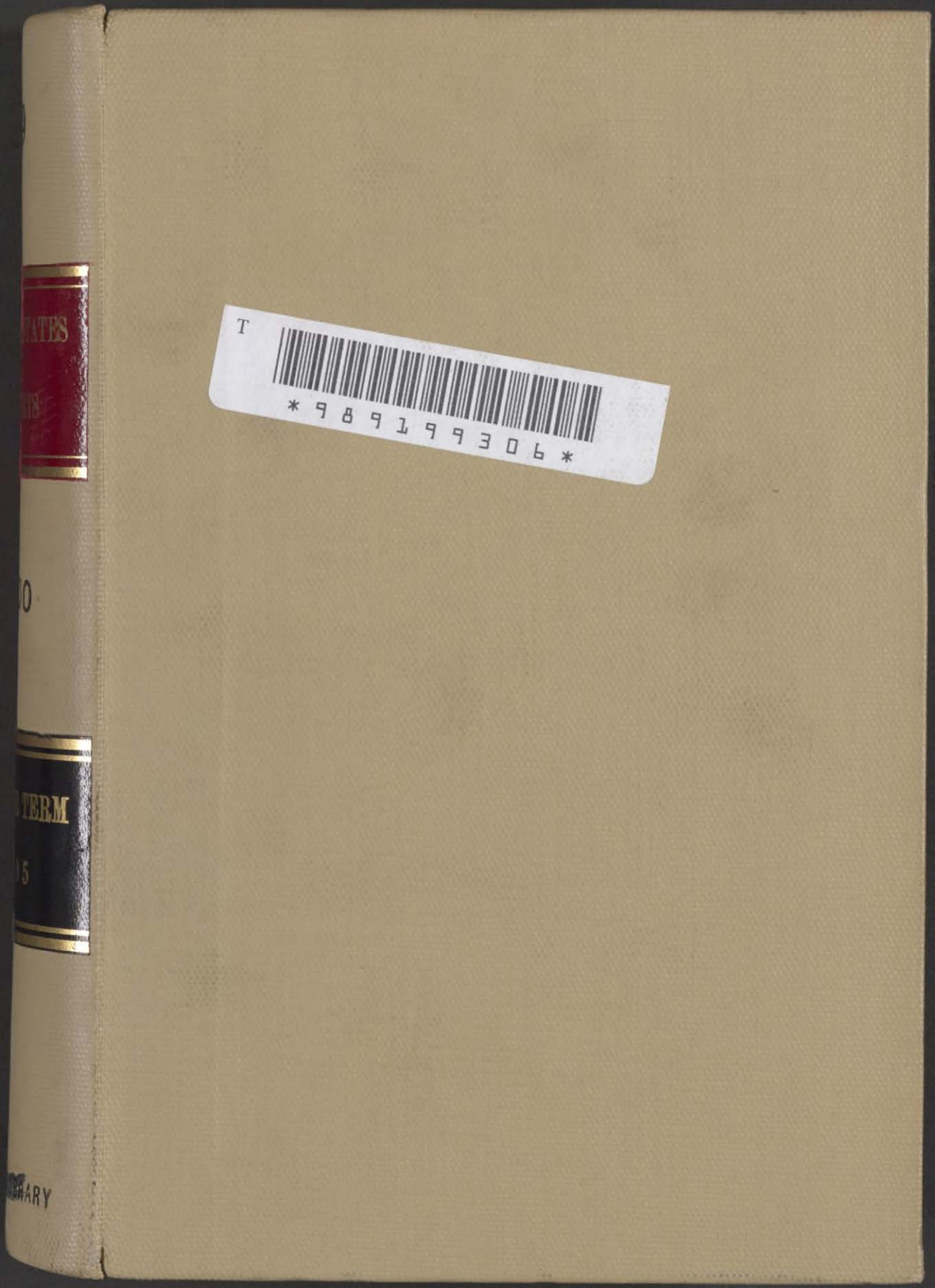
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UNITED STATES REPORTS

VOLUME 200

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1905

CHARLES HENRY BUTLER

REPORTER

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1906

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, 1905.

UNITED STATES *ex rel.* DRURY *v.* LEWIS, WARDEN OF THE COMMON JAIL.

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

No. 126. Argued December 12, 1905.—Decided January 2, 1906.

An officer and an enlisted soldier in the military service of the United States were indicted for murder and manslaughter and held for trial in a state court for having killed a citizen of the State who was not in the service of the United States, the alleged crime having been committed within the State, on property not belonging to, or under the jurisdiction of, the United States. On a writ of *habeas corpus* from a Circuit Court of the United States it was contended that petitioners were seeking to arrest the deceased for felony under the laws of the United States and that he met his death while attempting to escape, and as therefore the homicide was committed by petitioners in the discharge of their duties, the state court was without jurisdiction. On the hearing there was a conflict of evidence as to whether deceased had surrendered or not, and it was conceded that if he were not a fleeing felon the ground for Federal interposition failed. *Held*, that

The Circuit Court properly declined to wrest petitioners from the custody of the state officers in advance of trial in the state courts.
Ex parte Crouch, 112 U. S. 178, applied.

RALPH W. DRURY and John Dowd were indicted in the Court of Oyer and Terminer for the county of Allegheny, Pennsylvania, on two counts, the first charging them with murder, and the second with manslaughter, in the homicide of one William H. Crowley, September 10, 1903. They were admitted to bail in the sum of $5,000 each, and having been subsequently surrendered, obtained a writ of *habeas corpus* from the Circuit Court of the United States for the Western District of Pennsylvania. The case on the hearing was thus stated by Acheson, J., holding the Circuit Court:

"On September 10, 1903, Ralph W. Drury was a commissioned officer of the United States Army, of the rank of second lieutenant, and had under his command a detachment of twenty enlisted men, of whom John Dowd was one, stationed at Allegheny Arsenal, in the city of Pittsburg, in Allegheny County, Pennsylvania, this arsenal being a subpost of Ft. Niagara, N. Y. From time to time before September 10, 1903, some copper down spouts and eave troughs had been stripped from some of the buildings on the arsenal grounds and the material stolen, and other depredations, such as the breaking of window lights, had been committed on the arsenal property. Lieut. Col. Robertson, the commanding officer at Ft. Niagara, on the occasion of an inspection of Allegheny Arsenal, in July, 1903, had directed Lieutenant Drury to use his best endeavors to stop the depredations, and to that end ordered him to establish a patrol of the guards day and night upon the arsenal grounds, and to apprehend and arrest any person or persons committing depredations on the arsenal property. Shortly before 10 o'clock on the morning of September 10, 1903, having received word that some persons were stealing copper from one of the buildings on the arsenal grounds, Lieutenant Drury took John Dowd, then on guard duty, and another private soldier (each of the latter being armed with a rifle and ammunition), and, passing out of

the arsenal grounds through the gate on Butler street, the three proceeded by way of Butler street and Almond alley towards the Allegheny Valley Railroad. Drury informed the two men of the reported stealing of copper and instructed them to continue down Almond alley and to arrest any person coming from the arsenal. Drury himself left Almond alley at the corner of Willow street and went by Willow street to Fortieth street (which runs along, but outside of, the arsenal wall), and proceeded down Fortieth street to its foot, where were congregated three or four half-grown boys or young men, among whom was William H. Crowley, aged about 19 or 20 years. These persons fled in different directions when they saw Lieutenant Drury approaching. Crowley ran from the foot of Fortieth street away from the arsenal property in the direction of Forty-first street, keeping on or near the Allegheny Valley Railroad. When he was about one hundred yards from the arsenal wall Crowley was shot by Dowd, who aimed and fired his rifle at Crowley. At the time of the shooting, Drury, Dowd, and Crowley were all off the grounds belonging to the United States. Each one of the three then stood either upon a street of the city, on the Allegheny Valley Railroad, or on private property. The rifle ball struck Crowley's left thigh, inflicting a mortal wound from which he died on the evening of the same day—September 10, 1903.

"Thus far the facts are not open to dispute under the testimony. But as to the circumstances attending the shooting of Crowley the evidence is conflicting and leads to opposite conclusions of fact as one or other version of the affair given by the witnesses is accepted. Dowd testifies, and the petitioners have produced other evidence tending to show, that as Crowley fled he was called on several times by Dowd, who followed him, to halt, with warning that unless he halted Dowd would fire; that Crowley did not halt, but continued his flight, and to prevent his escape behind or through a lumber pile Dowd fired, and that Drury did not order Dowd to fire, and was not connected with the shooting save by the fact that he ordered the

arrest of any person coming from the arsenal. On the other hand, two witnesses who were present (Mrs. Long and Miss Terwillerger) testify that before the shot was fired Crowley stopped, turned around facing the pursuing soldier (Dowd), threw up his hand, said, 'Don't shoot,' 'I will come back,' or 'I will give up,' and that just then Lieutenant Drury said 'Fire!' and Dowd fired the shot that killed Crowley. The testimony of at least one other witness tends to corroborate the account of the transaction given by the two named women as above recited. It is not for me to say whether or not the witnesses who have testified thus on the part of the Commonwealth are mistaken.

"In view of all the evidence herein, should this court interfere to prevent the trial of the petitioners upon the indictment in the state court, take the petitioners out of the custody of the authorities of the State, and discharge them finally without trial by any civil court in the regular administration of justice? This is the question which confronts me." 129 Fed. Rep. 823.

The court entered an order discharging the writ and remanding petitioners to the custody of the warden of the jail of Allegheny County, and from that order this appeal was allowed and prosecuted.

Mr. Assistant Attorney General Purdy for appellants:

United States officers and other persons held in custody by state authority for doing acts which they are authorized or required to do by the Constitution and laws of the United States are entitled to be released from such custody, and the writ of *habeas corpus* is the appropriate remedy for that purpose. *In re Neagle*, 135 U. S. 1; *In re Waite*, 81 Fed. Rep. 359; *Ohio* v. *Thomas*, 173 U. S. 276; § 761 Rev. Stat.

The petitioners upon this appeal are entitled to have this court examine the evidence and determine the facts in this case, and to decide whether or not these petitioners are entitled to be discharged from the custody of the warden. *Storti* v. *Massachusetts*, 183 U. S. 138, 143.

Only a few minutes before his death Crowley had committed

a felony within the arsenal grounds, a place under the exclusive jurisdiction of the United States, over which crime and the place where it was committed the courts of the United States had exclusive jurisdiction.

In the absence of any specific law upon the subject, the petitioners were charged with the duty of arresting persons guilty of stealing Government property under their custody. At the time of the homicide there existed a specific law of the United States under which these petitioners were acting in making Crowley's arrest. § 161 Rev. Stat.; *Campbell* v. *Thayer*, 88 Fed. Rep. 102, 106.

As to the responsibility of officers of the army in command of a post or station for the security of all public property in their custody or under their control, see §§ 739, 740, 764 and 766 of the Army Regulations for 1901.

