduction of testimony tending to show the validity of the Uhlig locations, testimony was introduced on behalf of the plaintiff in respect to the location and working of the Levi P. claim, but on the offer of the Levi P. location notice the trial court sustained an objection thereto, and ruled that as the Yes You Do was not a valid location there were no adverse claims before the court, and as a result it was to be conclusively presumed that there did not exist any location which in anywise conflicted with the Uhlig claims sought to be patented.

The court made findings of fact, in which, *inter alia*, it was recited that the plaintiff at the trial had not introduced any legal or competent evidence to sustain the issues on his part, and consequently that "upon the trial, on motion of counsel for defendants, the said action of the plaintiff against the defendant was, and is hereby, dismissed." The facts were then found in respect to the location and working of the Uhlig claims, and, as conclusions of law, the court held that the action against the defendants should be dismissed with costs, and that the defendant, the St. Joe Mining Company, and the defendant, Alexander McKernan, were entitled to purchase

from the United States of America the said Uhlig claims and the whole thereof, and were also entitled to a decree quieting their title to the premises in dispute. From a decree entered in conformity to these conclusions an appeal was prosecuted to the Supreme Court of Utah, and that court affirmed the decree. 26 Utah, 1. A writ of error was thereupon sued out from this court.

Mr. Aldis B. Browne, with whom *Mr. Alexander Britton* and *Mr. N. W. Sonnedecker* were on the brief, for plaintiff in error:

Section 452, Rev. Stat., does not prohibit the location of a mining claim by a United States deputy mineral surveyor. Sutherland's Stat. Con. § 366; Endlich's Interpretation, § 341; act of April 25, 1812, 2 Stat. 716; act of July 4, 1836, 5 Stat. 107; *Grandy* v. *Bedell*, 2 L. D. 314; Instructions of Commissioners, 2 L. D. 313; *McMicken's Case*, 10 L. D. 97; *S. C.*, 11 L. D. 96; Circular of Sept. 15, 1890, 11 L. D. 348; *Winans* v *Beidler*, 15 L. D. 266.

The designation of United States deputy mineral surveyor is not known to Federal Statutes, § 2334, Rev. Stat.; General Mining Law of 1872, 17 Stat. 95; Mining Law of 1866, 14 Stat. 252; General Mining Circulars of Dec. 18, 1903, 31 L. D. 453, 489; 32 L. D. 367, §§ 90 *et seq.*

A deputy mineral surveyor is not a Federal officer. *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Smith*, 124 U. S. 525, 532. Nor is he a clerk either in the General Land Office or in any public office subordinate to it. Bouvier, *sub.* "Clerk"; *People ex rel. &c.* v. *Fire Commissioners*, 73 N. Y. 422. Nor can the term employé be applied to him. Century Dict., *sub.* "Employé"; *People* v. *Meyers*, 33 N. Y. 18, as the rendition of work and receipt of wages or salary is essential to constitute a person an employé. Mining regulations § 127 provides that the deputy has no claim on the United States but looks only to the surveyor. Section 5, act 1876, 19 Stat. 169; act of 1884, 23 Stat. 17; *McCluskey* v.

Cromwell, 11 N. Y. 593; Cent. Dict., *sub.* "Salary" and "Wages"; *United States* v. *Meigs*, 95 U. S. 748; *Ex parte Simons*, 32 Fed. Rep. 681; *Powell* v. *United States*, 60 Fed. Rep. 687; *United States* v. *McDonald*, 72 Fed. Rep. 898.

The idea of continuity of service is inseparable from the word employé. An employé is not one who renders an occasional service. *Louisville &c. R. R. Co.* v. *Wilson*, 138 U. S. 501; *Auffmordt* v. *Hedden*, 137 U. S. 310. The word employé implies relation of master and servant which does not exist. *State* v. *Emerson*, 72 Maine, 455; Wood on Master and Servant, § 4, 618; *People* v. *Board of Police*, 75 N. Y. 41; *Mache* v. *Hutchinson*, 12 Ont. Pr. Rep. 167; Bishop on Non-contract Law, § 602; *Campfield* v. *Lang*, 25 Fed. Rep. 128. The surveyor is not an employé but a contractor and the partial control retained over him does not make him a servant. Cooley on Torts, 548; Wharton on Agency, § 19; *Pack* v. *Mayor*, 8 N. Y. 222; *Kelly* v. *Mayor*, 11 N. Y. 432; *Kearney* v. *Oakes*, 18 Canada Sup. Ct. 148; *Blake* v. *Ferris*, 5 N. Y. 58; Pennsylvania Statute of 1802, cited in *Commonwealth* v. *Binns*, 17 S. & R. 220; *Coal Co.* v. *Railroad Co.*, 29 N. J. Eq. 255; *Vane* v. *Newcomb*, 132 U. S. 220, 233; *The Twenty per cent Cases*, 20 Wall. 179. The decisions of the Land Department are contradictory and it was not until 1898 that it held that a deputy mineral surveyor could not purchase Government lands. For decisions prior to 1898 see *Dennison* v. *Willetts*, 11 Copp's L. O. 261; *Lock Lode Case*, 6 L. D. 105; *Maxwell's Case*, 29 L. D. 76; *Baltzell's Case*, 29 L. D. 333; *Leffingwell's Case*, 30 L. D. 139.

Even if the prohibition of § 452, Rev. Stat., is applicable to deputy mineral surveyor's title to the Yes You Do claim it is good in the present holder, the plaintiff in error, to whom the alleged deputy had conveyed all his interest prior to the initiation of this proceeding. He is free from attack on this ground except from the Government itself—so as to alienage disabilities. *Manuel* v. *Wulff*, 152 U. S. 505; *McKinley Mining Co.* v. *Alaska Mining Co.*, 183 U. S. 563, 571; 1 Washburn,

Real Property, 63; 1 Kerr on Real Property, 215; *National Bank* v. *Matthews*, 98 U. S. 621; *Jones* v. *Habersham*, 107 U. S. 174; *Reynolds* v. *Bank*, 112 U. S. 405, 413. There was no exclusive adverse possession which is necessary in order to acquire prescriptive title. Buswell on Limitations, § 237; *Dosevell* v. *Morrill*, 14 Wall. 120, 145; *Ward* v. *Cochran*, 150 U. S. 597, 609; *Larwell* v. *Stevens*, 12 Fed. Rep. 559; *Bracken* v. *Union Pacific Ry.*, 56 Fed. Rep. 447; *Larsen* v. *Onesite*, 20 Utah, 360; *Digman* v. *Nelson*, 26 Utah, 186.

As to the validity of the relocation of a claim see 1 Lindley on Mines, 2d ed., §§ 363, 404; *Jupiter Mining Co.* v. *Bodie Mining Co.*, 11 Fed. Rep. 666, 676; *Jordan* v. *Duke*, 53 Pac. Rep. 197; *Oscamp* v. *Crystal River Mining Co.*, 58 Fed. Rep. 293.

The alleged discoveries of the Uhlig Nos. 1 and 2 being within the prior subsisting Levi P. location, the locations based thereon are void. 1 Lindley, § 611; *Watson* v. *Mayberry*, 15 Utah, 265; *Reynolds* v. *Pasco*, 24 Utah, 219; *Mining Co.* v. *Maier*, 134 California, 583; *Erwin* v. *Perego*, 93 Fed. Rep. 608; *Mining Co.* v. *Buck*, 97 Fed. Rep. 462; *Branagan* v. *Dulaney*, 2 L. D. 744; *Re Winter Lode*, 22 L. D. 362; *Gwillim* v. *Donellan*, 115 U. S. 45, 50; *Girard* v. *Carson*, 22 Colorado, 345.

Mr. D. H. Wenger, with whom *Mr. Arthur Brown* was on the brief, for defendants in error.

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

The Supreme Court of Utah was of the opinion that, by force of section 452 of the Revised Statutes of the United States (copied in the margin[1]), J. Fewson Smith, Jr., being

[1] Section 452 Revised Statutes of the United States.

"The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the

a deputy mineral surveyor, was disqualified from locating the Yes You Do claim; that in consequence the attempted location of such claim was void; and that the plaintiff Lavagnino acquired no rights by the conveyance of the claim to him by Smith. It was next decided that, as the plaintiff had failed to show any right to the disputed premises, he became a stranger to the title, and was without right to contest the claim of the defendant. The correctness of the decree entered by the trial court was also held to result from the terms of section 2332 of the Revised Statutes of the United States, and section 2859 of the Revised Statutes of Utah, both of which sections are copied in the margin.[1]

Adopting the finding of the trial court that the Uhlig claims were valid locations, attention was called to the fact that those claims were located on January 1, 1889, while the Yes You Do was located more than eight years thereafter, viz., on January 1, 1898. A mining claim was declared to be a possessory right and real estate under the statutes of Utah, and it was held that one Mayberry, the locator of the Levi P. claim, not having instituted a suit to recover possession of the premises in dispute within seven years after the location of the Uhlig claims, was barred of all right to such premises by the terms

purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

[1] Section 2332, Rev. Stat. United States.

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent."

Section 2859, Rev. Stat. Utah.

"No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seized or possessed of the property in question within seven years before the commencement of the action."

of section 2859 of the Revised Statutes of Utah, and that his right to contest the title of the defendants to the conflict areas "was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2." The court added: "In view of these facts the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the Yes You Do was not made until eight years after the possession of the Uhlig Nos. 1 and 2 was begun, could not avail himself of any rights which the said Mayberry may have had."

This latter ruling of the Supreme Court of Utah forms the basis for the first of two grounds of a motion to dismiss this writ of error, which motion will now be passed upon.

The first is, in substance, that, assuming that there was a Federal question determined by the Supreme Court of Utah, its decision was not necessary, and whether it was or not jurisdiction does not exist, because there was another ground upon which the decree of the trial court was affirmed, non-Federal in its nature, and broad enough to maintain the judgment, viz., the ruling of the bar of the statute of limitations. The second ground is thus stated:

"That under the decision of the Supreme Court of the State of Utah, this court has no jurisdiction to hear and determine the question raised under section 452, Rev. Stat. U. S., for the reason that the plaintiff in error has not brought himself within the provisions of section 709, Rev. Stat. U. S."

We are of opinion that neither of the grounds urged in support of the motion to dismiss is tenable. As to the first, it is true that the Supreme Court of Utah decided that, even although J. Fewson Smith, Jr., had been qualified to locate the Yes You Do claim, the location was invalid because made more than seven years after the location of the Uhlig Nos. 1 and 2, when, it was held, the bar of the statute of limitations was operative. But this amounted to saying that even although the plaintiff was entitled to adverse the Uhlig claims, he could not be heard to rebut the evidence for the defendants

as to the possession under the Uhlig locations, by evidence as to the possession taken and had under the Levi P. location. Plainly we think the ruling denied to the grantee of the Yes You Do, under the hypothesis that they existed, rights asserted by him under section 2324 of the Revised Statutes authorizing the relocation of forfeited claims. It is evident from the record that the finding of the trial court as to the time when possession was taken of the Uhlig Nos. 1 and 2 claims, and the duration of possession was based entirely upon the evidence introduced on behalf of the owners of those claims. The trial court treated as irrelevant and immaterial evidence tending to show that the premises in dispute were embraced in the Levi P. location, and that possession of that claim was held and retained from a time at least contemporaneous with the initiation of the Uhlig locations and almost up to the location of the Yes You Do, as a relocation of the Levi P. Under such circumstances a decision that the bar of the seven years' statute of limitations was operative, upon the assumption that the locator of the Yes You Do was entitled to adverse conflicting locations, amounted to deciding that Lavagnino could not show that the premises in dispute were unoccupied mineral lands of the United States at the time of the location of the Yes You Do, and, as bearing upon the validity of the relocation of the Levi P., the facts as to the location, possession under, and forfeiture of the Levi P. claim. The necessary effect of this ruling, as before stated, was, we think, to deny to the locator of the Yes You Do the protection of the relocation provisions of section 2324 of the Revised Statutes, if that section justified the claim of right based upon it.

As to the second ground, the record clearly shows that the trial court considered that the plaintiff was specially claiming rights under section 2326 of the Revised Statutes, authorizing an adverse of an application for a patent to mineral lands, and the Supreme Court of Utah necessarily acted upon that assumption in the opinion by it delivered. The motion to dismiss is, therefore, overruled.

The question then is, Did the Supreme Court of Utah err in affirming the decree of the trial court?

As we have seen, the Supreme Court of Utah, in part, rested its conclusion, upon the want of power in a deputy mineral surveyor to make the location in question, in consequence of the prohibition contained in section 452 of the Revised Statutes. A consideration of that subject, however, will be unnecessary if it be found that even if a deputy mineral surveyor was not within the restriction of the section referred to, nevertheless, the rights asserted under the Yes You Do location in the adverse proceeding were not paramount to the rights arising from the Uhlig location. We, therefore, come at once to a consideration of that question, and, of course, in doing so assume, for argument's sake, that the section of the Revised Statutes relied upon and the rules and regulations of the Land Department did not prohibit a deputy mineral surveyor from making a location of mineral land. And, moreover, in considering the question which we propose to examine, we concede, for the sake of argument, that the Levi P. location, of which the Yes You Do purported to be a relocation, was prior in date to the location of the Uhlig Nos. 1 and 2, and that there were areas in conflict between them. With all these concessions in mind the question yet remains whether Smith and his transferee, in virtue of the location of the Yes You Do, stood in such a relation as to enable them, or either of them, to successfully adverse the application for patent made by the owners and possessors of the Uhlig locations.

It is undoubted that this court in a number of cases has declared that the rights of a subsisting senior locator of mineral land are paramount to those of the owner of a junior location, so far as said junior location conflicts in whole or in part with the prior location. *Clipper Mining Co.* v. *Eli Min. & Land Co.*, 194 U. S. 220, 226, and cases cited. It is elementary also that the power conferred by section 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and

forfeited location. The statute merely provides that when a forfeiture has been occasioned "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The question then is, where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?

To say that the relocator had such right involves, necessarily, deciding that, as to the area in conflict between the junior and the senior locations, the junior could acquire no present or eventual right whatever, and that on the abandonment or forfeiture of the senior claim the area in conflict became, without qualification, a part of the public domain. In other words, the proposition must come to this: that as the junior locator had acquired no right whatever, present or possible, by his prior location, as to the conflicting area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto a new right, accompanied with a performance of those acts which the statute renders necessary to make a location of a mining claim.

The deductions just stated are essential to sustain the right of the relocator of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and alleged senior location, for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on the forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two

would be operative upon the area in conflict on a forfeiture of the senior location. If it had that effect it necessarily was prior and paramount to the right acquired by a relocation of the forfeited claim.

But we do not think that the deductions which we have said are essential to sustain the right of the relocator to adverse, under the circumstances stated, can be sustained consistently with the legislation of Congress in relation to mining claims. Indeed, we think such a construction would abrogate the provisions of section 2326 of the Revised Statutes, which is as follows:

"SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear,

from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to enure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse.

It cannot be denied that under section 2326, if before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adversed the application, upon an establishment of a *prima facie* right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. *Gwillim* v. *Donnellan*, 115 U. S. 45, 51. And the same result would have arisen had the owner of the Levi P. adversed the application for a patent based upon the Uhlig locations and failed to prosecute and waived such adverse claim.

In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.

Of course, the effect of the construction, which we have thus given to section 2326 of the Revised Statutes, is to cause the provisions of that section to qualify sections 2319 and 2324, thereby preventing mineral lands of the United States, which have been the subject of conflicting locations, from becoming *quoad* the claims of third parties, unoccupied mineral lands, by the mere forfeiture of one of such locations.

In text books (Barringer and Adams, Law of Mines and Mining of the United States, p. 306; Lindley on Mines, 2d ed., pp. 650, 651) statements are found which seemingly indicate that in the opinion of the writers, on the forfeiture of a senior mining location, *quoad* a junior and conflicting location, the area of conflict becomes in an unqualified sense unoccupied mineral lands of the United States without enuring in any way to the benefit of the junior location. But, in the treatises referred to, no account is taken of the effect of the express provisions of Rev. Stat. section 2326. Moreover, when the cases to which the text writers referred, as sustaining the statements made, are examined, it will be seen that they were decided either before the passage of the adverse claim statutes

of 1872, or concerned controversies between the senior and junior locators or depended upon the provisions of state statutes. How far such statutes would be controlling, we are not called upon to say, as it is not claimed that there is any statute in Utah in any way modifying the express provisions of section 2326.

As the issue raised by the complaint in this action concerned only the conflict areas and on the trial the invalidity of the Uhlig locations, in respect to the premises in dispute, was attempted to be established solely by proof that the Levi P. was an antecedent location and embraced the grounds in conflict, it follows, from the opinion which we have expressed, that at the time when Smith located the Yes You Do claim as a relocation of the Levi P. claim the land embraced within the location notices of the Uhlig claims, and upon which the Yes You Do overlapped, was not unoccupied mineral lands of the United States, and was consequently not subject to be relocated by Smith, even under the mere hypothesis which we have indulged in, that, as a deputy mineral surveyor, he was not debarred from making the location. For this reason the judgment of the Supreme Court of Utah was right, and it must therefore be

Affirmed.

MR. JUSTICE BREWER concurs in the result.

MR. JUSTICE MCKENNA dissents.

CUNNIUS, NOW SMITH, *v.* READING SCHOOL DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 165. Argued March 6, 1905.—Decided May 29, 1905.

That the Fourteenth Amendment does not deprive the States of their police power over subjects within their jurisdiction is elementary; and, in determining the validity of a statute, the question before the court is not the wisdom of the statute but whether it is so beyond the scope of the municipal government as to amount to a want of due process of law.

The right to regulate concerning the estate or property of absentees is an attribute, which in its very essence belongs to all governments, to the end that they may be able to perform the purposes for which government exists, and in the absence of restrictions, in its own constitution, none of which exists in the State of Pennsylvania, is within the scope of of a state government; nor does the exercise of this power violate the Fourteenth Amendment by depriving the absentee of his property without due process of law in case he is alive when the proceedings are initiated.

Where the provisions of a state statute for administration on the assets of an absentee are reasonable as to the period of absence necessary to create the presumption of death, and create proper safeguards for the protection of his interests in case the absentee should return, it does not violate the due process clause of the Fourteenth Amendment, because it deprives the absentee of his property without notice.

The Pennsylvania statute of 1885, Public Laws, p. 155, providing for the administration of the property of persons absent, and unheard of, for seven or more years, is a valid enactment and is not repugnant to the Fourteenth Amendment because it deprives the absentee of his property without due process of law.

THE legislature of Pennsylvania, in 1885, adopted a law "relating to the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicil." Briefly, and in substance, the act provided that upon application made to the register of wills for letters of administration upon the estate of any person supposed to be dead on account of absence for

seven or more years from the place of his last domicil within the State, the register of wills shall certify the application to the orphans' court, and that said court, if satisfied that the applicant would be entitled to administration if the absentee were in fact dead, shall cause the fact of the application to be advertised in a newspaper published in the county once a week for four successive weeks, giving notice that on a day stated, which must be two weeks after the last publication, evidence would be heard by the court concerning "the alleged absence of the supposed decedent and the circumstances and duration thereof." After providing for a hearing in the orphans' court, the statute empowers that court, if satisfied by the proof that the legal presumption of death is made out, to so decree and cause a notice to be inserted for two successive weeks in a newspaper published in the county, and also, when practicable, in a newspaper published at or near the place beyond the State where, when last heard from, the supposed decedent had his residence. This notice requires the absentee, if alive, or any other person for him, to produce to the court, within twelve weeks from the date of the last insertion of the notice, satisfactory evidence of the continuance in life of the absentee. If, within the period of twelve weeks, evidence is not produced to the court that the absentee is alive, the statute makes it the duty of the court to order the register of wills to issue letters of administration to the party entitled thereto, and such letters, until revoked, and all acts done in pursuance thereof, and in reliance thereupon, shall be as valid as if the supposed decedent were really dead. Power is further conferred upon the orphans' court to revoke the letters at any time on proof that the absentee is in fact alive, the effect of the revocation being to withdraw all the powers conferred by the grant of administration. But it is provided that—

"All receipts or disbursements of assets, and other acts previously done by him," (the administrator) "shall remain as valid as if the said letters were unrevoked, and the administrator shall settle an account of his administration down to

the time of such revocation, and shall transfer all assets remaining in his hands to the person as whose administrator he had acted, or to his duly authorized agent or attorney: *Provided,* Nothing in this act contained shall validate the title of any person to any money or property received as widow, next of kin, or heir of such supposed decedent, but the same may be recovered from such person in all cases in which such recovery would be had, if this act had not been passed."

It is further provided that before any distribution of the estate of such supposed decedent shall be made to the persons entitled to receive it, they shall give security, to be approved by the orphans' court, in such sum as the court shall direct, conditioned that if the absentee "shall, in fact, be at the time alive, they will, respectively, refund the amounts received by each on demand with interest thereon, but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest on security approved by said court, which interest is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the orphans' court, on application, shall order it to be paid to the person or persons entitled to it."

After affording remedies in favor of the absentee in case the issue of letters should be subsequently revoked, the statute provides that the costs attending the issue of letters or their revocation shall be paid out of the estate of the supposed decedent, and that the costs arising upon the application for letters which shall not be granted shall be paid by the applicant. Public Laws, 1885, p. 155.

The plaintiff in error, Margaret Cunnius, now Margaret Smith, whom we shall hereafter refer to as Mrs. Smith, prior to and at the time of the passage of this act, was domiciled in the State of Pennsylvania. In virtue of her right of dower in certain real estate of her husband, which passed to him from his deceased mother's estate, she became entitled to the annual interest during her life on the sum of $569.61. This debt was

assumed by John M. Cunnius, who acquired the real estate from which the right of dower arose, and was in turn assumed by the Reading School District, in consequence of its acquisition from John M. Cunnius of the property. The School District paid the interest as it accrued to Mrs. Smith, at her domicil in the city of Reading, up to the first of April, 1888. In that year she left her domicil in the city of Reading, and for nearly nine years, up to March, 1897, she had not been heard from. At that date her only son, who resided in Reading, alleging the absence of his mother for the period stated, and the fact that she had not been heard from, and the consequent presumption of her death, made application to the register of wills, under the statute to which we have just referred, for letters of administration. After the reference of the matter to the orphans' court, as required by the statute, and the making of the publication and compliance with the other requisites of the statutes, the letters of administration which the statute authorized were granted. Under the authority thus conferred the administrator collected from the Reading School District the arrears of interest which had accrued on the right of dower of Mrs. Smith, from the date of the last payment made to her before her disappearance on April 1, 1888, down to the time of the appointment of the administrator. The administrator gave the School District a receipt and discharge. In 1899 Mrs. Smith sued the Reading School District in the Court of Common Pleas of Berks County to recover the arrears of interest which had been paid during her absence to the administrator appointed by the orphans' court. And the proof in the suit developed that at the time the proceedings against her as an absentee were initiated, and when the administrator was appointed, she was living in Sacramento, California. The School District relied for its defense upon the payment of the interest made to the administrator and the discharge which that officer had given under the law. Mrs. Smith asserted that the proceedings in the state court and the receipt of the administrator furnished no protection

to the School District, because, as she was alive when the proceedings for administration were taken in the state court, those proceedings and the law which authorized them were repugnant to the Fourteenth Amendment to the Constitution of the United States. She, moreover, contended, even although there was power in the State to provide by law for the administration of the property of an absentee, the particular law in question was repugnant to the Fourteenth Amendment to the Constitution, as it did not provide for adequate notice, and because the law failed to furnish the necessary safeguards to give it validity. The case went to a jury upon legal points being reserved.

The trial court decided that Mrs. Smith was entitled to recover, because the Pennsylvania statute did not provide essential notice, and was, therefore, repugnant to the due process clause of the Fourteenth Amendment. The Superior Court, to which the case was taken, affirmed the action of the trial court on the ground that, as Mrs. Smith was alive when the proceedings to administer her estate as an absentee were had, that administration was void and the statute authorizing it was repugnant to the Fourteenth Amendment. 21 Superior Court Pa. 340. The Supreme Court of Pennsylvania, on appeal, reversed the judgments of the court below, and decided that the statute was a valid exercise of the police power of the State, and, therefore, both as to form and substance, was not repugnant to the Fourteenth Amendment. 206 Pa. St. 469.

Mr. Caleb J. Bieber for plaintiff in error:

Plaintiff was deprived of her property without due process of law. Whether property is taken without due process depends on the nature of each case. *Leigh* v. *Green,* 193 U. S. 79, 87; *Del Castillo* v. *McConnico,* 168 U. S. 674, 680. By leaving the State and not demanding arrearage of interest plaintiff ran no risk except to be barred by the twenty-one year state statute of limitations. She made her demand prior

to that time and any attempt to turn her claim over to another meanwhile deprived her of it without due process.

If her departure from Pennsylvania and her omission to demand her arrearages for a period of eleven years worked an injury to any one, it was to herself alone, and not to any public right such as would bring this case within the police powers of the State. *Clapp* v. *Houg*, 98 N. W. Rep. 710; *Lavin* v. *Bank*, 1 Fed. Rep. 641, 668. She was under no legal obligation to remain in Reading.

The object of the act is to administer on the estates of persons presumed, from all the evidence at hand, to be dead.

As to the construction of the act see *Devlin* v. *Commonwealth*, 101 Pa. St. 273. And while the state court has held that its object is to conserve the estate rather than distribute it, it still deprives a living person of his property without due process. *Clapp* v. *Houg*, 98 N. W. Rep. 710; and it is not the purpose but the effect of an act that determines its constitutionality. *Pa. R. R. Co.* v. *Ribble*, 66 Pa. St. 164; *S. C.*, 92 U. S. 259; *Carr* v. *Brown*, 20 R. I. 217; *Lavin* v. *Bank*, 1 Fed. Rep. 641, 661; *Davidson* v. *New Orleans*, 96 U. S. 97, 102.

The orphans' court had no jurisdiction over the person of the plaintiff and could not, in the absence of personal service, or the voluntary appearance of the plaintiff in the proceeding, render a decree or order which would be binding on her personally. Herrman on Estoppel, p. 201, § 182; *Boswell* v. *Otis*, 9 How. 336; *Lafayette Ins. Co.* v. *French*, 18 How. 408; *Pennoyer* v. *Neff*, 95 U. S. 714.

Taking the private property of one person and transferring it to another, is not due process of law. *Wilkinson* v. *Leland*, 2 Pet. 627, 657; *Ervine's App.*, 16 Pa. St. 264; *Missouri R. R. Co.* v. *Nebraska*, 164 U. S. 403; *Johnson* v. *Beasley*, 65 Missouri, 264; *King* v. *Hatfield*, 130 Fed. Rep. 583; *Dodge* v. *Missouri Township*, 107 Fed. Rep. 637.

The appointment of the administrator is open to collateral attack. *Stevenson* v. *Superior Ct.*, 62 California, 65; *Hamilton*

v. *Brown*, 161 U. S. 267. A void judgment or decree is always open to collateral attack. 1 Herman on Estoppel, 64.

For authorities on the invalidity of letters of administration upon the estate of a living person see *Carr* v. *Brown*, 20 R. I. 217; *Clapp* v. *Houg*, 98 N. W. Rep. 710; *Lavin* v. *Bank*, 1 Fed. Rep. 641; *Scott* v. *McNeal*, 154 U. S. 34, and cases cited p. 50.

To decide abstractly whether a State can by a statute clothe its courts with certain powers would not be to the point, because the same act of assembly may be valid as to some persons and the reverse as to others. *Rothermel* v. *Myerle*, 136 Pa. St. 250, 266; *Presser* v. *Illinois*, 116 U. S. 252. The persons as to whom an act is constitutional may not be before the court. Granting that the State through an act of assembly has clothed a court with certain powers, the real point at issue is the effect of the operation of those powers on the rights of the party before the court.

The legal *situs* of plaintiff's property, that is, the right to the arrearages of interest owing her by the School District, as well as the *situs* of the arrearages themselves for which the defendant was indebted, was in California at the time of the proceedings. *New Orleans* v. *Stempel*, 175 U. S. 310, 313, 314; *Tax on Bonds*, 15 Wall. 300, 320.

The proceeding under the act of 1885 is not of such a character as to constitute it a proceeding against property, thereby making it a proceeding *in rem*, for the property is not proceeded against nor taken possession of until after the appointment of the administrator in pursuance of a proceeding and a decree of a court of which the lawful owner of the property had no notice and to which he was neither party nor privy. See *Leigh* v. *Green*, 193 U. S. 79, 91; *Leber* v. *Kauffelt*, 5 W. & S. Pa. 440, 445.

Mr. Frederick W. Nicolls, by special leave of court, with whom *Mr. William Rick* was on the brief, for defendant in error.

The act of 1885 created a jurisdiction in the orphans' court over the property of people living and coming within its terms

and this comes within the definition of jurisdiction to hear and determine a cause as declared by this court in *United States* v. *Arredondo*, 6 Pet. 709; *Cooper* v. *Reynolds*, 10 Wall. 316; and differentiates it from *Allen* v. *Dundas*, 3 T. R. 129; *Griffith* v. *Frazier*, 8 Cr. 9, 23, as shown in *Roderigas* v. *Savings Institution*, 63 N. Y. 460; *Plume* v. *Savings Institution*, 17 Vroom, 211.

For cases stating as a mere *obiter dictum*, that administration upon the estate of the living is a nullity see *Day* v. *Floyd*, 130 Massachusetts, 488, 489; *Andrews* v. *Avory*, 14 Gratt. 229, 236; *Moore* v. *Smith*, 11 Rich. 569; *Withers* v. *Patterson*, 27 Texas, 491, 497; *Johnson* v. *Beazley*, 65 Missouri, 250, 264; *Perry* v. *St. Joseph & Western Railroad*, 29 Kansas, 420, 423; *Fish* v. *Nowell*, 9 Texas, 13, 18; *Morgan* v. *Dodge*, 44 N. H. 255, 259; *Quidort's Adm.* v. *Pergeaux*, 18 N. J. Eq. 472; *Martin* v. *Robinson*, 67 Texas, 368; *Waters* v. *Stickney*, 12 Allen, 1, 13; *Hamilton* v. *Brown*, 161 U. S. 256, 267. For those where the question was directly in issue, see *French* v. *Frazier*, 7 J. J. Marsh, 425, 427; *State* v. *White*, 7 Ired. 116; *Duncan* v. *Stewart*, 25 Alabama, 408; *Melia* v. *Simmons*, 45 Wisconsin, 334; *Thomas* v. *People*, 107 Illinois, 517; *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87, 96; *Devlin* v. *Commonwealth*, 101 Pa. St. 273; *Burns* v. *Van Loan*, 29 La. Ann. 560, 563; *Springer* v. *Shavender*, 118 N. Car. 33; *Schleicher* v. *Gutbrod*, 34 S. W. Rep. 550; *Stevenson* v. *Superior Court*, 62 California, 65; *Scott* v. *McNeal*, 154 U. S. 34. All of these were decided in the absence of any local statute similar to the act of 1885. There are some other authorities which refer directly to the existence of such local statute as a circumstance which might alter the case. 2 Wharton on Evidence, § 810; *D'Arusment* v. *Jones*, 4 Lea, 251.