If the laws of the United States imposed upon these petitioners the duty to arrest Crowley for the felony which he had committed, they were justified in making use of whatever force was necessary for the purpose of performing such duty, even to the extent of firing upon Crowley, if in no other way he could be apprehended. *Rex* v. *Geo. Howarth*, 3 Moody's Crown Cases, 207; *The Queen* v. *Dadson*, 2 Denison's Crown Cases, 35; *Regina* v. *Murphy*, 3 Crawford & Dix's Circuit Cases, 20; 1 East's Pleas of the Crown, 298; 1 Hale, 481; *Rex* v. *Finnerty*, 1 Crawf. & Dix's C. C. 167; 1 Hawkins, 881; 1 Russ. Crimes, 666; 3 Wharton on Crim. Law, § 2927; 1 Bishop Crim. Pro. § 159; 2 Bishop New Crim. Law, § 648; *Conraddy* v. *People*, 5 Parker (N. Y.), 234, 241; *Commonwealth* v. *Long*, 17 Pa. Super. Ct. 641, 647.

The petitioner Dowd was justified, under all the facts and circumstances of the case, in firing upon the felon Crowley for the purpose of effecting his arrest, and that the court of Oyer and Terminer of Allegheny County is without jurisdiction to try the petitioners on the indictment which has been found against them in that court. *Brish* v. *Carter et al.*, 57 Atl. Rep. (Md.) 210; *Olson* v. *Leindecker*, 97 N. W. Rep. (Minn.) 972;

Brooks v. *State*, 39 S. W. Rep. (Ga.) 877; *People* v. *Glennon*, 74 N. Y. Supp. 794; *Kirk & Son* v. *Garrett*, 84 Maryland, 383; *People* v. *Hochstin*, 73 N. Y. Supp. 626; *Stapely* v. *Commonwealth*, 6 Binney (Pa.), 316; *Brooks* v. *Commonwealth*, 61 Pa. St. 352; *United States* v. *Fuellhart*, 106 Fed. Rep. 911.

The evidence is conclusive that Crowley was wounded while fleeing from arrest. Even though Dowd used more force in attempting to make the arrest than he was warranted in using under the law, nevertheless since he was engaged in performing a duty imposed upon him by a law of the United States, the state courts are without jurisdiction to call him to account for the excessive use of force in performing a duty which the Federal laws commanded. *Ex parte Jenkins*, 2 Wall. Jr. 543; *In re Neagle, supra; In re Waite*, 81 Fed. Rep. 359.

There was no appearance for the appellee.

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

In *Baker* v. *Grice*, 169 U. S. 284, 290, an appeal from the final order of the Circuit Court of the United States for the Northern District of Texas, in *habeas corpus*, it was said:

"The court below had jurisdiction to issue the writ and to decide the questions which were argued before it. *Ex parte Royall*, 117 U. S. 241; *Whitten* v. *Tomlinson*, 160 U. S. 231. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from

this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U. S. 372, and *In re Neagle*, 135 U. S. 1, but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court."

The rule thus declared is well settled and, in our judgment, it was properly applied in this case. Crowley was a citizen of Pennsylvania, not in the service of the United States, and was killed in or near a street of the city of Pittsburgh, and not on property belonging to the United States or over which the United States had jurisdiction.

The homicide occurred within the territorial jurisdiction of the Court of Oyer and Terminer, which, as Judge Acheson observed, was the only civil court which could have jurisdiction to try petitioners for the alleged unlawful killing, and the indictment presented a case cognizable by that court.

The general jurisdiction in time of peace of the civil courts of a State over persons in the military service of the United States, who are accused of a capital crime or of any offense against the person of a citizen, committed within the State, is, of course, not denied.

But it is contended on behalf of the Government that the state court was absolutely without jurisdiction to try petitioners for the killing of Crowley, because the homicide was com-

mitted by them "while in the lawful performance of a duty and obligation imposed upon them by the Constitution and laws of the United States." The argument is that Crowley had been guilty of the crime of larceny and could have been indicted and prosecuted on the charge of felony in the District Court of the United States under section 5439 of the Revised Statutes, or under section 5391, the United States having jurisdiction over the Allegheny Arsenal property and the Pennsylvania laws making what Crowley is alleged to have done a felony. Hence that it was the duty of petitioners to arrest Crowley and to surrender him to the Federal authorities for prosecution. And it is insisted that the fact is "established that Crowley met his death while attempting to escape arrest." But there was a conflict of evidence as to whether Crowley had or had not surrendered, and it is conceded that if he had, it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law, and the state court had jurisdiction.

The Circuit Court was not called on to determine the guilt or innocence of the accused. That was for the state court if it had jurisdiction, and this the state court had, even though it was petitioners' duty to pursue and arrest Crowley (assuming that he had stolen pieces of copper), if the question of Crowley being a fleeing felon was open to dispute on the evidence; that is, if that were the gist of the case, it was for the state court to pass upon it, and its doing so could not be collaterally attacked. The assertion that Crowley was resisting arrest and in flight when shot was matter of defense, and *Ex parte Crouch*, 112 U. S. 178, is in point.

We have repeatedly held that the acts of Congress in relation to *habeas corpus* do not imperatively require the Circuit Courts to wrest petitioners from the custody of state officers in advance of trial in the state courts, and that those courts may decline to discharge in the proper exercise of discretion. We think that discretion was properly exercised in this case.

Final order affirmed.

ALBRIGHT *v.* TERRITORY OF NEW MEXICO *ex rel.* SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 229. Submitted November 27, 1905.—Decided January 2, 1906.

The renewal in this court of a motion to dismiss the appeal which was considered and denied by the Supreme Court of the Territory amounts to no more than an assignment of error to the action of that court in this regard, to be passed on or disposed of as such, if this court otherwise has jurisdiction.

In the proceedings in *quo warranto* in this case the alleged usurpation of the office is the matter in dispute, and the liability to fine on judgment of ouster or the effect of the judgment in a subsequent action to recover the emoluments of the office does not make that matter measurable by some sum or value in money, and an appeal to this court will not lie from the Supreme Court of a Territory under either section of the act of March 3, 1885, c. 355.

THE facts are stated in the opinion.

Mr. William B. Childers for appellant.

Mr. Neill B. Field for appellee.

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

This was a proceeding *in quo warranto* brought in the District Court of Bernalillo County, New Mexico, July 20, 1903, by the Territory on the relation of Jesus M. Sandoval against George F. Albright, it being alleged that Sandoval was duly elected to the office of assessor of Bernalillo County for the term of two years from the first day of January, 1903; that he duly qualified and entered on the discharge of the duties of the office; and that he had never resigned, vacated or abandoned the office, and ever since his election and qualification had continued to discharge the duties thereof. It was further alleged that on

March 23, 1903, respondent Albright, without authority of law, unlawfully usurped the office and took possession of the assessor's room in the court house and of the books, papers and other insignia of office, claiming office by virtue of a pretended appointment by the board of county commissioners of Bernalillo County, made under the authority of an act of the legislative assembly of the Territory of New Mexico, entitled "An act to create the county of Sandoval," approved March 10, 1903, as amended by an act entitled "An act to amend section 3 of an act entitled 'An act to create the county of Sandoval,'" approved March 12, 1903.

Judgment was rendered by the District Court in favor of Albright, August 3, 1903, and carried to the Supreme Court of the Territory, which reversed the judgment and remanded the cause with directions to the court below to reinstate it and proceed in accordance with the views expressed in its opinion. 78 Pac. Rep. 204. The mandate was filed below October 19, 1904, and on the nineteenth of November the District Court entered judgment "that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of assessor of the county of Bernalillo and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of assessor of the county of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof," and for costs.

The case was again carried to the Supreme Court and heard upon a motion to dismiss, and on the merits, and February 24, 1904, the court denied the motion to dismiss, modified the judgment of the District Court by striking out the words "and that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of as-

sessor of the county of Bernalillo and Territory of New Mexico, as the lawful custodian thereof," and affirmed the judgment as so modified. 79 Pac. Rep. 719. On the same day an appeal was allowed to this court, a supersedeas bond given, which was approved March 9, 1905, and the record was filed here April 17. The case comes before us on a motion to dismiss.

The ground assigned for the motion is the expiration of the term of the office of assessor of the county of Bernalillo and the consequent lack of power to grant appellant any effectual relief. But the same motion has already been considered and denied by the Supreme Court of the Territory, and its renewal here amounts to no more than an assignment of error to the action of that court in this regard, to be passed on and disposed of as such, if otherwise we have jurisdiction of the case. If we have not, the appeal must be dismissed even though for reasons not put forward in support of the motion. The opinion of the Supreme Court fully discussed the authorities on the subject of the right to have a review of the judgment on appeal after the expiration of the term of office involved in the proceeding in *quo warranto*. The court refused to dismiss the writ, holding that the statute, 9 Anne, c. 20, § 5, providing that in addition to judgment of ouster, fine and costs may be imposed, was a part of the common law of the Territory, and also that the judgment might affect the rights of the parties in another litigation in relation to the emoluments of the office.

The appeal to this court was taken under the statute of March 3, 1885, 23 Stat. 443, c. 355; *Shute* v. *Keyser*, 149 U. S. 649. Both sections of that act apply to cases where there is a matter in dispute measurable by some sum or value in money, although the amount is not restricted under the second section. *Washington & Georgetown Railroad Company* v. *District of Columbia*, 146 U. S. 227; *Farnsworth* v. *Montana*, 129 U. S. 104. In proceedings in *quo warranto*, such as those in this case, the alleged usurpation is the matter in dispute and the liability to a fine on judgment of ouster does not make that matter measurable by some sum or value in money. As in criminal cases,

the fine is "in the eye of the law, a punishment for the offense committed, and not the particular object of the suit." *United States* v. *More*, 3 Cranch, 159, 174. Moreover, appellant could hardly be allowed to invoke our jurisdiction on the ground that if his appeal were sustained he might be fined on a new judgment.

The term of office had expired before the rendition of judgment by the Territorial Supreme Court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in such subsequent action. *New England Mortgage Security Company* v. *Gay*, 145 U. S. 123; *Washington & Georgetown Railroad Company* v. *District of Columbia*, 146 U. S. 227.

Appeal dismissed.

NUTT *v.* KNUT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 78. Argued November 29, 1905.—Decided January 2, 1906.

An attorney was employed to prosecute a claim against the United States; the contract which was in writing provided that he should prosecute it before the courts, officers and departments of the Government and Congress; that he should receive as compensation a sum equal to a specified percentage of the amount allowed, the payment whereof was made a lien upon the recovery. The prosecution was successful and the amount allowed was collected by the claimant himself. The attorney sued in the state court on the contract and recovered a judgment, his claim being resisted on the ground that the contract was void under § 3477, Rev. Stat., prohibiting transfers of claims against the United States, and also that being for lobbying services was void against public policy. He also sought a recovery upon a *quantum meruit*. He moved to dismiss the writ of error on the ground that there was no Federal question, *held* in affirming the judgment that

A party who insists in the state court that a judgment cannot be rendered against him consistently with a statute of the United States asserts, within

the meaning of § 709, Rev. Stat., a right and immunity under such statute, although it might not give him a personal or affirmative right, enforceable in direct suit against his adversary, and a writ of error will lie from this court to review the judgment denying the existence of such right or immunity. The contract, so far as it gave a lien on the amount allowed, was void under § 3477, Rev. Stat., but the provision agreeing to pay the compensation fixed was not in violation of the statute and could stand alone. The state court having held, on evidence taken in that regard, that the suit was not one for lobbying services, this court accepts that view of the case.

THIS suit was brought in the Chancery Court of Adams County, Mississippi, the plaintiff being S. Prentiss Knut, defendant in error, and the defendants being the administrator, heirs and devisees of Haller Nutt, deceased.