The legislature can make a valid grant of jurisdiction to its courts over any legitimate subject matter, provided the subsequent steps be according to law. Such a grant of authority the Pennsylvania assembly directly conveyed by the act of 1885. It is an elementary principle that statutes are

to be construed according to the intention of the legislature. The intention of the legislature to confer jurisdiction over the subject matter is clear beyond a peradventure.

The former practice was for the register to grant letters upon the common law presumption of death after seven years' absence. But this method was rendered worthless by the opinion in *Devlin* v. *Commonwealth*, 101 Pa. St. 272, delivered in November, 1882, which held such administration absolutely void. The law was thus left in chaotic condition, for if a resident of the State disappeared, there was no way of settling his estate. This predicament occasioned the almost immediate passage of the act of 1885.

The grant to a court of jurisdiction over the estates of those who by reason of long absence are probably dead would seem a highly beneficial, and, if the process were proper, a legal and rational, exercise of legislative discretion. As to legislative grants of a generally similar jurisdiction which have been passed upon by Federal courts see *Arndt* v. *Griggs*, 134 U. S. 316; *Boswell* v. *Ohio*, 9 How. 336; *Bennett* v. *Fenton*, involving 18 Stat. 472, 41 Fed. Rep. 283; *Roller* v. *Holley*, 176 U. S. 398. And see also *Shepperd* v. *Ware*, 48 N. W. Rep. 773; *Gray* v. *Galis*, 37 Wisconsin, 614.

The orphans' court having authority over the estates of absentees presumed to be dead, who have left property within the jurisdiction of the court, the proceedings thereon are adapted to like cases of administration upon actual decedents, follow such precedents as closely as possible, and are, therefore, substantially proceedings *in rem*. *Kinselman* v. *Stine*, 192 Pa. St. 462; *Shaupe* v. *Shaupe*, 12 S. & R. 9; *Schalls' App.*, 40 Pa. St. 170; *Furness* v. *Smith*, 30 Pa. St. 520; *State Tax on Foreign-held Bonds*, 15 Wall. 300, distinguished. See *Savings Society* v. *Multnomah County*, 169 U. S. 421; *Bristol* v. *Washington County*, 177 U. S. 133; *Wyman* v. *Halstead*, 109 U. S. 654.

Proceedings under the act of 1885, being adapted to like cases of administration upon the estates of the dead, are sub-

stantially proceedings *in rem* and constructive notice, if reasonable, is sufficient. *Pennoyer* v. *Neff*, 95 U. S. 727; *Woodruff* v. *Taylor*, 20 Vermont, 73; Freeman on Judgments, § 607; Black on Judgments, § 793, 808; *Freeman* v. *Alderson*, 119 U. S. 185; *Heidritter* v. *Oil Cloth Co.*, 112 U. S. 294, 302; Herman on Estoppel, § 327; *Runyan's Appeal*, 27 Pa. St. 121; *Quidort's Adm.* v. *Pergeaux*, 18 N. J. Eq. 472, 477; *Vanderpool* v. *Van Valkenburgh*, 6 N. Y. 190; *Storey* v. *Storey*, 120 Illinois, 244.

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

In their ultimate aspect the assignments of error and the propositions based on them all rest on the assumption that the State of Pennsylvania had no jurisdiction over the person or property of the absentee, and therefore the proceedings for the appointment of the administrator and all acts done by him were void and subject to collateral attack. But to uphold this contention, in a broad sense, would be to deny the possession by the various States of powers which they obviously have the right to exert. That the debt due the absentee by the School District, resulting from the establishment of her dower, was within the jurisdiction of the state authority, is clear. It would undoubtedly have been subject to administration under the laws of Pennsylvania had the absentee been in fact dead. *Wyman* v. *Halsted, Administrator*, 109 U. S. 654, 656; *Sayre* v. *Helme*, 61 Pa. St. 299; *Mansfield* v. *McFarland*, 202 Pa. St. 173, 174. The debt was certainly subject to taxation, and, being so subject, had it been taxed, the State would have had power to provide remedial process for the collection of the tax. *Savings Society* v. *Multnomah County* 169 U. S. 421, 428; *Bristol* v. *Washington County*, 177 U. S. 133. Moreover it would have been in the power of the State to subject the debt to attachment at the instance of a creditor of the absentee. *Harris* v. *Balk*, 198 U. S. 215. And that the law

of Pennsylvania would have authorized such an attachment is also clear. *Furness* v. *Smith*, 30 Pa. St. 520, 522. It may not also be doubted that the State of Pennsylvania had authority to enact an applicable statute of limitations.

Shrinking from the conclusion to which the assertion of the want of jurisdiction in the State over the debt logically leads, the foregoing propositions are not seriously disputed. It is, however, insisted that they are not determinative of the power of the State to provide for the administration of the property of a person who, having been domiciled in the State, has absented himself for an unreasonable time, leaving no trace of his whereabouts. The contentions on this subject are thus stated in the brief of counsel:

"In a word, the case before the court is one in which the private property of one person was, without her knowledge or consent, transferred to another who in reality had no shadow of a right to it, by virtue of an *ex parte* proceeding of which the owner had no lawful notice. Is it possible that such a manifest infringement of the fundamental and inherent rights which belong to every person in the use and enjoyment of his private property can be construed to be due process of law?"

Again:

"If the plaintiff's departure from Pennsylvania and her omission to demand her arrearages for the period of eleven years, work an injury to any one, it was to herself alone and not to any public right such as would bring this case within the police power of the State. Plaintiff was under no legal obligation to remain in Reading."

It will be observed that the propositions challenge the authority of the State to enact the statute which formed the basis of the proceedings, not only because it is insisted that there was a complete want of power to do so, but also because, even if the State had power, the method of procedure which the statute authorized was so wanting in notice as not to constitute due process of law. We shall consider these objections separately:

1st. Was the state statute providing for the administration of the property of an absentee under the circumstances contemplated by the statute so beyond the scope of the State's authority as to constitute a want of due process of law within the intendment of the Fourteenth Amendment? That the Amendment does not deprive the States of their police power over subjects within their jurisdiction is elementary. The question then is, not the wisdom of the statute, but whether it was so beyond the scope of municipal government as to amount to a want of due process of law. The solution of this inquiry leads us therefore to consider the general power of government to provide for the administration of the estates of absentees under the conditions enumerated in the Pennsylvania law. We do not pause to demonstrate, by original reasoning, that the right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists. This is not done, because we propose rather to test the question by ascertaining how far such authority has been deemed a proper governmental attribute in all times and under all conditions. If it be found that an authority of that character has ever been treated as belonging to government and embraced in the right to protect and foster the well-being and order of society, it must follow that that which has at all times been conceded to be within the power of government, cannot, in reason, be said to be so beyond the scope of governmental authority that the exertion of such a power must be held to be a want of due process of law, even although there is no constitutional limitation affecting the exercise of the power. Whilst it may be that under the Roman Law there was no complete and coherent system provided for the administration of the estate of an absentee, Toullier, title 1, No. 379; Duranton, title 1, No. 384, it is nevertheless certain that absence, without being heard from for a given length of time, authorized the appointment of a curator to protect and administer an

estate. See the references to the Roman Law on that subject in Domat, liv. 2, tit. 2, section 1, No. 13. That in the ancient law of France, under varying conditions, the same governmental right was recognized is also undoubted. Journal du Palais Rep. Verbo Absence, p. 20, from No. 9 to 25. In the Code Napoleon the subject is especially provided for under a title treating of absence, in which ample provision is made for the administration of the property of the absentee, the law providing for, first, the provisional and ultimately the final distribution of such property in accordance with the restrictions and regulations which the title provides. Code Nap. title 4, article 112 *et seq.* Demolombe, in generally treating upon the subject, thus expounds the fundamental conceptions from which the power of government on the subject is derived:

"Three characters of interest invoke a necessity for legislation concerning this difficult and important subject. First. The interest of the person himself who has disappeared. If it is true that generally speaking every person is held at his own peril to watch over his own property, nevertheless the law owes a duty to protect those who from incapacity are unable to direct their affairs. It is upon this principle of public order that the appointment of tutors to minors or curators to the insane rests. It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and which, therefore, places him in the category of an incapable person, whose interest it is the duty of the law to protect. And it is for this reason that the provisions as to absence in the code are placed in the chapter treating of the status of persons because the absentee, in the legal sense, is a person occupying a peculiar legal status. Second. The duty of the lawmaker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. Third. Finally, the general interest of society which may require that property

does not remain abandoned without some one representing it and without an owner. . . ."

And it may not be doubted that the power to deal with the estate of an absentee was recognized and exerted not only by the common law of Germany, but also by the codes of the various States of the continent of Europe. De Saint Joseph Concordance entre les Codes Civils Etrangers et le Code Napoleon, vol. 1, page 11.

Provisions similar in character to those of the Code Napoleon were incorporated in the Civil Code of Louisiana of 1808 under the head of absentees in book 1 of that code, defining the status of persons, and such provisions have been in force from that day to the present time. Louisiana Civil Code, article 47, *et seq.* The provisions of that code on the subject were referred to by this court in *Scott* v. *McNeal*, 154 U. S. 34, 41. Under the law of England, as stated in that case, a presumption of death arose from an absence of seven years without being heard from; and whilst it is true, as we shall hereafter have occasion to say, that such presumption was not conclusive and was rebuttable, nevertheless the very fact of the presumption occasioned by absence, irrespective of the force of the presumption, was a manifestation of the power to give legal effect to the status arising from absence.

As the preceding statement shows that the right to regulate the estates of absentees, both in the common and civil law, has ever been recognized as being within the scope of governmental authority, it must follow that the proposition that the State of Pennsylvania was wholly without power to legislate concerning the property of an absentee, is without merit, unless it be that the authority of a State over the subject is restrained by some constitutional limitation. That the constitution of Pennsylvania does not put such a restriction, is foreclosed by the decision of the Supreme Court of Pennsylvania in this case. But it is insisted, conceding that the State of Pennsylvania had power to provide for the administration of the property of an absentee, yet that authority could not

be exerted without violating the due process clause of the Fourteenth Amendment if the administrative proceeding, brought into play under the exercise of the authority, is made binding upon the absentee if it should subsequently develop that he was alive when the administration was initiated. To sustain this proposition numerous decisions of state courts of last resort are relied upon, which are enumerated in the margin,[1] and special reliance is placed upon the decision of this court in *Scott* v. *McNeal, supra.* We are of opinion, however, that the cases relied upon, with one or two exceptions hereafter to be noticed, are inapposite to this case. The leading cases were reviewed in *Scott* v. *McNeal,* and their inapplicability to the present case will therefore be demonstrated by a brief consideration of *Scott* v. *McNeal.*

In that case a probate court in the State of Washington had issued letters of administration upon the estate of a person who had disappeared, and proceeded to administer his estate as that of a dead person upon the presumption of death, which the court assumed had arisen from his absence. There was no statute of the State of Washington providing for an administration of the estate of an absentee as such, and creating rights and safeguards applicable to that situation, as distinct from the general law of the State, conferring upon courts of probate power to administer the estates of deceased persons. Referring to the presumption under the law of England of

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[1] *French* v. *Frazier's Adm'r,* (1832) 7 J. J. Marsh, 425, 432; *State* v. *White,* (1846) 7 Ired. 116; *Duncan* v. *Stewart,* (1854) 25 Alabama, 408, 414; *Moore* v. *Smith,* (1858) 11 Rich. (Law) 569; *Jochumsen* v. *Suffolk Savings Bank,* (1861) 3 Allen, 87; *Morgan* v. *Dodge,* (1862) 44 N. H. 255, 259; *Withers* v. *Patterson,* (1864) 27 Texas, 491, 498; *Quidort's Adm'r* v. *Pergeaux,* (1867) 3 C. E. Green, (18 N. J. Eq.) 472, 477; *Melia* v. *Simmons,* (1878) 45 Wisconsin, 334, 337; *D'Arusment* v. *Jones,* (1880) 4 Lea (72 Tenn.), 251; *Devlin* v. *Commonwealth,* (1882) 101 Pa. St. 273; *Stevenson* v. *Superior Court,* (1882) 62 California, 60, 65; *Thomas* v. *The People,* (1883) 107 Illinois, 517; *Perry, Adm'r,* v. *St. Joseph & W. R. Co.,* (1883) 29 Kansas, 420, 423; *Epping* v. *Robinson,* (1884) 21 Florida, 36, 49; *Martin* v. *Robinson,* (1887) 67 Texas, 368; *Springer* v. *Shavender,* (1895) 116 N. Car. 12; *S. C.,* 118 N. Car. 33; *Carr* v. *Brown,* (1897) 20 R. I. 215; *Clapp* v. *Houg,* (1904) 12 N. Dak. 600.

death arising from absence, it was held that such presumption was not conclusive, and was absolutely rebutted by proof that the person who was presumed from the fact of absence to be dead was, in fact, alive. Having established this proposition, it was then held, as death was essential to confer jurisdiction on a probate court to administer an estate as such, the fact of life at the time the administration was initiated conclusively rebutted the presumption and caused the court to be wholly without jurisdiction to administer the estate of a person who was alive. This conclusion was abundantly sustained by a citation of the English and American adjudications, in none of which was the doctrine upon which the case proceeded more cogently stated than in the opinion of this court, speaking through Chief Justice Marshall, in *Griffith* v. *Frazier*, 8 Cr. 9, 23. That the opinion, however, in *Scott* v. *McNeal* was not intended to and did not imply that the States were wholly devoid of power to endow their courts with jurisdiction under proper conditions to administer upon the estates of absentees, even though they might be alive, by special and appropriate proceedings applicable to that condition as distinct from the general power to administer the estates of deceased persons, is conclusively shown by the opinion in *Scott* v. *McNeal*. Thus, the law of Louisiana, providing for the administration of the property of absentees, as distinct from the authority conferred to administer the estates of deceased persons, was approvingly referred to. And, moreover, as showing that it was deemed that the absence of legislation by the State of Washington of a similar character was the determinative factor in the case, the court said (p. 47):

"The local law on the subject, contained in the Code of 1881 of the Territory of Washington, in force at the time of the proceedings now in question, and since continued in force by article 27, section 2, of the constitution of the State, does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his estate therefore

subject to be administered and disposed of by the probate court.

"On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his lands for the payment of his debts."

After copiously reviewing the Washington statutes and pointing out that they dealt with the estates of deceased persons as such, the case was summed up in the following language:

"Under such a statute, according to the overwhelming weight of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called, ecclesiastical court, probate court, orphans' court, or court of the ordinary or the surrogate, does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead and thereupon undertake to dispose of his estate."

True it is that there are some general expressions found in the opinion (p. 50), which, if separated from the context of the opinion, might lead to the conclusion that it was held that a State was absolutely without power to provide by a special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so, irrespective of the fact of death. But these general expressions are necessarily controlled by the case which was before the court, and by the context of the opinion, which makes it

clear that it was alone decided that under a law giving jurisdiction to probate courts to administer the estates of deceased persons, even although a rebuttable presumption existed as to death after a certain time, that if such presumption was subsequently rebutted by the proof of the fact of life that the court, whose authority depended upon death, was devoid of jurisdiction.

We have said that two of the cases relied upon would be separately noticed. Those cases are *Carr* v. *Brown*, 20 R. I. 217, and *Clapp* v. *Houg*, 12 N. Dak. 600. In the first case there was a statute of Rhode Island providing for administration under the presumption of death after an absence of seven years, and it was decided that the statute was void. The opinion leads to the view that the conclusion of the court was primarily based upon the construction that the statute did not create a conclusive presumption conferring jurisdiction in the event the absentee was alive and not dead. In the second case there was also a statute of the State of North Dakota, but the court held it to be void, because of the inadequacy of the notice for which it provided. There are, in both of the cases, expressions tending to the view that the State was without power to provide by special legislation for the administration of the property of an absentee. In so far, of course, as these views were rested upon the state constitution, we are not concerned with them. In so far, however, as they intimate that by the operation of the Fourteenth Amendment the States are deprived of power to legislate concerning the estates of absentees, we do not approve them.

The error underlying the argument of the plaintiff in error consists in treating as one two distinct things, the want of power in a State to administer the property of a person who is alive, under its general authority to provide for the settlement of the estates of deceased persons, and the power of the State to provide for the administration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject. The distinction between the

two is well illustrated in Pennsylvania, for in that State, prior to the enactment of the statute in question, it had been expressly decided that a court of probate as such was absolutely wanting in jurisdiction to administer the estate of a person who was alive simply because there existed a presumption which was rebuttable as to the fact of death. This is also aptly illustrated by the law of Louisiana. In that State, as we have seen, provisions have existed from the beginning for the administration of the estates of absentees as distinct from the power conferred upon the courts of probate to administer the estates of deceased persons. In this condition of the law, under an averment of death an estate was opened in a probate court of Louisiana and administered upon. A question as to the validity of that administration subsequently arose in *Burns* v. *Van Loan*, 29 La. Ann. 560, 563. As the proceedings were probate proceedings not taken under the statute providing for the administration of the estates of absentees, the Supreme Court of the State of Louisiana declared them to be absolutely void. As it cannot be denied that in substance the Pennsylvania statute is a special proceeding for the administration of the estates of absentees distinct from the general law of that State providing for the settlement of the estates of deceased persons, and as by the express terms of the statute jurisdiction was conferred upon the proper court to grant the administration, it follows that the Supreme Court of Pennsylvania, did not deprive the plaintiff in error of due process of law within the intendment of the Fourteenth Amendment.

2d. It remains only to consider the contention that even although there was power to enact the statute, it is nevertheless repugnant to the Fourteenth Amendment, because it fails to provide notice as a prerequisite to the administration which the statute authorizes and because of the absence from the statute of essential safeguards for the protection of the property of the absentee which is to be administered. Let it be conceded, as we think it must be, that the creation by a state law of an arbitrary and unreasonable presumption of death

resulting from absence for a brief period, would be a want of due process of law, and therefore repugnant to the Fourteenth Amendment. Let it be further conceded, as we also think is essential, that a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee would also be repugnant to the Fourteenth Amendment. Again, let it be conceded that if a state law, in providing for the administration of the estate of an absentee, contained no adequate safeguards concerning property, and amounted therefore simply to authorizing the transfer of the property of the absentee to others, that such a law would be repugnant to the Fourteenth Amendment. We think none of these concessions are controling in this case. So far as the period of absence provided by the statute in question, it certainly cannot be said to be unreasonable. So far as the notices which it directs to be issued, we think they were reasonable. As concerns the safeguards which the statute creates for the protection of the interest of the absentee in case he should return, we content ourselves with saying that we think, as construed by the Supreme Court of Pennsylvania, the provisions of the statute do not conflict with the Fourteenth Amendment.

Affirmed.

KENDALL v. AMERICAN AUTOMATIC LOOM COMPANY.

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

No. 541. Submitted April 24, 1905—Decided May 29, 1905.

This court can review by appeal under § 5 of the act of March 3, 1891, the judgment of the Circuit Court dismissing the bill on the sole ground that it never acquired jurisdiction over the defendant, a foreign corporation, for lack of proper service of process. *Board of Trade* v. *Hammond Elevator Co.*, *ante*, p. 424.

Where the foreign corporation was doing no business and had no assets in the State, service upon a former officer residing therein, *held*, insufficient under the circumstances of this case.

THIS suit was brought against the defendant, appellee, for the purpose of obtaining a discovery of all the matters referred to in the bill of complaint, and to have a receiver appointed of the assets of the company within the State of New York, and for an accounting by the directors of the defendant, and for other relief.

The bill alleged that the plaintiff, at the time of filing his bill, was a citizen of the United States and of the State, county and city of New York; that the defendant was a stock corporation, organized in March, 1898, and existing under the laws of the State of West Virginia, and was incorporated to engage in the business of manufacturing and selling looms and weaving machinery, and that by its charter its principal office and place of business was in the city, county and State of New York. The bill of complaint, together with a writ of subpœna requiring the defendant to answer the bill, were served in the city of New York upon a person who had been the treasurer of the defendant corporation. Within the proper time the defendant appeared specially, for the sole purpose of questioning the jurisdiction of the court and of moving to set aside the attempted service.

The motion was founded upon the affidavit of Joseph H. Emery, in which he averred, among other matters, that the service of the subpœna had been made upon him in the city of New York, because (as he believed) he had been the treasurer of the defendant corporation; that the domicil and residence of the defendant were in the State of West Virginia; the purpose of its incorporation was the development of a self-feeding loom attachment, which gives to the ordinary loom a continuous supply of filling thread. It was further stated in the affidavit that the corporation was the owner of divers patents, but it had never manufactured merchandise. It had never made a sale, and it had never engaged in the transaction

of the business for which it was incorporated. It had no business or assets in the State of New York, and had no office or place of business there, and those of its officers who resided in that State were not there officially, or as representing any business or interest of the corporation. After the formation of the corporation, and between the years 1898 and 1901, the meetings of the directors of the company were held at different places in the city of New York where accommodations could be secured, sometimes at the office of the counsel of the company in New York and sometimes at a hotel; but since August 10, 1901, there had been no meeting, either of the stockholders or of the directors, and on the last-mentioned date the stockholders were notified that the company had no funds with which to pay the franchise taxes which were due to the State of West Virginia, and affiant averred that no funds had since been provided for that purpose; that since that date the company had transacted no business, had maintained no office in the State of New York, and that an action had been commenced by the State of West Virginia against it to terminate and forfeit its corporate franchise. The sole assets of the company consisted of two automatic looms and tools and machinery employed in the making thereof and its patents. The looms, with machinery and tools, were in Attleboro, Massachusetts. The letters patent were also in the possession of a Mr. Mossberg, in Attleboro, Massachusetts, who had made divers attempts to improve the looms. The company had no bank account, no office force, and no employés. It had never reached the stage of the active transaction of business, and such assets as it possessed were beyond the jurisdiction of the court. No one had been elected treasurer in place of Mr. Emery, so far as the record shows, and he was the treasurer of the company when service was made upon him.

An affidavit in opposition was filed by the complainant, but the facts above set forth were substantially undenied. The Circuit Court, upon the hearing, granted the motion of the defendant to set aside and declare null and void the attempted

service on the corporation of the bill of complaint and writ of subpœna by the service thereof upon Joseph H. Emery, on or about the thirteenth day of December, 1904. The complainant has appealed directly to this court from the order of the Circuit Court setting aside the service of the subpœna.

Mr. Noah C. Rogers for appellant:

The defendant is subject to the jurisdiction of the New York court by the provision in its articles of incorporation fixing its principal place of business there. *People* v. *Geneva College*, 5 Wendell (N. Y.), 211; *Attorney General* v. *Oakland Co. Bank*, 1 Walker C. L. (Mich.) 90, 97.

Having made it one of the conditions of its creation that its principal place of business should be in the city, county and State of New York, it will not be heard now to deny this jurisdiction. The defendant has not amended its charter, revoked the agency of its treasurer or withdrawn its place of business to another jurisdiction. *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 537.

The service of the writ of subpœna on the defendant's treasurer was sufficient to give the court jurisdiction. *Am. Locomotive Co.* v. *Dickson Co.*, 117 Fed. Rep. 972; *McCord Lumber Co.* v. *Doyle*, 97 Fed. Rep. 22; *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Merchants' Mfg. Co.* v. *Grand Trunk Ry. Co.*, 13 Fed. Rep. 358.

Mr. Benjamin N. Cardozo for appellee:

The defendant has no domicil or abode in the State of New York; it is not engaged in business in that State; and the service of the subpœna on its treasurer was ineffective to bring it into court. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Goldey* v. *Morning News*, 156 U. S. 518; *Construction Co.* v. *Fitzgerald*, 137 U. S. 106; *Geer* v. *Mathieson Alkali Works*, 190 U. S. 429; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 444; *Sharkey* v. *Indiana &c. Ry. Co.*, 186 U. S. 479; *Wabash Ry. Co.* v. *Brow*, 164 U. S. 271; *In re Keasbey*, 160 U. S. 221; *St. Clair* v. *Cox*,

106 U. S. 350; *Stock Exchange* v. *Board of Trade*, 125 Fed. Rep. 463; *Martin* v. *Asphalt Co.*, 130 Fed. Rep. 394; *McGillin* v. *Claflin*, 52 Fed. Rep. 657; *Good Hope Co.* v. *Fencing Co.*, 22 Fed. Rep. 635.

The cases which attribute controlling force to the designation of the place of business, as contained in the certificate of incorporation, have relation only to the question of the *situs* of the corporation within the State of its origin. They have no bearing upon its *situs* without that State. *Western Transportation Co.* v. *Scheu*, 19 N. Y. 408; *Galveston R. R.* v. *Gonzales*, 151 U. S. 496.

The question in issue is not a question of the jurisdiction of the court below within the meaning of section 5 of the act of March 3, 1891, and an appeal directly from the Circuit Court cannot be sustained. *Courtney* v. *Pradt*, 196 U. S. 89; *Bache* v. *Hunt*, 193 U. S. 523; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 232; *Blythe* v. *Hinckley*, 173 U. S. 501; *Mex. Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429.

The question that the Circuit Court decided is not one as to the jurisdiction of the Federal judiciary. That the suit is cognizable in the Circuit Court of the United States for the Southern District of New York has neither been disputed by the appellee nor denied by the court below. The complainant is a citizen of the State of New York, and a resident of the Southern District of New York; the defendant is a citizen of the State of West Virginia. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444. Indisputably, therefore, there exists that diversity of citizenship which confers jurisdiction of the cause on the Federal courts. The trouble is that the defendant has not been served with process. An attempt has been made to bring it into court by service of the subpœna on an agent, and the sole question is whether that service was effective. In passing on that question, the court has been governed, not by any consideration peculiar to the jurisdiction of the Circuit Courts, but by considerations of general jurisprudence, applicable, as this court has declared, to all tribunals.

The Circuit Court has certified no question for review. It has not disputed its jurisdiction of the subject matter of the cause. It has not suggested that the parties, if properly brought before it, are beyond its competence, or are rendered immune from prosecution in the Circuit Courts. It has merely held that the defendant has not yet been served with process. That is not a question of jurisdiction within the meaning of the statute.

The order should be affirmed or the appeal dismissed.

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

It is objected, in the first place, by the appellee that the appellant had no statutory right to appeal directly to this court from the order setting aside the service of the subpœna. It is asserted that the case does not involve the jurisdiction of the court below within the meaning of section 5 of the act of March 3, 1891, inasmuch as the jurisdiction of the Circuit Court as a Federal court is not questioned, the jurisdiction being denied upon grounds alike applicable to any other judicial tribunal, state or Federal, under the same circumstances. This case is, however, on that point governed by that of *Board of Trade* v. *Hammond Elevator Co.*, decided this day (*ante* p. 424), where it is held that the order is reviewable by this court under the section above mentioned.

Regarding the case as properly here, the question is whether the service made upon the treasurer of the appellee corporation was a valid service upon the corporation itself. We think it was not. It is perfectly apparent that the corporation was, at the time of the service on the treasurer, doing no business whatever within the State of New York, and that it had never done any business there since it was incorporated in the State of West Virginia. While we have lately held that, in the case of a foreign corporation, the service upon a resident director of the State where the service was made was a good service

where that corporation was doing business within that State, *Pennsylvania Lumbermen's &c. Co.* v. *Meyer*, 197 U. S. 407, yet such service is insufficient for a court to acquire jurisdiction over the corporation where the company was not doing any business in the State, and was situated like this company at the time of the service upon the treasurer. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406.

The order of the Circuit Court was right, and is

Affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* WEST COAST NAVAL STORES COMPANY.

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

No. 225. Submitted April 25, 1905.—Decided May 29, 1905.

A common carrier may agree with such other carrier as it may choose to forward beyond its own line goods it has transported to its terminus; and, if it has adequate terminal facilities at a sea port, sufficient for all freight destined for that place, it is not obliged to allow other and competing carriers to load and discharge at a wharf owned by it and erected for facilitating the transportation of through freight to points beyond that place.

The fact that a wharf is built by a railroad company on what might be the extension of a public street, under permissions of the municipality, does not, in the absence of express stipulations, make it a public wharf, or affect the company's right of sole occupancy, or power of regulation, thereof.

CERTIORARI to the Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming one in favor of the West Coast Naval Stores Company (hereinafter called the plaintiff), against the Railroad Company (hereinafter called the defendant), for damages for refusing to permit the plaintiff to use the wharf of defendant at Pensacola for the

transportation of plaintiff's property, as stated in the declaration.

The action was brought in the Circuit Court of the United States for the Northern District of Florida.

The plaintiff's declaration contains two counts, which are substantially the same, and it is therein averred that the plaintiff is a citizen of Florida and the defendant is a citizen of Kentucky, and that the latter is a common carrier, and carries goods into Pensacola over its railroad, and among them the goods of the plaintiff. The course of business between the two companies has been for the plaintiff to obtain transportation of its turpentine and rosin from its yard near Pensacola, and its warehouse in that city, by means of a switch, built for that purpose by the defendant, to defendant's main line, and thence to the wharf of defendant (which plaintiff alleged was a public wharf), by means of the cars and upon the railroad of the defendant. The wharf extended into the bay of Pensacola, and was used by defendant (and by persons bringing goods over the defendant's railway to and into Pensacola) for the purpose of shipping such goods from the wharf to vessels destined for other ports. After defendant had transported the goods of the plaintiff to the wharf of defendant, the plaintiff had been accustomed to ship to other ports by vessels, with the managers of which plaintiff had contracts of carriage; that in the midst of the prosecution of such business defendant had notified plaintiff that it would thereafter refuse, and it did thereafter refuse, to allow plaintiff to transport its goods to the wharf for the purpose of there loading them on such vessels as above mentioned, and refused to permit the wharf and railway of defendant to be used in the prosecution of plaintiff's business, in so far as the prosecution would involve the use of the vessels chosen by the plaintiff for the shipment of the goods from Pensacola, to the damage of the plaintiff, as set forth in the declaration.

The defendant filed several pleas to this declaration and the plaintiff demurred to them, which demurrer was overruled

by the Circuit Court. Upon writ of error the Circuit Court of Appeals reversed that judgment. 121 Fed. Rep. 645, and when the case came down the defendant withdrew all former pleas and filed in the Circuit Court another plea, as follows:

"The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

"1. That the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter nor any statutory law has compelled or required, or compels or requires it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant in cars on its railroad over said wharf to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels and the loading and unloading thereat of such vessels. That in accordance with such purpose it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, 'to traffic handled by vessels in regular lines running in connection with the Louisville and Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company' (an agency of defendant), and making the use of said wharves 'for traffic in connection with vessels other than herein referred to,' 'subject to special arrangement.' The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf

into the 'certain vessels' mentioned in the declaration, and still are in force and operation. That the said 'certain vessels' were not regular lines running in connection with the Louisville and Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf, but that said vessels constituted an independent line between New York and Pensacola, and New York, and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

"That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores nor refused to transport plaintiff's naval stores over its railway mentioned in the declaration, to and on its wharf also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff; that the defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf to be transported by them to the port of New York, as aforesaid, but that such

refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels connecting with the defendant, running to and from New York, and was, as aforesaid, in competition with the defendant itself in its rail transportation aforesaid to and from New York city; and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff the same facilities for shipping naval stores to New York, or any other port, over defendant's said wharf, as it gave to any and all other shippers; that the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to and use of the said wharf, one of the terminals of the defendant, by the said vessels; that the said wharf was not at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such."

This plea was in substance the same as the third plea, which defendant had theretofore interposed and which the Circuit Court of Appeals had held bad. The plaintiff again demurred. The Circuit Court sustained the demurrer, in accordance with the decision of the Circuit Court of Appeals, and gave leave to the defendant to amend as it might be advised. The defendant refused to amend. Judgment was then entered against it by default and direction given to proceed with the case for the purpose of having plaintiff's damages assessed. A trial by jury upon the question of damages was had, and the jury found a verdict for the plaintiff for one thousand dollars, upon which judgment was duly entered.

The defendant then sued out a writ of error to the Circuit Court of Appeals for the Fifth Circuit, which court, adhering to the views expressed by it on the former appeal, affirmed the judgment, 128 Fed. Rep. 1020, and the defendant thereupon applied to this court for a writ of certiorari, which was granted, and the case is now here.

Mr. W. A. Blount and *Mr. A. C. Blount, Jr.*, for plaintiff in error:

Plaintiff in error affirms and defendant in error denies that a railroad company which has provided ample facilities for the delivery by it of all freight committed to it for transportation to, and delivery at, a city on the seaboard, can, when not compelled by statute or charter, construct a wharf, place tracks thereon, connect them with its tracks leading thereto, and transport freight over such track for all persons alike and have the right to permit to come to such wharf, for the purpose of removing such freight, only such vessels as may run in regular lines in connection with it, or such as may come under special arrangements with it, and to refuse such wharf facilities to vessels which would come in competition with it, or with lines of steamers running in connection with it.

The railway company is not under the circumstances of this case a common carrier as to its wharf.

A railroad company may restrict itself to carrying passengers, as in the case of inter-urban trolley lines; it may decline to carry dogs, *Dickson* v. *Gt. Nor. Ry.*, L. R. 18 Q. B. 176; or coals, *Oxlade* v. *N. E. R. R. Co.* (*No. 2*), 1 Nev. & Mac. 162; *S. C.*, 15 C. B., N. S. 680; *Johnson* v. *Midland Ry. Co.*, 4 Exc. (W., H. & G.) 367; or money, *Hosea* v. *McCrory*, 12 Alabama, 349; *Whitemore* v. *Caroline*, 20 Missouri, 513; or cattle, *Lake Shore &c.* v. *Perkins*, 25 Michigan, 329.

Or any other article of transportation which may be sufficiently differentiated from articles actually carried by it as to be reasonably put into a distinct class. It may devote portions of its facilities to its own use, or to the use of particular individuals, and thus refuse to be a common carrier as to those facilities. The mere fact that they belong to it or are used by it in connection with transportation does not subject them to the common use of the public. *People* v. *Spruance*, 67 Illinois, 437; *Citizens' Bank* v. *Nantucket Steamboat Co.*, 2 Story, 33; *Garton* v. *Railway Co.*, 1 Best & Sm. 112, 162; Hutchinson on Carriers, 75.

One common carrier has not, independent of charter or contract, the right to use the terminals of another carrier. *Atchison, T. & S. F. R. R. Co.* v. *Denver & New Orleans Ry. Co.*, 110 U. S. 667; *Gulf, C. & S. F. Ry.* v. *Miami S. S. Co.*, 86 Fed. Rep. 407, 416; *Little Rock &c. R. R. Co.* v. *St. Louis & Lev. Ry. Co.*, 63 Fed. Rep. 775; *Little Rock &c. R. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 59 Fed. Rep. 404; *St. Louis Drayage Co.* v. *L. & N. R. R. Co.*, 65 Fed. Rep. 39; *Kentucky & I. B. Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 567, 628; *Ore. Short Line &c.* v. *Nor. Pac. R. R. Co.*, 51 Fed. Rep. 465, 475; *Ilwaco Ry. & Nav. Co.* v. *Ore. Short Line &c.*, 57 Fed. Rep. 673. The law is the same in England. See *Napier* v. *Glasgow and S. W. Ry. Co.*, 1 Nev. & Mac. 292.

The principles of this case are covered by the decisions which treat of the right of a railway company to discriminate between draymen, hackmen., etc., desiring to use the depot and like facilities of the railroad. While such decisions are in conflict, the vast weight of them is in favor of the right of the carrier to select from the persons desiring such facilities, one or more with whom it can make agreements agreeable to it, and refuse to permit the others the use of such facilities. Among the numerous cases upholding this contention in both state and Federal courts see *Jencks* v. *Coleman*, 2 Sumner, 221; *Barker* v. *Midland Ry. Co.*, 18 C. B. 46; *S. C.*, 86 E. C. L. R. 45; *Beadell* v. *Eastern Counties Ry. Co.*, 2 C. B. (N. S.) 509; *S. C.*, 89 E. C. L. R. 509; *Painter* v. *London &c. Ry. Co.*, 2 C. B. (N. S.) 702; *S. C.*, 89 E. C. L. R. 701; *Barney* v. *Oyster Bay Steamboat Co.*, 67 N. Y. 301; *Barney* v. *D. R. Martin*, 11 Blatch. 534; *Old Colony R. Co.* v. *Tripp*, 147 Massachusetts, 35; *Commonwealth* v. *Carey*, 147 Massachusetts, 40; *Fluker* v. *Georgia Ry. Co.*, 81 Georgia, 461; *Griswold* v. *Webb*, 16 R. I. 649; *Smith* v. *N. Y., L. E. & W. R. Co.*, 149 Pa. St. 249; *N. Y. Cent. R. Co.* v. *Flinn*, 74 Hun, 124; *N. Y. Cent. Ry. Co.* v. *Sheeley*, 27 N. Y. Supp. 185; *Brown* v. *N. Y. Cent. Ry. Co.*, 75 Hun, 355; *Summit* v. *State*, 76 Tennessee, 413; *Lucas* v. *Herbert*, 148 Indiana, 64; *N. Y. R. R. Co.* v. *Scoville*,

71 Connecticut, 136; *Kates* v. *Cab Co.*, 107 Georgia, 636; *Godbout* v. *St. Paul Union Depot*, 79 Minnesota, 188; *N. Y. Cent. R. Co.* v. *Warren*, 64 N. Y. Supp. 781; *Boston & Albany R. Co.* v. *Brown*, 177 Massachusetts, 65; *Boston & Maine R. Co.* v. *Sullivan*, 177 Massachusetts, 230; *N. Y. &c. R. Co.* v. *Bork*, 23 R. I. 49.

There is no charge in the declaration that the railway company discriminated against the plaintiff or the public.

Plaintiff has no cause of action unless it be law that it can sue for the deprivation of an alleged right of the vessels by which deprivation it has not been in the slightest injured.

It is especially true that one competing common carrier has not, independent of statute or contract, the right to use the terminals of another carrier.

The right of a railroad company to discriminate to the extent of protecting itself is fully recognized by this court. See *Tex. & Pac. Ry. Co.* v. *Interstate Com. Com.*, 162 U. S. 197.

It is also especially true that one common carrier has not, independent of statute or contract, the right to use the wharf of another carrier.

A railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. *Express Cases*, 117 U. S. 1, 24; *C., St. L. & N. O. Ry. Co.* v. *Pullman Co.*, 139 U. S. 79; *St. Louis Drayage Co.* v. *L. & N. R. R. Co.*, 65 Fed. Rep. 39.

Even if the wharf had been a public one the railroad company had a right to discontinue its public use at any time and refuse to let any particular individual use it. *O'Neil* v. *Annett*, 27 N. J. Law, 290; *Heany* v. *Heeny*, 2 Den. 625; *Bogart* v. *Haight*, 20 Barb. 251; *The Mary K. Campbell*, 31 Fed. Rep. 840; *Steamboat Co.* v. *Transportation Co.*, 28 Florida, 433, distinguished.

Mr. John C. Avery for respondent:

The wharf is either a public wharf or it is so located and used that the public have a right to have goods intended for shipment by water beyond Pensacola carried thereto and have ships moored thereat and take on the goods.

The gravamen of the case is not that the railway company would transport the goods on its lines but that it would not permit the goods to be at, from or by means of, the wharf loaded on vessels other than those of the railway company. The case is not covered by § 3 of the interstate commerce act. What is involved here is terminal facilities, not within the interstate commerce act, but merely a public toll or charge not only reasonable, but necessary. This must be enforced by, and subject to, some law, and, in the absence of congressional legislation, there is no law except that of the State. The application of state law in such cases is not inconsistent with the general power conferred upon Congress, and does not introduce into commerce either confusion or restraint.

As the case is not within the operation of the interstate commerce act, the common law must govern in determining the rights of the parties. Under this the right of plaintiff is clear. As to whether there is a national common law applicable in the Federal courts see *W. U. Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 101. And see *Steamboat Co.* v. *Transportation Co.*, 28 Florida, 433; *Ore. Short Line* v. *I. R. M. Co.*, 51 Fed. Rep. 611; but see *I. R. M. Co.* v. *Ore. Short Line*, 57 Fed. Rep. 673.

The wharf was operated by the railroad company, not as a private wharf, but for use not only by the boats operated by it and the Gulf Transit Company, but also by all persons with whom the railroad company should see fit to make "special arrangements." That is, it appears that the wharf was not a private but a public wharf; it was used, not only in the private business of the railroad company, but as a facility in the navigable waters of the Bay of Pensacola, in aid of commerce engaged in by the Louisville & Nashville Railroad

Company and by the Gulf Transit Company, and by all the rest of the public.

It is perfectly obvious that the course of the company was to give to a very large portion of the public the right to use its wharf, with the result that such wharf became a facility in which the public, as a public, had become interested in such manner and to such extent as to deprive the defendant of the right to claim that it was a private wharf, in the operation of which the public were not entitled to insist that equal privileges were to be accorded to all persons requiring them in their respective businesses. *Munn* v. *Illinois*, 94 U. S. 125. See Hale's De Portibus Maris, under "Ferries;" *Dutton* v. *Strong*, 1 Black, 33; Gould on Waters, 231; 1 Dillon Mun. Corp. § 68; *Compton* v. *Hawkins*, 8 So. Rep. 75; *Barrington* v. *Commercial Dock Co.*, 45 Pac. Rep. 748; *The Express Co. Cases* can be distinguished.

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

When this case was first before the Circuit Court of Appeals it was stated in the opinion which was then delivered that the case showed that the railroad company was in possession of a large wharf, built at its own expense, "on the extension of a public street in the city of Pensacola into the deep waters of the harbor of the city." On looking at the record before us we find in the pleadings no averment that the wharf in question was in fact built as such an extension. The statement of facts preceding the opinion of the Circuit Court of Appeals shows, however, that there were replications filed to the various pleas, one of which replications contained the averment that the wharf was an extension of a street of the city of Pensacola into the bay of Pensacola for a distance of more than five hundred yards, all within the limits of the city of Pensacola, and maintained by the defendant by authority of the city. Hence the statement in the opinion was perfectly

correct. Subsequently to the decision of the Circuit Court of Appeals, and after the case was remanded to the Circuit Court, it appears by the record before us that the defendant withdrew all its former pleas and filed the single plea set forth in the foregoing statement of facts. To this plea no replication was filed. Counsel for the plaintiff admits that neither the declaration nor the plea contains any averment that the wharf in question was an extension of a public street. If we assume, what is without doubt the fact, that the wharf was built at the foot of a public street in the city of Pensacola and was carried out into the deep water of the bay some hundreds of yards, we must also assume the fact mentioned in the brief of the defendant, and substantially set forth in the former replication, that the building and maintaining of the wharf were authorized by authority from the city of Pensacola and also from the State of Florida. These facts will therefore be taken as admitted, in order that the case may be discussed upon the facts as they really exist.

Counsel for plaintiff now asserts, and we assume, that the gravamen of plaintiff's complaint is, not that the defendant would not transport plaintiff's goods, or any part of them, on defendant's lines, from the wharf in question, "but only that defendant would not permit plaintiff's goods to be at, from or by means of defendant's wharf loaded upon, or delivered to, the said vessels," with the managers of which plaintiff had contracted to have its goods transported to other ports. This means of transportation, by such vessels as plaintiff should choose, is asserted by it as a right, because it contends that the wharf of defendant, under the averment to that effect in the declaration and not denied, in terms, in the plea, taken in connection with the facts stated in such plea, was a public wharf, or that, at least, the defendant had devoted it to a public use. The defendant in its plea sets up facts which it avers show that the wharf was not a public one. The plaintiff insists that the plea shows that the defendant built and used the wharf itself and permitted a large part of the public to

use it, including, at any rate, those who were engaged in traffic handled by vessels belonging to regular lines running in connection with the defendant, and also including vessels belonging or consigned to the Gulf Transit Company, an agent of defendant, together with those who were using the wharf under some special arrangements between them and the defendant. All this, the plaintiff contends, amounted to making the wharf a public one, or at least that it thereby became a facility, to the use of which the public as a public had a right on payment of reasonable compensation. If plaintiff chose to employ, for the further transportation of its goods, the vessels with the managers of which the defendant had some business arrangement or contract, it is not denied that the defendant would and did permit such transportation. In this respect there is no allegation that the plaintiff did not have equal facilities with all other shippers. Defendant's plea avers that it did give to plaintiff the same facilities for shipping its goods over defendant's wharf that it gave to any or all shippers. In brief, the fact seems to be that the only complaint of the plaintiff is that defendant will not permit competing vessels to make use of its wharf for the purpose of such competition.

We do not see that the fact that the wharf was erected under authority from the city, at the foot of a public street of the city, makes any material difference in the character of the wharf or that the right of plaintiff to select its own vessels to continue from that wharf the transportation of its goods is on that ground enhanced, or the right of defendant to control the wharf for its own use when erected is thereby diminished. The right to erect the wharf was granted by the proper authorities, and so far as the record shows, it was granted without imposing any conditions as to its use by the public. We think the plaintiff had no right of access to the wharf founded simply upon the fact that it was erected under proper authority, in the harbor of Pensacola and at the foot of one of the public streets of that city. The question of the rights of plaintiff must really

turn upon the character of the use of the wharf, whether it is public or private.

The argument upon the part of plaintiff is in substance this: True, defendant has erected a wharf, which is not in fact intended or used as the terminus of its road at Pensacola, adequate yards and depots having been furnished by the defendant for all goods and passengers destined to Pensacola only; but the wharf has been erected to enable defendant to more conveniently carry out contracts for transportation beyond its own line, which it was not compelled to make, and which it could carry out by such agencies as it chose; but the plaintiff, having goods destined for points outside of Florida, insists upon its right to use the road of defendant, not to carry these goods to Pensacola, but to defendant's wharf, so that plaintiff may there transfer them into vessels which it has arranged to take them; in order to do this it is necessary that defendant be compelled to share its possession of its own wharf, with the managers of these other vessels; for this possession plaintiff is prepared to make reasonable compensation. This right on the part of the plaintiff is urged as the result of the action of defendant in permitting the use of the wharf as stated in the plea. By such use it is contended that the defendant in effect dedicated the wharf to the public, or at least has granted to the public an interest in the use of the wharf.

We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation.

Neither the public nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire. Nor was the wharf a depot

or place of storage of the defendant for goods, to be delivered at or taken from the city of Pensacola for transportation by rail. The defendant had adequate depots and yards in that city for the proper storage of all merchandise committed to it for delivery at Pensacola, or there received, to be transported therefrom by defendant. All consignees of goods at Pensacola had equal facilities for obtaining them there. Although not bound originally to carry goods beyond its own terminus at Pensacola, yet the defendant might agree to do so, and it had the right, when duly authorized by the proper authorities, to construct facilities to enable it to continue such transportation beyond the line of its railroad, by such other carriers as it might agree with. The city or state authorities in granting the right to erect such facilities might, of course, have attached such conditions as they thought wise, but in their absence neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with the defendant. The defendant never became a common carrier, as to this wharf, in the sense that it was bound to accord to the public or to plaintiff a right to use it upon payment of compensation. We do not see that the plaintiff had any right even to demand that the defendant should carry plaintiff's goods on the rails defendant had laid down to reach the wharf from its depot or yards at Pensacola, the terminus of its road at that city. Those rails were only laid for the purpose of reaching the wharf, in order that defendant might carry goods to it which it had undertaken to forward, by itself or by vessels it had arranged with, beyond its line. Very likely it would be bound to carry plaintiff's goods on this part of its rails, for the same purpose and on the same terms it did for others, viz., in order that it might itself, or through others it had contracted with, forward the goods beyond its own line. But plaintiff demands more than this; it demands that defendant shall carry plaintiff's goods over its rails thus laid, in order that plaintiff may itself forward its

goods by vessels of its own selection, and that defendant shall surrender possession of enough of its wharf to enable plaintiff to do so.

That the defendant had the right to choose its own agencies, and grant to them the exclusive privilege of access to its own wharf, which it built only for the purpose of continuing the transportation of goods which it had transported to the end of its line, has in effect been decided by this court. *Atchison &c. R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667. In that case it was held that, although at common law the common carrier was not bound to carry beyond its own lines, yet it might contract to do so, and in the absence of statutory regulations prohibiting it the carrier might determine for itself what agencies it would employ to continue the transportation, and it was not bound to enter into agreements for each transportation with another because it had done so with one common carrier. Having the right, as the authorities prove, to decide what agencies it would employ for the purpose of transporting goods beyond its own line, and not being bound to enter into any contracts or arrangements with one person or carrier because it had so contracted or arranged with another, we think it follows that defendant was not obliged to permit the public to have access to its wharf, built for the purpose stated, simply because it granted such permission to those with whom it made arrangements of the kind set forth in the plea. While refusing to make any agreement with defendant for the further transportation of plaintiff's goods beyond Pensacola, plaintiff nevertheless claims a right to use the wharf erected by defendant for its own purpose, as already stated. This cannot be sustained. The principle stated in the above case is in substance recognized in *Gulf &c. Ry. Co.* v. *Miami S. S. Co.*, 86 Fed. Rep. 407; *Little Rock &c. Ry. Co.* v. *St. Louis &c. Ry. Co.*, 63 Fed. Rep. 775, affirming same case in 59 Fed. Rep. 400. The two last cases involved the construction of the Interstate Commerce Act, but they affirm the principle that a common carrier may agree with

such other carrier as it may choose, to forward beyond its own line the goods which it had transported to its own terminus. See also *Central Stock Yards Co.* v. *L. & N. Railway Co.*, 192 U. S. 568, 571; *Kentucky &c. Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 567; *Oregon &c. Co.* v. *Northern Pacific R. R. Co.*, 51 Fed. Rep. 465; *Ilwaco &c. Co.* v. *Oregon &c. Co.*, 57 Fed. Rep. 673.

The cases cited did not involve rights of parties to a wharf situated in a harbor, but we think that the right of one carrier to enter into arrangements with another carrier to forward its goods, and to refuse to do so with others, or to permit such others to avail themselves of the facilities constructed by the original carrier for that purpose, is not altered because the facility so constructed by it happens to be a wharf in the harbor of a city instead of some structure on land. The wharf may be a private one, and its owner may permit those only to have access to it that it may choose. A private wharf may exist on the shores of a navigable river or lake, or in a harbor of a city from which access is obtained directly to the sea. *Dutton* v. *Strong*, 1 Black, 23, 32.

It is to be remembered that the wharf was not in strictness the terminus of defendant for unloading its goods for Pensacola. The defendant had other depots and yards for that purpose. The main use of the wharf was only for the purpose of sending the goods brought by defendant, to other ports as a continuation of their carriage beyond the lines of the defendant's road. How much space, if any, it might devote to other vessels, with the managers of which it might make special arrangements, would naturally be for the defendant to decide, as also the particular terms of such arrangements. The conveniences of the wharf are, of course, necessarily limited.

It is well said by counsel for defendant in their brief that "The very nature of a wharf and its inadequacy to meet the demands of every incoming vessel necessitates that its use should be exclusively for those with whom the carrier enters into arrangements. The carrier has a right to select a strong

connection instead of a weak one, one that will give assurance of permanent business, instead of one that can offer only occasional shipment. If the free use is incompatible with the certain regular use by the steamer, or lines of steamers, with which the carrier is aligned, it is too clear for further reasoning that such carrier has the right to accept the latter and thereby exclude the former."

The reasons for permitting such use of the wharf are manifold. Without it the commerce of the country in the large cities would be cramped, if not very greatly damaged, by the uncertainty of finding quarters for the regular and swift unloading and loading of the vessels. But the capacity of a wharf is necessarily limited, and if the wharf were open to all comers in their turn there could be no certainty as to any particular vessels being able to reach the wharf at any definite time, and consequently there would be a like uncertainty as to when such vessel would be able to depart with its load. One, unexpected, so-called, tramp vessel might, by arriving a few hours in advance, take possession of all that was left of the wharf for the purpose of loading, and thus prevent the regular steamer, arriving a little later, from coming to the dock, unloading its cargo, and then loading with goods from the railroad. In this way there would be confusion in time and in the possession of the wharf by the different vessels, and its value for the purpose for which it was erected would be greatly reduced, if not wholly destroyed.

The principle herein recognized has also been affirmed by this court in what are known as the *Express Co. Cases*, 117 U. S. 1, where it was held (because the facilities were necessarily limited) that railroad companies had the right to contract with particular express companies for the transportation of the traffic of the latter over the lines of their railroads, and that the railroad company was not bound to transport the traffic of independent express companies over its lines in the same manner in which it transported the traffic of the particular companies contracted with; in other words, that the railroad

companies were not bound to furnish, in the absence of a statute, to all independent express companies, equal facilities for doing an express business upon their passenger trains.

These observations answer the contention of plaintiff that defendant, by erecting the wharf and using it in the way it does, has thereby devoted its property to a public use, and that it has thereby granted to the public an interest in such use, within the principle laid down in *Munn* v. *Illinois*, 94 U. S. 113. It has not devoted its wharf to the use of the public in so far as to thereby grant to every vessel the right to occupy its private property upon making compensation to defendant for the exercise of such right. The reasons we have already endeavored to give.

The judgments of the Circuit Court of Appeals and of the Circuit Court for the Northern District of Florida are reversed, and the case remanded to the latter court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HARLAN dissents.

AH SIN *v.* WITTMAN.

ERROR TO THE SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

No. 245. Submitted April 28, 1905.—Decided May 29, 1905.

Where the petitioner contends that a criminal law of the State is unconstitutional because it denies a class to which he belongs the equal protection of the law, not on the ground that it is unconstitutional on its face, or discriminatory in tendency and ultimate actual operation, but because it is made so by the manner of its administration, in being enforced exclusively against such class, it is a matter of proof and no latitude of intention will be indulged, and it is not sufficient to simply

allege such exclusive enforcement but it must also appear that the conditions to which the law was directed do not exclusively exist among that class and that there are other offenders against whom the law is not enforced.

THE facts are stated in the opinion.

Mr. George D. Collins for plaintiff in error:

As the ordinance is enforced only against Chinese persons it violates the Fourteenth Amendment and is void. *Yick Wo* v. *Hopkins*, 118 U. S. 356, and cases cited.

The state court has so construed the ordinance that it makes criminal the innocent visit to a place, lawfully barricaded and barred against trespassing, by the police, and where, without the privity of the visitor, the articles specified are exposed to view, there being present three or more persons. The right of liberty that a person may visit any place where he is lawfully invited is one which cannot be infringed, except where necessary in the legitimate exercise of the police power of the State. This power cannot be used to prohibit or punish what is entirely innocent or indifferent; it must be exercised in subordination to the Federal Constitution. *Lawton* v. *Steele*, 152 U. S. 137; *Mugler* v. *Kansas*, 123 U. S. 661; *Health Dept.* v. *Trinity Church*, 145 N. Y. 321; *In re Jacobs*, 98 N. Y. 105; *St. Louis* v. *Roche*, 31 S. W. Rep. 915; *Railway Co.* v. *Smith*, 173 U. S. 689; *Minnesota* v. *Barber*, 136 U. S. 320; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 155.

It is the constitutional right of a person to bar, barricade and protect his premises against entry by police officers who have no right to enter and who are nothing but trespassers.

What is done in a barred and bolted house is not in the presence of a man outside. Indeed, not even an officer can, without a warrant, break an outer door to arrest persons within, who are merely engaged in unlawful gaming. 1 Bish. New Crim. Proc. § 197; *McLennan* v. *Richardson*, 15 Gray, 74.

The ordinance is unconstitutional because of its discrimination in favor of the three persons who visit the designated

house or room; their visit is not unlawful, but the visit of the plaintiff in error, while the other three are present, is made criminal and punishable, thus depriving him of the equal protection of the laws.

While an ordinance similar to this was held valid in *Re Ah Cheung*, 136 California, 678, these points were not decided, and the court erred in assuming that police officers have the legal right to enter upon private premises to ascertain whether illegal gambling is being carried on. A police officer, as such, has no right to enter on private premises unless in the execution of process, or to make an arrest for felony, or to prevent an escape; manifestly not to discover, or suppress, or make an arrest for gambling where he has no warrant or process. Cases *supra* and § 8[illegible]6, Penal Code of California.

The system of police espionage prevailing in Europe would not be lawful in the United States, nor in England; it would be unlawful to issue a search-warrant for the purpose of obtaining evidence of crime, by way of discovery. Cooley's Const. Lim., 7th ed., 424, 431; *Boyd* v. *United States*, 116 U. S. 630.

Whatever may be the opinion of the state court this court will place its own construction upon the ordinance, and will not interpolate, in order to make it valid, a provision which it does not contain. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Mr. L. F. Byington and *Mr. I. Harris* for defendant in error:

As to the point that the ordinance is unconstitutional because it is enforced against Chinese only. It may be that as far as is known the Chinese are the only persons who have thus far violated this ordinance. It does not appear that others offended and were not punished.

Mr. Justice McKenna delivered the opinion of the court.

Error to the judgment of the Superior Court of the city and county of San Francisco, State of California, discharging a writ of *habeas corpus*.

Plaintiff in error filed a petition in said court, alleging that he was a subject of the Emperor of China, and was restrained of his liberty by defendant in error, who was the chief of police of the city and county of San Francisco, under a judgment of imprisonment rendered in the police court of said city for the violation of one of its ordinances. The ordinance is as follows:

> "Prohibiting the exposure of gambling tables or implements in a room barred or barricaded or protected in any manner to make it difficult of access or ingress to police officers, when three or more persons are present; or the visiting of a room barred and barricaded or protected in any manner to make it difficult of access or ingress to police, in which gambling tables or implements are exhibited, or exposed, when three or more persons are present.
>
> "Be it ordained by the people of the city and county of San Francisco as follows:
>
> "SEC. 1. It shall be unlawful for any person within the limits of the city and county of San Francisco to exhibit or expose to view in any barred or barricaded house or room, or in any place built or protected in a manner to make it difficult of access or ingress to police officers when three or more persons are present, any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever.
>
> "SEC. 2. It shall be unlawful for any person within the limits of the city and county of San Francisco to visit or resort to any such barred or barricaded house or room or other place built or protected in a manner to make it difficult of access or ingress to police officers, where any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever are exhibited or exposed to view when three or more persons are present.
>
> "SEC. 3. Every person who shall violate any of the provisions of this ordinance shall be deemed guilty of misdemeanor,

and upon conviction thereof shall be punished by a fine not to exceed five hundred ($500.00) dollars, or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

"SEC. 4. This ordinance shall take effect and be in force on and after its passage."

The complaint in the police court charges a violation of the ordinance by the plaintiff in error. The petition for a writ of *habeas corpus* alleges that the ordinance violates section one of the Fourteenth Amendment of the Constitution of the United States, in that it deprives plaintiff in error of the equal protection of the laws, because it is enforced solely and exclusively against persons of the Chinese race, and in that it "unjustly and arbitrarily discriminates in favor of certain visitors and also in favor of certain persons resorting to the house, room or place referred to in said ordinance, as well as in favor of such persons and visitors as resort to or visit such house or room or place when not barred or barricaded or protected in a manner to make the same difficult of access or ingress to police officers." These objections, it is alleged, were made by him in the police court and overruled.

The petition also alleges that plaintiff in error is, by the ordinance, deprived of his liberty without due process of law, in that he is prohibited thereby from visiting, innocently and for a lawful purpose, the house or room or place mentioned in said ordinance.

It is also alleged that the ordinance is in contravention of the treaty between the United States and China.

Upon filing the petition a writ of *habeas corpus* was issued, returnable before the court on the twenty-second of March, 1904, and petitioner admitted to bail in the sum of $10.

The following is the order of the court dismissing the writ and remanding the petitioner to custody:

"This matter came on regularly for hearing this 28th day of March A. D. 1904, the petitioner being represented by his counsel and the people being represented by the district attor-

ney; whereupon it was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are as set forth in the petition on file herein for the writ of *habeas corpus*. The cause was then argued by counsel on the points stated in the said petition and was thereupon submitted to the court for its decision and judgment; and the court being fully advised in the matter does now upon the authority of *Matter of Ah Cheung* (136 California, 678), dismiss the writ of *habeas corpus* heretofore issued herein and remand the petitioner to the custody of the chief of police of the city and county of San Francisco. Ordered accordingly. The petitioner reserved an exception to the judgment."