It was based upon a written contract between the late James W. Denver and the (then) executrix of Haller Nutt, deceased, as follows: "That the party of the first part (Denver) agrees to take exclusive charge and control of a certain claim which the party of the second part (executrix of Nutt's estate) holds against the Government of the United States, for the use of property and for property of which the said Haller Nutt and his estate was deprived by the acts of officers, soldiers and employés of the United States in Louisiana and Mississippi, in the years 1863, 1864 and 1865, amounting to one million of dollars, more or less, and to prosecute the same before any of the courts of the United States, and upon appeal to the Supreme Court of the United States, or before any of the departments of Government, or before the Congress of the United States, or before any officer or commission or convention specially authorized to take cognizance of said claim, or through any diplomatic negotiations as may be deemed by him for the best interests of the party of the second part. And in consideration therefor the party of the second part agrees to pay the party of the first part a sum equal to 33⅓ per cent of the amount which may be allowed on said claim, the payment of which is hereby made a lien upon said claim and upon any draft, money or evidence of indebtedness which may be issued thereon. This agreement

not to be affected by any services performed by the claimant, or by any other agents or attorneys employed by him. All expenses of printing, costs of court and commission fees for taking testimony are to be charged to the party of the second part, and the party of the second part agrees to execute from time to time such powers of attorney as may be convenient or necessary for the successful prosecution and collection of said claim. No revocation of any authority conferred on the party of the first part by this agreement or any power of attorney relating to the business covered by the same to be valid."

On the same day the executrix of Nutt executed to Denver a power of attorney, constituting the latter her attorney "irrevocable," for her and in her name and stead "to prosecute a certain claim against the Government of the United States, for property used and for property of which said Haller Nutt and his estate was deprived by United States officers, soldiers and employés in Louisiana and Mississippi, amounting to one million dollars, more or less, before any court of the United States, or before any of the departments of the Government, or before the Congress of the United States, or before any officer or commission or convention specially authorized to take cognizance of said claim, or through any diplomatic negotiations, to collect the same; and from time to time to furnish any further evidence necessary, or that may be demanded, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, and to receipt and sign all vouchers and bonds of indemnity or appeal and to indorse all drafts and vouchers in my name, either by or without indicating it is done by procuration, which may be requisite in the prosecution or collection of said claim, hereby ratifying and confirming all that my said attorney or his substitute may or shall lawfully do, or cause to be done by virtue hereof."

The petition shows, and it is not disputed, that the plaintiff succeeded to all the rights, whatever they were, of Denver under the above contract, and that as the result of his labors Congress at different times appropriated, on account of the Nutt claim, the sums of $35,556.51 and $89,999.88. 23 Stat. 552, 586; 32 Stat. 207, 212. Prior to the bringing of the present suit the plaintiff had received his "due share" of the first appropriation, but has not received his full part of the last one. He therefore sought payment, in accordance with the contract, for the balance due him on account of the said sum of $89,999.88 appropriated to and received by the Nutt estate.

The plaintiff subsequently amended his petition, and asked that in the event of his not being entitled to compensation under the Denver contract he have judgment for such sum as his services were reasonably worth, which he alleged to be $30,000.

Some of the defendants by their answers put the plaintiff upon proof of his case but submitted to the court the question of the reasonableness of his claim for fees.

Three of the defendants while not denying that plaintiff had been recognized by the executrix and subsequent administrators of Nutt's estate as the attorney of record against the United States Government, yet denied any legal liability of the estate by reason of such recognition. They averred that "the original contract and power of attorney as assignee of which petitioner claims to recover from the present administrator $33\frac{1}{3}$ per cent of said sum of $89,999.88 were contrary to good morals and public policy, were null and void, so far as they undertook to vest a right to a contingent fee in said Denver, and conferred upon said Denver no rights for the recovery of any fee against this estate which a court would recognize and enforce. And respondents further charge that said petitioner, as assignee of said Denver, occupies no better position than his assignor had, and that as such assignee he has no standing in this court for the enforcement of said void contract, or for the enforcement of any claim whatever for professional services rendered by him, or alleged to have been rendered by him in behalf of said

estate in connection with said claim against the United States Government.''

Upon the final hearing of the case in the court of original jurisdiction the chancellor rendered a decree holding that the Denver contract was "violative of the United States statute laws, and being further of the opinion that complainant in the prosecution of said claim under said contract before the Congress of the United States, in procuring and attempting to procure appropriations for the payment thereof, did procure personal solicitations to be made of members of Congress of the United States in behalf of said claim, and for the reasons stated is not entitled to the relief prayed for in his petition, doth order, adjudge and decree that complainant's petition be and the same is hereby dismissed at his cost, for which let execution issue."

Upon appeal to the Supreme Court of Mississippi the judgment was reversed, and that court, proceeding to render such decree as in its opinion should have been rendered, adjudged that the plaintiff was entitled "to his prayer for 33⅓ per cent of the amount collected by his administrator, $89,993.83, in full for any advance made by him and all services, less any payments made." 35 So. Rep. 686. The cause was remanded for an account to be taken and for an order directing the administrator to pay to Knut any balance of that per cent unpaid. The accounting was had in the inferior state court, Knut being charged with $10,000 paid on June 10, 1902, and allowed interest. The result was a decree that the plaintiff have and receive from the administrator of Haller Nutt's estate the sum of $22,143.30, with six per cent interest. That decree, upon appeal, was affirmed by the Supreme Court of Mississippi.

Mr. A. S. Worthington for plaintiffs in error:

The final decree in the state court is based solely on the decision that the contract is not void under § 3477, Rev. Stat.; this raised a Federal question and this court has jurisdiction. § 709, Rev. Stat.; *Udell* v. *Davidson*, 7 How. 769; *Walworth* v. *Kneeland*, 15 How. 348; *Daniel* v. *Tearney*, 102 U. S. 415; *An-*

derson v. *Carkins*, 135 U. S. 483; *Bank* v. *Townsend*, 139 U. S. 67; *McCormick* v. *Bank*, 165 U. S. 538; *Conde* v. *York*, 168 U. S. 642; *Price* v. *Forrest*, 173 U. S. 410; *Allen* v. *Arguimbau*, 198 U. S. 149.

The contract is void under § 3477, Rev. Stat. *Trist* v. *Child*, 21 Wall. 441; *Spofford* v. *Kirk*, 97 U. S. 484; *Hager* v. *Swayne*, 149 U. S. 242; *Ball* v. *Halsell*, 161 U. S. 72; *Owens* v. *Wilkinson*, 20 App. D. C. 51; *Tool Co.* v. *Norris*, 2 Wall. 452.

Even if not void under § 3477, the contract was, at least as to part of the services rendered, against the public policy of the United States, and no recovery should be permitted. See cases *supra* and *Barry* v. *Capen*, 151 Massachusetts, 99; *McMullen* v. *Hoffman*, 174 U. S. 653. The evidence shows that the principal services rendered were personal solicitations of members of both houses of Congress, for which no compensation should be allowed. *Peck* v. *Henrich*, 6 App. D. C. 273, 284; *S. C.* 167 U. S. 624; *Alexander* v. *Van Wyck*, 4 App. D. C. 294.

Mr. Frederic D. McKenney, with whom *Mr. T. C. Catchings*, *Mr. O. W. Catchings* and *Mr. John Spalding Flannery* were on the brief, for defendant in error:

The writ of error should be dismissed as there is no Federal question. *Masterton* v. *Herndon*, 10 Wall. 416; *Meagher* v. *Manufacturing Co.*, 145 U. S. 608; *Freibelman* v. *Packard*, 108 U. S. 14; *Estis* v. *Trabue*, 128 U. S. 225; *Mason* v. *United States*, 136 U. S. 581; *Hardee* v. *Wilson*, 146 U. S. 179. No Federal statute or treaty was drawn in question or any immunity claimed thereunder by defendant in error. *Oxley Stove Co.* v. *Butler County*, 166 U. S. 648, 655; *Mining Co.* v. *Turck*, 150 U. S. 138; *Borgmeyer* v. *Idler*, 159 U. S. 408.

The contract was legal on its face and was not made illegal even if in its execution something, such as lobbying, had been done by defendant in error. *Barry* v. *Capen*, 151 Massachusetts, 99; *Jernegan* v. *Jordan*, 155 Massachusetts, 207.

No statute of the United States entitled plaintiff in error to avail of defendant in error's services without compensation,

and the state court having rendered the judgment this court cannot interfere. *Walworth* v. *Kneeland*, 15 How. 348, and see *Leyson* v. *Davidson*, 170 U. S. 36; *Bailey* v. *United States*, 109 U. S. 432; *Freedmen's Co.* v. *Shepherd*, 127 U. S. 495; *Price* v. *Forrest*, 173 U. S. 410, 419. Even if the provisions for lien are bad under the statute, that does not affect the rest of the contract. *Gelpcke* v. *Dubuque*, 1 Wall. 222. And if there is any doubt as to the legality of the statute it must be resolved in favor of the legality. *Hobbs* v. *McLean*, 117 U. S. 576.

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. The present plaintiffs in error based their defense in part upon section 3477 of the Revised Statutes,[1] which declares absolutely null and void certain transfers and assignments of claims against the United States. They insisted that the contract sued on was in violation of that statute; and that they and the estate of Nutt were protected by its provisions against any judgment whatever in favor of the plaintiff. In every substantial sense, therefore, they asserted a right and immunity under a statute of the United States, and such right and immunity was denied to them by the Supreme Court of Mississippi. That court ex-

[1] "Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

pressly adjudged that the contract was not, on its face, in violation of the statutes of the United States, and could legally be the basis of a valid claim against the Nutt estate. The case, so far as our jurisdiction is concerned, is therefore within section 709 of the Revised Statutes, which authorizes this court to reëxamine the final judgment of the highest court of a State, "where any title, right, privilege or immunity" is claimed under a statute of the United States, and the decision is against such title, right, privilege or immunity specially set up or claimed. A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved. *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 72; *Railroads* v. *Richmond*, 15 Wall. 3; *Swope* v. *Leffingwell*, 105 U. S. 3; *Anderson* v. *Carkins*, 135 U. S. 483, 486; *McNulta* v. *Lochridge*, 141 U. S. 327; *Metropolitan Bank* v. *Claggett*, 141 U. S. 520; *McCormick* v. *Market Bank*, 165 U. S. 538, 546; *California Bank* v. *Kennedy*, 167 U. S. 362. We perceive no sufficient reason to modify the views expressed in those cases as to our jurisdiction. It is true there are some cases which, it is contended, justify a contrary view. We will not now stop to examine those cases narrowly and to declare wherein they may be in conflict with the cases above cited. Suffice it to say, that upon a careful reconsideration of the whole subject, and after reviewing all the cases bearing upon the precise question of jurisdiction now before us, we reaffirm the views expressed in the above-cited cases, as demanded by the statutes regulating the jurisdiction of this court.

We now come to the merits of the case as affected by section 3477 of the Revised Statutes. That section, as we have seen, declares null and void all transfers and assignments of a

claim upon the United States, or of any part or share thereof, or any interest therein, whether absolute or conditional, and whatever may be the consideration thereof, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, unless they are freely made and executed after the allowance of the claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. This statute has been the subject of examination in many cases. *Spofford* v. *Kirk*, 97 U. S. 484; *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Ball* v. *Halsell*, 161 U. S. 72; *Freedmen's Saving Co.* v. *Shepherd*, 127 U. S. 494; *Hobbs* v. *McLean*, 117 U. S. 567; *St. Paul & Duluth R. R.* v. *United States*, 112 U. S. 733; *Bailey* v. *United States*, 109 U. S. 432; *Price* v. *Forrest*, 173 U. S. 410.