Plaintiff in error's petition presents the question of the constitutionality of the ordinance under which he was convicted. Section one makes it unlawful for any person to exhibit any gambling implements whatsoever in any "barred or barricaded house or room or other place built or protected in a manner to make it difficult of access or ingress to police officers, where any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever, are exhibited or exposed to view when three or more persons are present."

Section two makes it unlawful to visit or resort to such barricaded house or room.

The ordinance received consideration in the *Matter of Ah Cheung* by the Supreme Court of the State of California. 136 California, 678. It was decided that it refers "only to places which are specially barred and barricaded against intrusion by officers of the law, so that illegal gambling may be protected from discovery. Rightly construed, the words 'barred and barricaded' do not include an ordinary private residence or room, where doors are sometimes locked or bolted in the ordinary method. Neither should it be construed to mean an attempted prevention of ordinary innocent games played with cards, dice or dominoes."

The suppression of gambling is concededly within the police

powers of a State, and legislation prohibiting it, or acts which may tend to or facilitate it, will not be interfered with by the court unless such legislation be a "clear, unmistakable infringement of rights secured by the fundamental law." *Booth* v. *Illinois*, 184 U. S. 425, 429; *Otis* v. *Parker*, 187 U. S. 606. As interpreted by the Supreme Court of the State, the ordinance cannot be so characterized.

It is contended that the ordinance makes criminal "the mere act of innocently visiting such a house or room where the visitor had no knowledge and nothing whatever to do with the barring or barricading of the premises or the prescribed articles." It is hence contended by plaintiff in error that "he is deprived of his liberty without due process of law, in that he is prohibited thereby from visiting, innocently and for a lawful purpose, the house or room or place mentioned in said ordinance." Granting, for argument's sake, that one might visit innocently a barred or barricaded house or room where gambling implements are exhibited or exposed to view, and, if as plaintiff in error alleges in his petition, that he was convicted, notwithstanding he established that he had innocently visited the house mentioned in the charge against him, we are not at liberty to declare the ordinance unconstitutional. Besides, his remedy for that ruling was not by *habeas corpus*. It was by appeal to the Superior Court, which the Penal Code of the State gave him. We may observe he could have raised on such appeal the questions he now raises and have them reviewed by this court.

Plaintiff in error avers "That said ordinance and the provisions thereof are enforced and executed by the said municipality of San Francisco, and said State of California, solely and exclusively against persons of the Chinese race, and not otherwise." The contention is that Chinese persons are thereby denied the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States. *Yick Wo* v. *Hopkins*, 118 U. S. 356, is cited to sustain the contention. And, it is further contended that the fact of

a partial execution of the ordinance is admitted by the order of the Superior Court, wherein it is recited that upon the presentation of the case "It was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are as set forth in the petition on file herein for the writ of *habeas corpus*." There is a misunderstanding between counsel as to what was intended by the stipulation. Counsel for defendant in error contends it was not intended to admit a discrimination in the administration of the law, but to submit the case on such facts as would test and cause a review of the *Matter of Ah Cheung, supra*. This seems to be supported by the order of the court taken as a whole, and it is the understanding of the court we are to ascertain. In other words, we are to ascertain what questions of law and fact were submitted to the court. It cannot be certainly said that the court regarded the fact of discrimination to have been admitted, for it rested its decision on the authority of the *Cheung case*. The court indeed may have regarded the allegation of the petition as lacking in certainty of averment, and hence not bringing the case within the ruling of the *Yick Wo case*. That case concerned the use of property for lawful and legitimate purposes. The case at bar is concerned with gambling, to suppress which is recognized as a proper exercise of governmental authority, and one which would have no incentive in race or class prejudice or administration in race or class discrimination. In the *Yick Wo case* there was not a mere allegation that the ordinance attacked was enforced against the Chinese only, but it was shown that not only the petitioner in that case, but two hundred of his countrymen, applied for licenses, and were refused, and that all the petitions of those not Chinese, with one exception, were granted. The averment in the case at bar is that the ordinance is enforced "solely and exclusively against persons of the Chinese race and not otherwise." There is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against

the ordinance than the Chinese as to whom it was not enforced. No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the *Yick Wo case*, but that it was made so by the manner of its administration. This is a matter of proof, and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State.

We think, therefore, the judgment of the Superior Court should be and it is hereby

Affirmed.

MR. JUSTICE PECKHAM dissents.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, *v.* MEYER.

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

No. 234. Argued April 28, 1905.—Decided May 29, 1905.

A certificate of insurance on the life of a member residing in New York in a mutual association was executed by the officers in Illinois; it provided that it should first take effect as a binding obligation when accepted by the member, and the member accepted it in New York. It contained a provision that it was to be null and void in case of suicide of insured and also one waiving all right to prevent physicians from testifying as to knowledge derived professionally. After the insured died the association defended an action brought in New York on the ground of suicide and claimed that §§ 834, 836, N. Y. Code Civil Procedure, under which the court excluded testimony of physicians in regard to condition of deceased, were inapplicable because the policy was an Illinois

contract and also because in view of the waiver in the certificate their enforcement impaired the obligation of the contract. *Held*, that:

The general rule is that all matters respecting the remedy and the admissibility of evidence depend upon the law of the State where the suit is brought.

Under the circumstances of this case the contract was a New York contract and not an Illinois contract.

As §§ 834, 836, of the N. Y. Code of Civil Procedure, were enacted prior to the execution of the contract involved, they could not impair its obligation.

In cases of this nature this court accepts the construction given by the courts of the State to its statutes, and even if under § 709, Rev. Stat., this court could review all questions presented by the record, the judgment should be affirmed.

THE facts are stated in the opinion.

Mr. Carlos S. Hardy and *Mr. Lawrence G. Goodhart* for plaintiff in error:

The terms of the certificate, the laws and rules of the association, together with the application for membership, constitute the contract which existed between the member and the society. *Sabin* v. *Phinney*, 134 N. Y. 143; *Hellenberg* v. *District No. 1*, 94 N. Y. 580; *Sanger* v. *Rothschild*, 123 N. Y. 577; Niblack on Mut. Ben. Societies, § 166; *Grossman* v. *Supreme Lodge*, 13 St. Rep. 592; *Fullenwider* v. *Royal League*, 180 Illinois, 625.

It was, therefore, competent to introduce evidence which the trial court excluded, tending to prove that Meyer committed suicide.

The contract in suit is within the protection of the non-impairment clause of the Federal Constitution. Art. I, § 9, cl. 7.

This contract is therefore not to have its obligations impaired by any act of the State of New York. 15 Ency. of Law, 2d ed., 1032.

Plaintiff in error is not a resident of New York, but is a Federal corporation, organized under the act of Congress.

The contract consisted of an offer made on the sixth day of September, 1894, and its acceptance.

Pursuant to the terms of the offer, the last act which changed the offer of Meyer into a contract between him and the defendant; that is, the acceptance of the offer, was the issuance of the certificate and no other act, matter or thing was necessary after such acceptance was evidenced in this record to create the obligation of contract on the part of the defendant, and the one party being bound by the contract, it of necessity follows that the other party was likewise bound by the contract.

The acceptance of this offer, which was the act of the creation of the contract between the parties, took place at Chicago, by the execution of the certificate of membership. Nothing remained to be done. The contract had arisen, and the acceptance which made up a contract, took place in Illinois, and it is, therefore, an Illinois contract, and the *lex loci celebrationis* applies. 22 Ency. of Law, 2d ed., 1324; *Bascom* v. *Zediker*, 48 Nebraska, 380; *Waldron* v. *Ritchings*, 9 Abb. Pr. N. S. 359; *Armstrong* v. *Best*, 112 N. Car. 59; *Equitable Life Society* v. *Clements*, 140 U. S. 226; *Carrollton* v. *Am. Credit Co.*, 124 Fed. Rep. 25; *Shelton* v. *Haxtun*, 91 N. Y. 124; *McIntyre* v. *Parks*, 3 Metc. 207; *Milliken* v. *Pratt*, 125 Massachusetts, 374; *Gay* v. *Rainey*, 89 Illinois, 221; *Buchanan* v. *Drovers' Bank*, 55 Fed. Rep. 223; *Western T. & C. Co.* v. *Kilderhouse*, 87 N. Y. 430; *Merchant* v. *Chapman*, 4 Allen, 362; *Sands* v. *Smith*, 1 Nebraska, 108; *Hosford* v. *Nichols*, 1 Paige's Ch. 220; *Jewell* v. *Wright*, 30 N. Y. 264; *Merchants' Bank* v. *Griswold*, 72 N. Y. 480; *Dickinson* v. *Edwards*, 77 N. Y. 576.

The contract is an Illinois contract, made with reference to the laws of that State, and the evidence rejected at the trial is admissible without the waiver and the waiver is entirely effective and the exceptions to its rejection must be sustained.

Where (as in the case at bar) a proposal is made by a person residing in the State of New York, to a corporation having its residence in the State of Illinois, and is in Illinois accepted, the place of acceptance and not the place of proposal is the place of the contract, and is in all respects and for all purposes

an Illinois contract. *Farmers' Sav. Co.* v. *Bazore*, 67 Arkansas, 252; *Zeltner* v. *Irwin*, 25 App. Div. N. Y. 228; *Baum* v. *Birchall*, 150 Pa. St. 164.

And where, by the terms of the offer, it is not to become a contract until accepted, the place of acceptance is the place of the contract.

It will be presumed that the contract is to be performed at the place where it is made (*i. e.*, Chicago, Illinois), and is to be governed by the law of Illinois, unless there is something in the terms of the contract, or in the explanatory circumstances of its execution inconsistent with that intention. *Toledo Bank* v. *Shaw*, 61 N. Y. 294; *Liverpool &c. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 448; *Pritchard* v. *Norton*, 106 U. S. 124; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; *Lewis* v. *Headley*, 36 Illinois, 433; *Smith* v. *Mead*, 3 Connecticut, 353; *DeSobry* v. *De Laistre*, 3 Am. Dec. 535; *Tillinghast* v. *Boston Lumber Co.*, 39 S. Car. 484; *Fisher* v. *Otis*, 3 Pin. (Wis.) 78; *Hilliard* v. *Outlaw*, 92 N. Car. 266; *Kittle* v. *Delamater*, 3 Nebraska, 325; *Young* v. *Harris*, 14 B. Mon. (Ky.) 447; *Hyatt* v. *State Bank*, 8 Bush. 193; *Philadelphia Loan Co.* v. *Towner*, 13 Connecticut, 357.

The contracts rest on like obligations. The rates are the same to all. Should it have to pay in suicide cases more than the stipulated amount in New York, and only the covenanted sum in Illinois, the burdens are unequally placed and equity has not been done.

The interpretation of the contract, and of the rights and obligations of the parties thereto, are regulated by the law prevailing at the place of performance, and how much more is this true when the place of performance is the place of execution. *St. Nicholas Bank* v. *State Nat. Bank*, 128 N. Y. 26; *Jewell* v. *Wright*, 30 N. Y. 259; *Dickinson* v. *Edwards*, 58 How. Pr. 24; *Scudder* v. *Union Nat. Bank*, 91 U. S. 406; *Cox* v. *United States*, 6 Pet. 172; *Morris* v. *East Side Car Co.*, 104 Fed. Rep. 409; *Sandham* v. *Grounds*, 94 Fed. Rep. 83; *Martin* v. *Roberts*, 36 Fed. Rep. 217; *Don* v. *Lippmann*, 5 Cl. & F. 1;

Ferguson v. *Fyffe*, 8 Cl. & F. 121; *Shoe &c. Nat. Bank* v. *Wood*, 142 Massachusetts, 563; *Akers* v. *Demond*, 103 Massachusetts, 323; *Brown* v. *Camden &c. R. Co.*, 83 Pa. St. 316; *First Nat. Bank* v. *Hall*, 150 Pa. St. 466; *Fitzsimons* v. *Guanahani Co.*, 16 S. Car. 192; *Robinson* v. *Queen*, 87 Tennessee, 445; *Cartwright* v. *New York &c. R. Co.*, 59 Vermont, 675; *Hanrick* v. *Andrews*, 9 Port (Ala.), 9; *Belmont* v. *Cornen*, 48 Connecticut, 342; *Vermont State Bank* v. *Porter*, 5 Day (Conn.), 322; *Herschfeld* v. *Dexel*, 12 Georgia, 582; *Greenwald* v. *Freese*, 34 Pac. Rep. 73; *Guignon* v. *Union Trust Co.*, 156 Illinois, 135; *Lowy* v. *Andrews*, 20 Ill. App. 521; *Abt* v. *Trust Co.*, 159 Illinois, 467; *Peoples' Bldg. Assn.* v. *Fowble*, 17 Utah, 122; *Stevens* v. *Gregg*, 89 Kentucky, 461; *Boyd* v. *Ellis*, 11 Iowa, 97; *Arnold* v. *Potter*, 22 Iowa, 194; *Alexandria &c. R. R. Co.* v. *Johnson*, 61 Kansas, 417; *Capryn* v. *Adams*, 28 Maryland, 529; *Marburg* v. *Marburg*, 26 Maryland, 8; *Jordan* v. *Fitz*, 63 N. H. 227; *Whitney* v. *Whiting*, 35 N. H. 462; *Thayer* v. *Elliott*, 16 N. H. 102; *Dyer* v. *Hunt*, 5 N. H. 401; *Knox* v. *Gerhausen*, 3 Montana, 275; *Shacklett* v. *Polk*, 51 Mississippi, 378; *Hart* v. *Livermore Foundry Co.*, 72 Mississippi, 809; *Reg.* v. *Ogilvie*, 6 Can. Exch. 21.

The last essential act to complete the contract was the acceptance of the application, and, as this was done, and could only be done by the terms of the offer contained in the application, by the board of control, at Chicago, Illinois, it is in that place, under all the authorities, that the contract arose.

An executory (bilateral) contract is within the protection of the non-impairment clause. 15 Ency. of Law, 2d ed., 1033, 1039, n. 8.

As to what is the obligation which the plaintiff in error claims that § 834, N. Y. Code Civ. Pro. impairs see *Sturges* v. *Crowninshield*, 4 Wheat. 197; *McCracken* v. *Hayward*, 2 How. 608.

Tested by an examination of the Illinois decisions or by the common law of Illinois which is the same as that of New York the evidence excluded was admissible under the contract.

Communications from a patient to his physician were not privileged at common law. 23 Ency. of Law, 83; *Edington* v. *Aetna Life Ins. Co.*, 77 N. Y. 564; *People* v. *Stout*, 3 Park Crim. Rep. 670; *Kendall* v. *Grey*, 2 Hilton, 300; *Rex* v. *Gibbons*, 1 C. & P. 97; *Brown* v. *Carter*, 9 L. C. Jur. 163; *Duchess of Kingston's Case*, 20 How. St. Trials, 572; *Broad* v. *Pitt*, 3 C. & P. 518; *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; *Goddard* v. *Gardner*, 28 Connecticut 172; *Springer* v. *Byram*, 137 Indiana, 15; *Winters* v. *Winters*, 102 Iowa, 53; *Barnes* v. *Harris*, 7 Cush. 577; *Campau* v. *North*, 39 Michigan, 606; *Territory* v. *Corbett*, 3 Montana, 50; *Steagald* v. *State*, 22 Tex. App. 464; *Boyles* v. *N. W. Mut. Relief Assn.*, 95 Wisconsin, 312; *In re Breuendl*, 102 Wisconsin, 45.

California, Colorado, Indiana, Iowa, Kansas, Michigan, Missouri, Montana, New York, Pennsylvania, and Wisconsin have enacted statutes which affect the admissibility as evidence of communications made to a physician; but no such statute has been enacted in Illinois.

A Federal question having been made and this cause being properly in this court under the writ of error allowed herein, the entire record is to be examined, and if reversible error has been committed, the judgment must be reversed. *Burton* v. *United States*, 196 U. S. 283; *Horner* v. *United States*, 140 U. S. 570, 576; act of March 3, 1891, § 5; § 709, Rev. Stat.

Mr. Otto H. Droege, with whom *Mr. J. Lawrence Friedmann* was on the brief, for defendant in error:

The contract in question was executed in New York and subsequent to the enactment of the statute of that State, which, it is claimed, impairs the obligation of the contract in question.

This finding of fact of the highest court of the State of New York upon this question is conclusive upon this court. *W. U. Tel. Co.* v. *Gottlieb*, 190 U. S. 412, 422; *Dowe* v. *Richards*, 151 U. S. 658. The policy fully bears out the construction placed upon it by the Court of Appeals.

The policy was signed by the officers of the association at Chicago on September 20, and was accepted by the assured September 28, 1894, in New York.

The last act in connection with this contract was performed at New York and the policy did not become effective until the first premium had been paid, and as that was to be paid in New York, where assured resided, therefore, the place of payment is the place of contract. *Equitable Life Assur. Soc.* v. *Clements*, 140 U. S. 226; *Russell* v. *Prudential Life Ins. Co.*, 176 N. Y. 178; *Millard* v. *Brayton*, 177 Massachusetts, 533.

The place of performance of the contract under the policy is necessarily in New York, the residence of the wife of the assured. *Bottomley* v. *Metropolitan Life Ins. Co.*, 170 Massachusetts, 274.

As the contract sued upon in this case was made subsequent to the enactment of the statute in question the non-impairment clause of the Constitution has no application. Code Civ. Pro. of N. Y. §§ 834, 836; *Holden* v. *Met. Life Ins. Co.*, 165 N. Y. 13.

The non-impairment clause of the Constitution prohibits a State from enacting a law which will impair the obligation of an existing contract. This clause was not intended to prohibit a State from enacting a law prohibiting certain contracts in the future. It was intended as a protection to existing contracts only. *Denney* v. *Bennett*, 128 U. S. 489; *Brown* v. *Smart*, 145 U. S. 454. A law in force at the time of making a contract does not impair its obligation. *Ohio* v. *McClure*, 10 Wall. 511; *Churchman* v. *Martin*, 54 Indiana, 380; *Savings Bank* v. *Tripp*, 13 R. I. 621; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388.

Assuming that the contract was made in Illinois upon an action brought in this State, the rules of evidence of the forum in which the action is brought govern. *Nor. Pac. R. R. Co.* v. *Babcock*, 154 U. S. 190; *Miller* v. *Brenham*, 68 N. Y. 82; *Scudder* v. *National Bank*, 1 Otto, 406; *Clarke* v. *Lake Shore Co.*, 94 N. Y. 218; *Sturgess* v. *Vanderbilt*, 73 N. Y. 384.

The rules of evidence adopted in New York govern in a case

of this kind, particularly when the rule has been adopted as a matter of public policy. The courts of the State of New York need not enforce the laws of another State, which are contrary to the public policy of the State of New York.

When defendant came into New York to do business it subjected itself to the laws of that State, which were made for the protection of the citizens thereof. *Davis* v. *Supreme Lodge*, 165 N. Y. 159; *Hoyt* v. *Hoyt*, 112 N. Y. 493; *Weston* v. *Insurance Co.*, 99 N. Y. 56; Story, Conflict of Laws, 7th ed. § 556; Taylor on Evidence, § 917.

The rules of evidence applied in a case are part of the law of the forum. *Wilcox* v. *Hunt*, 13 Pet. 378; *Pritchard* v. *Norton*, 106 U. S. 124; *Bank* v. *Donnally*, 8 Pet. 361.

The non-impairment clause of the Constitution has not the slightest application to this case. *Lehigh Water Co.* v. *Easton*, *supra*.

A judgment of a state court cannot be reviewed because it refuses to give effect to a valid contract, or because the judgment impairs the obligation of a contract. It must be a statute of a State which impairs the obligation of a contract. *Knox* v. *Exchange Bank*, 12 Wall. 379.

Mr. Justice McKenna delivered the opinion of the court.

The plaintiff in error is a corporation organized under an act of Congress approved June 29, 1894. This action was brought against it by defendant in error as payee in a certain benefit certificate issued by it to Emanuel Meyer, husband of Henrietta Meyer, dated September 20, 1894, whereby it insured his life in the sum of $2,000. The defendant in error obtained judgment, which was successively affirmed by the Appellate Division and by the Court of Appeals of New York. The judgment of affirmance was entered in the Supreme Court, to which the case was remitted, and this writ of error was then sued out.

There are two questions in the case, the place of the contract

and the effect of the following provision in the certificate of insurance:

"And I hereby, for myself, my heirs, assigns, representatives and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

This provision takes pertinence from another, whereby "it is agreed that if death shall result by self-destruction, whether sane or insane," the certificate "shall be null and void, and all claims on account of such membership shall be forfeited."

The case was submitted for a special verdict on the question "did Emanuel Meyer, the husband of the plaintiff in error, commit suicide?" The jury answered "No."

On the trial plaintiff in error offered the testimony of three physicians who attended Meyer, as to declarations made by him tending to show that he had taken poison with suicidal intent. It appeared that Meyer did not request the attendance of the physicians—indeed, protested against treatment. The testimony was excluded under sections 834 and 836 of the Code of Civil Procedure of the State. Section 834 forbids any physician "to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," and section 836 provides that section 834 applies "unless the provisions thereof are expressly waived upon the trial or examination . . . by the patient. . . . But a physician . . . may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patients professionally, except confidential communications, and such facts as would tend to disgrace the memory of the patient,

when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient."

The Court of Appeals held that the physicians were "attending a patient in their professional capacity;" that the information that they acquired "was necessary to enable" them "to act in that capacity," and that their testimony was therefore properly excluded under sections 834 and 836. The court also held that the certificate of insurance was a New York contract. Judge Gray and Chief Judge Parker concurred in the former view, but dissented as to the application of the code sections. Plaintiff in error contests both sections. The argument is that (1) it appears from the testimonium clause of the certificate of insurance that it was signed and sealed by plaintiff in error at Chicago, Illinois, and hence is an Illinois contract, and must be construed with regard to the law of that jurisdiction, and as there is no evidence of what that law is it must be assumed to be what the common law of the State is, and under that law the testimony of the physicians was admissible. (2) We quote counsel: "The attempted application of sections 834 and 836 of the Civil Code of Procedure of the State of New York to the contract in the case at bar is a violation of the Federal Constitution."

These contentions may be said to have the same ultimate foundation, but regarding them as separate and independent, the first is based on the ground that plaintiff in error derived the right from its contract with Meyer to the testimony of the physicians, which right attended the contract in whatever forum suit upon the contract might be brought. This is certainly debatable. The general rule is that all matters respecting the remedy and admissibility of evidence depend upon the law of the State where the suit is brought. *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190; *Wilcox* v. *Hunt*, 13 Pet. 378; *Pritchard* v. *Norton*, 106 U. S. 124; *Bank of the United States* v. *Donnally*, 8 Pet. 361.

However, if the certificate of insurance is not an Illinois

contract, all the questions which depend upon that become irrelevant. We think it is not an Illinois contract. Judge Gray, expressing the opinion of the Court of Appeals, disposed of the contention that the certificate of insurance is an Illinois contract briefly but completely. The learned judge said:

"With respect to the first of these questions [that the legislation of New York impaired the obligation of the contract between plaintiff in error and Meyer] raised by the appellant, whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the State of New York and is to be governed, in its enforcement, by the laws of that State. The beneficiary was a resident of this State and there made his application for the insurance. The certificate, issuing upon the application, appears, from its language only, to have been signed by the officers of the defendant at Chicago, in the State of Illinois, on September 20th, 1894; but upon it was printed the following clause: 'I hereby accept this certificate of membership subject to all the conditions therein contained,' and that had the signature of the applicant followed by the words, 'Dated at New York, this 28th day of September, 1894, attest: Louis Riegel, secretary section 2179, Endowment Rank, K of P.' By the terms of the certificate, the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but 'to the further conditions and agreements hereinafter named,' and the clause containing his acceptance, above quoted, was one of those 'further agreements.' From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement indorsed upon the certificate: namely, to accept it 'subject to all the conditions therein contained.' The contract was not completed, in the sense that

it was binding upon either party to it, until it was delivered in New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms, it was first to take effect as a binding obligation, when the required agreement on the part of the member was executed by him."

2. The ground of this contention is not made clear. The language of counsel points to the contract clause of the Constitution as that relied on, and to render it available makes the law of Illinois the obligation of the contract of insurance. But this can only be upon the supposition, which we have seen is erroneous, that the certificate of insurance was an Illinois contract, not a New York contract. Being a New York contract, the code sections did not impair its obligation. They were enacted before the contract was executed, and if they were a valid exercise of legislative power, and we have no doubt they were, it was competent for the State to enact the rule of evidence expressed in them. The case is in this narrow compass, and we need not further follow the details of the argument of counsel that the obligation of the contract of insurance was impaired. But we may observe that there is no question in the case of the validity or the enforcement of the provision in the certificate of insurance against suicide. It is only of the testimony offered to prove suicide. Plaintiff in error sought to prove it by the testimony of a physician, and the attempt encountered the New York Code and the questions we have discussed.

Plaintiff in error further contends that, as in writs of error to the Circuit and District Courts of the United States, we are not restricted to constitutional questions, so in writs of error to a state court we may also decide all questions presented by the record and that it is open for us to decide whether the

relation of doctor and patient existed between one of the witnesses and Meyer. This is attempted to be made out by that part of section 709 of the Revised Statutes, which provides: "The writ [to the final judgment or decree of a state court] shall have the same effect as if the judgment or decree complained of had been rendered or passed on in a court of the United States."

However this may be, in cases like that at bar, we accept the construction the state courts give to state statutes. It is manifest that the question submitted involves the construction of the state statute. Plaintiff in error is not helped by the decision in *Foley* v. *Royal Arcanum*, 151 N. Y. 196. It was there decided that a waiver in a policy of insurance was valid under sections 834 and 836, as they then stood, and their subsequent amendment did not affect the waiver. But the certificate of insurance in the case at bar was made after the amendment to section 836. In *Holden* v. *Metropolitan Life Ins. Co.*, 165 N. Y. 13, it was held that the statute, by virtue of the amendment, "in positive and express terms, requires the waiver to be made upon or at the time of the trial or examination," and "no one except the personal representatives of the deceased patient can waive the provisions of section 834, and it can be waived by them only upon the trial or examination where the evidence is offered or received." *Foley* v. *Royal Arcanum* was referred to and limited to the construction of the statute as it stood before amendment. The opinion of the Court of Appeals in the case at bar follows the *Holden case* and distinguishes prior cases.

Judgment affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* DASHIELL.

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

No. 212. Argued April 11, 1905.—Decided May 29, 1905.

An employé of a railroad company executed a release which, after reciting that he had been injured in an accident, and that it was desirable to maintain pleasant relations, and avoid all controversy in the matter, and specifying certain slight bodily injuries including a scalp wound, released the company for a consideration of thirty dollars from all "claims and demands of every kind whatsoever for or on account of the injuries sustained in the manner and on the occasion aforesaid;" subsequently, after having remained in the company's employ about three months, he sued and obtained a verdict for permanent bodily and mental injuries, resulting from injuries not enumerated in the release, including a fracture of the skull; there was testimony going to show that the fracture was not known when the release was executed and that the permanent disability resulted from non-enumerated injuries. The trial court charged that the release related only to damages sustained by the enumerated injuries and not to those sustained from the non-enumerated injuries. *Held*, not error and that:

General words in a release are to be limited and restrained to the particular words in the recital; and the release in this case, not being for all injuries but only for the particular ones specified, was not a bar to a recovery for damages resulting from the non-enumerated injuries and that the application of this rule is not affected by the words "avoid all controversy in regard to the matter" as those words did not relate to the accident but to the specified injuries.

THE facts are stated in the opinion.

Mr. David D. Duncan, with whom *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* were on the brief, for plaintiff in error:

The release on its face was intended by the parties to apply not only to injuries then known, but to such as might develop thereafter.

The construction put upon the release by the trial judge is an error which works serious injustice, and defeats the inten-

tion of the parties. *Union Pacific* v. *Artist*, 60 Fed. Rep. 365, distinguished; *Greene* v. *Chi. & N. W. R. R. Co.*, 92 Fed. Rep. 873, 880.

As a general principle of construction, applicable to all releases, while mistakes of fact may be sufficient to avoid a release, ignorance of future effects of an injury does not render the instrument inoperative or void. *Currier* v. *Bilger*, 149 Pa. St. 109; *Kane* v. *Traction Co.*, 186 Pa. St. 145; *Eccles* v. *Union Pacific Ry. Co.* 7 Utah, 335; *Nelson* v. *Minneapolis St. Ry.*, 61 Minnesota, 167; *Shooks* v. *Ill. Cent. R. R. Co.*, 115 Fed. Rep. 57; *Chi. & N. W. Ry. Co.* v. *Wilcox*, 116 Fed. Rep. 913.

Since the judgment in this case was affirmed by the Circuit Court of Appeals, the law in Texas, where the cause of action arose, has been settled in favor of the railroad company by the Supreme Court of that State. *Quebe* v. *Gulf, C. & S. F. R. R. Co.*, 10 Tex. C. Rep. 296; *S. C.*, 81 S. W. Rep. 20.

Mr. Ben. M. Terrell for defendant in error, as to the effect of the release:

Where there are general words alone in a release they shall be taken most strongly against a releasor; but where there is a particular recital, and then general words follow, the general words shall be qualified by the particular recital.

If the terms and expressions of an instrument are such as to render it uncertain to the court as to what was the true intention of the parties in the use of such terms and expressions, then the court should hear testimony touching the matters to which said instrument relates and give the instrument such a construction as will obviate any latent ambiguity therein and express the real intention of the parties at the time of its execution, and to ascertain what was contemplated by them when such terms and expressions were so used. *Un. Pac. Ry.* v. *Artist*, 60 Fed. Rep. 365; *Railroad Co.* v. *McCarty*, 94 Texas, 302; *Ramsden* v. *Hylton*, 2 Vesey, 304; *Lumley* v. *Railway*, 76 Fed. Rep. 66; 2 Parsons on Con., ed. 1855, 28;

Jackson v. *Stackhouse*, 1 Cowan, 122; *Hill* v. *Miller*, 76 N. Y. 33; *Clark* v. *Woodruff*, 83 N. Y. 520; Chitty on Con., 6th Am. ed., 778*a;* Bacon's Abr. Release, K; *Payler* v. *Homevsham*, 4 M. & S. 423; *Shook* v. *Illinois Central Ry. Co.*, 115 Fed. Rep. 57.