If regard be had to the words as well as to the meaning of the statute, as declared in former cases, it would seem clear that the contract in question was, in some important particulars, null and void upon its face. We have in mind that clause making the payment of the attorney's compensation a *lien* upon the claim asserted against the Government and upon any draft, money or evidence of indebtedness issued thereon. In giving that lien from the outset, before the allowance of the claim and before any services had been rendered by the attorney, the contract, in effect, gave him an interest or share in the claim itself and in any evidence of indebtedness issued by the Government on account of it. In effect or by its operation it transferred or assigned to the attorney in advance of the allowance of the claim such an interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute; for its obvious purpose, in part, was to forbid any one who was a stranger to the original transaction to come between the claimant and the Government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of the Government. We are of opin-

ion that the state court erred in holding the contract, on its face, to be consistent with the statute.

It does not follow, however, that, for this error, the judgment must be reversed. There is a provision in the contract of 1882 which can stand alone and which was not in violation of the statute, namely, the one evidencing an agreement on the part of Nutt's executrix to pay to the attorney for his services a sum equal to $33\frac{1}{3}$ per cent of the amount allowed on the claim. *Wylie* v. *Cox*, 15 How. 415; *Wright* v. *Tebbitts*, 91 U. S. 252; *Taylor* v. *Bemiss*, 110 U. S. 42. Such an agreement did not give the attorney any interest or share in the claim itself nor any interest in the particular money paid over to the claimant by the Government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions. The decree below may then be regarded as only giving effect to the agreement as to the basis upon which the attorney's compensation was to be calculated. It did not assume to give him any lien upon the claim or any priority in the distribution of the money received by Nutt's personal representative from the United States, nor upon any other money in his hands. Indeed, no lien is asserted by the plaintiff in his pleadings. While the original petition asserted his right to be paid in accordance with the contract, the plaintiff claimed, if he could not be paid under the contract, that he be compensated according to the reasonable value of his services.

Much was said in argument as to the nature of the services rendered by the plaintiff—the charge being that his services were of the kind called *lobby* services for which, consistently with public policy and public morals, no recovery could be had in any court. *Trist* v. *Child*, 21 Wall. 441; *McMullen* v. *Hoff-*

man, 174 U. S. 639. We have seen that the state court of original jurisdiction was of opinion the suit was for lobbying services, and on that ground denied all relief. But the Supreme Court of Mississippi held that the record did not establish such a case, and we accept that view of the evidence in the cause.

Finding in the record no error of law as to any question which may be properly reviewed by this court, the judgment of the state court is

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE WHITE concur in the result.

KNOXVILLE WATER COMPANY *v.* KNOXVILLE.

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

No. 123. Argued December 11, 12, 1905.—Decided January 2, 1906.

Where the bill properly sets forth the facts on which a corporation insists that the agreement under which it erected, and is operating, its plant constituted a contract whereby it acquired exclusive rights for a given period and that the obligation of that contract will be impaired by the threatened action of the municipality in erecting its own waterworks, the case is one arising under the Constitution of the United States and of which the proper Circuit Court can take cognizance without regard to the citizenship of the parties.

Only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public; whatever is not unequivocally granted is withheld; and nothing passes by implication.

Although the contract in this case between a waterworks company and a municipality provided that no contract or privilege would be granted to furnish water to any other person or corporation, the city was not, in the

absence of a special stipulation to that effect, precluded from establishing its own independent system of waterworks.

THE facts are stated in the opinion.

Mr. Charles T. Cates, Jr., with whom *Mr. Samuel G. Shields* and *Mr. R. E. L. Mountcastle* were on the brief, for appellant:

The city and the Water Company both had power to enter into the contract and no other reasonable or just interpretation can be placed upon said contract than that the city thereby agreed not to erect and maintain waterworks on its own account, in competition with appellant, during the continuance of said contract.

A contract entered into within the authority of a municipal corporation receives the same construction as one entered into between individuals. The purpose of the contract was not to govern the inhabitants of the city, but to obtain a private benefit for both the city and its inhabitants, as distinguished from its governmental and legislative functions. *Illinois Trust & Savings Bank* v. *Arkansas City*, 76 Fed. Rep. 271; *Cunningham* v. *City of Cleveland*, 98 Fed. Rep. 657, 663; *Western Sav. Fund Soc.* v. *Philadelphia*, 31 Pa. St. 175; *Bailey* v. *New York*, 3 Hill (N. Y.), 531; *Brumm's Appeal*, 12 Atl. Rep. 855.

The interpretation placed by the lower court upon the contract cannot be sustained. Courts may acquaint themselves with the persons and circumstances that are the subjects of the written agreement, and place themselves in the situation of the parties who made the contract; view the circumstances as they viewed them, so as to judge of the meaning of the words, and of the correct application of the language to the thing described. *Goddard* v. *Foster*, 11 Wall. 123, 143; *Guarantee Co.* v. *Bank & Trust Co.*, 80 Fed. Rep. 766, 778.

The obligations of the parties to the contract are correlative. Though a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations, when that is necessary to carry out the intention of the parties and

prevent the contract from being ineffectual. *Churchwarden* v. *Queen*, L. R. 1 Q. B. 173; *Barton* v. *McLean*, 5 Hill (N. Y.), 256; *Manistee Iron Works* v. *Lumber Co.*, 92 Wisconsin, 21; *D. & H. Canal Co.* v. *Penn. Coal Co.*, 8 Wall. 288.

The use of the word "exclusive" would have added nothing to the contract.

The implied duties and obligations are as much a part of a contract as those expressed. *United States* v. *Babbit*, 1 Black, 55; *Massachusetts* v. *Rhode Island*, 12 Pet. 123; *Union Depot Co.* v. *Chicago Ry. Co.*, 113 Missouri, 213; Parsons on Contracts, 8th ed., 515; *Water Co.* v. *Los Angeles*, 103 Fed. Rep. 711.

This case is governed by *Water Co.* v. *Walla Walla*, 172 U. S. 1; *Water Company* v. *Vicksburg*, 185 U. S. 65, 82; *Memphis* v. *Water Co.*, 5 Heisk. (Tenn.) 495, 500; *Cunningham* v. *Cleveland*, 98 Fed. Rep. 657; and not by *Stein* v. *Water Co.*, 141 U. S. 67; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258; *Bienville Supply Co.* v. *Mobile*, 175 U. S. 109, and 186 U. S. 212; *Water Co.* v. *Skaneateles*, 184 U. S. 354; *Joplin* v. *Light Co.*, 191 U. S. 150; *Water Co.* v. *Helena*, 195 U. S. 383.

While the actions of municipal corporations are to be held strictly within the powers expressly or by necessary implication conferred upon it, yet within those limits they are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction. Dill. Mun. Corp., 4th ed., § 91, note 2; *Smith* v. *Madison*, 7 Indiana, 86; *Memphis* v. *Adams*, 9 Heisk. 518; *Indianapolis* v. *Gas Light Co.*, 66 Indiana, 407; *White* v. *Meadville*, 177 Pa. St. 643; *Memphis Gas Co.* v. *Williamson*, 9 Heisk. 326.

The company was obligated to comply with all the terms of the contract for thirty years and under the contract had an exclusive right in the streets for that period and the city is estopped from denying this right. *San Antonio Ry. Co.* v. *State*, 99 Texas, 520; *Northern Pacific* v. *Washington*, 152 U. S. 492; *Water Co.* v. *Knoxville*, 189 U. S. 435, both *in pais;* 2 Dillon,

Mun. Corp., 14th ed., §§ 463, 675; *Dennis* v. *Rainey*, 8 Baxt. 501; *Memphis* v. *Looney*, 9 Baxt. 129; *Sims* v. *Chattanooga*, 2 Lea (Tenn.), 695; *Land Co.* v. *Jellico*, 103 Tennessee, 320; *Gas Light Co.* v. *Memphis*, 93 Tennessee, 612, and by judgment *Knoxville* v. *Water Co.*, 107 Tennessee, 647; *S. C.*, 189 U. S. 434.

The contract was recognized and ratified by the legislature of the state.

Mr. John W. Green, with whom *Mr. J. W. Culton* was on the brief, for appellees:

This court has no jurisdiction; diverse citizenship does not exist and no constitutional rights are impaired. *Gas Light Co.* v. *Hamilton*, 146 U. S. 266; *New Orleans* v. *Water Co.*, 142 U. S. 79.

The city had no power to grant an exclusive franchise. All the presumptions are against the creation of an exclusive contract and appellant has failed to distinguish the cases so holding cited in its brief, and see also Cooley's Const. Lim., 4th ed., 493; *Railroad Co.* v. *Railway Co.*, 24 Fed. Rep. 306; *Turnpike Co.* v. *Montgomery County*, 100 Tennessee, 417.

The same cases hold that the public is favored by the courts where questions of this character arise, and see *Stein* v. *Bienville Co.*, 141 U. S. 67. There was no legislative authority for an exclusive grant as there was in *Gas Co.* v. *Gas Light Co.*, 115 U. S. 650; *Water Co.* v. *New Orleans*, 115 U. S. 674; *St. Tammany Water Co.* v. *New Orleans*, 120 U. S. 64, and *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Water Co.* v. *Walla Walla*, 172 U. S. 1.

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought by the Knoxville Water Company, a corporation of Tennessee, against the City of Knoxville, a municipal corporation of the same State, and against certain indi-

vidual citizens of Tennessee constituting the Waterworks Commission of that city.

Are the rights which the plaintiff sought to protect secured by the Constitution of the United States in any such sense as to make the case—the parties, all, being citizens of Tennessee—one arising under that instrument and therefore one of which the Circuit Court could take original cognizance? An answer to these questions, it would seem, requires for their intelligent solution a somewhat extended statement of the facts.

The Water Company, by its charter granted in 1877, was authorized to establish waterworks of sufficient capacity to furnish the corporate authorities and inhabitants of Knoxville with water. To that end it was empowered to lay down pipes through the streets, lanes and alleys of the city; bring into the city a sufficient supply of water by means of pipes or tanks, or in any other way; construct reservoirs; supply with water the inhabitants of the city and its environs and all who may be along the lines of the company's pipes; erect hydrants or fire plugs; and contract with the inhabitants and with the corporate authorities of the city or any incorporated companies for the use of water, charging such price for the same as might be agreed upon between the company and the parties.

Prior to 1882—taking the allegations of the bill to be true, since the case went off in the Circuit Court upon demurrer to the bill—the city of Knoxville determined to establish a system of waterworks, and to that end it purchased certain real estate. But that scheme having been abandoned or having been ascertained to be unwise and impracticable at that time, the city advertised for bids and proposals by responsible parties for the erection of waterworks, which, after being built, it was to have the option of purchasing at a time to be agreed upon.

The advertisement brought two competitive propositions, one by the City Water Company and the other by the present plaintiff. The proposition of the plaintiff was accepted, and thereupon the city and the plaintiff on the first day of July,

1882, entered into an agreement or contract which is the foundation of this suit.