General words in a release are to be limited and restrained to the particular words contained in the recital. *Stonehewer* v. *Farrer*, 14 L. J., Q. B. 122; *Lyman* v. *Clark*, 9 Massachusetts, 234.

Mr. Justice McKenna delivered the opinion of the court.

This action was originally brought in the District Court of Tarrant County, in the State of Texas, and removed by the railway company to the United States Circuit Court for the Northern District of Texas on the ground that the railway company is a corporation under the law of the United States. The trial resulted in a verdict for the defendant in error for the sum of $7,500, upon which judgment was entered. It was affirmed by the Circuit Court of Appeals.

The action was for personal injuries sustained by defendant in error through the negligence of the railway company. The defendant in error was a conductor on one of the company's freight trains, with which another train collided, "whereby," it is alleged, "plaintiff was seriously, painfully and permanently injured in many parts of his body and especially was he so injured in and about the head, eyes, back, sides, arms and shoulders, and in the organs and functions of his brain and in his entire mental and nervous system, and that as a result of said injuries plaintiff has, since the reception thereof, now is, and in the future will permanently be, helpless, injured and unsound of mind and body, and wholly incapable of transacting any kind of business or of doing any kind of mental or manual work, and that he now is and for the remainder of his life will be cared for and protected, if at all, by his friends and relatives."

And it is also alleged:

"That as a result of said negligence and collision plaintiff further says he was badly burned about the legs, sides, back, arms, hands and head, and that his left eye has become seriously affected by reason of said injury thereto, and by reason of said injury to his head and nervous system affecting said eye, in so much that the value, use and sight of said eye is now greatly impaired and almost entirely lost, and that the sight of his right eye is also now considerably weakened and impaired by reason of its sympathy for his said left eye. That as a result of said negligence and injury plaintiff now suffers, has suffered and for all his life will continue to suffer great physical pain and much mental anguish and pain."

Among other defenses plaintiff in error pleaded a release executed by defendant in error on the second of February, 1901, which is as follows:

"Whereas on and prior to the 24th day of December, 1900, I, G. H. Dashiell, was employed by the Texas and Pacific Railway Co. as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3.15 o'clock A. M. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to wit:

"Extra east eng. 189 struck caboose of extra east eng. 255, $2\frac{1}{2}$ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound.

"And, whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and avoid all controversy in respect to said matter:

"Now, therefore, to that end, and in consideration of thirty and no /100 dollars, to me now here paid in cash by said Texas and Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages and liabilities, of any and every kind or character whatsoever, for or on account

of the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way therefrom.

"It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas and Pacific Railway Company has not and does not agree to bind itself to employ me at or for any time, or in any capacity whatsoever.

"And it is also expressly understood, that all promises and agreements respecting or in any wise relating to the subject hereof, are fully expressed herein and no others are made or exist."

The plaintiff in error further pleaded that defendant in error remained in its service and employment for about three months, and did at said time and at all times thereafter ratify and approve the release and all of its terms and provisions.

To that part of the answer which pleaded the release, defendant in error demurred, and also answered alleging that (1) at the time of its execution and ratification, if it was ratified, he was of unsound mind; (2) he and plaintiff in error were mistaken as to the extent of his injuries and did not contemplate the result set out in his petition; (3) the release was without consideration.

These defenses to the release were disposed of by the court as follows:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit: injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been received by him resulting in the impaired mental powers, and in the partial loss of sight in his left eye. These injuries are those for which damages

are sought in this action, and the consideration of which will be submitted to you in this charge."

This interpretation of the release was affirmed by the Court of Appeals, and presents the only question in the case.

Plaintiff in error contends that the release was intended "to be a final settlement of all claims growing out of the accident." The defendant in error contends that it was a settlement only of the particular injuries enumerated.

An instantly occurring objection to the contention of plaintiff in error is that if the release was a settlement of all claims growing out of the accident, why enumerate the particular injuries. The mere collision of the trains was of no consequence independent of the injuries which resulted, and it was for the injuries satisfaction was to be made, and satisfaction would be measured by the visible injuries, and because measured by them they would be enumerated. If the accident alone was settled for there was a more direct way of accomplishing it.

But let us analyze the release. It commences with the recital of the relation of defendant in error with plaintiff in error, and that he "sustained certain personal injuries in the manner and of the character described, to the best of his knowledge and ability." Then follows this: "Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound." For the injuries compensation was fixed at $30, with the additional consideration, let us say, in order to fully exhibit the contention of plaintiff in error, of the desire mutually entertained by him and defendant in error (we quote from the release), "to maintain amicable and pleasant relations and avoid all controversy in respect to said matter." Upon the word "matter" plaintiff in error puts its main reliance; indeed, makes it dominant of the meaning of the release. The contention is that it refers to the accident, not to the injuries, the latter serving only to identify the accident which "was the cause of action." This is an

attempt to separate the inseparable. The negligence of plaintiff in error caused the accident which resulted in injuries to defendant in error and constituted his right or cause of action, and was the matter to which the release was addressed, but the extent of the release, whether it is confined to the injuries enumerated or includes other injuries, depends upon the other words of the release. They are as follows:

"I hereby release and acquit and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages and liabilities of any and every kind or character whatsoever, for and on account of *the injuries* and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing or hereafter arising or accruing in any way therefrom."

We may admit that there is some ambiguity in these words. The release is "of all claims of every kind and character whatsoever," arising, not from all injuries and damages sustained, but from "*the* injuries and damages sustained." That is the specific or enumerated injuries sustained "in the manner or upon the occasion aforesaid," and the results of those injuries. The words "in the manner and upon the occasion" are a mere tautological identification of the collision and cause of the injuries. They add nothing else whatever to the meaning of the release. This construction gives purpose to the enumeration of the injuries and to all of the provisions of the release. And the rule of construction should not be overlooked that general words in a release are to be limited and restrained to the particular words in the recital. The rule is illustrated by the case of *Union Pacific Railway Company* v. *Artist*, 60 Fed. Rep. 365. Artist was an engineer in the employ of the company and sustained injuries while switching cars. The release passed upon recited that it was "For amount agreed upon in settlement of claim of Andrew S. Artist against the Union Pacific Railway Company on account of injuries received." The injuries were specified, and the release recited

"settlement is in full of all claims and demands of whatever character," and concluded with a release "of all manner of actions, causes of action, suits, debts and sums of money, dues, claims and demands, whatsoever in law or equity." Passing on the effect of the release, Circuit Judge Sanborn, speaking for the Court of Appeals of the Eighth Circuit, applied the rule, citing *Jackson* v. *Stackhouse*, 1 Cow. 122, 126, and 2 Pars. Cont. 633 note.

In *Lumly* v. *Wabash Railroad Company*, 76 Fed. Rep. 66, the rule was also applied by the Circuit Court of Appeals of the Sixth Circuit. The instrument enumerated the injuries received, released the railroad company "from all actions, suits, claims, reckonings, and demands for, on account of, or arising from injuries so as aforesaid received, and any, every and all results hereafter flowing therefrom."

Quebe v. *Gulf, C. & S. F. R. R. Co.* (Texas), 81 S. W. Rep. 20, is cited in opposition. The case can be distinguished. Notwithstanding some of its expressions, we do not think it was the intention of the court to impugn the rule which qualifies general words by the particular words in a recital. The trial court submitted to the jury as a question of fact whether the release was intended to be confined to the injury mentioned in the release. Quebe contended that the release was so confined as a matter of law. The Supreme Court, replying to it, said that the intention was "to release the cause of action rather than to acknowledge receipt of payment for a part of the damage." The court admitted the existence of the rule of construction relied on, and that it was supported by many authorities, but used language which seemed to confine it to cases where the release is attacked on the ground of mistake or fraud, and not to apply it when the interpretation or construction of language of a release is under consideration. This is certainly a doubtful limitation of the rule. The purpose is not to set aside or reform an instrument, but to ascertain its scope and meaning. In the case at bar, however, mistake is charged, and there is evidence tending to show that

defendant in error's skull was fractured, and it was from that the impairment of his sight and mental powers resulted. Such effects, the testimony tended to show, could not result from a simple wound to the scalp. There was testimony going to show, therefore, that the injuries to defendant in error's skull, brain and eye were not known to the parties when the release was executed, and that his impaired mental powers and loss of sight were the results of those injuries, and not the result of those which were enumerated.

In *Union Pacific Railway Co.* v. *Harris*, 158 U. S. 326, a written release was set up in bar of an action for damages against the railway company. Several defenses were made to the release, among others, "that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought." This defense was complicated in the instructions of the court with the defenses of fraud and mental incompetency to understand the terms and extent of the release, and it is difficult to make satisfactory extracts from the charge of the trial court. Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received as bearing on the effect of the release, and this action was affirmed by this court.

It follows from these views that judgment should be and it is

Affirmed.

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

UNION TRUST COMPANY, AND SECURITY WAREHOUSING COMPANY *v.* WILSON.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FROM THE SEVENTH CIRCUIT.

No. 424. Submitted January 6, 1905.—Decided May 29, 1905.

Prior to the petition the bankrupt, a wholesale merchant in Chicago, walled off part of the basement of his store and let it at a nominal rental to a warehouse company and there stored goods, so that they were not seen from the store, and the company alone had access thereto; and it exhibited signs to the effect that it occupied the premises and had possession of the goods, it charged the merchant for storage, and issued to him certificates or receipts for the goods, which he pledged and endorsed over to banks as collateral for loans. In an action brought by the trustee who claimed that goods were in the possession of the bankrupt and not of the warehouse company, *Held*, that:

A bailee asserting a lien for charges has the technical possession of the goods.

The transfer of a warehouse receipt is not a symbolical delivery, but a real delivery to the same extent as if the goods had been transported to another warehouse named by the pledgee.

Upon the facts in this case there is no reason to deny such a place of storage the character of a public warehouse so far as the Illinois statutes are concerned.

The receipts issued in this case were to be deemed valid warehouse receipts so that their endorsement and delivery as security for loans constituted a pledge of the goods represented thereby valid as against attaching creditors, and if the receipts were not valid as warehouse receipts, the transaction constituted an equally valid pledge of the goods as such security.

UPON the facts the following questions of law were certified:

1. Whether, upon the facts above recited, the receipts issued by the warehousing company are to be deemed valid warehouse receipts, so that their endorsement by Flanders to the trust company, as security for loans, constituted a pledge or pledges to the trust company of the leather covered by such receipts, which would be valid against attaching creditors.

2. Whether, if the receipts are not to be deemed valid as *warehouse receipts*, upon the facts above recited, the transactions are to be regarded as constituting pledges of such leather

by Flanders to the trust company, which would be valid as against attaching creditors.

3. If there was no pledge, whether the trust company, under the facts above recited, acquired an equitable lien upon such leather that is superior to the title thereto of the trustee in bankruptcy.

Mr. Henry S. Robbins, with whom *Mr. Charles R. Holden* was on the brief, for the Union Trust Company and the Security Warehousing Company:

The receipts are valid and their endorsement constituted a valid pledge. They were issued under a new system of warehousing, created by the requirements of modern commerce, and resulting from the commendable aim of our business men to cheapen the cost of production and distribution.

The question here is—as it was in the case of bulk warehousing of grain—whether the law will obstruct, or conform to, the requirements of modern commerce.

While it is competent for a State, within constitutional limits, to regulate warehousing within its borders, and declare what shall constitute a warehouse and what a warehouse receipt, Illinois has not, as respects this kind of warehousing, seen fit to adopt any statute imposing any restrictions. Article XIII, § 1, Const. Illinois, 1870; §§ 1, 2, 24, Rev. Stat. Illinois, ch. 114.

The enclosure in this case falls within the definition of a public warehouse; property was stored there for compensation. *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146.

Ample steps were taken to notify anyone seeing the property or the premises, as to actual possession and control.

Placing property in a room, leased to, and kept locked by, a vendee or pledgee or warehouseman, accompanied by a continuous display of signs and placards plainly indicating the vendee's, pledgee's or warehouseman's interest, is a sufficient change of possession to make the transaction a valid one. *Hatch* v. *Oil Co.*, 100 U. S. 124; *Sumner* v. *Hamlet*, 12 Pick.

76; *First Nat. Bank* v. *Penna. Trust Co.*, 124 Fed. Rep. 968; *Bank of Rome* v. *Haselton*, 83 Tennessee, 216; *Sharp* v. *Warehouse Co.*, 9 Reporter, 572; *Kentucky Furnace Co.* v. *City Bank*, 25 Ky. Law Rep. 28; *Fidelity* v. *Roanoke Iron Co.*, 81 Fed. Rep. 439; *Am. Warrant Co.* v. *German*, 126 Alabama, 194; *Dunn* v. *Train*, 125 Fed. Rep. 221; *Allen* v. *Hollander*, 128 Fed. Rep. 159; *Gibson* v. *Stevens*, 8 How. 383; *Lickbarrow* v. *Mason*, 1 Sm. Leading Cas., 7th Am. ed., 1197; *Northrop* v. *Bank*, 27 Ill. App. 527; *Ward* v. *Am. Trust Bank*, 71 Ill. App. 20; *Manufacturing Co.* v. *Mitts Co.*, 101 Virginia, 579; *Rice* v. *Cutler*, 17 Wisconsin, 362.

Even if the first question is answered in the negative the transactions constituted a valid pledge by Flanders to the trust company. *Proctor* v. *Shotwell*, 79 S. W. Rep. 728.

If there was no pledge still the Trust Company acquired an equitable lien that is superior to the title of the trustee in bankruptcy. *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146.

Equitable liens have also been upheld by this court. *Walker* v. *Brown*, 165 U. S. 654.

Such equitable lien is superior to the title of the trustee in bankruptcy, and was so held under the bankrupt act of 1841, *Fletcher* v. *Morey*, 2 Story, 555; *Winsor* v. *McLellan*, 2 Story, 492, and of 1867, *Hauselt* v. *Harrison*, 105 U. S. 401; *Yeatman* v. *Savings Inst.*, 95 U. S. 764; *Stewart* v. *Platt*, 101 U. S. 731.

The bankrupt was estopped from denying the lien of the Trust Company and so is the trustee in bankruptcy. *Re Standard Laundry Co.*, 116 Fed. Rep. 476; *Pennington* v. *Hunt*, 20 Fed. Rep. 195; *Bank* v. *Trust Co.*, 124 Fed. Rep. 968; *Re Rodgers*, 125 Fed. Rep. 169.

As to the trustee taking subject to liens and conditional sales and the enforcement of the lien, see *Re Economical Printing Co.*, 110 Fed. Rep. 514; *Re Garcewich*, 115 Fed. Rep. 87; *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296; *Re Chase*, 124 Fed. Rep. 753; *Chattanooga Bank* v. *Iron Co.*, 102 Fed. Rep. 755; *Re Josephson*, 116 Fed. Rep. 404; *In re Hinsdale*, 111 Fed. Rep. 502; *In re Sewell*, 111 Fed. Rep. 791; *Chesa-*

peake Shoe Co. v. *Seldner,* 122 Fed. Rep. 593; *Re Pekin Plow Co.,* 112 Fed. Rep. 308; *Re Butterwick,* 131 Fed. Rep. 371; *Re Thorp,* 130 Fed. Rep. 371.

Mr. Edwin Burritt Smith, Mr. George Packard and *Mr. Vincent J. Walsh* for Wilson, trustee:

The receipts issued by the Security Company were not true warehouse receipts. Their endorsement and delivery to the Trust Company, therefore, as security for loans, was not a pledge of the leather covered by them which would be valid as against attaching creditors. *Burton* v. *Cunyea,* 40 Illinois, 320; *Thornton* v. *Davenport,* 2 Illinois, 295; *Hamilton* v. *Russell,* 1 Cranch, 309; *Warner* v. *Norton,* 20 How. 448; *Ticknor* v. *McClelland,* 84 Illinois, 471; *Hervey* v. *Locomotive Works,* 93 U. S. 664; *Dooley* v. *Pease,* 180 U. S. 126; *Harkness* v. *Russell,* 118 U. S. 663; *Gibson* v. *Stevens,* 8 How. 384; *Conrad* v. *Atlantic Ins. Co.,* 1 Pet. 445; *Geilfuss* v. *Corrigan,* 95 Wisconsin, 651; *National Bank* v. *Whitehead,* 149 Indiana, 560; *State* v. *Watson,* 141 Missouri, 338; *Shepardson* v. *Cary,* 29 Wisconsin, 34; *State* v. *Bryant,* 63 Maryland, 66; *Staubli* v. *National Bank,* 11 Washington, 426; *Thorne* v. *National Bank,* 37 Ohio St. 254; *Bell & Co.* v. *Glass Works.,* 48 S. W. Rep. 440; *Yenni* v. *McNamee,* 48 N. Y. 614; *Adams* v. *National Bank,* 2 Fed. Rep. 174; *Broadwell* v. *Howard,* 77 Illinois, 305; *National Bank* v. *Wilder,* 34 Minnesota, 149; *Merchants' Bank* v. *Hibbard,* 48 Michigan, 118; *Union Trust Co.* v. *Trumbull,* 137 Illinois, 146; *In re Rodgers,* 125 Fed. Rep. 169; *National Bank* v. *Jagode,* 186 Pa. St. 556; *Moores* v. *Jagode,* 195 Pa. St. 163; *Trust Co.* v. *Dandridge,* 37 S. W. Rep. 288; *Bucher* v. *Commonwealth,* 103 Pa. St. 528.

If the receipts were not true warehouse receipts, the transactions did not constitute a pledge of the leather by Flanders to the Trust Company which would be valid against attaching creditors. *Casey* v. *Cavaroc,* 96 U. S. 467; *Sinsheimer* v. *Whitley,* 111 California, 378; *Second Nat. Bank* v. *Gilbert,* 174 Illinois, 485; *Harding* v. *Eldridge,* 71 N. E. Rep. 115; *Sholes*

v. *Asphalt Co.*, 183 Pa. St. 528; *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146; *George* v. *Pierce*, 123 California, 172; *Watson* v. *Dealy*, 59 N. Y. Supp. 623; *Harington* v. *Blanchard*, 70 N. H. 597; *Story* v. *Cordell*, 13 Montana, 204; *Button* v. *Rathbone*, 126 N. Y. 187; *Caperton* v. *McCormick*, 74 Mississippi, 85; *Martin* v. *Sexton*, 72 Ill. App. 395; *Moores* v. *Redding*, 167 Massachusetts, 322; *Drury* v. *Moores*, 50 N. E. Rep. 618.

The Trust Company had no equitable lien upon the leather enforceable against a trustee in bankruptcy. *Yenni* v. *McNamee*, 48 N. Y. 614; *Adams* v. *Bank*, 2 Fed. Rep. 174; *Dry Dock Company* v. *Foster*, 48 Illinois, 507; *Casey* v. *Cavaroc*, 96 U. S. 467; *Matthews* v. *Hardt*, 79 App. Div. (N. Y.) 570; Hurd's Ill. Rev. Stat., Cap. 95, 1270; Bankruptcy Act, §§ 67, 70; *Hooven* v. *Burdette*, 153 Illinois, 672; *Gilbert* v. *Nat. Cash Register Co.*, 174 Illinois, 288; *Chesapeake Shoe Co.* v. *Seldner*, 122 Fed. Rep. 593; *Re Pekin Plow Co.*, 112 Fed. Rep. 308; *Re Thorp*, 130 Fed. Rep. 371; *Tatman* v. *Humphrey*, 184 Massachusetts, 361; *Re Carpenter*, 125 Fed. Rep. 831; *Re Butterwick*, 131 Fed. Rep. 371; *Canadian Bank of Commerce* v. *McCrea*, 106 Illinois, 381.

Mr. Justice Holmes delivered the opinion of the court.

The questions certified by the Circuit Court of Appeals arise upon the following facts, abridged from the statement submitted to us. The bankrupt, Flanders, was a wholesale leather dealer. He walled off a part of the basement of his place of business, and let it at a nominal rent to the Security Warehousing Company. There were doors to this part, with padlocks bearing the name of the company, which were kept locked and to which the company had the only keys. The company had a key to Flanders' front door and access to the part let to it, at all hours of day or night. No one else could get such access without breaking in. There were two signs on the outside, stating in large letters that the premises were occupied by the company as a public warehouseman. The company received leather from Flanders into this place, issuing

a certificate that it had received the same on storage subject to the order of H. L. Flanders & Co., and identifying the leather; "said commodity to be retained on storage and delivered only upon surrender of this receipt properly endorsed and payment of all charges thereon." To every parcel of the leather was attached a card legibly stating that it was in the possession of the Warehouse Company. The company stipulated in the receipt against liability for damage by fire, water, etc., and by a general contract with Flanders the latter assumed all risk of loss except from dishonesty of the company's servants. Flanders paid the company twenty dollars a month for the first $10,000 worth of property or less, and a dollar a month for each additional $1,000. He also paid the expenses of the company in connection with storing the goods. The certificates of the company issued as above were all endorsed by Flanders to the Union Trust Company as security for loans made by it to him in the regular course of business. If Flanders desired to remove any part of the leather he paid the necessary sum to the Trust Company, was entrusted with the receipts, got the Warehouse Company to send a man to unlock the place of enclosure and allow the removal, endorsing on the receipt the amount delivered if less than all, and then, as the case might be, returned the receipt to the Trust Company or surrendered it into the Warehousing Company's hands.

Flanders became bankrupt and his trustee filed a bill in the District Court, alleging the storage arrangement to have been fraudulent, and claiming the leather on the ground that it always had been in the possession of Flanders, and therefore had come to the possession of the trustee. Upon these facts the Circuit Court of Appeals certifies the following questions:

"1. Whether, upon the facts above recited, the receipts issued by the warehousing company are to be deemed valid warehouse receipts, so that their endorsement by Flanders to the trust company, as security for loans, constituted a pledge or pledges to the trust company of the leather covered by such receipts, which would be valid against attaching creditors.

"2. Whether, if the receipts are not to be deemed valid as *warehouse receipts*, upon the facts above recited, the transactions are to be regarded as constituting pledges of such leather by Flanders to the trust company, which would be valid as against attaching creditors.

"3. If there was no pledge, whether the trust company, under the facts above recited, acquired an equitable lien upon such leather that is superior to the title thereto of the trustee in bankruptcy."

No question under the statutes of Illinois is suggested. Apart from statute a warehouse receipt simply imports that the goods are in the hands of a certain kind of bailee. A bailee asserting a lien for charges has the technical possession of the goods. But it always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another to whom the owner has sold, mortgaged or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge. Therefore it is common for certain classes of bailees to give receipts to the order of the bailor, because by a receipt in that form the bailee assents in advance to becoming bailee for any one who is brought within the terms of the receipt by an endorsement of the same. That, at least, is the argument of Benjamin on Sales, 2d ed., 676 *et seq.*, 6th Am. ed., 795, § 817, is the understanding of merchants, and is the principle adopted as to public warehouse receipts by the statutes of Illinois, Rev. Stat., c. 114, § 24, and probably adopted by the courts, apart from statute. *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146, 173; *Northrop* v. *First Nat. Bank of Chicago*, 27 Ill. App. 527; *Millhiser Manuf. Co.* v. *Gallego Mills Co.*, 101 Virginia, 579, 589; *Hallgarten* v. *Oldham*, 135 Massachusetts, 1, 10. The transfer of the receipt is not a symbolical delivery; it is a real delivery to the same extent as if the goods had been transported to another warehouse named by the pledgee.

If then the Security Warehousing Company had possession

of the goods, it had it as bailee, and, unless some reason appears to the contrary, the endorsement of its receipt, the same being drawn to Flanders' order, was a delivery sufficient to validate the pledge. But there can be no doubt on the facts as stated, without more, that the company had possession of the goods. It had them under lock and key in a place to which it had a legal title and right of access by lease. Even if it had not had a right of access to the place it would have had possession of the contents of the room, according to the analogy of the settled law that a carrier who breaks bulk and takes the goods is guilty of larceny. Y. B. 13 Ed. IV. 9, pl. 5. The act is a trespass as agreed in Keilway, 160, pl. 2. *Ward* v. *Turner*, 1 Dick. 170, 172; *S. C.*, 2 Ves. Sr. 431, 443; *Moore* v. *Mansfield*, 182 Massachusetts, 302, 303. So, again, if the goods had been in a place under the exclusive control of the company, even without the company's knowledge they would have been in the company's possession. *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562, 568; *Reg.* v. *Rowe*, Bell, C. C. 93. See *Barker* v. *Bates*, 13 Pick. 255, 257, 261; *Northern Pacific Railroad* v. *Lewis*, 162 U. S. 366, 378, 379, 382. When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense. *Gough* v. *Everard*, 2 H. & C. 1, 8; *Ancona* v. *Rogers*, 1 Ex. Div. 285.

We deal with the case before us only. No doubt there are other cases in which the exclusive power of the so-called bailee gradually tapers away until we reach those in which the courts have held as matter of law that there was no adequate bailment. *Bank* v. *Jagode*, 186 Pa. St. 556; *Drury* v. *Moors*, 171 Massachusetts, 252. So, different views have been entertained where the owner has undertaken to constitute himself a bailee by issuing a receipt. We may concede, for purposes of argument, that all the forms gone through in this case might be emptied of significance by a different understanding between the parties, which the form was intended to disguise. But no such understanding is stated here, and it cannot be assumed.

There is no reason even to infer it as a conclusion of fact, if such inferences were open to us to draw. It is true that the evident motive of Flanders was to get his goods represented by a document for convenience of pledging rather than to get them stored, and the method and amount of compensation show it. But that was a lawful motive and did not invalidate his acts if otherwise sufficient. He could get the goods by producing the receipt and paying charges, of course, but there is no hint that the company did not insist upon its control. It is suggested that the goods gave credit to the owner. But, in answer to this, it is enough to say that the goods were not visible to any one entering the shop. They could be surmised only by going to the basement, where signs gave notice of the company's possession, and probably could be seen only if the company unlocked the doors. There is nothing stated which warrants us in doubting that all the transactions were in good faith.

Although the first question does not refer in terms to the statutes of Illinois it is proper to add that we see no sufficient reason for denying to the place of storage the character of a public warehouse. "Public warehouses of Class C shall embrace all other warehouses or places where property of any kind is stored for a consideration." Rev. Stat. c. 114, § 2. These sweeping words embrace any place so used, whether owned or hired by the warehousemen, and, if so, they embrace as well a place hired of the owner of the goods as one hired of anybody else. See *Sumner* v. *Hamlet*, 12 Pick. 76; *Gough* v. *Everard*, 2 H. & C. 1. If we are right in this, then the endorsement of the receipts transferred the property in the leather by the express terms of the statute already referred to. Rev. Stat., c. 114, § 24. If not, we should come to the same result by the common law, for even if we did not adopt the argument of Mr. Benjamin to which we have referred above, against the earlier view of Blackburn on Sales, 297, followed in *Farina* v. *Home*, 16 M. & W. 119, still all the authorities agree that, if an assent in advance is not enough, yet as soon as the bailee

attorns to the assignee the delivery is complete. The statement has not this point in view. But we should suppose that a fuller statement would make it plain that the Warehouse Company knew and assented to the transfers to the Trust Company, if that be material, which we do not imply. See also *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146, 173; *Millhiser Manuf. Co.* v. *Gallego Mills Co.*, 101 Virginia, 579, 589; *Gibson* v. *Stevens*, 8 How. 384, 399.

As we answer the first and second questions in the affirmative, it is unnecessary to consider the third.

It will be so certified.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE DAY dissent.

WHITNEY *v.* WENMAN.

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

No. 576. Submitted April 24, 1905.—Decided May 29, 1905.

The bankruptcy court has jurisdiction of a proceeding in the nature of a plenary action brought by the trustee to determine controversies in relation to property held by the bankrupt or by other parties for him, and the extent and character of liens thereon; and this applies to a suit brought against parties claiming possession of goods in the bankrupt's store, as warehousemen, under a nominal lease of the store from the bankrupt.

A receiver in bankruptcy is appointed as a temporary custodian and it is his duty to hold possession of property until the termination of the proceedings or the appointment of the trustee, and meanwhile the bankruptcy court has possession of the property and jurisdiction to hear and determine the interests of those claiming liens thereon or ownership thereof, and this jurisdiction cannot be affected by the receiver turning the property over to any person without the authority of the court.

EDWARD B. WHITNEY, as trustee in bankruptcy of Daniel LeRoy Dresser and Charles E. Riess, members of the firm of Dresser & Company, filed a bill in equity against Charles H. Wenman, Stuyvesant Fish, George C. Boldt, the Security Warehousing Company and others, in the District Court of the United States for the Southern District of New York. Upon demurrer to the bill, the court dismissed the same for want of jurisdiction. The allegations of the bill set forth in substance: That on September 17, 1903, the complainant was duly appointed trustee in bankruptcy of Dresser and Riess, doing business as Dresser & Company, and that as such trustee he qualified on September 29, 1903. That during the time mentioned in the bill, and up to March 7, 1903, Dresser & Company were carrying on business as merchants in the city of New York. That the defendants, the Security Warehousing Company and the United States Mortgage and Trust Company, were corporations of the State of New York. That the defendant, Charles H. Wenman, acted as the agent and attorney in fact of the defendants Fish and Boldt. Prior to March 7, 1903, the bankrupts, partners as Dresser & Company, became insolvent, and on that day assigned all their property for the benefit of their creditors. On March 9, 1903, upon the petition of certain creditors, Robert C. Morris and Charles S. Mackenzie were appointed by the District Court for the Southern District of New York receivers in bankruptcy of Dresser & Company. That at least six months prior to March 7, 1903, the firm of Dresser & Company had been insolvent and unable to pay its debts, and was only able to continue in business by borrowing large sums of money, and in order not to injure the creditors it became necessary to pledge the goods, wares and merchandise in which the company was dealing, but to conceal said pledge from the unsecured creditors. That the goods dealt with by Dresser & Company consisted for the most part of Japanese silks imported for sale. For the purpose of pledging these goods with certain of the creditors, without the knowledge of the other creditors, Dresser & Company entered

into a plan or arrangement with the defendants, the Security Warehousing Company, to wit, a certain alleged lease of the store, display and sales rooms was made by Dresser & Company to the Security Warehousing Company at a nominal rental of one dollar a year, in order that thereafter the said warehousing company might claim that the goods and display and sales rooms belonged to it. That the goods in reality belonged to the firm of Dresser & Company, and there was no change of location or ownership of the said goods, but Dresser & Company remained in possession and control thereof and permitted the display of them in the same manner as that firm had done prior to the pretended storage. Dresser & Company exhibited the goods to their customers, sending portions to dyers and manipulators, and generally handled and used them as if they were their own, and free and clear from all claims and encumbrances. That the Security Warehousing Company exercised no supervision or control over the said goods, but merely employed, or pretended to employ, the confidential clerk and secretary of Daniel LeRoy Dresser and Dresser & Company, as its alleged custodian, in whose charge it was claimed the goods had been placed at a salary of one dollar per month. She exercised no control or supervision over the goods, but during the period of her employment continued to act as the confidential secretary of the bankrupts. The Security Company also placed a few small tags on the shelves and bins in which the goods were stored and displayed for sale, upon which tags the name of the Security Company was printed, but the tags were not easily discovered, and in most instances were so placed as not to be readily seen and were not of such a character as to identify the goods.