By that agreement the Water Company stipulated (omitting many minor details): That it would erect and establish on the land acquired by the city a system of waterworks, with reservoir and all necessary mains, pipes, hydrants, machinery, buildings and other appurtenances and incidents sufficient to supply the city with water to be taken from the Tennessee River at the site purchased by the city for that purpose—the waterworks and fixtures throughout to be of first-class materials, capable of furnishing 2,000,000 gallons of water every twenty-four hours and affording an uninterrupted daily supply to the city of such quantity as might be required, not exceeding the amount above specified, and the reservoir to be built on a specified site, and to have a capacity of 3,200,000 gallons of water. The company was to furnish water free of charge (except the rental of hydrants) from hydrants for the sprinkling of streets and flushing of gutters and sewers along, on or under such streets as were curbed, guttered or sewered; also, free of charge, water for all purposes of the fire department and for supplying the city hall buildings, office and prison. It was to purchase at the price of $7,800 the property then already acquired by the city for the purpose of erecting waterworks, including lands, plans, specifications, drawings, maps, etc., and to pay therefor within thirty days from the execution of the agreement and before the construction of said works. It engaged to supply private consumers with water at a rate not to exceed five cents per hundred gallons, the cost of introducing from the mains, and the cost of meter when used, to be borne by such private parties. The work of construction was to be commenced within thirty days from the execution of the agreement, and the works to be completed, ready for use, within twelve months thereafter. The company was to maintain the waterworks stipulated to be built by it in such condition as would enable it to comply with its undertakings for the period of thirty years from January 1, 1883, unless the city should become the owner of the same

within that period. At its own expense it was to establish with the waterworks a system of telegraphic fire alarms of such quality and efficiency as those in general use in cities, consisting of two alarm boxes in each of the (then) eight wards of the city, with proper telegraphic connections with a central station.

In consideration of the promises and undertakings by the Water Company, as set out in the above agreement, the city covenanted and agreed, among other things, "not to grant to any other person or corporation, any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the first day of August, A. D. 1883, provided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement;" also, "to pay to said company for rent of the seventy-five hydrants hereinbefore stipulated to be erected fifty dollars each per annum, payable in quarterly instalments on the last day of each quarter, beginning on the day upon which the city shall commence receiving a supply of water from said works, and for any additional hydrants erected for the use of the city it will pay in the same manner at the rate of not more than fifty dollars each per annum. . . ." Recognizing the benefit and advantage accruing to it and to its citizens from the construction of the waterworks and the erection of hydrants, the city also covenanted and agreed with the Water Company "to pay, in addition to the annual rent of fifty dollars, as hereinbefore provided, and as an additional annual rent for the said seventy-five hydrants, a sum equal to that which, under the laws of the State and the ordinances and resolutions of the city, would be annually assessed as taxes for city purposes and uses on property of the same kind, quantity and value as that owned by the said Water Company within the corporate limits of the city of Knoxville: Provided, that the said additional annual rental shall only

be paid for the term of five years next following first of August, 1894, and no longer."

It was further mutually agreed and understood between the parties that at the expiration of fifteen years from the time fixed for the completion of the waterworks the city should have the right, upon giving one year's notice of such purpose and intention, to purchase from the company the waterworks provided for, and all the property, rights, franchises and privileges thereto belonging; by negotiations, if the terms could in that way be agreed upon, or if not then at any time for a consideration to be fixed and determined by appraisers; and if not purchased at the end of fifteen years, the waterworks plant, franchises, rights, privileges, etc., could be purchased by the city upon the same terms and conditions and in the same way at the expiration of each and every year thereafter. But in no case was such right of purchase to exist or be exercised unless due notice thereof was given one year before the expiration of the period aforesaid or either of them. If the parties differed as to price, the matter, the agreement provided, was to be determined by appraisers designated in a particular way, and whose award should be final and conclusive. It was further stipulated that the Water Company should not transfer, set over or assign the agreement for the construction of the waterworks to any company, corporation or individual whatsoever.

By an ordinance adopted October 20, 1899, the city consented to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and made certain changes both in the contract between the latter company and the town of West Knoxville and in the above agreement of 1882. It is not necessary to set out these changes.

We come now to the act of the Tennessee Legislature of February 2, 1903, passed avowedly for the purpose of enabling the city to exercise the option it had under the agreement of 1882 and the ordinance of 1899 to purchase and acquire the plant and property of the Water Company and maintain it for the benefit of its people. To that end the act authorized the city

to issue bonds to an amount sufficient for that purpose, upon the agreed valuation of the parties, or in default of same, upon a valuation to be ascertained and fixed by appraisers, and to such additional amount as would be necessary in making additions to the plant, including real estate required for such additions. It was, however, provided that bonds should not be issued unless approved by the assent of two-thirds of the qualified voters of the city, expressed at an election duly held to ascertain their wishes. The execution of the provisions of the act was committed to a Waterworks Commission, to be created by the City Council, and to have the power to make all contracts for the maintenance and extension of the plant.

Subsequently, the Legislature passed the act of April 3, 1903 (also amending the above act of February 2, 1903), whereby the city was authorized to acquire, own and operate a system of waterworks, either by purchase or construction, and for that purpose power was given to issue interest-bearing coupon bonds to an amount not exceeding $750,000 under the restrictions named in the act. The act created a Waterworks Commission of five members, to be elected by the City Council, and to have the entire supervision, under prescribed restrictions, of the purchase or construction, operation and maintenance of any system of waterworks established under the sanction of the act. The act embodied, among others, a provision authorizing and directing the Commissioners to obtain from the Water Company a written proposition for the sale of its plant, franchises, etc., to the city of Knoxville, giving the price and terms of payment, together with the opinion of competent, disinterested experts as to the cost and present value of the plant; the commission to secure plans, specifications and estimates of the cost of the construction of a new system of waterworks, and to report all matters to the City Council for its consideration, but not to close any contract for the purchase or construction of waterworks until it had been duly authorized to do so by the City Council after the proposition shall have been ratified by a vote of the people.

If the city determined to construct, equip and maintain its own system of waterworks, then for the purpose of securing sites for pumping stations and other necessary purposes, including the laying of mains and water pipes and sites for reservoirs and filtering galleries, extensions, improvements and alterations, it was given the right of condemnation of grounds within and without its corporate limits.

There is no need to refer to other provisions of the agreement of 1882. But it may be said in this connection that an election was held on the second day of July, 1903; and the City Council—having express authority to declare the result of the election—declared, by ordinance, that 1,818 votes had been cast in favor of, and only 239 votes against, an issue of bonds for the construction by the city of a system of waterworks. It may be also stated, in this connection, that after the passage of the two acts of 1903, and before the above election, some correspondence ensued between the Water Commission and the Water Company in reference to the purchase of the latter's plant. But the parties failed to agree as to the mode of ascertaining the value of the company's plant, and negotiations ceased. It is not important to inquire which side, if either, was to blame in this matter. Suffice it to say that the City Council, on or about May 20, 1904, conceived and was about to enter a plan of establishing a system of city waterworks wholly independent of, and in competition with, that maintained by the Water Company.

The present suit was brought upon the theory that the legislative enactments of 1903 were laws impairing the obligations of the contract of 1882 between the Water Company and the city, as well as upon the theory that the maintenance by the city of a system of waterworks in competition with those of the Water Company would inevitably destroy the value of the latter's property, and be a taking, under the sanction of the State, of the company's property for public use without compensation, in violation of the due process of law enjoined by the Fourteenth Amendment.

The substantial relief asked was a perpetual injunction restraining the city, its agents or officers, and the Waterworks Commission from entering into any contract for the construction of a separate, independent and competing plant, and from issuing any bonds for such a purpose.

Upon the question of the jurisdiction of the Circuit Court to take cognizance of this case, without regard to the citizenship of the parties, but little need be said. The Water Company, as we have seen, insists that the agreement of 1882 constituted a contract, whereby it acquired, for a given period, an exclusive right, by means of pipes laid in the public ways and a system of works established for that purpose, to supply water for the use of the city and its inhabitants. It also insists, as just stated, that the obligation of this contract will be impaired if the city, proceeding under the acts of the Legislature and under the ordinances in question, establishes and maintains an independent, separate system of waterworks in competition with those of the Water Company. These questions having been aptly raised by the company's bill, the case is plainly one arising under the Constitution of the United States.

The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it cannot, consistently with the constitutional rights of the Water Company, establish and maintain a separate system of waterworks of its own. If the city made no such contract that will be an end of the case; for, in the absence of a contract protected by the Constitution of the United States, the Circuit Court could not take cognizance of the dispute between the parties, all citizens of Tennessee; and it could not be said that any taking of private property for public use could arise merely from the construction and maintenance by the city of a waterworks plant.

The principles which must control in determining the scope and obligations of the agreement of 1882 have been clearly outlined in our decisions. We may assume, for purposes of the present discussion, but without deciding, that the city of Knox-

ville was invested by the Legislature with full authority, or that under its general municipal powers it could bind itself by contract, to give to a single corporation or company the *exclusive* right for a specified period to supply water for the use of itself and its inhabitants. It will yet be conceded that whatever authority it possessed in this matter was granted solely for the public good, and that in every substantial, legal sense the agreement with the Water Company is to be deemed a public grant, entitling that company to exercise certain public functions that appertain to the city as a municipal corporation.

Although the doctrines which must control in determining the scope of such a grant are clearly settled and are familiar, it may be well to recall the words of some of the adjudged cases. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544, 547, 548, the doctrine announced was that government, possessing powers that affect the public interests, and having entered into a contract involving such interests, is not, by means merely of implications or presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such a contract "'must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given by the act;'" that "it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created;" and that those who insist that the Government has surrendered any of its powers or agreed that they may be diminished, must find clear warrant for such a contention before it can be heeded. "Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public." Such were the words of this court in *Turnpike Co.* v. *Illinois*, 96 U. S. 63, 68. The universal rule in doubtful cases—this court said in *Oregon Railway Co.* v. *Oregonian Ry. Co.*, 130 U. S. 1, 26—is that "the construction shall be against the grantee and in favor of the Government." As late as *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 562, this court said: "The doctrine is firmly established that only

that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest.[1] Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication.[2] This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell* v. *Grandjean*, 111 U. S. 412, 438. We have never departed from or modified these principles, but have reaffirmed them in many cases.[3]

It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings.

Turning, now, to the agreement of 1882, we fail to find in it any words necessarily importing an obligation on the part of the city not to establish and maintain waterworks of its own during the term of the Water Company. It is said that the

[1] Citing: *Rice* v. *Railroad Co.*, 1 Black, 358, 380; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666; *Hannibal &c. R. R.* v. *Missouri Packet Co.*, 125 U. S. 260, 271; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49; *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67, 80; *State* v. *Pacific Guano Co.*, 22 S. Car. 50, 83, 86.

[2] Citing: *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *The Binghamton Bridge*, 3 Wall. 51, 75.