The bill then avers the issue of certain warehouse receipts upon said goods, representing that they had been stored with the company at its warehouse at 15–17 Greene street, New York, which was, in fact, the store of Dresser & Company. Then follow allegations as to the delivery of the warehouse receipts, some to the United States Mortgage and Trust Company and

some to the defendant Wenman for himself or defendants Fish and Boldt. And it is averred that the security instruments did not describe the goods in such a way as to make them capable of identification. That Daniel LeRoy Dresser was one of the incorporators of the Security Warehousing Company, and one of its directors and stockholders. That at the time of the delivery of the security instruments Charles S. Mackenzie was general counsel of the Security Company, and was fully cognizant of the system of pretended storage before described, and was also personal counsel for Daniel LeRoy Dresser. That after the delivery of the warehouse instruments Dresser & Company continued to display and sell and dispose of the goods and manage the business in the same manner that they had been in the habit of doing prior to the said pretended storing, without objection from the Security Warehousing Company. Then follow allegations as to the knowledge or opportunity for knowing on the part of the defendants of the situation above described. When the receivers Morris and Mackenzie went into possession of the stock of Dresser & Company on March 9, 1903, upwards of $150,000 worth of the goods was still in the possession and under control of Dresser & Company. After the receivers had taken possession of the store the Security Warehousing Company notified them that it claimed that the store display and sales rooms belonged to it under the alleged lease, and that the goods therein contained had been stored with Dresser & Company, and requested the delivery of all the goods to it. The receivers did not dispute this claim of the Warehousing Company, but complied with it. Neither the court or the unsecured creditors of Dresser & Company were advised of the facts concerning this claim or the character of the pretended storing upon which the issue of the so-called warehouse receipts was based. Then follow allegations as to the sale of the goods, and that the Security Warehousing Company claimed that certain of the goods supposed to have been stored with Dresser & Company and covered by the security instruments had been sold by

Dresser & Company before March 7, 1903, amounted to the sum of $22,000. That said receivers collected upwards of $20,000 of accounts receivable of Dresser & Company, and paid the same over to the Security Warehousing Company. That these goods were sold and the accounts collected by the warehousing company before the appointment of complainant as trustee in bankruptcy of Dresser & Company. None of said goods or their proceeds have come into the hands of the trustee except the sum of $1,944.93, paid to the complainant by the Security Company. Then follow averments as to the payment of the proceeds of the goods sold and accounts collected to the other defendants and the holders of said warehouse receipts. It is averred that the books and records of the Security Warehousing Company are lost or destroyed. It is alleged that the attempt to create a lien upon the goods in the manner aforesaid was contrary to law and the statutes of the State of New York. That the silk goods had been sold at much less than their value. The prayer of the bill is that the security instruments be declared invalid, fraudulent and void, and that the complainant be decreed the owner of the goods and accounts, and that the defendants be required to account for the value of the same, and for general relief as the nature of the case may require.

Mr. Robert D. Murray, *Mr. J. Aspinwall Hodge* and *Mr. George H. Gilman* for appellant:

The District Court had jurisdiction over this suit, because the subject matter thereof is in its custody. *White* v. *Schloerb*, 178 U. S. 542; *Bardes* v. *Bank*, 178 U. S. 524, distinguished.

Where a court of equity has taken possession of property for any reason, and has placed it in the custody of receivers, sequestrators or custodians, it will maintain its possession of such property and will determine all rights with respect thereto, even though the actual physical custody of the property may have been parted with by its officers, either under void orders of the court, *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 632,

or where the property has been obtained from the receiver or other court officer, through collusion with him (as in this case) or by fraud. *De Winton* v. *Brecon*, 28 Beavan, 200. See also *Morgan's Co.* v. *Texas Central*, 137 U. S. 171, 201; *Smith* v. *Express Co.*, 135 Illinois, 279, 292; *Sharpe* v. *Doyle*, 102 U. S. 686.

Section 70*e* of the bankrupt act, as amended, expressly confers jurisdiction upon the District Court of a suit to set aside transfers made prior to the filing of a petition.

Appellees are not *bona fide* holders of the silks and the accounts. *Shaw* v. *Railroad Co.*, 101 U. S. 557; *Pollard* v. *Vinton*, 105 U. S. 7. As to rights of the holders of warehouse receipts see *Friedlander* v. *Texas & Pacific*, 130 U. S. 415, 424; *The Carlos F. Roses*, 177 U. S. 655, 665. The goods never having been really stored the receipts are voidable. *Yenni* v. *McNamee*, 45 N. Y. 614.

As to *Gregory* v. *Atkinson*, 127 Fed. Rep. 183, cited and referred to by the appellees to effect § 70*e*, does not give jurisdiction where the defendants do not consent, see cases holding that § 70*e* does give jurisdiction without the consent of the defendants. *Horskins* v. *Sanderson*, 132 Fed. Rep. 415, 416; *In re Leeds Woolen Mills*, 129 Fed. Rep. 922, 926; *Pond* v. *N. Y. Nat. Exch. Bank*, 124 Fed. Rep. 992; *Lawrence* v. *Lowrie*, 133 Fed. Rep. 995; *Delta National Bank* v. *Easterbrook*, 133 Fed. Rep. 521.

The question has not, as yet, been passed upon by this court.

In construing a statute, a meaning must be given to each and every part thereof, and the plain intent as expressed in the amendment to § 70*e*, that suits of the character therein enumerated may be brought in the District Court, requires a construction which will confer such jurisdiction, and not a construction such as is contended for by the appellees, which will render its language meaningless.

Section 23*b* is a general provision and § 70*e* is a special one. Where there is any conflict between a general and a special

provision, the universal rule of construction requires that the special provision shall be considered as an exception to the general rule, contained in the general provision. *Townsend* v. *Little*, 109 U. S. 504, 512; *United States* v. *Nix*, 189 U. S. 199, 205.

Appellees having demurred only as to jurisdiction cannot now bolster up their case by arguing the merits of the cause of action as if they had demurred generally. This they cannot do. The certificate raises only the question of jurisdiction of courts of the United States as such. *Schweer* v. *Brown*, 195 U. S. 171; *Lucius* v. *Cawthorn-Coleman Co.*, 190 U. S. 149. The merits of the case are not before this court.

Appellees confuse the New York lien law as to chattel mortgages with the personal property law as to pledges and other charges. *Hangen* v. *Hachemeister*, 114 N. Y. 566; *Southard* v. *Benner*, 72 N. Y. 424; *Russell* v. *Winne*, 37 N. Y. 591. And the question of jurisdiction alone can be considered. Act of March 3, 1891, c. 517, § 5; *Hennessy* v. *Richardson Drug Co.*, 189 U. S. 25, 33; *Huntington* v. *Laidley*, 176 U. S. 668, 679; *McDonald* v. *Smalley*, 1 Pet. 620.

As to *Re Economical Printing Company*, 110 Fed. Rep. 514, cited to effect, that there should have been an allegation in the bill that there was a judgment creditor in existence, in whose right the trustee was acting, see *In re Garcewich*, 115 Fed. Rep. 87.

The lien law of New York provides that transactions such as are disclosed by the appellant's bill, shall be "absolutely void as against creditors."

Muller v. *Nugent*, 188 U. S. 1, 14, holds that the filing of a petition in bankruptcy is in effect a levy of attachment and it is settled law of the State of New York that an attaching creditor may attack an invalid chattel mortgage.

Other Circuit Courts of Appeals have refused to follow *Re Economical Printing Company, supra.* See *Chesapeake Co.* v. *Seldner*, 112 Fed. Rep. 593; *Re Antiago Screen Co.*, 123 Fed. Rep. 249; *Re Rodgers*, 125 Fed. Rep. 169; *Re Pekin Plow Co.*,

112 Fed. Rep. 308; *Spencer* v. *Duplex Co.*, 112 Fed. Rep. 638, 643; *In re Beede*, 126 Fed. Rep. 853; *Mueller* v. *Bruss*, 112 Wisconsin, 406, 412, and cases cited.

Hewit v. *Berlin Co.*, 194 U. S. 302, held in construing § 112 of the lien law of New York with respect to conditional sales, that a trustee in bankruptcy has no standing to attack a voidable transaction thereunder.

Mr. Edwin B. Smith for appellee, Security Warehousing Company, as to question of jurisdiction:

The fair presumption as to a court of limited jurisdiction is against the jurisdiction until the contrary appears. *Thomas* v. *Board*, 195 U. S. 210; *People* v. *Spencer*, 55 N. Y. 1; *Fife* v. *Whittell*, 102 Fed. Rep. 539; *Pacific Railway* v. *Los Angeles*, 194 U. S. 118. The history of the act shows this jurisdiction never was intended; that § 70*e* affects fraudulent conveyances running back through the period of the State's statutes of limitations which are a fraud on creditors though made without reference to the bankrupt act. These long past transactions are left to the state courts unless defendant consents to the jurisdiction of a Federal court. Collier on Bankruptcy, 4th ed., 250; *Gregory* v. *Atkinson*, 127 Fed. Rep. 183; Brandenberg, 369, § 578.

To maintain an equity suit under § 70*e*, by a trustee, these facts must be averred with the certainty and positiveness required in equity pleadings, viz.: (1) A transfer by the bankrupt; (2) such as his creditor might have avoided; (3) that the defendant is not a *bona fide* holder for value; (4) that the proposed defendant has consented to the bringing and prosecution of the suit in the Federal court. Before a party can avail himself of the statutory right he must show upon the record that his is a case which comes within the provisions of the statute. *Pacific Railway* v. *Los Angeles*, 194 U. S. 118.

In this case the bill does not properly aver any one of the necessary jurisdictional facts. It is immaterial how this failure to state jurisdictional facts is called to the attention of the

court. *Chase* v. *Palmer*, 23 Maine, 345; *Richards* v. *Lake Shore*, 124 Illinois, 521, and the presumptions are against it. Wels. Eq. Pl. 10, 126; M. & F. 128; *Vernon* v. *Vernon*, 2 Myl. & Cr. 145; *Clark* v. *Dillon*, 97 N. Y. 373.

The transfer by the bankrupt was not one that any creditor might have avoided. A general lien was created at common law and sustained by statute. *Brooks* v. *Hanover Bank*, 26 Fed. Rep. 302; *Stallman* v. *Kimberly*, 121 N. Y. 393; *Yenni* v. *McNamee*, 45 N. Y. 614. A trustee in bankruptcy can avoid a transfer only to the extent that a judgment creditor could. *Re N. Y. Economical Printing Co.*, 49 C. C. A. 133; *Re Kellogg*, 112 Fed. Rep. 52; *Hewit* v. *Berlin*, 194 U. S. 302; *Thompson* v. *Fairbanks*, 196 U. S. 526; *In re Garcewich*, 115 Fed. Rep. 87.

The bill does not charge that defendants were holders for value.

It is not the defendant's consent that is made a condition precedent to jurisdiction, but that of the person whom the trustee proposes to make a defendant.

A "proposed" defendant is not one *in esse*, but a person intended to be made such *in futuro*. 27 App. Div. N. Y. 110. The purpose to sue him in a bankruptcy court must be communicated, and assented to by him, before service of the summons; for that service makes him, *eo instanti*, a defendant, calling him into court to make some defense. 184 U. S. 26.

Section 23 does not say simply no suit shall be brought without the consent of the proposed defendant; it adds "or prosecuted." Consent to the prosecution of a suit requires something more than merely appearing to demur. The *Bardes case* went up on a demurrer to the jurisdiction. 178 U. S. 525; *In re Thomson*, 112 Fed. Rep. 946; *Donnelly* v. *Cordage Co.*, 66 Fed. Rep. 613; *St. Louis Ry.* v. *McBride*, 141 U. S. 127; *Louisville Traction Co.* v. *Cominger*, 184 U. S, 26; *In re Mitchie*, 116 Fed. Rep. 725; *In re Steuer*, 104 Fed. Rep. 977; *In re Hembey-Hutchinson Pub. Co.*, 105 Fed. Rep. 909.

Mr. Louis F. Doyle for appellees, Wenman and others:

The bill is not framed as an application for the exercise of the summary jurisdiction of the court of bankruptcy and it seeks relief wholly beyond that jurisdiction. *Bardes* v. *Bank*, 178 U. S. 524; *Whitney* v. *Wenman*, 96 App. Div. N. Y. 290; *White* v. *Schloerb*, 178 U. S. 542; *Mueller* v. *Nugent*, 184 U. S. 1; *Minnesota* v. *St. Paul Co.*, 2 Wall. 609; *Morgan Co.* v. *Tex. Cent. Ry.*, 137 U. S. 171; *Sharpe* v. *Doyle*, 102 U. S. 171, distinguished.

On the admitted facts it does not appear that the property was *in custodia legis*. See *Bush* v. *Export Co.*, U. S. Circuit Ct., E. D. Tennessee, August, 1904.

Jurisdiction is not conferred by § 70*e*. *Bardes* v. *Bank*, 178 U. S. 524, and cases cited by other counsel for appellees.

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

This case is here upon the question of the jurisdiction of the District Court to entertain the action. The case in the court below was dismissed for want of jurisdiction, the demurrer having been sustained solely upon the ground that the bankruptcy act of July 1, 1898, as amended by the act of February 5, 1903, gave the court no jurisdiction. We are not concerned with the merits of the controversy further than the allegations concerning the same are necessary to be considered in determining the question of the jurisdiction of the District Court as a court of bankruptcy to entertain this suit. It is sufficient to say that in our opinion the bill made a case which presented a controversy for judicial determination as to the right of the defendants to hold the lease and property under the alleged security of the warehouse receipts undertaken to be issued in the manner set forth in the petition. Whether it will turn out upon full hearing that the lease and securities are good is not now to be determined. The bill makes allegations which raise a justiciable controversy as to the validity

of the alleged lien in view of the lack of change of possession of the goods under the circumstances set forth. The question for this court now to determine is whether the bankruptcy court, on the allegations made and admitted as true by the demurrer, had jurisdiction to determine the controversy. It is positively alleged in the bill that the supervision and control of the goods continued in the firm of Dresser & Company, and that the alleged doings of the Security Warehousing Company and its agents were merely colorable and did not, in fact, change the control over the goods, nor give any notice of the alleged lease of the Warehousing Company, nor the lien of the instruments thereby secured. It is further positively averred that when the receivers were appointed upwards of $150,000 worth of goods belonging to the firm were in the possession and under the control of the bankrupts, and after the receivers had taken possession of the store the goods were delivered up to the Warehousing Company without any order or attempt to procure the sanction of the court to such surrender of the property. Under these circumstances had the bankruptcy court jurisdiction to determine the rights of parties claiming interests in the property?

Section 2 of the bankrupt act of 1898, among other things, confers jurisdiction upon the District Courts of the United States, as courts of bankruptcy, (3) to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" (7) to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

This section, in connection with section 23, was before this court for construction in the case of *Bardes* v. *Hawarden Bank*, 178 U. S. 524, in which case it was held that section 23*b* of the act as it then stood prevented the courts of the United

States from entertaining jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the bankruptcy proceedings, without the consent of the defendants. In that case it was held that the power conferred in subdivision 7 of section 2, above quoted, was limited by the direct provisions of section 23 as to the jurisdiction of suits brought by trustees, the effect of which section was to compel the trustee to resort to the state courts to set aside conveyances of the character named where an alleged fraudulent transfer had been made by the bankrupt before the beginning of the proceedings, unless jurisdiction in the District Court was by consent. This case, *Bardes* v. *Bank*, did not determine the right of the District Court to entertain jurisdiction of a proceeding having in view the adjudication of rights in or liens upon property which came into the possession of the bankruptcy court as that of the bankrupt; the right to proceed concerning which would seem to be broadly conferred in the section of the bankruptcy act above quoted. At the same term at which the *Bardes case* was decided, this court determined the case of *White* v. *Schloerb*, 178 U. S. 542. In that case it was held that, after an adjudication in bankruptcy, an action in replevin could not be brought in the state court to recover property in the posesssion of and held by the bankrupt at the time of the adjudication, and in the hands of the referee in bankruptcy when the action was begun, and that the District Court of the United States, sitting in bankruptcy, had jurisdiction by summary process to compel the return of the property seized. In the case of *Bryan* v. *Bernheimer*, 181 U. S. 188, it appeared that the bankrupt had made a general assignment for the benefit of his creditors nine days before the filing of his petition in bankruptcy, and the assignee sold the property after the bankruptcy proceedings had been begun, after the adjudication in bankruptcy, but before the appointment of a trustee. Upon petition of creditors the District Court ordered that the marshal take possession, and

the purchaser appear within ten days and propound his claim to the property, or, failing so to do, be declared to have no right in it. The purchaser appeared and set up that he bought the property in good faith from the assignee, and prayed the process of the court that the creditors might be remitted to their claim against the assignee for the price, or that same be ordered to be paid into court by the assignee and paid over to the purchaser who was willing to rescind the purchase upon receiving his money. It was held that the purchaser had no title to the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court, bringing in the assignee if necessary. In that case Mr. Justice Gray, who also delivered the opinion in the *Bardes case*, said:

"The bankrupt act of 1898, § 2, invests the courts of bankruptcy 'with such jurisdiction, at law and in equity, as to enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms'; to make adjudications of bankruptcy; and, among other things, '(3) appoint receivers or the marshals, upon the application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;' '(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided.' The exception refers to the provision of section 23, by virtue of which, as adjudged at the last term of this court, the District Court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bank-

ruptcy. *Bardes* v. *Hawarden Bank,* 178 U. S. 524; *Mitchell* v. *McClure,* 178 U. S. 539; *Hicks* v. *Knost,* 178 U. S. 541."

This case (*Bryan* v. *Bernheimer*) would seem to limit the effect of the decision in the *Bardes case* to suits against third persons on account of transfers made before the bankruptcy, and to recognize the right of the bankruptcy court to adjudicate upon rights in property in the possession of the court belonging to the bankrupt. In the case of *Mueller* v. *Nugent,* 184 U. S. 1, this court recognized the power of the bankruptcy court to compel the surrender of money or other assets of the bankrupt in his possession or that of some one for him. In that case the decisions in *Bardes* v. *Hawarden Bank, White* v. *Schloerb* and *Bryan* v. *Bernheimer* were reviewed by the Chief Justice, who delivered the opinion of the court, and it was held that the filing of a petition in bankruptcy, is a *caveat* to all the world, and in effect an attachment and injunction, and that on adjudication title to the bankrupt's estate became vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court.

We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the Federal courts. *In re Whitener,* 105 Fed. Rep. 180; *In re Antiago Screen Door Co.,* 123 Fed. Rep. 249; *In re Kellogg,* 121 Fed. Rep. 333. In the case of *First National Bank* v. *The Chicago Title & Trust Company,* decided May 8 of this term, *ante,* p. 280, in holding

that the jurisdiction of the District Court did not obtain, it was pointed out that the court had found that it was not in possession of the property. Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure.

It is insisted that in the present case the property was voluntarily turned over by the receiver, and thereby the jurisdiction of the District Court, upon the ground herein stated, is defeated, as the property is no longer in the possession or subject to the control of the court. But the receiver had no power or authority under the allegations of this bill to turn over the property. He was appointed a temporary custodian, and it was his duty to hold possession of the property until the termination of the proceedings or the appointment of a trustee for the bankrupt. The circumstances alleged in this bill tend to show that the transfer of the property was collusive, and certainly if the allegations be true, it was made without authority of the court. The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by the receiver, without authority of the court. Whether the rights of the claimants to the property could be litigated by summary proceedings, we need not determine. What we hold is that under the allegations of this bill the District Court had the right in a proceeding in the nature of a plenary action, in which the parties were duly served and brought into court, to determine their rights, and to grant full relief in the premises if the allegations of the bill shall be sustained. This view renders it unnecessary to consider the effect of the amendments of the bankruptcy act, passed February 5, 1903, broadening the power of the bankruptcy courts to entertain suits by trustees to set aside certain conveyances made by the bankrupt.

Decree reversed.

VAN REED *v.* PEOPLE'S NATIONAL BANK OF LEBANON.

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

No. 229. Submitted April 25, 1905.—Decided May 29, 1905.

National banks are *quasi*-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to control of Congress, and not to be interfered with by state legislative or judicial action, except so far as Congress permits.

Under § 5242 Rev. Stat. a national bank, whether solvent or insolvent, is exempt from process of attachment before judgment in any suit, action or proceeding in any State, county or municipal court, *Pacific National Bank* v. *Mixter*, 124 U. S. 721, nor can a state court acquire jurisdiction over a national bank situated in another State by the process of attaching property within its jurisdiction under § 4 of the act of July 12, 1882.

THE plaintiff, who was the owner of a claim against the defendant, the People's National Bank of Lebanon, Pennsylvania, commenced an action in the State of New York by levying an attachment upon the funds of the defendant in that State, upon the ground that it was a foreign corporation. The defendant, appearing specially for that purpose, moved to have the attachment vacated upon the ground that it was prohibited by the Revised Statutes of the United States. At special term the motion was denied; the Appellate Division reversed the judgment of the special term and vacated the attachment. The Court of Appeals answered two questions certified to it by the Appellate Division and affirmed the judgment of that court. The two questions propounded are as follows, 173 N. Y. 314:

"1. Is the defendant exempt from attachment before judgment under section 5242, U. S. Revised Statutes?

"2. Are the rights claimed by plaintiff, to attachment against the defendant before judgment, and to the jurisdiction

thereby acquired, preserved and given by section 4 of the act of Congress of July 12, 1882?"

The Court of Appeals, in affirming the judgment of the court below, answered the first question in the affirmative and the second question in the negative. The case was then brought to this court upon writ of error.

Mr. James W. M. Newlin for plaintiff in error:

What is said in the opinion of this court in *Pacific National Bank* v. *Mixter*, 124 U. S. 721, that all attachments before judgment against national banks solvent or insolvent are void under § 5242, is not only *obiter* but contradicts the judgment of the court in the *Mixter case* itself, which upheld the jurisdiction of the court below, acquired against the non-resident national bank by reason of the attachments and sustained the judgments entered below in virtue of this jurisdiction, but restrained what was practically execution, viz., proceedings on the bond to dissolve the attachment the bank being itself insolvent.

The *Mixter case* has been questioned by this court. *Earle* v. *Pennsylvania*, 178 U. S. 449; *Earle* v. *Conway*, 178 U. S. 456. *Robinson* v. *Bank*, 81 N. Y. 385; *Raynor* v. *Bank*, 93 N. Y. 37.

All doubts must be resolved against the jurisdiction of the United States courts. *Petri* v. *National Bank*, 142 U. S. 649; *Joy* v. *St. Louis*, 122 Fed. Rep. 525; *United States* v. *Am. Bell Telephone Co.*, 159 U. S. 548.

Cases on defendant's brief, *Ex parte Jones*, 164 U. S. 693; *Garner* v. *National Bank*, 66 Fed. Rep. 371, make no reference to the acts of July 12, 1882, and August 13, 1888. And see *Hower* v. *Weiss*, 55 Fed. Rep. 356; *National Bank* v. *Buford*, 191 U. S. 119; *Norris* v. *National Bank*, 30 Ill. App. 54; *Kentucky* v. *Greer*, 13 Illinois, 432; *Holmes* v. *National Bank*, 18 S. Car. 37.

The act of July 12, 1882, introduces a new and unanswerable authority for the proposition that whatever may have been the former law, attachments against national banks, be-

fore judgment, when constituting the basis of jurisdiction, are now to be sustained. Had the defendant in the case at bar, been a foreign state bank, with funds here, the New York courts would clearly have had jurisdiction through attachment, to impound the funds. Hence under the act of 1882, the same jurisdiction exists over the funds of a foreign national bank.

If the prohibition of § 5242 be construed to include solvent banks, then the act of July 12, 1882, conflicts, and being the later statute, must prevail.

The trend of legislation is distinctly toward removing from national banks any class privilege, or legal advantage of any description whatever. *Petri* v. *National Bank*, 142 U. S. 644. For definition of word jurisdiction as used in this statute see 17 Am. & Eng. Ency. of Law, 2d ed., 1041, and cases cited. What was said in the *Mixter case* is now clearly *obiter*.

Mr. Percy S. Dudley for defendant in error:

A national bank is exempt from attachment before final judgment under § 5242, Rev. Stat.; §§ 52, 57, Currency Act of 1864, 13 Stat. 115, 116; act of March 3, 1873, 17 Stat. 603; *Robinson* v. *National Bank*, 81 N. Y. 385; *Raynor* v. *Pacific Nat. Bank*, 93 N. Y. 371; *National Bank* v. *Mixter*, 124 U. S. 721. The New York courts followed the *Mixter case* in *Bank of Montreal* v. *National Bank*, 112 N. Y. 667.

In Massachusetts an injunction against a solvent national bank was denied, on the authority of the *Mixter case*. *Freeman Mfg. Co.* v. *Nat. Bank of Republic*, 160 Massachusetts, 398.

In Vermont it is held that national banks were not subject to attachment or injunction before final judgment. *Safford* v. *Nat. Bank*, 61 Vermont, 373; *Hazen* v. *Lyndonville Nat. Bank*, 70 Vermont, 543.

In Minnesota it has been held that an attachment against a national bank in another State was void. *First Nat. Bank* v. *La Due*, 39 Minnesota, 415. So in Tennessee. *Rosenheim Co.* v. *Southern Nat. Bank*, 46 S. W. Rep. 1026. See also

Planters' Loan &c. Bank v. *Berry*, 91 Georgia, 264; *Dennis* v. *First Nat. Bank of Seattle*, 127 California, 453; *Garner* v. *Second Nat. Bank*, 66 Fed. Rep. 369.

The decision in the *Mixter case* was not questioned, even indirectly, in *Earle* v. *Pennsylvania*, 178 U. S. 449; *Earle* v. *Conway*, 178 U. S. 456. The point was clearly not involved in those cases.

The act of July 12, 1882, § 4, did not repeal these provisions of § 5242, Rev. Stat., or give any new or different rights to creditors of national banks in regard to provisional remedies. 22 Stat. 162. See cases cited *supra* and *Petri* v. *Bank*, 142 U. S. 644; *National Bank* v. *Buford*, 191 U. S. 119, 123. As held by the Court of Appeals Congress did not intend to regulate the method of commencing an action so as to enable a state court to acquire jurisdiction over the property of a national bank without acquiring jurisdiction of the bank itself. *Raynor* v. *Nat. Bank*, 93 N. Y. 371; *Manufacturing Co.* v *National Bank*, 160 Massachusetts, 398; *Pacific Nat. Bank* v. *Mixter*, 124 U. S. 721.

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

We deem the answer to the first question already determined by the decision of this court in *Pacific National Bank* v. *Mixter*, 124 U. S. 721. The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit. Section 5242 of the Revised Statutes of the United States is as follows:

"All transfers of the notes, bonds, bills of exchange, or other

evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court." 3 Compiled Statutes, 1901, p. 3517.

The language of the latter clause of this section would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction or execution against a national bank or its property before final judgment in any suit, action or proceeding in any State, county or municipal court. This was the view taken by this court in *Bank* v. *Mixter, supra.* The origin of section 5242, and its growth from previous enactments were pointed out by Mr. Chief Justice Waite, who delivered the opinion of the court in that case:

"It is clear to our minds that, as it stood originally as part of § 57, act of 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. . . . It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank."

Since the rendition of that decision it has been generally followed as an authoritative construction of the statute holding that no attachment can issue from a state court before judgment against a national bank or its property. *Freeman Manufacturing Co.* v. *National Bank of the Republic*, 160 Massachusetts, 398; *Planters' Loan and Savings Bank* v. *Berry*, 91 Georgia, 264; *First National Bank of Casson* v. *La Due*, 39 *Minnesota*, 415; *Safford* v. *First National Bank of Plattsburg*, 61 Vermont, 373; *Rosenheim Real Estate Co.* v. *Southern National Bank*, 46 S. W. Rep. [Tenn.] 1026; *Garner* v. *Second National Bank of Providence*, 66 Fed. Rep. 369. It is argued by the plaintiff in error that the decision in the *Mixter case*, *supra*, should be limited to cases where the bank is insolvent; but the statement of facts in that case shows that at the time when the attachment was issued the bank was a going concern and entirely solvent so far as the record discloses. The language of Chief Justice Waite, above quoted, is broad and applicable to all conditions of national banks, whether solvent or insolvent; and there is nothing in the statute, which is likewise specific in its terms, giving the right of foreign attachment as against solvent national banks. We find nothing in the case of *Earle* v. *Pennsylvania*, 178 U. S. 449, which qualifies the decision announced in the *Mixter case*. We therefore conclude that the *Mixter case* is applicable here, and the decision therein announced meets with our approval.

The answer to the second question involves a consideration of the act relating to national banks of July 12, 1882, § 4, 22 Stat. 162, which is as follows:

"That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided, however*, That the juris-

diction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun: and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

There is nothing to this section enlarging the right of attachment against national banks. Before the passage of this section Circuit Courts of the United States had jurisdiction of suits against national banks because they were corporations of Federal origin. It was the purpose of this legislation to deprive such banks of the right to invoke the jurisdiction of the Federal courts simply upon the ground that they were created by and exercised their powers under the acts of Congress. *Petri* v. *Commercial Bank*, 142 U. S. 644; *Continental National Bank* v. *Buford*, 191 U. S. 119, 123. It regulated the jurisdiction of the courts to entertain such actions against corporations of this character, and had nothing to do with the kind and character of remedies which could be had against them. Certainly there is nothing in the act repealing the prior provisions of section 5242, above quoted.

It is further insisted that whether or not the lien is absolute upon the property of the bank, jurisdiction is obtained of it by the issuing of the attachment; but we cannot take this view. There was no personal service in the court of original jurisdiction, and the attachment being without the power of the court by reason of the terms of the Federal statute, no jurisdiction was acquired in the case, either over the person or property of the defendant. We see no error in the judgment of the Court of Appeals of New York, and the same is

Affirmed.

GREAT WESTERN MINING AND MANUFACTURING COMPANY *v.* HARRIS.

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

No. 217. Argued April 14, 17, 1905.—Decided May 29, 1905.

A receiver is an officer of the court which appoints him, and in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court appointing him, to recover the property of the debtor. *Booth* v. *Clark*, 17 How. 338.

A receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, as every jurisdiction in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to control the distribution of the funds realized within its own jurisdiction.

Where the receiver can not maintain an action to recover property in a jurisdiction other than that in which he was appointed, jurisdiction is not established because the action is authorized to be instituted by the receiver in the name of the corporation, if it appears that in case of a recovery the property would be turned over to the receiver to be by him administered under the order of the court appointing him.

THIS case was begun by bill in equity filed in the Circuit Court of the United States for the District of Vermont in the name of the Great Western Mining and Manufacturing Company, a Kentucky corporation, by L. C. Black, its receiver, against B. D. Harris, a citizen of the State of Vermont. It is averred that the corporation was duly organized under the laws of the State of Kentucky. In substance the bill sets forth: That the Great Western Mining and Manufacturing Company was organized by the Kentucky legislature on January 19, 1856, for the purpose of owning and operating mining property and selling coal. On or about February 10, 1859, it became the owner of coal properties to the value of about $40,000, situated in Lawrence County, Kentucky. The capital stock of said company was $200,000, divided into 2,000 shares

of $100 each. That previous to November 10, 1887, the capital stock of the company was owned as follows:

B. D. Harris, the defendant herein, 600 shares, par value	$60,000 00
G. D. Harris, 600 shares, par value	60,000 00
John Carlisle, 440 shares, par value	44,000 00
George W. Carlisle, 300 shares, par value	30,000 00
James C. Holden, 4 shares, par value	400 00
Loring Hinsdale, 4 shares, par value	400 00
George S. Richardson, 52 shares, par value	5,200 00

On November 10, 1887, the stockholders increased the capital stock in the sum of $50,000, the same being distributed among the stockholders as follows:

To B. D. Harris, 150 shares, par value	$15,000 00
To G. D. Harris, 150 shares, par value	15,000 00
To John Carlisle, 110 shares, par value	11,000 00
To George W. Carlisle, 75 shares, par value	7,500 00
To George S. Richardson, 13 shares, par value	1,300 00
To James C. Holden, 1 share, par value	100 00
To Loring Hinsdale, 1 share par value	100 00

[The record shows that this increase was in fact made on January 11, 1888, in pursuance of a meeting authorized to be called at that date in the meeting of November 10, 1887, and certificates issued January 14, 1888.]

On April 22, 1889, a further increase of capital stock was had by adding 1,000 shares of $100 each, which was distributed as follows:

To B. D. Harris, 300 shares, par value	$30,000 00
To G. D. Harris, 300 shares, par value	30,000 00
To John Carlisle, 220 shares, par value	22,000 00
To George W. Carlisle, 150 shares, par value	15,000 00
To George S. Richardson, 26 shares, par value	2,600 00
To James C. Holden, 2 shares, par value	200 00
To Loring Hinsdale, 2 shares, par value	200 00

The complainant avers that at the time the increases of capital stock were made and carried out the stockholders had formed a plan of issuing bonds and selling the same, and that the issues and distribution of said stock were made for the purpose of defrauding said company, and obtaining without consideration the aforesaid shares of capital stock, and for the purpose of selling the same to the company in connection with the said loan, and defrauding the company out of a part thereof. That said issues of capital stock were made by the shareholders and board of directors, of whom the defendant was one, ostensibly in consideration of alleged betterments of said mining property, which betterments, it was pretended, were made and paid for out of the net earnings of the company, which it was represented had increased the value of the property belonging to the stockholders. Complainant alleges that no such betterments had been made, and if made they were paid for out of money borrowed upon the credit of the company, for which an indebtedness then existed and still exists. That in fact there had been no net earnings which had been put into betterments by the company, and that the issue of said stock was without consideration, illegal and void, and a breach of duty upon the part of the stockholders and the directors of the corporation to its creditors. That said stock so issued still remains outstanding in the names of the parties to whom it was issued or their assignees. That on May 13, 1889, the directors of the company, of whom the defendant Harris was one, and who were also stockholders in the company, for the purpose of defrauding said company and abstracting the assets of the company for their own use and benefit, the corporation then being insolvent, without means to pay its floating indebtedness, which then amounted to $100,000, or more, agreed that they would obtain a loan of $300,000 for said company, said loan to be evidenced by bonds to the number of 300 in the denomination of $1,000 each, to be secured by mortgage upon the property of the company. That the issues of stock had been made upon the consideration that certain betterments

had been added to the property, and had been paid for out of the profits of the operation thereof, which profits would otherwise belong to the stockholders, when in truth and fact the said company was largely insolvent and had a mortgage debt of about $60,000 upon it and a floating debt of $100,000 or more. In fact, said company had not made any net profits whatever, and said betterments had not been made at all, or, if made, had been paid for out of the earnings of the company, and no consideration except that herein stated was ever paid by the stockholders for the stock issued to them. That it was for the purpose of carrying out the scheme of abstracting from the company money arising from the sale of the bonds, and for that purpose only, that said stock was issued to the defendant Harris and others. That said bonds were sold at a price of eighty-five cents on the dollar, including a bonus of fifty per cent of the par value of said bonds in the stock of the company; that is, a purchaser of a $1,000 bond was entitled to have with said bond $500 of the capital stock of the company. That in pursuance of the combination aforesaid the said directors and stockholders furnishing said bonus stock were paid for the same from the proceeds of the sale of the bonds. The stock was furnished as follows in pursuance of the said arrangement:

By B. D. Harris, 450 shares, par value	$45,000 00
G. D. Harris, 450 shares, par value	45,000 00
John Carlisle, 336 shares, par value	33,600 00
George W. Carlisle, 225 shares, par value	22,500 00
George S. Richardson, 39 shares, par value	3,900 00

That out of the proceeds of the sale of the bonds the sum of $75,000 was distributed among the parties, as follows:

To B. D. Harris, the defendant herein	$22,500 00
To G. D. Harris	22,500 00
To John Carlisle	16,800 00
To George S. Richardson	1,950 00
To George W. Carlisle	11,250 00

That, as a matter of fact, when the stock was contributed the company was insolvent, and could not carry on its business without making the said loan; that said stock was worthless and was sold to the company at fifty cents on the dollar for the purpose above mentioned, and thereafter said stock was transferred to the purchasers of the bonds. Then follow allegations as to the mismanagement of the company, and the wrongful payment of dividends, and the averment that on or about September 12, 1892, one of the creditors of the company was compelled to make an application to the United States Circuit Court of Kentucky, wherein a request was made for the appointment of a receiver of the property and franchises of the company for the purpose of realizing its assets and distributing them among its creditors; that in said proceedings all of the property of the Great Western Mining and Manufacturing Company was sold and was found to be of the value of $75,666.66, which left a large floating indebtedness of about $90,000, besides a large balance due upon the bonded indebtedness, aggregating about $270,000; that, in said proceedings in the United States Court for the District of Kentucky, L. P. Black was appointed receiver of the assets of the company, for the purpose of realizing upon the same for the benefit of its creditors, and it is averred that by special order of the United States Court said receiver had been directed to prosecute this suit, either in his own name or that of the company, as may be proper. The prayer of the bill is for an accounting respecting the matters and things set up in the bill, and that the defendant be required to pay to the complainant the sums which may be found to be due by reason of the matters and things set forth, and for general relief. An answer and replication were filed, and the issues made up were heard upon the pleadings and testimony. The Circuit Court found the estate of B. D. Harris, he having died pending the suit, liable in the sum of $15,000, being the amount Harris received from the company in exchange for the 300 shares of stock issued to him in April, 1889, and held that the estate was

not liable on account of the amounts received by him for stock previously issued to him, and was not liable to account for the amounts taken by other officers, directors or stockholders of the company. The case in the Circuit Court is reported in 111 Fed. Rep. 38. Upon cross appeals the Circuit Court of Appeals for the Second Circuit reversed the judgment of the court below upon the ground that the Circuit Court had no jurisdiction of the action, as the same could not be brought by the receiver in the name of the corporation, and if it could be maintained by the corporation, or in its behalf, no case was made for a recovery, because of the consent of the stockholders to the transactions complained of. 128 Fed. Rep. 321. The order appointing the receiver in the Circuit Court is found in the record, and is as follows:

"The above cause coming on this day to be heard upon the motion of complainant for appointment of a receiver and having been fully heard and considered, it is ordered by the court that said motion be granted, and that the order hereinbefore entered, appointing L. C. Black as temporary receiver, be continued, and said L. C. Black be and he is hereby appointed receiver of all the property, rights in action, choses in action, and all assets of every description, of the defendant, The Great Western Mining and Manufacturing Co., with all the powers and authority conferred by the order appointing him temporary receiver herein; and that he is to act and continue to act under the orders hereinbefore made, and that he hold and keep the property and assets arising from the funds of said business, or that may come into his hands, subject to such order as may be made from time to time; and it is also ordered that he shall have power to purchase such current supplies as are or may be needed in the proper conduct and operation of the business of said company."

The application for the order to bring this action sets forth:

"The receiver represents that he has ascertained from the books and records of the Great Western Mining and Manufacturing Company, in his possession, that, in connection with

the floating of the loan of $300,000 in the year 1889, upon the property of the Great Western Mining and Manufacturing Company, situate in Lawrence County, Kentucky, certain stockholders and officers of said company combined to obtain for themselves, and did so obtain, proceeds resulting from the sale of said bonds in the sum of $75,000, which money belonged to and should have been paid into the treasury of said company.

"Your receiver says that he finds shares of capital stock of the Great Western Mining and Manufacturing Company were issued at the instance of and through the action of certain of said stockholders and officers of said company, to the amount of $150,000, which said stock was distributed among said stockholders and officers; that as your receiver is informed and believes there was no consideration for the issue and distribution of said stock; that the said stock was sold by said stockholders, so as aforesaid receiving it, to the defendant, The Great Western Mining and Manufacturing Company, and by means of said sale moneys to the amount of $75,000 were abstracted from the treasury of said company; that the issue and distribution of said capital stock was, as your receiver believes, a mere device or instrumentality to abstract said moneys from the treasury of said company; that said company as your receiver believes, has a valid claim against said persons to recover said moneys; that some of said parties are solvent and able to repay said monies, and proceedings should be taken to recover it for said company and its creditors.

"Your receiver further says that he has discovered from the books of the company that apparently, by reason of the inattention and negligence of the board of directors of the said Great Western Mining and Manufacturing Company, and apparently by reason of the mismanagement and misappropriation of the funds of the company, by certain members of said board, that the said company has been greatly damaged, and its assets depreciated in value in a large amount, the exact sum of which is unknown to your receiver, and that said losses

should now be made part of the said company's assets, and that the same is, in the opinion of your receiver, a valid claim against the said board of directors, and that proceedings should be taken to recover the same for the said company and its creditors.

"Wherefore your receiver prays the direction of your honorable court as to his duty in the premises."

Upon this application the court made the following order:

"This cause coming on to be heard upon the application of L. C. Black, receiver herein, asking for instructions as to his duty in the matters and things set forth in the said application, and wherein said receiver represents to the court that in certain transactions connected with the floating of a loan of $300,000 upon the property of the Great Western Mining and Manufacturing Company, apparently $75,000 was withdrawn by certain stockholders and officers of the said company, whereas the same should have been paid into the treasury of the said company; and wherein said receiver further represents that apparently certain stock was issued to the stockholders and officers of the said company without consideration, and that apparently by reason of the inattention and negligence and mismanagement of the board of directors of the said company and the misappropriation of the funds of the said company, said company has been greatly damaged and its assets depreciated.

"And it appearing to the court that it will be for the advantage of the said company that suit shall be instituted against the stockholders and directors of the same for the recovery of the sums so represented to be lost, it is, therefore, directed that said receiver proceed in his own name as receiver or in the name of the company, as he may be advised, to recover said sums."

Mr. Harlan Cleveland for petitioner as to the right of receiver to maintain the action:

The United States Circuit Court for Vermont had jurisdic-

tion of the suit. The cases cited by the Circuit Court of Appeals simply decide that an ordinary receiver in whom no title has vested cannot in his own name maintain a suit in a court of another State to recover assets or enforce double liability.

But the court in collecting the assets of a corporation is acting within its powers on behalf of the corporation, or as the successor of the officers of the corporation in directing suit to be brought by it and in its name.

When the United States Circuit Court for the District of Kentucky appointed a receiver of The Great Western Mining and Manufacturing Company, and by that act assumed charge of the assets and affairs of the corporation, it took the place, and could exercise the powers, of the directors. See authorities so holding as to calls or assessments on stockholders for the unpaid portion of the subscription price of stock. *Scoville* v. *Thayer*, 105 U. S. 143, 155; *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Marbury*, 145 U. S. 499, 510; *Gt. W. Tel. Co.* v. *Purdy*, 162 U. S. 329, 336; *Hayward* v. *Leeson*, 176 Massachusetts, 310; Kentucky Codes, § 302.

The practice is entirely familiar to courts of chancery.

In *Taylor* v. *Allen*, 2 Atk. 213, a receiver to collect the assets of a testator was empowered to sue in the name of the executrix. *Pitt* v. *Snowden*, 3 Atk. 750; *Yeager* v. *Wallace*, 44 Pa. St. 291; *Merritt* v. *Merritt*, 16 Wend. 405; *Freeman* v. *Winchester*, 10 S. & M. (Miss.) 577; *Green* v. *Winter*, 1 Johns. Ch. 60.

Even if the suit be treated as one brought by the receiver in his own name, it is maintainable on the principle of comity.

In Kentucky a receiver can bring an action in his own name. Codes, § 21.

The receiver could undoubtedly have maintained this suit in Kentucky in his own name. Kentucky allows foreign receivers to sue in that State by comity when there are no domestic creditors requiring protection or no infringement of the public policy of that State or no injustice would be done thereby to the citizens within its jurisdiction. *Rogers* v. *Riley*, (Ky.) 80 Fed. Rep. 759; *Zacher* v. *Fidelity Trust Co.*, 106 Fed.

Rep. 593; *S. C.*, 59 S. W. Rep. 493; *Kirtley* v. *Holmes*, (Ky.) 107 Fed. Rep. 1, 9; *Johnson* v. *Roger's Receiver*, (Ky.) 43 S. W. Rep. 234; *Weedon* v. *Association*, (Ky.) 59 S. W. Rep. 758. This seems to be the general rule. *Howorth* v. *Augle*, 162 N. Y. 179; *Howorth* v. *Lombard*, 175 Massachusetts, 570; *Howorth* v. *Elwanger*, 86 Fed. Rep. 54; *Sands* v. *Greeley*, 88 Fed. Rep. 130; *Burr* v. *Smith*, 113 Fed. Rep. 858; *Lewis* v. *Naval Stores*, 119 Fed. Rep. 396, 397; *Metzner* v. *Bauer*, 98 Indiana, 425; *Boulware* v. *Davis*, 90 Alabama, 207; *Cooke* v. *Orange*, 48 Connecticut, 401; *Planters' Bank* v. *Bank*, 2 La. Ann. 430; *Comstock* v. *Frederickson*, 51 Minnesota, 350; *Hurd* v. *Elizabeth*, 41 N. J. Law, 1; *Sobernheimer* v. *Wheeler*, 45 N. J. Eq. 614; *Runk* v. *St. John*, 29 Borh. 585; *Barclay* v. *Quicksilver Min. Co.*, 6 Lans. 25; *Pugh* v. *Hurtt*, 52 How. Pr. 22; *Dyer* v. *Power*, 60 Hun, 583; *Merchants' Bank* v. *McLeod*, 38 Ohio St. 174; *Porter* v. *Stoughton Mill Co.*, 91 Wisconsin, 174; *Wyman* v. *Kimberly Clark Co.*, 93 Wisconsin, 554.

Nothing in the public policy or decisions of Vermont precludes a foreign receiver from suing in the courts of that State, under the circumstances of this case. No creditor in Vermont has intervened to prevent the prosecution of this suit. The Harris estate alone objects to this suit being maintained.

The right to recover on the one hand property of a corporation or its proceeds which have been misappropriated by officers and directors, or on the other hand damages for its misappropriation, is in the corporation. *Porter* v. *Sabin*, 149 U. S. 473; *Hawes* v. *Oakland*, 104 U. S. 450; *Davenport* v. *Dows*, 18 Wall. 626; *Van Weel* v. *Winston*, 115 U. S. 228.

Mr. Brainard Tolles, with whom *Mr. Julien T. Davies* was on the brief, for respondents as to the right of receiver to maintain action:

The order of the Circuit Court for the District of Kentucky was not effective to authorize the receiver to maintain a suit in the name of the mining company, in the Circuit Court for the District of Vermont. The receiver was a mere instrument

of the court which appointed him, for the exercise of its ordinary jurisdiction in equity.

No assignment or transfer of its property to the receiver was ever made by the mining company and no authority was ever given to the receiver to file this bill in the name of the mining company. The receiver has no statutory title to the property of the corporation, nor any statutory right to sue in its name. The only justification of his action in making use of the name of the corporation for the purpose of this suit is found in the order of the Circuit Court.

There were both stockholders and directors of this corporation in the District of Kentucky at the time that order was made, no proceedings were instituted in said District, in pursuance of said order. But in the District of Vermont a bill was filed in the name of the mining company, not authenticated by its seal nor verified or signed by any of its officers.

To sign the name of another, without his consent, to a bill of complaint or to an appeal bond, is an act which requires affirmative justification. When the act is done in the District of Vermont, and the object of the act is to get possession of property having a *situs* in said District, and the official character of the receiver and the Circuit Court for the District of Kentucky had no power to authorize such act for such a purpose outside of the District. The order was one which could have been acted on only within the District.

As to comity this court is not constrained, by judicial precedent, or by any settled course of practice in this country, to adopt the English rule. *Booth* v. *Clark*, 17 How. 322.

In the Federal courts it has never been doubted that *Booth* v. *Clark*, *supra*, was conclusive against the right of receivers to sue in the courts of the United States, outside the State or District in which they were appointed. *Brigham* v. *Luddington*, 12 Blatchf. 237; *Kittel* v. *Augusta &c. R. Co.*, 78 Fed. Rep. 855; *Hazard* v. *Durant*, 19 Fed. Rep. 471; *Philadelphia &c. Iron Co.* v. *Daube*, 71 Fed. Rep. 583; *Wigton* v. *Bosler*, 102 Fed. Rep. 70.

The only Federal case to the contrary, *Hale* v. *Hardon*, 95 Fed. Rep. 747, was overruled in *Hale* v. *Allinson*, 188 U. S. 56, and *Hilliker* v. *Hale*, 117 Fed. Rep. 224 (certiorari refused, 188 U. S. 739).

Constrained by the authority of *Booth* v. *Clark*, *supra*, the courts of the United States have built up a system of procedure for dealing with the affairs of insolvent corporations, which rests upon firmer ground than that of comity, and which avoids the practical objections pointed out in *Booth* v. *Clark*, while securing to foreign creditors reasonable facilities for the collection of their debts. The system which has thus been evolved has the spirit of comity, but is made effective through the exercise by each court of its own jurisdiction, rather than by the abdication of jurisdiction on the part of any court in favor of another. *Parsons* v. *Charter Oak Life Ins. Co.*, 31 Fed. Rep. 305; *Mercantile Trust Co.* v. *Kanawha &c. R. Co.*, 39 Fed. Rep. 337; *Platt* v. *Philadelphia & R. R. Co.*, 54 Fed. Rep. 569; *Central Trust Co.* v. *East Tennessee &c. R. Co.*, 69 Fed. Rep. 658; *Ames* v. *Union Pacific R. Co.*, 60 Fed. Rep. 966; *Bayne* v. *Brewer Pottery Co.*, 82 Fed. Rep. 391; *Sands* v. *E. S. Greeley & Co.*, 88 Fed. Rep. 130; *Reynolds* v. *Stockton*, 140 U. S. 254; *In re Brant*, 96 Fed. Rep. 257; *Shinney* v. *North American Savings &c. Co.*, 97 Fed. Rep. 9; *Coltrane* v. *Templeton*, 106 Fed. Rep. 370; *Lewis* v. *American Naval Stores Co.*, 119 Fed. Rep. 391; *Conklin* v. *U. S. Shipbuilding Co.*, 123 Fed. Rep. 913.

These decisions show a system of procedure which, while perhaps not complete or incapable of improvement, is far superior to that which this court was urged to adopt in *Booth* v. *Clark*. It is a system now universally understood. It works smoothly in practice. It effectively protects the rights of possible creditors in each jurisdiction where assets are found, by compelling the foreign receiver to give reasonable security and to submit himself to the orders of the local court before removing assets which may be needed to meet the claims of domestic creditors. It provides a convenient forum in which

such creditors may prove their claims. It enables the receiver appointed by a foreign court, without delay or publicity or unreasonable expense, to qualify himself to collect or impound assets properly forming part of the estate under administration. It avoids unseemly conflicts of judicial authority. It provides a central tribunal for the determination of those questions of general policy which must be decided with reference to a great system of railways of a great business undertaking, while leaving to local tribunals full power over questions of a local nature. The courts of the several States and the legal profession throughout the United States are gradually conforming their practice to the standard thus established.

As to the claim that the right of the court appointing the receiver to authorize him to sue in the name of a party is absolute, and does not rest on comity, the court can no more invest the receiver with the name, identity and citizenship of a party for the purpose of suit in a foreign jurisdiction than it can confer on him a defendant's complexion, reputation, chirography or good health. *In re Sawyer*, 124 U. S. 310.

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

The theory of the complainant's case seems to be that the transfers of the stock of the defendant and other directors and stockholders, paid for out of the proceeds of the bonds, in view of the allegations of the bill as to the condition of the company and the purposes in view by the defendant and associates, amounted to a breach of duty upon the part of the defendant and other directors, and a conversion to their own use of the property of the company, for which they should be held to account in an action brought by the company through its receiver, under the order of the Circuit Court of Kentucky. The particulars of the suit in which the receiver was appointed are not very fully set forth, but enough appears to show that he

was appointed in a suit to adjudicate and enforce liens and subject the property to the payment of the claims of creditors. In the brief of the learned counsel for complainant, it is styled a "general creditors' and foreclosure suit." It does not appear that by order of the court or otherwise there has been any conveyance of the property and assets of the company to the receiver, nor has the corporation been dissolved, and the receiver made its successor, entitled to its property and assets. The minute books of the company in evidence do not show any authority by the corporation for the filing of this bill in the name of the Great Western Mining and Manufacturing Company or otherwise, although meetings were held after the appointment of the receiver. Nor is our attention called to any statute vesting the title of the corporation in the receiver. So far, then, as the receiver is concerned, his right to prosecute the action must depend upon his powers as such officer of the court and the order of the court, set forth in the statement of facts, authorizing him to bring suit against the stockholders and directors for the purpose of realizing the assets, either in his own name or that of the corporation, as may be proper. This condition of the record brings up for consideration at the threshold of this case the question of the extent of the power of the receiver to maintain this action under the order of the court, either in his own name or that of the company. As to the power of the court to authorize the receiver to sue, we think the case is ruled by *Booth* v. *Clark*, 17 How. 322, 338, in which case the authority of the court to authorize a receiver appointed in one jurisdiction to sue in a foreign jurisdiction was the subject of very full consideration. In that case it was held that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the property of the debtor in him, he can not sue in courts of a foreign jurisdiction upon the order of the court which appointed him, to recover the property of the debtor. While that case was decided in 1854, its authority has been frequently recognized in this court, and as late as *Hale* v. *Allinson*,

188 U. S. 56, it was said by Mr. Justice Peckham, who delivered the opinion of the court:

"We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case."

In that case the following language, as to a receiver's powers, from *Booth* v. *Clark, supra,* is quoted with approval:

"He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Mr. Justice Wayne, who delivered the opinion of the court in *Booth* v. *Clark,* stated, among others, the following reasons for refusing to recognize the powers of a receiver in foreign jurisdictions:

"We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be

difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

It will thus be seen that the decision in *Booth* v. *Clark* rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered. In *Quincy &c. Railroad Co.* v. *Humphreys*, 145 U. S. 82, the powers of a receiver were under consideration, and the following language was quoted with approval (p. 98): "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned." There are exceptional cases, such as *Relfe* v. *Rundle*, 103 U. S. 222, in which the entire property of the insolvent company was vested in the superintendent of insurance of the State, where his authority did not come from the decree of the court, and his right to sue was maintained. In *Hawkins* v. *Glenn*, 131 U. S. 319, it appeared that Glenn had derived title by assignment and deed and he was permitted to sue. In the case now before us it does not appear that the receiver had any other title to the assets and property of the company than that derived from

his official relation thereto as receiver under the order of the court. In such a case we think the doctrine of *Booth* v. *Clark* is fully applicable. It is doubtless because of the doctrine therein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with a view of vesting control of property rights in the court in whose jurisdiction they are located. If the powers of a chancery receiver in the Federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative and not judicial action.

Nor do we think the jurisdiction is established because the action is authorized to be instituted by the receiver in the name of the corporation. Such actions subjecting local assets to a foreign jurisdiction and to a foreign receivership would come within the reasoning of *Booth* v. *Clark*. If a recovery be had, although in the name of the corporation, the property would be turned over to the receiver, to be by him administered under the order of the court appointing him.

It is urged that jurisdiction in this case is sustained by the case of *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329, in which it was held that the assets and affairs of an insolvent corporation being in the hands of a receiver, the court might direct the calls or assessments upon delinquent shareholders who had not paid for their shares, thereby using the authority the directors might have exercised before the appointment of the receiver. In that case, a receiver appointed by the Circuit Court of Cook County, in Illinois, under the direction of that court brought an action in the name of the Great Western Telegraph Company, an Illinois corporation, by its receiver, against Purdy, a citizen of Iowa, to recover a sum alleged to

be due from him upon an assessment upon his stock subscription, and it was held that the Illinois court might make the assessment and calls necessary to collect the stock which would be binding in another court. The jurisdiction of the Iowa court was not called in question in the state court of Iowa, where the original action was brought, nor was the question of jurisdiction raised in this court, or passed upon in deciding the case. While not detracting from the authority of that case as to the matter decided, we see nothing in it to indicate that had the question herein presented been made it would have been decided otherwise than herein indicated.

There are numerous and conflicting decisions in the state courts as to the rights of a receiver to sue in a foreign jurisdiction upon principles of comity, which it is not necessary to review here. In this court, since the case of *Booth* v. *Clark*, *supra*, we deem the practice to be settled, and to limit a receiver, who derives his authority from his appointment as such, to actions, either in his own name, or that of an insolvent corporation, to such as may be authorized within the jurisdiction wherein he was appointed.

We think the Circuit Court of Appeals was right in holding that the Circuit Court had no jurisdiction of this action.

This view of the case renders it unnecessary to consider the other questions made in the record.

Decree affirmed.

Mr. Justice Brewer concurs in the decree.

OPINIONS PER CURIAM, ETC., FROM APRIL 11, TO MAY 29, 1905.

No. 204. MIKE HERNAN, PLAINTIFF IN ERROR, *v.* THE STATE OF TEXAS. In error to the Court of Criminal Appeals of the State of Texas. Submitted April 7, 1905. Decided April 17, 1905. *Per Curiam.* Judgment affirmed with costs. *Noble* v. *Mitchell*, 164 U. S. 367, 372; *Osborne* v. *Florida*, 164 U. S. 650; *Murray* v. *Gibson*, 15 How. 425. Case below, 77 S. W. Rep. 225. *Mr. Cecil H. Smith*, *Mr. Amos L. Beaty* and *Mr. Wm. P. Ellison* for plaintiff in error. *Mr. C. K. Bell* for defendant in error.

No. 216. H. C. LANE *v.* WILLIAM E. BENNER. On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit. Argued April 13 and 14, 1905. Decided April 17, 1905. *Per Curiam.* Second question answered in the negative, on authority of *Knepper* v. *Sands*, 194 U. S. 476. *Mr. Wm. P. Jewett* for Lane. *Mr. John H. King* and *Mr. M. B. Davis* for Benner.

No. 493. CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* THOMAS NEWELL. In error to the Supreme Court of the State of Illinois. Motions to dismiss or affirm submitted April 10, 1905. Decided April 17, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Bethell* v. *Demaret*, 10 Wall. 537, 540; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, 653; *Harding* v. *Illinois*, 196 U. S. 78, 96; *Railroad Company* v. *Brown*, 17 Wall. 445, 450; *Railroad Company* v. *Barron*, 5 Wall. 104; Ill. Stat., 3 Starr and Curtis, 3247, c. 114, par. 53; *Railway Company* v. *Hart*, 209 Illinois, 414; *Glenn* v. *Garth*, 147. U. S. 368; *Bacon* v.

Texas, 163 U. S. 207, 216. Case below, 72 N. E. Rep. 416. *Mr. George W. Kretzinger* for plaintiff in error. *Mr. Harvey Lantz* for defendant in error.

No. 544. LEE LOOK, APPELLANT, *v.* FRANK H. ROSS, JR., SHERIFF OF SANTA CLARA COUNTY, CAL. Appeal from the District Court of the United States for the Northern District of California. Motions to dismiss or affirm submitted April 10, 1905. Decided April 17, 1905. *Per Curiam.* Final order affirmed with costs. *Lee Look* v. *California*, 195 U. S. 623; *Markuson* v. *Boucher*, 175 U. S. 184; *People* v. *Lee Look*, 143 California, 216. *Mr. A. H. Jarman* for appellant. *Mr. James H. Campbell* for appellee.

No. 513. ROBINSON AND WATSON, ET AL., PLAINTIFFS IN ERROR, *v.* W. J. WINGATE, COUNTY JUDGE OF ORANGE COUNTY, TEX., ET AL. In error to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas. Motions to dismiss or affirm submitted April 17, 1905. Decided April 24, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Erie Railroad Company* v. *Purdy*, 185 U. S. 148; *Harding* v. *Illinois*, 196 U. S. 78. Case below, 80 S. W. Rep. 1067; 83 S. W. Rep. 182. *Mr. Thomas H. Clark* for plaintiffs in error. *Mr. Rebel Lee Robertson* for defendants in error.