[3] *United States* v. *Arredondo*, 6 Pet. 691, 738; *Mills* v. *St. Clair County*, 8 How. 569, 581; *Richmond &c. R. R. Co.* v. *Louisa R. R. Co.*, 13 How. 71, 81; *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 23 How. 66, 88; *Newton* v. *Commissioners*, 100 U. S. 548, 561.

company could not possibly have believed that the city would establish waterworks to be operated in competition with its system, for such competition would be ruinous to the Water Company, as its projectors, on a moment's reflection, could have perceived when the agreement of 1882 was made. On the other hand, the city may with much reason say that, having once thought of having its own waterworks, the failure to insert in that agreement a provision precluding it, in all circumstances and during a long period, from having its own separate system, shows that it was not its purpose to so restrict the exercise of its powers, but to remain absolutely free to act as changed circumstances or the public exigencies might demand. The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1, 1883, grant to any person or corporation the same privileges it had given to the Water Company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own. For some reason, not distinctly disclosed by the record, the city abandoned the scheme it had at one time formed of constructing its own system of waterworks. And it may be that it did not in 1882 intend or expect ever again to think favorably of such a scheme. It may also be that the Water Company, having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition, if the city would agree not to give to other persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, as if purposely, not to bind itself further. The agreement, as executed, is entirely consistent with the idea that while the city, at the time of making the agreement of 1882, had no purpose or plan to establish and operate its own waterworks in competition with those of the Water Company, it refrained from binding itself not to do so, although willing to stipulate, as it did stipulate, that the grant to the Water Company should be exclusive as against all other persons or corporations. We are therefore

constrained by the words of the agreement to hold that the city did not assume, by any contract protected by the Constitution of the United States, to restrict its right to have a system of waterworks, independent altogether of the system established and maintained by the Water Company. If this interpretation of the contract will bring hardship and loss to the Water Company, and to those having an interest in its property and bonds, the result (omitting now any consideration of the question of power) is due to the absence from the agreement between the parties of any stipulation binding the city not to do what, unless restrained, it now proposes to do.

While there is no case precisely like the present one in all its facts, the adjudged cases lead to no other conclusion than the one just indicated. We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which under previous authority had placed its pipes, mains, etc., in public streets to supply, and was supplying, gas for a city and its inhabitants: "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis* v *Whitney*, 13 Wall. 68, 70: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and National legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants,

susceptible of two constructions, must receive the one most favorable to the public.'' *Hamilton Gaslight Co.* v. *Hamilton City*, 146 U. S. 258, 268; *Skaneateles Water Co.* v. *Skaneateles*, 184 U. S. 354, 363.

So in *Joplin* v. *Light Co.*, 191 U. S. 150, 156, which involved the question whether a city could establish its own electric plant in competition with that of a private corporation, the court said: "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

Again, in the recent case of *Helena Water Works Company* v. *Helena*, 195 U. S. 383, 392, where a city established its own system of waterworks in competition with that of a private company, the court, observing that the city had not specifically bound itself not to construct its own plant, said: "Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla City* v. *Walla Walla Water Company*, 172 U. S. 1. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable, but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract." To the same effect, as to the principle involved, are *Turnpike Co.* v. *State*, 3 Wall. 210, 213; *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67, 81; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685.

It is, we think, important that the courts should adhere firmly

to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers.

As, then, the city of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case. The judgment of the court dismissing the bill must be affirmed.

It is so ordered.

MR. JUSTICE BROWN, MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE HOLMES dissented.

OWENSBORO WATERWORKS COMPANY *v.* OWENSBORO.

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

No. 145. Submitted December 13, 1905.—Decided January 2, 1906.

Maladministration of its local affairs by a city's constituted authorities cannot rightfully concern the National Government, unless it involves the infringement of some Federal right.

When a Federal court acquires jurisdiction of a controversy by reason of the diverse citizenship, it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the state court. But, as between citizens of the same State, the Federal court may not interfere to compel municipal corporations or other like state instrumentalities to keep within the limits of the power conferred upon them by the State, unless such interference is necessary for the protection of a Federal right.

The acts of a municipal corporation are not wanting in the due process of law

ordained by the Fourteenth Amendment, if such acts when done or ratified by the State would not be inconsistent with that Amendment. Many acts done by an agency of a State may be illegal in their character, when tested by the laws of the State, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the States.

The Fourteenth Amendment was not intended to bring within Federal control everything done by the States or by its instrumentalities that is simply illegal under the state laws, but only such acts by the States or their instrumentalities as are violative of rights secured by the Constitution of the United States.

The Circuit Court cannot take cognizance of a suit to prevent a municipality from improperly issuing bonds under the circumstances of this case as it does not involve a controversy under the Constitution and laws of the United States and diverse citizenship does not exist.

THE plaintiff in this suit, the Owensboro Waterworks Company, is a private corporation of Kentucky, while the defendant, the city of Owensboro, is a municipal corporation of the same Commonwealth.

The bill was dismissed for want of jurisdiction in the court below to hear and determine the cause, the Circuit Court being of opinion that the suit was not one arising under the Constitution or laws of the United States, and the matter in dispute not of sufficient value to give that court jurisdiction.

The case made by the bill was this:

On the tenth day of October, 1900, the Common Council of Owensboro adopted an ordinance authorizing the borrowing of money, upon the city's bonds, for the purpose of erecting a system of waterworks for supplying the city of Owensboro and its inhabitants with water. The ordinance provided for a submission to the voters of the question of issuing city bonds to the amount of $200,000 with which to raise money for the purpose just stated.

The election was held and the proposition was carried, more than two-thirds of those voting approving the proposed issue of bonds.

By an ordinance of December 3, 1900, bonds to the amount of $200,000 were directed to be issued, and $14,666.66 was appro-

priated out of the revenues and public moneys of the city for the payment of the semi-annual interest on the bonds and the creation of a fund for the ultimate payment of the principal thereof, such fund to be designated as the Owensboro Water Bond Account.

By an ordinance approved March 11, 1901, $14,666.66 was appropriated and set apart out of the revenues and funds of the city, to be raised by taxation or otherwise, each year until the bonds were paid, for the purpose of paying the interest on the bonds semi-annually and for creating a sinking fund for the payment of the principal of the bonds. And for the purpose of providing a fund for that purpose it was ordained, the bill alleged, that there should be, and that there was thereby, levied upon all the taxable property of said city subject by law to taxation for municipal purposes, a direct annual tax for the year 1901, and for each succeeding year up to and including the year 1931, sufficient to raise the said sum of $14,666.66, to be collected annually with other municipal taxes, licenses, revenues and public dues, and continuing from year to year until the ultimate payment of the bonds; and it was also, by the ordinance, ordained that no part of said funds should ever be used for, or appropriated to, any other purpose or use, except the payment of the principal and interest of the bonds; further, that provision to meet the requirements of said section be made in the annual budget and appropriation ordinance.

Pursuant to the ordinance of December 3, 1900, the city executed 200 bonds of $1,000 each, bearing 4½ per cent interest per annum from their date, January 1, 1901, payable semi-annually, and transferable by delivery, and at the date of the bringing of this suit all of those bonds were, the bill alleged, in the possession or under the control of the city, "ready and about to be immediately sold and delivered to purchasers, with the exception of seven bonds which the said Mayor and Council have already sold and have received therefor the sum of $7,000."

In each of the years 1901, 1902 and 1903 the city, proceeding under ordinances adopted by the Common Council, levied an

ad valorem tax of $2 on each $100 worth of property in the city subject to taxation, part of such tax, $14,666.66, to be appropriated annually for the payment of interest on the water bonds and for the creation of a sinking fund for the ultimate payment of the principal. A similar tax was also levied for 1904, of which $14,666.66 was appropriated to pay interest and create a sinking fund—$8,000 to be paid on interest and $6,666.66 to go into the sinking fund. So that under the levies made in 1901, 1902 and 1903, $44,000 had been collected for interest and the sinking fund, and $14,666.66 was to be collected for 1904.

Of the 200 bonds actually signed, 193 remain in the hands of the city, its officers and agents, and after applying the sum of $44,000, collected under the levies of 1901, 1902 and 1903, and the $14,666.66 to be collected under the levy of 1904, there will remain only $149,000 to be raised by the sale of bonds. Nevertheless, the city, by its agents and officers, claims to have authority and proposes immediately to sell and dispose of, and, unless restrained, will sell and dispose of the entire 193 bonds, amounting to $193,000. If that be done, then the city will have collected and realized $244,000 on account of the erection of the waterworks; whereas it was only authorized to raise $200,000 for that purpose. Of the $44,000 collected by the city $20,000 has been expended for land on which the proposed water plant was to be erected, while $24,000 has been illegally expended for purposes other than those for which it was collected.

The bill further alleges that for each of the years 1901, 1902 and 1903, taxes were levied on the taxable property of plaintiff, and other taxpayers of the city; that capitation, license and franchise taxes were also assessed, levied and collected by it; that all the taxes so levied were collected each year, from all sources, and for all purposes, were expended and exhausted each year, and none so collected, in either of said years, are now on hand; that no part of the $44,000 collected is on hand, nor has said city any means of replacing same, except by levying

and collecting taxes from the taxpayers of said city for that purpose, and this it had no legal authority to do; that by the payment of the $44,000 the city paid and extinguished that amount of bonds, and bonds to that amount should be surrendered up and cancelled, and that by law complainant, and other taxpayers have the right to have said bonds so surrendered and cancelled.

The bill proceeds: "Your orator says said bonds are negotiable by delivery, and are on the footing of commercial obligations, and if said 193 bonds, or any of them, shall be sold and transferred for value, to innocent *bona fide* purchasers, then complainant and all other taxpayers of said city would be compelled to pay the full amount of all of said 200 bonds, and the full amount of all interest accrued, or to accrue thereon. It says defendant and its officers and agents purpose and are now endeavoring to immediately sell and transfer said 193 bonds, and coupons attached, to some person for value, and are doing this without giving such persons any notice, or information of the facts herein stated, or of any facts pertaining to the collection or disposition of any part of said $44,000, and purpose to continue said efforts without giving to any person, to whom said bonds may be offered, any notice or information pertaining thereto, and said prospective purchasers have no notice, knowledge or information of any of said facts, so far as complainant is advised or believes, and, unless restrained and prevented, defendant and its officers and agents will immediately sell said bonds and coupons to some person or persons, for value, who have no notice or information in regard to said transaction, and will do so without giving such persons any notice or information as to said facts, and thus complainant and its property, and said other taxpayers and their property, will be burthened with the payment of said entire 200 bonds and interest, and, by the means aforesaid, and without due process of law, deprived of the right to have credit, on said debt, for said $44,000 heretofore paid by them, and be compelled to pay said 200 bonds and all interest accrued and to accrue thereon.

"Your orator says that by Article fourteen of the Amendments to the Constitution of the United States it is provided that no State shall 'deprive any person of life, liberty or property, without due process of law,' but your orator says that if more than 149 of said bonds shall be sold to innocent purchasers, without notice, which defendant city is about to do, that it and the taxpayers, for whom it sues, will be forced to pay such excess, both principal and interest, without opportunity to plead, or to be heard as to the matters herein alleged, and so deprived of their property without due process of law, and the amount in controversy here exceeds $2,000."