No. 534. EDWARDS SANFORD HATCH, APPELLANT, *v.* HENRY B. KETCHAM, TRUSTEE IN BANKRUPTCY, ETC. Appeal from the United States Circuit Court of Appeals for the Second Circuit. Motions to dismiss or affirm submitted April 17, 1905. Decided April 24, 1905. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Holden* v. *Stratton*, 191 U. S. 115. *Mr. John C. F. Gardner* for appellant. *Mr. Benjamin N. Cardozo* for appellee.

No. —, Original. *Ex parte:* IN THE MATTER OF OLI NIFOU, PETITIONER. Submitted April 10, 1905. Decided May 1, 1905. Motion for leave to file petition for writs of *habeas corpus* and certiorari denied. *Mr. Gilbert F. Little* for petitioner. *The Attorney General* and *The Solicitor General* opposing.

No. 435. NICK GURVICH *v.* THE UNITED STATES. On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted May 1, 1905. Decided May 1, 1905. *Per Curiam.* On the authority of *Rassmussen* v. *United States,* 197 U. S. 516, the question is answered that the District Court of the United States for the District of Alaska, division No. 1, erred in compelling the plaintiff in error to go to trial before a jury composed of only six persons. No appearance for Gurvich. *The Attorney General* and *The Solicitor General* for the United States.

No. 398. JOHN C. ORRELL ET AL., PLAINTIFFS IN ERROR, *v.* THE BAY MANUFACTURING COMPANY. In error to the Supreme Court of the State of Mississippi. Motion to dismiss submitted May 15, 1905. Decided May 29, 1905. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Schlosser* v. *Hemphill,* 198 U. S. 173. *Mr. E. M. Barber, Mr. Frederic D. McKenney, Mr. Wayne MacVeagh, Mr. J. S. Flannery* and *Mr. William Hitz* for plaintiffs in error. *Mr. E. J. Bowers* for defendant in error.

No. 431. IGNACIO ROSALES Y CUELI, PLAINTIFF IN ERROR, *v.* DOLORES MOYA Y RODRIGUEZ, GUARDIAN, ETC., ET AL. In error to the District Court of the United States for the District of Porto Rico. Motion to dismiss submitted April 24, 1905. Decided May 29, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. *Royal Insurance Company* v. *Martin,* 192

U. S. 149; *Railroad Company* v. *Hopkins*, 130 U. S. 210; *Filhis* v. *Maurice*, 185 U. S. 108; *Louisville and Nashville Railroad Company* v. *Louisville*, 166 U. S. 709; *Harrison* v. *Morton*, 171 U. S. 38. *Mr. Frederic D. McKenney*, *Mr. Wayne MacVeagh* and *Mr. J. S. Flannery* for plaintiff in error. *Mr. George H. Lamar* for defendants in error.

No. 588. Edward W. Shoesmith, Appellant, *v.* H. Meyer Boot and Shoe Manufacturing Company et al. Appeal from the District Court of the United States for the Northern District of Illinois. Motion to dismiss submitted May 15, 1905. Decided May 29, 1905. *Per Curiam.* Dismissed for want of jurisdiction. *McLish* v. *Roff*, 141 U. S. 661; *Maynard* v. *Hecht*, 151 U. S. 324; *United States* v. *Jahn*, 155 U. S. 109, 113; *Louisville Trust Company* v. *Knott*, 191 U. S. 225, 232. *Mr. William R. Payne* for appellant. *Mr. Gwynn Garnett* for appellees.

No. —, Original. *Ex parte:* In the Matter of Benjamin F. McCaully, Petitioner. Submitted May 29, 1905. Decided May 29, 1905. Motion for leave to file petition for writs of *habeas corpus* and certiorari denied. *Mr. Arthur A. Birney* and *Mr. Henry F. Woodard* for petitioner.

Decisions on Petitions for Writs of Certiorari from April 11 *to May* 29, 1905.

No. 598. Peter Cahill, Owner, etc., Petitioner, *v.* Norris and Cumings Dredging Company; and No. 599. Peter Cahill, Owner, etc., Petitioner, *v.* Annie Olsen, Administratrix, etc. April 17, 1905. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Macklin* and *Mr.*

LaRoy S. Gove for petitioner. *Mr. Albert A. Wray* for respondents.

No. 605. HARRY L. JEWELL, PETITIONER, *v.* CITY OF SUPERIOR. April 17, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Chester B. Masslich* for petitioner. No appearance for respondent.

No. 602. HERMAN ASTRICH, PETITIONER, *v.* GERMAN-AMERICAN INSURANCE COMPANY OF NEW YORK. April 24, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles H. Bergner* for petitioner. *Mr. Wm. M. Hargest* for respondent.

No. 611. ALLAN N. MACNABB, TRUSTEE, ETC., PETITIONER, *v.* THE BANK OF LE ROY. April 24, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank M. Loomis* for petitioner. *Mr. Vincent H. Riordan* for respondent.

No. 610. THE UNITED STATES, PETITIONER, *v.* EMIL DIECKERHOFF ET AL. April 24, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. W. Wickham Smith* for respondents.

No. 624. THE UNITED STATES, PETITIONER, *v.* THE CORNELL STEAMBOAT COMPANY. May 1, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General* and *The*

Solicitor General for petitioner. *Mr. Robert D. Benedict* for respondent.

No. 561. THE LEATHER MANUFACTURERS' NATIONAL BANK OF NEW YORK CITY, PETITIONER, *v.* CHARLES H. TREAT, COLLECTOR, ETC. May 1, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank W. Hackett* for petitioner. *The Attorney General* and *Mr. Solicitor General Hoyt* for respondent.

No. 582. NEW YORK TELEPHONE COMPANY, PETITIONER, *v.* CHARLES H. TREAT, COLLECTOR, ETC. May 1, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. C. Walter Artz* and *Mr. Melville Egleston* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 586. LOTTIE R. RUSSELL, PETITIONER, *v.* BENJAMIN RUSSELL ET AL. May 1, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John G. Carlisle* and *Mr. John H. Hazelton* for petitioner. *Mr. Walter H. Bacon* for respondents.

No. 616. THE DISTRICT OF COLUMBIA, PETITIONER, *v.* JOHN W. LEE. May 1, 1905. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. A. B. Duvall, Mr. E. H. Thomas* and *Mr. F. H. Stephens* for petitioner. *Mr. A. E. L. Leckie* for respondent.

No. 620. FRANK KELLEY ET AL., PETITIONERS, *v.* THE DIAMOND DRILL AND MACHINE COMPANY. May 1, 1905. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Third Circuit denied. *Mr. Horace Pettit* for petitioners. *Mr. William C. Strawbridge* for respondent.

No. 625. CHARLES C. WILSON, PETITIONER, *v.* ATLANTIC COAST LINE RAILROAD COMPANY ET AL. May 1, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Burton Smith* for petitioner. *Mr. F. G. du Bignon* for respondent.

No. 626. HERBERT BARBER ET AL., PETITIONERS, *v.* EDWARD R. LAZARUS. May 1, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* for petitioners. *Mr. Anson M. Beard* for respondent.

No. 622. PETER PEARSON ET AL., PETITIONERS, *v.* WILLIAM WILLIAMS, UNITED STATES COMMISSIONER OF IMMIGRATION. May 8, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Eugene Treadwell* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 632. WILLIAM S. BRYAN, PETITIONER, *v.* JOSEPH C. DUPOYSTER ET AL. May 8, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. C. Calhoun* and *Mr. S. T. G. Smith* for petitioner. *Mr. Ira Julian* for respondents.

No. 637. THE CONSUMERS' GAS TRUST COMPANY ET AL., PETITIONERS, *v.* BYRON C. QUINBY. May 8, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Addison C.*

Harris for petitioners. *Mr. Ferdinand Winter* and *Mr. Alexander C. Ayres* for respondent.

No. 641. Louis A. Darnal, Petitioner, *v.* The United States. May 8, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. M. Smith* for petitioner. No brief filed for respondent.

No. 639. Stephen A. Ralli et al., Petitioners, *v.* The Direct Navigation Company; and No. 640. P. C. Heineken et al., Petitioners, *v.* The Direct Navigation Company. May 15, 1905. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John F. Lewis, Mr. Francis S. Laws* and *Mr. James B. Stubbs* for petitioners. *Mr. M. F. Mott* for respondent.

No. 651. Benjamin F. McCaully, Petitioner, *v.* The United States. May 15, 1905. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Arthur A. Birney* and *Mr. Henry F. Woodard* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 638. Francis H. Duehay, Petitioner, *v.* The District of Columbia. May 29, 1905. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. (Mr. Justice Brewer took no part in the consideration and disposition of this application.) *Mr. Samuel Maddox* for petitioner. *Mr. A. B. Duvall* and *Mr. F. H. Stephens* for respondent.

No. 647. D. G. Fritzlen et al., Petitioners, *v.* Boatmen's Bank of St. Louis, Mo. May 29, 1905. Petition for

a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. D. R. Hite* and *Mr. H. J. Bone* for petitioners. *Mr. James S. Botsford* for respondent.

No. 653. THE PITCH PINE LUMBER COMPANY, PETITIONER, *v.* WILLIAM S. ROSASCO ET AL. May 29, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harrington Putnam* and *Mr. Charles C. Burlingham* for petitioner. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for respondents.

No. 654. THE BRUNSWICK-BALKE-COLLENDER COMPANY, PETITIONER, *v.* JOHN G. KLUMPP ET AL. May 29, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph C. Clayton* for petitioner. *Mr. Louis C. Raegener* for respondents.

Nos. 656 and 657. WILLIAM H. STAAKE, TRUSTEE, PETITIONER, *v.* WATTS, ROBERTSON & ROBERTSON ET AL. May 29, 1905. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. H. Gordon McCouch* and *Mr. Samuel W. Cooper* for petitioner. *Mr. S. Hamilton Graves* for respondents.

No. 659. MARTHA RAPHAEL, ADMINISTRATRIX, ETC., PETITIONER, *v.* THE RIO GRANDE WESTERN RAILWAY COMPANY ET AL. May 29, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles Locke Easton* for petitioner. *Mr. Edward M. Shepard, Mr. A. H. Joline* and *Mr. Wm. Mason Smith* for respondents.

No. 663. JOHN B. MCPHERSON, JUDGE, ETC., PETITIONER,

v. AMERICAN SODA FOUNTAIN COMPANY. May 29, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. G. Henderson* for petitioner. No appearance for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM APRIL 11 TO MAY 29, 1905.

No. 220. THE ATLANTIC LUMBER COMPANY, PETITIONER, *v.* THE L. BUCKI & SON LUMBER COMPANY. On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. April 11, 1905. Dismissed with costs, pursuant to the tenth rule. *Mr. R. H. Liggett* for petitioner. *Mr. H. Bisbee* and *Mr. George C. Bedell* for respondent.

No. 297. MARY K. WALP, PLAINTIFF IN ERROR, *v.* C. E. MOAR ET AL., COPARTNERS AS LAMKIN & FOSTER. In error to the Supreme Court of Errors of the State of Connecticut. April 11, 1905. Dismissed with costs, on authority of counsel for plaintiff in error. *Mr. Henry G. Newton* and *Mr. Bernard E. Lynch* for plaintiff in error. No appearance for defendants in error.

No. 323. PLYMOUTH CORDAGE COMPANY ET AL., APPELLANTS, *v.* J. A. SMITH ET AL. Appeal from the Supreme Court of the Territory of Oklahoma. April 19, 1905. Dismissed with costs on motion of counsel for appellants. *Mr. Edwin A. Krauthoff* for appellants. No appearance for appellees.

No. 241. JOSE MAULEON Y CASTILLO, APPELLANT, *v.* JOSE URRUTIA Y CORTON, WARDEN, ETC. Appeal from the Supreme Court of Porto Rico. April 26, 1905. Dismissed with costs, pursuant to the tenth rule. *Mr. Federico Degetau* for appellant. No appearance for appellee.

No. 257. ISAAC K. KERR, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the United States Circuit Court of Appeals for the Seventh Circuit. May 1, 1905. Dismissed, on authority of counsel for the plaintiff in error, on motion of *The Solicitor General* for the defendant in error. *Mr. A. L. Sanborn* for plaintiff in error. *The Attorney General* for defendant in error.

No. 682. GUSTAV SCHERF, APPELLANT, *v.* P. J. CURTIS, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, CAL. Appeal from the Circuit Court of the United States for the Northern District of California. May 29, 1905. Docketed and dismissed with costs, on motion of *Mr. William R. Harr* for the appellee. No one opposing.

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BANKS.

See NATIONAL BANKS;
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BOUNDARIES.

See PUBLIC LANDS, 1.

BRIBERY.

See REMOVAL OF CAUSES, 7.

CAPITAL STOCK.

See TAXATION, 1.

CARRIERS.

Right to exclusive use of terminal facilities—Contract with connecting carrier —Wharf rights.

A common carrier may agree with such other carrier as it may choose to forward beyond its own line goods it has transported to its terminus; and, if it has adequate terminal facilities at a sea port, sufficient for all freight destined for that place, it is not obliged to allow other and competing carriers to load and discharge at a wharf owned by it and erected for facilitating the transportation of through freight to points beyond that place. The fact that a wharf is built by a railroad company on what might be the extension of a public street, under permissions of the municipality, does not, in the absence of express stipulations, make it a public wharf, or affect the company's right of sole occupancy, or power of regulation, thereof. *Louisville &c. R. R. Co.* v. *West Coast Co.*, 483.

CASES FOLLOWED.

Barney v. *City of New York*, 193 U. S. 430, followed in *Savannah, Thunderbolt &c. Ry.* v. *Savannah*, 392.

Board of Trade v. *Hammond Elevator Co.*, 198 U. S. 424, followed in *Kendall* v. *Automatic Loom Co.*, 477.

Booth v. *Clark*, 17 How. 338, followed in *Great Western Mining Co.* v. *Harris*, 561.

Muhlker v. *Harlem R. R. Co.*, 197 U. S. 544, followed in *Birrell* v. *New York & Harlem R. R. Co.*, 390.

Pacific National Bank v. *Mixter*, 124 U. S. 721, followed in *Van Reed* v. *Peoples' National Bank*, 554.

Pallister, Re, 136 U. S. 257, followed in *Benson* v. *Henkel*, 1.

Russell v. *United States*, 182 U. S. 516, 530, followed in *Harley* v. *United States*, 229.

Thompson v. *Fairbanks*, 196 U. S. 516, followed in *Humphrey* v. *Tatman*, 91.

11. *Waiver of constitutional rights.*

The rule reiterated that persons may by their acts, or omissions to act, waive rights which they might otherwise have under the Constitution and laws of the United States; and the question whether they have or have not lost such rights by their failure to act, or by their action, is not a Federal question. The judgment in this case rested on grounds broad enough to sustain it independent of any Federal question. *Leonard* v. *Vicksburg, S. & P. R. R. Co.*, 416.

CONSTRUCTION.

Of Release. *See* Release and Discharge;
Of Statutes. *See* Interstate Commerce;
Of Treaties. *See* Treaties. Statute, A.

CONTRACTS.

Insurance—Lex loci contractus—Impairment of obligation—Practice as to construction of state statute.

A certificate of insurance on the life of a member residing in New York in a mutual association was executed by the officers in Illinois; it provided that it should first take effect as a binding obligation when accepted by the member, and the member accepted it in New York. It contained a provision that it was to be null and void in case of suicide of insured and also one waiving all right to prevent physicians from testifying as to knowledge derived professionally. After the insured died the association defended an action brought in New York on the ground of suicide and claimed that §§ 834, 836, N. Y. Code Civil Procedure, under which the court excluded testimony of physicians in regard to condition of deceased, were inapplicable because the policy was an Illinois contract and also because in view of the waiver in the certificate their enforcement impaired the obligation of the contract. *Held*, that the general rule is that all matters respecting the remedy and the admissibility of evidence depend upon the law of the State where the suit is brought. Under the circumstances of this case the contract was a New York contract and not an Illinois contract. As §§ 834, 836, of the N. Y. Code of Civil Procedure, were enacted prior to the execution of the contract involved, they could not impair its obligation. In cases of this nature this court accepts the construction given by the courts of the State to its statutes, and even if under § 709, Rev. Stat., this court could review all questions presented by the record, the judgment should be affirmed. *Knights of Pythias* v. *Meyer*, 508.

See Carriers; Jurisdiction, D;
Constitutional Law, 2; Mails;
Restraint of Trade.

CORPORATIONS.

Sufficient compliance with law of Mississippi to constitute corporation capable of suing in Federal court.

The charter of a corporation in Mississippi provided that the incorporators "are hereby created a body politic and corporate," and also that "as

COURTS.

GARNISHMENT.

Liability, at suit of original creditor, of one satisfying judgment against him as garnishee in another State—Sufficiency of jurisdiction of person—Voluntary payment—Effect of failure by garnishee to give creditor notice of attachment.

A citizen of North Carolina who owed money to another citizen of that State, was, while temporarily in Maryland, garnished by a creditor of the man to whom he owed the money. Judgment was duly entered according to Maryland practice and paid. Thereafter the garnishee was sued in North Carolina by the original creditor and set up the garnishee judgment and payment, but the North Carolina courts held that as the situs of the debt was in North Carolina the Maryland judgment was not a bar and awarded judgment against him. *Held*, error and that: As under the laws of Maryland the garnishee could have been sued by his creditor in the courts of that State he was subject to garnishee process if found and served in the State even though only there temporarily, no matter where the situs of the debt was originally. Attachment is the creature of the local law, and power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues. A judgment against a garnishee, properly obtained according to the law of the State, and paid, must, under the full faith and credit clause of the Federal Constitution, be recognized as a payment of the original debt, by the courts of another State, in an action brought against the garnishee by the original creditor. Where there is absolutely no defense and the plaintiff is entitled to recover, there is no reason why the garnishee should not consent to a judgment impounding the debt, and his doing so does not amount to such a voluntary payment that he is not protected thereby under the full faith and credit clause of the Constitution. While it is the object of the courts to prevent the payment of any debt twice over, the failure on the part of the garnishee to give proper notice to his creditor, of the levying of the attachment, would be such neglect of duty to his creditor, as would prevent him from availing of the garnishee judgment as a bar to the suit of the creditor, and thus oblige him to pay the debt twice. *Harris* v. *Balk*, 215.

GRAND JURY.

Objection to selection of grand jurors; waiver by failure to except to.

Although a motion in arrest of judgment, based on the ground that the grand jury was not properly impaneled by reason of the deputy clerk acting in place of the clerk, was made in time, and the court below may have erred in its interpretation of the statute, the accused cannot avail of that even in this court unless the record shows that an exception was properly taken. The accused could have waived such an objection to the grand jury and by not excepting to the ruling he must be held to have acquiesced in the ruling and waived his objection. *Rodriguez* v. *United States*, 156.

INTERSTATE COMMERCE.

State regulation as to liquors shipped from other States held not an interference —Wilson Act—Police power of State.

The malt liquor inspection law of Missouri provides for the inspection of malt liquors manufactured within the State and also for those manufactured without and held for sale and consumption within the State. The Supreme Court of the State sustained the law deciding among other things that the act does not affect liquors shipped into the State and held there for reshipment without the State, that it does not discriminate in favor of beer manufactured in the State, and that it is not a revenue, but an inspection law. The constitutionality of the law was attacked by a manufacturer of malt liquors without the State as an interference with interstate commerce, and also on the ground that as the amount of the inspection charge far exceeds the expense of inspection it is a revenue, and not an inspection law and therefore does not fall under permissive provisions of the Wilson Act. *Held*, a state statute which operates upon beer and malt liquors shipped from other States after their arrival and while held for sale and consumption within the State, is not an interference with interstate commerce in view of the provisions of the Wilson Act. The regulation of the sale of liquor is essentially a police power of the State and a provision in a state law, tending to determine the purity of malt liquors sold in the State, is an exercise of the same power. The purpose of the Wilson Act is to make liquor, after its arrival in a State, a domestic product, and to confer power on the States to deal with it accordingly. The police power is, hence, to be measured by the right of the State to control or regulate domestic products and this creates a state and not a Federal question as respects the commerce clause of the Constitution; and this court cannot review the determination of the state court that the statute involved in this case was not a revenue but an inspection measure. A state regulation, valid under the Wilson Act, as to liquors shipped from another State after delivery at destination is not an interference with interstate commerce because it affects traffic in, and deters shipments of, the article into that State. The rule that state inspection laws, which do not provide adequate inspection and impose a burden beyond the cost of inspection, are repugnant to the commerce clause of the Constitution does not apply to liquors after they have ceased to be articles of interstate commerce under the provisions of the Wilson Act. *Pabst Brewing Co.* v. *Crenshaw*, 17.

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INTOXICATING LIQUORS.

See INTERSTATE COMMERCE.

INVENTION.

See JURISDICTION, D;
PATENT FOR INVENTION.

E. Of Bankruptcy Court.

Determination of controversies relative to property, its ownership and liens thereon.

The bankruptcy court has jurisdiction of a proceeding in the nature of a plenary action brought by the trustee to determine controversies in relation to property held by the bankrupt or by other parties for him, and the extent and character of liens thereon; and this applies to a suit brought against parties claiming possession of goods in the bankrupt's store, as warehousemen, under a nominal lease of the store from the bankrupt. A receiver in bankruptcy is appointed as a temporary custodian and it is his duty to hold possession of property until the termination of the proceedings or the appointment of the trustee, and meanwhile the bankruptcy court has possession of the property and jurisdiction to hear and determine the interests of those claiming liens thereon or ownership thereof, and this jurisdiction cannot be affected by the receiver turning the property over to any person without the authority of the court. *Whitney* v. *Wenman*, 539.

F. Of Federal Courts Generally.

1. *Powers in support of jurisdiction.*

A Federal court exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed, and may protect the title which it has decreed as against all parties to the original suit and prevent any of such parties from relitigating questions of right already determined. *Riverdale Mills* v. *Manufacturing Co.*, 188.

2. *Conclusiveness of judgment entered in case where jurisdiction based on admitted diverse citizenship.*

Where parties litigate in a Federal court whose jurisdiction is invoked on the ground of diverse citizenship, alleged and admitted, the judgment or decree which is entered is conclusive and cannot be upset by either of them in any other tribunal on the mere ground that diverse citizenship did not actually exist. In an ancillary suit a party to the original action cannot challenge the jurisdiction of the Circuit Court in the original action on the ground that its admission of citizenship was an error and that a correct statement would have disclosed a lack of jurisdiction. *Ib.*

3. *Diverse citizenship—Corporations—When court will regard substantial rights rather than mere matter of organization.*

Although where two corporations of the same name, chartered by different States, exist and there has been no merger, the corporations are separate legal persons, the court may, where the circumstances as in this case justify it, look beyond the formal and corporate differences and regard substantial rights rather than the mere matter of organization. *Ib.*

4. *Yielding of jurisdiction for trial elsewhere—Election to remove—Rights of defendant.*

The rule that where jurisdiction has attached to a person or thing it is

2. *State law; grounds for avoidance by Federal court.*

If a state pilot law does not conflict with the provisions of the Federal statutes in regard to pilotage this court cannot avoid its provisions because it deems them unwise or unjust. *Ib.*

PISCARY.

See TREATIES.

PLEADING.

See JURISDICTION, A 1; C 1;
REMOVAL OF CAUSES, 3.

PLEDGE.

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POSTAL SERVICE.

See MAILS.

POWERS OF CONGRESS.

See CONSTITUTIONAL LAW, 3; PILOTAGE, 1;
NATIONAL BANKS, 1; TREATIES.

PRACTICE.

See CONTRACTS;
REMOVAL OF CAUSES;
TREATIES.

PREFERENCES.

See BANKRUPTCY, 3.

PROCESS.

See JURISDICTION, A 3, 4;
NATIONAL BANKS, 2;
WRIT AND PROCESS.

PROPERTY.

Collections of quotations of prices as—Effect on property rights of limited dissemination—Effect of illegal nature of acts concerned.

The Chicago Board of Trade collects at its own expense quotations of prices offered and accepted for wheat, corn and provisions in its exchange and distributes them under contract to persons approved by it and under certain conditions. In a suit brought by it to restrain parties from using the quotations obtained and used without authority of the Board, de-

PUBLIC OFFICERS.

See PUBLIC LANDS, 4.

RAILROADS.

See CARRIERS;
CONSTITUTIONAL LAW, 6.

RAILWAY MAIL SERVICE.

See MAILS.

RECEIVERS.

Character as officer of court—Right to sue in foreign jurisdiction.

A receiver is an officer of the court which appoints him, and in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court appointing him, to recover the property of the debtor. (*Booth* v. *Clark*, 17 How. 338.) A receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, as every jurisdiction in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to control the distribution of the funds realized within its own jurisdiction. Where the receiver cannot maintain an action to recover property in a jurisdiction other than that in which he was appointed, jurisdiction is not established because the action is authorized to be instituted by the receiver in the name of the corporation, if it appears that in case of a recovery the property would be turned over to the receiver to be by him administered under the order of the court appointing him. *Great Western Mining Co.* v. *Harris*, 561.

See JURISDICTION, E.

RELEASE AND DISCHARGE.

Release of claim for personal injuries construed.

An employé of a railroad company executed a release which, after reciting that he had been injured in an accident, and that it was desirable to maintain pleasant relations, and avoid all controversy in the matter, and specifying certain slight bodily injuries including a scalp wound, released the company for a consideration of thirty dollars from all "claims and demands of every kind whatsoever for or on account of the injuries sustained in the manner and on the occasion aforesaid;" subsequently, after having remained in the company's employ about three months, he sued and obtained a verdict for permanent bodily and mental injuries, resulting from injuries not enumerated in the release, including a fracture of the skull; there was testimony going to show that the fracture was not known when the release was executed and that the permanent disability resulted from non-enumerated injuries. The trial court charged that the release related only to damages sustained by the enumerated injuries and to those sustained from the

STATUTES.

A. Construction of.

State statute of exemptions not to be limited.

Courts will not read into a broadly expressed state statute of exemption limitations which do not exist therein because they do exist in similar statutes of other States or because they deem the limitations equitable. To do so could not be construction of the statute but legislation; and the broad terms of the statute shows an intention of the legislature of the State to adopt broader and more comprehensive exemptions than those adopted by the other States. *Holden* v. *Stratton*, 202.

See Contracts;
Interstate Commerce;
Public Lands, 3.

B. Of the United States.

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C. Of the States and Territories.

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STOCK.

See Taxation, 1.

TAXATION.

1. *Capital stock of corporation represents property in which capital invested —Exclusion from assessment, of property sent out of State—Illegality of taxation of capital stock on value arising from value of property out of State.*

A tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and therefore no tax can be levied upon the corporation issuing the stock which includes property that is otherwise exempt. The same rule that requires the exclusion from the assessment of valuation of capital stock of tangible personal property permanently situated out of the State applies to property sent out of the State to be sold and which is actually out of the State when the assessment is made. As a State cannot directly tax tangible property permanently outside the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of a corporation which arises from the value of property beyond its jurisdiction. While an appraisement of value is in general a decision on a question of fact and final, where it is arrived at by including property not within the jurisdiction of the State, it is absolutely illegal as made without jurisdiction. The collection of a tax on a corporation on its capital stock based on a valuation which includes property situated out of the State would amount to the taking of property without due process of law and can be restrained by the Federal courts. In assessing the value of the capital stock of a corpo-

pears that defendant has the right to use the name and has not done anything to promote confusion in the mind of the public except to use it, complainant's case must stand or fall on the possession of the exclusive right to the use of the name. A personal name—an ordinary family surname such as Remington—cannot be exclusively appropriated by any one as against others having a right to use it; it is manifestly incapable of exclusive appropriation as a valid trade-mark, and its registration as such can not in itself give it validity. Every man has a right to use his name reasonably and honestly in every way, whether in a firm or corporation; nor is a person obliged to abandon the use of his name or to unreasonably restrict it. It is not the use, but dishonesty in the use, of the name that is condemned, and it is a question of evidence in each case whether there is a false representation or not. One corporation cannot restrain another from using in its corporate title a name to which others have a common right. Where persons or corporations have a right to use a name courts will not interfere where the only confusion results from a similarity of names and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one person for that of another, and if defendant is not attempting to palm off its goods as those of complainant the action fails. *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 118.

TREATIES.

Treaty of 1859 *with Yakima Indians, construed—Preservation of fishing rights under—Power of Federal Government to create servitude of lands which State must recognize.*

This court will construe a treaty with Indians as they understood it and as justice and reason demand. The right of taking fish at all usual and accustomed places in common with the citizens of the Territory of Washington and the right of erecting temporary buildings for curing them, reserved to the Yakima Indians in the treaty of 1859, was not a grant of right to the Indians but a reservation by the Indians of rights already possessed and not granted away by them. The rights so reserved imposed a servitude on the entire land relinquished to the United States under the treaty and which, as was intended to be, was continuing against the United States and its grantees as well as against the State and its grantees. The United States has power to create rights appropriate to the object for which it holds territory while preparing the way for future States to be carved therefrom and admitted to the Union; securing the right to the Indians to fish is appropriate to such object, and after its admission to the Union the State cannot disregard the right so secured on the ground of its equal footing with the original States. Patents granted by the United States for lands in Washington along the Columbia River and by the State for lands under the water thereof and rights given by the State to use fishing wheels are subject to such reasonable regulations as will secure to the Yakima Indians the fishery rights reserved by the treaty of 1859. *United States* v. *Winans*, 371.

WATERS.

See CONSTITUTIONAL LAW, 4;
PILOTAGE, 1;
TREATIES.

WHARVES.

See CARRIERS.

WRIT AND PROCESS.

1. *Sufficiency of service on foreign corporation.*

A Delaware corporation having its principal office in Indiana, and continuously carrying on a grain and stock brokerage business through the same persons in Illinois under an arrangement practically equivalent to agency, *held*, under the circumstances of this case, and in view of the statutes of Illinois as to service on foreign corporations, to be carrying on business in Illinois, and that service on such persons of process in a suit against it in the Circuit Court of the United States for Illinois was sufficient. *Board of Trade* v. *Hammond Elevator Co.*, 424.

2. Where the foreign corporation was doing no business and had no assets in the State, service upon a former officer residing therein, *held*, insufficient under the circumstances of this case. *Ib.*

3. *Semble*, service on a director of a corporation, which is doing no business and has no property in the State, when he is casually in the State for a few days, is bad. *Remington* v. *Central Pacific R. R. Co.*, 95.

See CONSTITUTIONAL LAW, 8;
JURISDICTION, A 2, 3, 4;
NATIONAL BANKS, 2.