The relief prayed was that the defendant, its officers and agents, be perpetually enjoined and restrained from selling or disposing of any of the bonds in excess of 149 in number, and before selling them to detach and destroy all coupons for interest that have heretofore matured or that may mature before the date when the bonds may be sold, and be ordered and compelled to cancel and surrender all of the bonds, and all coupons pertaining thereto, in excess of 149, and that the bonds and coupons be destroyed, and if the $14,666.66 levied May 16, 1904, should be collected before the sale was made of the bonds, that said sum be applied to the extinguishment of the debt and interest, and the bonds and interest coupons be destroyed, and not sold, as prayed for in regard to the money heretofore collected; also that defendant be enjoined and restrained from levying and collecting from complainant, and all the other taxpayers, of the city, or their property, any taxes in excess of a sufficient amount to create a sinking fund with which to pay the 149 bonds, when sold, and the seven bonds, already sold, and to pay the interest to accrue thereon, upon the seven bonds, heretofore sold, and to accrue upon the 149 bonds, after they were sold.

The plaintiff further prayed that the sum of $44,000, paid by the taxpayers of the city, be adjudged to have satisfied that amount of the bonds, and that it have such further or other relief in the premises as the nature of the case required.

Mr. John D. Atchison and *Mr. William T. Ellis* for appellant:

The Circuit Court of the United States has jurisdiction. The bill shows the taxpayers are about to be deprived of their property without due process of law. Complainant has the right, as a taxpayer, to maintain this action in its own behalf and on behalf of all the other taxpayers, who are too numerous to be brought before the court, and there is nothing in the record to show that it will not truly represent the interest of such other taxpayers.

By the sale of the entire issue of negotiable bonds, involved in this case, the officers of the city, who are officers created by the state statute, and thus officers of the State, will place an unlawful encumbrance upon the property of the taxpayers by which they will be compelled to pay $44,000 more than they agreed to pay, and thus be deprived of their property to that extent without due process of law. *Dundee Mortgage Co.* v. *School District*, 19 Fed. Rep. 359; *Southern Railway Co.* v. *Corporation Commission*, 97 Fed. Rep. 513; *Ex parte Virginia*, 100 U. S. 339; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226.

The Circuit Court has jurisdiction. *Brown* v. *Trusdale*, 138 U. S. 389; *Smith* v. *Swormstedt*, 16 How. 302; *Water Company* v. *El Paso*, 152 U. S. 157; *Colvin* v. *Jacksonville*, 158 U. S. 456.

Mr. Charles S. Walker for appellee.

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

The bill presents the case of the diversion, or the intended diversion, by a municipal corporation, of certain funds which under legislative sanction it had collected from taxpayers for a specific public object, which funds were not applied to the object for which they were raised, and which failure of duty on the part of the corporation so to apply them may ultimately cause increased taxation if the full amount originally intended to be applied to the particular object named by the legislature is to be collected.

We share with the court below the difficulty in understanding how such a case can be regarded as one arising under the Constitution of the United States. It certainly must be one of that character in order to sustain the jurisdiction of the Circuit Court—the parties, all, being citizens of Kentucky.

In support of their contention that the present suit arises under the Constitution of the United States and is within the original cognizance of the Circuit Court, without regard to the citizenship of the parties, the learned counsel for the plaintiff in error cites certain cases in this court which hold that the prohibitions of the Fourteenth Amendment "refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities," and consequently, "whoever, by virtue of public position under a state government, deprives another of any right protected under that Amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ex parte Virginia*, 100 U. S. 339, 346, 347; *Neal* v. *Delaware*, 103 U. S. 370, 397; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gibson* v. *Mississippi*, 162 U. S. 565; *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 235.

These were all cases in which the right sought to be protected was held to have been granted or secured by the Constitution of the United States, but yet was violated by some agency or instrumentality proceeding under the sanction or authority of the State. But no right involved in the present case has its origin in or is secured by the Constitution of the United States. It is not contended that the legislative enactments by the authority of which the city intends to establish and maintain a system of waterworks are inconsistent either with the constitution of Kentucky or the Constitution of the United States. The plaintiff, however, complains that the defendant city has not properly discharged its duties under the laws of the State. For the purposes of the present discussion let this be taken as true; still, maladministration of its local affairs by a city's con-

stituted authorities cannot rightfully concern the National Government, unless it involves the infringement of some Federal right. If the city authorities have received funds from taxation which ought strictly to have been applied to take up or cancel the bonds of the city, but have been used for other municipal purposes, and if, by reason of such misapplication of those funds, taxation may ultimately come upon the people for an amount beyond what the legislature originally intended—if nothing more can be said—the remedy must be found in the courts and tribunals of the State and not in the Federal courts of original jurisdiction where the controversy is wholly, as it is here, between citizens of the same State. When a Federal court acquires jurisdiction of a controversy by reason of the diverse citizenship of the parties, then it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the state court. But, as between citizens of the same State, the Federal court may not interfere to compel municipal corporations or other like state instrumentalities to keep within the limits of the power conferred upon them by the State, unless such interference is necessary for the protection of a Federal right. There has been no actual invasion here of any right secured by the Constitution of the United States; nothing more, taking the allegations of the bill to be true, than a failure of a municipal corporation to properly discharge the duties which, under the laws of the State, it owes to its people and taxpayers. And there is here no deprivation of property without due process of law within the meaning of the Fourteenth Amendment, even if it be apprehended that the defendant city may, at some future time, impose a tax in violation of its duty under the laws of the State.

The utmost that can be said of the present case, as disclosed by the bill, is that the municipal authorities of Owensboro have done some things outside or in excess of any power the city possessed. But this does not of itself show that they acted without the due process of law enjoined by the Fourteenth

Amendment; for, if what is complained of had been done directly by the State or by its express authority, or if the legislature could legally ratify that which the city has done, as it undoubtedly might do, no one would contend that there had been a violation of the due process clause of the Amendment. It cannot be that the acts of a municipal corporation are wanting in the due process of law ordained by the Fourteenth Amendment, if such acts when done or ratified by the State would not be inconsistent with that Amendment. Many acts done by an agency of a State may be illegal in their character, when tested by the laws of the State, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the States. The Fourteenth Amendment was not intended to bring within Federal control everything done by the States or by its instrumentalities that is simply illegal under the state laws, but only such acts by the States or their instrumentalities as are violative of rights secured by the Constitution of the United States. A different view would give to the Fourteenth Amendment a far wider scope than was contemplated at the time of its adoption, or than would be consonant with the authority of the several States to regulate and administer the rights of their peoples, in conformity with their own laws, subject always, but only, to the supreme law of the land.

We are of opinion that this suit is not one arising under the Constitution of the United States, and, therefore, the parties being all citizens of Kentucky, it is not one of which the Circuit Court could take original cognizance.

Affirmed.

PEORIA GAS AND ELECTRIC COMPANY *v.* PEORIA.

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

No. 33. Argued October 30, 1905.—Decided January 2, 1906.

A gas company brought an action against a city in Illinois to restrain the enforcement of an ordinance fixing price of gas on the ground that the low price practically amounted to taking property without compensation and that the ordinance impaired contract rights. The case was tried on these questions but they were ignored by the court which decided adversely to the company, although the master had reported that the rates were confiscatory, on the single ground that the company had for a period violated the anti-trust law of Illinois and thereby was not entitled to relief, *held* that:

Although parties making an agreement, unlawful by the anti-trust act of Illinois, may while the agreement is in force be subject to its penalties, whenever they cease to act under the agreement the penalties also cease.

As the case had been tried on one theory and decided on another and injustice had probably resulted, the judgment should be reversed and sent back so that the terms and duration of the alleged agreement may be ascertained and taken into consideration in determining the case.

THIS was a bill filed in the Circuit Court of the United States for the Northern District of Illinois by the Peoria Gas and Electric Company to restrain the enforcement of an ordinance passed by the defendant, fixing the price of gas. A decree was entered in the Circuit Court dismissing the bill, and the case was brought directly here, as involving a constitutional question.

The facts are these: Prior to 1899 for a period of many years, the Peoria Gaslight and Coke Company had manufactured and furnished gas to the city of Peoria and its citizens. The business had been profitable and the stock was valuable. In 1899 the plaintiff company was organized to construct gas works in Peoria, and that city, by ordinance, granted to it a franchise permitting it to construct and operate a gas plant and lay mains along certain streets, etc. It is charged that in order to obtain

this franchise the promoters of the plaintiff company represented that it was to be a Peoria company and enterprise, and that it would furnish gas at a cheaper rate than the old company; that in fact it was a scheme of certain Chicago capitalists, who, as soon as the ordinance was passed and the plant constructed, appeared as owners of substantially the entire stock. After the new company was organized and its plant constructed the two companies became competitors, the competition being so sharp that in the early summer of 1900 the new company lowered its price to 30 cents per thousand cubic feet for both light and fuel gas. On July 31, 1900, after a conference between the managers of the two companies, both raised the rate to $1.15 net for light and 75 cents net for fuel gas, to take effect August 1, 1900. The announcements of this raise in the rates were published in the Peoria papers on the same day, each announcement being in precisely the same language. On September 4, 1900, the city passed an ordinance providing that the maximum price for gas should be 75 cents per thousand cubic feet, and that the gas to be furnished should not be less than eighteen candle power.

On September 18, 1900, the plaintiff filed this bill of complaint, setting forth its organization, the ordinance under which it was given authority to occupy certain streets and that of September 4, 1900; alleged that the latter ordinance was invalid as establishing a rate which was not remunerative and in effect confiscatory, and was thus taking private property for public use without just compensation and depriving the plaintiff of its property without due process of law. The city answered, narrating the circumstances attending the organization of the plaintiff and the passage of the ordinance authorizing it to occupy the streets and supply the city with gas, with the representation made at the time, and claimed an estoppel by reason thereof, showing also the rates which had been the result of competition, the raise in price by the two companies, charged that this was by agreement between the companies, alleged that the ordinance of September 4 was passed in good faith and to

prevent extortion by the companies, and also that the rate fixed was reasonable. While the answer alleged that the fixing of the rates from the first of August was by agreement between the two corporations, it did not, in terms, plead that the agreement was in violation of any particular statute.

By consent a special commissioner was appointed to take the proofs and report the same with his findings and conclusions thereon. He took an enormous amount of testimony, the printed record in this court amounting to 1,780 pages. From it he found and reported that the rate prescribed by the ordinance of September 4 did not furnish compensation, was confiscatory in its effect, and therefore unreasonable. Exceptions were taken by both sides to different portions of his findings and conclusions of law. On a hearing before the Circuit Court the question of the reasonableness of the rates prescribed was ignored, the court found that the increase in rates on August 1, 1900, was the result of an illegal combination between the two gas companies and in violation of the Illinois anti-trust law of 1891, that, therefore, the plaintiff was not entitled to any relief against the ordinance of September 4, and entered a decree dismissing the bill.

The anti-trust act of Illinois, approved June 11, 1891 (Laws, 1891, p. 206), forbids the entering into any "pool, trust, agreement, combination, confederation or understanding . . . to regulate or fix the price of any article of merchandise or commodity," and punishes the same by fine. Sections 5 and 6 are as follows:

"5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

"6. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment."

Subsequently and in 1893 another act was passed, which was

held by this court in *Connolly* v. *Sewer Pipe Company*, 184 U. S. 540, to constitute class legislation, and to be void. An amendment in 1897 to the act of 1891 was subject to the same objection. The Supreme Court of Illinois has since held that the act of 1891 was not repealed by the act of 1893 or the amendment of 1897, and is still in force. *The People ex rel.* v. *Butler Street Foundry*, 201 Illinois, 236, 257; *Chicago, Wilmington & Vermilion Coal Co.* v. *The People*, 214 Illinois, 421, 454.

Mr. E. C. Ritsher, and *Mr. W. T. Abbott* with whom *Mr. W. T. Irwin* was on the brief, for appellant:

The contract in question was entered into more than a year subsequent to the filing of the bill of complaint in this cause; it existed for a period of but ten months and was terminated more than a year before the court heard the arguments in this cause.

A complainant who comes into court with clean hands cannot by a temporary act of business accommodation, performed more than a year after the pleadings have been settled —and fully completed and abandoned more than a year before the hearing of the cause,—be denied rights guaranteed to it by the Constitution of the United States.

If the contract in question were vicious and pertinent to the issues in the case, the doctrine of *locus pœnitentiæ* would apply. As a benign contract and wholly collateral to the issues, it cannot properly be made an excuse for denying to complainant its constitutional rights.

The illegality of corporate acts cannot be raised collaterally, especially when the action is not one to enforce the illegal agreement, and no rights are predicated upon it. *Rector* v. *Hartford Deposit Co.*, 190 Illinois, 387; *Gas Light Co.* v. *Memphis*, 72 Fed. Rep. 952; *Bridge Co.* v. *Streator*, 105 Fed. Rep. 729; *L. S. & M. S. Ry. Co.* v. *Smith*, 173 U. S. 698; *Gilbert* v. *Am. Surety Co.*, 121 Fed. Rep. 494; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 450; *Macginnis* v. *B. & M. Con. Co.* (Mont.), 75 Pac. Rep. 89; *Kinner* v. *L. S. & M. S. Ry. Co.*, 69 Ohio St.

376; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *Strait* v. *Nat. Harrow Co.*, 51 Fed. Rep. 819; *Dennehy* v. *McNulta*, 30 C. C. A. 422; *S. C.*, 86 Fed. Rep. 825; *Wiswall Co.* v. *Scott*, 86 Fed. Rep. 671; *Box and Paper Co.* v. *Robertson*, 99 Fed. Rep. 985; *Harrison* v. *Glucose Co.*, 116 Fed. Rep. 304.

A fortiori, a collateral attack will not be permitted even under a special statute, if the statute is not pleaded or its inhibition challenged by the issues in the case, especially where the remedy given by the statute is cumulative and differs from or is in addition to that given by the common law. Moreover, such defense must be set up by plea and not by answer. *Chicago & Alton Ry. Co.* v. *Dillon*, 123 Illinois, 570; *Haskins* v. *Alcott*, 13 Ohio St. 210; *Denton* v. *Moore's Administrator*, 2 Tennessee, 168; *Neagle* v. *Kelley*, 146 Illinois, 465; *Chambers* v. *Chambers*, 4 G. & J. (Md.) 438; *Tanning Co.* v. *Turner*, 14 N. J. Eq. 329; *Curtis* v. *Mastin*, 11 Paige's Ch. 15; *Dyer* v. *Lincoln*, 11 Vermont, 301; 1 Daniel's Ch. Pl. & Pr., 5th ed., 630; *Farley* v. *Kittson*, 120 U. S. 303, and cases cited; *Sullivan* v. *Portland &c. R. R.*, 94 U. S. 806; *Dey* v. *Dunham*, 2 Johnson Ch. (N. Y.) 182; *Crutcher* v. *Trabue* 5, Dana (Ky.), 82; *Hudson* v. *Hudson's Admr.*, 6 Munford (Va.), 352; *Prince* v. *Heylin*, 1 Atkins, 494.

See also cases in which foreign corporations seeking to recover or protect their property have been met by the defense that they had violated or failed to comply with the provisions of some local statute in compliance with which only would they have the right to do business in such State. *Smith* v. *Little*, 67 Indiana, 549; *St. L. &c. R. R. Co.* v. *Fire Association*, 60 Arkansas, 325; *Brewery Co.* v. *Ester*, 86 Hun (N. Y.), 22; *Telephone Co.* v. *Pesauken Township*, 116 Fed. Rep. 910.

Such collateral attack is expressly forbidden in the Federal courts. *Blodgett* v. *Lanyon Zinc Co.*, 120 Fed. Rep. 893.

A defense must either be technically pleaded or the facts constituting such defense must be properly alleged and relied upon on the hearing of the cause in support of such defense. *Eyre* v. *Potter*, 15 How. 42; *French* v. *Shoemaker*, 14 Wall.

314; *Babbitt* v. *Dotten*, 14 Fed. Rep. 19; *Spies* v. *Chicago &c. R. R. Co.*, 40 Fed. Rep. 34; *Britton* v. *Brewster*, 2 Fed. Rep. 160; *S. C.*, aff'd 4 Fed. Rep. 808; *Price* v. *Berrington*, 15 Jurist, 999; *S. C.*, 7 Eng. L. & Eq. 254; *Wilde* v. *Gibson*, 1 H. L. Cases, 605; *Ferraby* v. *Hobson*, 2 Phillips, 255; *Curson* v. *Belworthy*, 3 H. L. Cases, 742; *Fire Ins. Co.* v. *Kavanaugh*, 1892, A. C. 473; *Harrison* v. *Guest*, 8 H. L. Cases 481; *Hickson* v. *Lombard*, 1 H. L. Cases, 324; *Tillinghast* v. *Champlin*, 4 R. I. 173; *Fisher* v. *Boody*, 1 Curtis, 206; *Dashiell* v. *Grosvenor*, 66 Fed. Rep. 334; *S. C.*, aff'd 162 U. S. 425; *Leighton* v. *Grant*, 20 Minnesota, 345.

Even were it permissible to set up the anti-trust act collaterally, and even though such act had been specifically set forth in the answer, it would not have been a proper defense in this case.

The only possible purpose for which a violation of the statute might be urged would be for the purpose of inflicting upon complainant the criminal penalties of the act or to show that complainant was a criminal under the act. 1 Starr & Curtis, 2d ed., 1252.

If complainant had violated the anti-trust law, or any other criminal statute, such fact would not bar its rights in this suit. *Gilbert* v. *Am. Surety Co.*, 121 Fed. Rep. 494; *Brewery Co.* v. *Breweries Co.*, 121 Fed. Rep. 713; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Armstrong* v. *Am. Exch. Bank*, 133 U. S. 433; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *Armstrong* v. *Toler*, 11 Wheat. 258; *Brooks* v. *Martin*, 2 Wall. 70; *Sharp* v. *Taylor*, 2 Phillips' Ch. 801; *McBlain* v. *Gibbs*, 17 How. 232.

When a court of equity is appealed to for relief, it will not go outside of the subject matter of the controversy and make its interference depend upon the conduct of the moving party as to matters in no way affecting the equitable right which he asserts against the defendant or the relief which he demands. Pomeroy's Eq. Jur. § 399; *Lewis' Appeal*, 67 Pa. St. 166; *Woodward* v. *Woodward*, 41 N. J. Eq. 224; *Insurance Co.* v.

Clunie, 88 Fed. Rep. 160; *Bateman* v. *Fargarson*, 4 Fed. Rep. 32; *Chicago* v. *Union Stockyards Co.*, 164 Illinois, 224; *Trice* v. *Comstock*, 121 Fed. Rep. 620; *Bonsack Machine Co.* v. *Smith*, 70 Fed. Rep. 383; *Mining Co.* v. *Miners Union*, 51 Fed. Rep. 260; *Knapp* v. *Jarvis Adams Co.*, 135 Fed. Rep. 1008; *Yale Gas Stove Co.* v. *Wilcox*, 64 Connecticut, 101; *Delaware Surety Co.* v. *Layton* (Del. 1901), 50 St. Rep. 378; *Deering* v. *Earl of Winchelsea*, 1 Cox Ch. 318; *Barton* v. *Mulvane*, 59 Kansas, 314; *Foster* v. *Winchester*, 92 Alabama, 497; *Wiley* v. *National Wall Paper Co*, 70 Ill. App. 543.

Mr. Winslow Evans for appellee:

The Illinois anti-trust law is valid and its constitutionality as it applies to this case has been upheld. The appellant entered into a combination unlawful under the act and the court will not aid it to reap the fruits thereof. *Gibb* v. *Gas Company*, 130 U. S. 396, 412; *Russell* v. *De Grand*, 15 Massachusetts, 35.

Mr. William D. Guthrie by leave of the court and on behalf of Darius O. Mills, a party to another pending case involving the question of the power of cities of Illinois to fix the price of gas, submitted a brief contending that such power did not exist under existing statutes.

Mr. James Hamilton Lewis, Mr. Henry M. Ashton and *Mr. David K. Tone* by leave of the court and on behalf of the City of Chicago, a party to such other pending action, submitted a brief, in support of such power.

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

This case was tried on one theory and decided on another. While that does not always and necessarily constitute error, yet, under the circumstances, as disclosed by the record, we

are of opinion that injustice has probably resulted and that there should be a reversal of the decree and a further examination in the Circuit Court. As stated in the findings of the commissioner, the bill proceeds upon the theory that the ordinance of September 4, 1900, impaired the rights of contract theretofore existing between the parties, that its enforcement would constitute the taking of private property for public use without just compensation, that the penalties prescribed for a violation of the ordinance were exorbitant and not sanctioned by the laws of the State of Illinois, while the answer justified the provisions of the ordinance by the statements and representations made by the stockholders in the company to the city council at the time the plaintiff's franchise was sought, and alleged that the rate therein fixed was reasonable. On these questions the stress of the controversy was rested. The court entirely ignored them and placed its decision on the single ground that the two companies had by agreement attempted to fix their prices, and therefore came within the scope of the Illinois anti-trust law—an act which had not been in terms referred to either in the pleadings or the report of the master.

There was no positive evidence and no finding by the commissioner of an agreement between the two companies, and while from their action an inference might be drawn that they had entered into some agreement in respect to rates on August 1, 1900, neither its terms, scope nor duration were shown. It also appears from the testimony that that rate was continued by the old company only until January 1, 1901, when an even rate of one dollar per thousand was established, and that this latter rate was on September 1, 1901, also established by the new company, the plaintiff herein. Whether this action of the new company in adopting the rate which had been kept in force by the old company since January 1, 1901, was the result of an agreement or an independent act on its part is not shown. It appears further that in October, 1901, the plaintiff entered into a contract with the old company to supply it with gas for the use of its customers and that, the latter company desisting

temporarily from manufacture, this contract continued in force until August 19, 1902, but this was found by the commissioner to have been a purely private business arrangement between the companies and without relation to the charges made by either to its customers. Doubtless it, together with the evidence of changes in holding of stock, tended to show at least a cessation of competition between the two companies, if not of a unity of control or agreement between them.

We shall assume that there was testimony from which the court justly found that the rates announced on August 1 were fixed by an agreement between the two companies. We shall also assume, though without deciding, that while that agreement was in force and the parties were acting under it, neither could recover for the gas that it furnished, nor could this plaintiff question the validity of the ordinance of September 4. But although the stringent provisions of the Illinois anti-trust law may apply to the case of an agreement between two gas companies fixing the price of gas, and even if while the parties are proceeding under it any party receiving gas may avoid payment therefor on that ground, and the city likewise be upheld in an ordinance establishing maximum rates which are not remunerative, yet the making of such an agreement does not subject the companies to a perpetual penalty. Parties making an agreement, unlawful by the anti-trust act, may while the agreement is in force be subject to its penalties, but whenever they cease to act under it the penalties also cease. The punishment adheres to the offense and stops when the offense itself stops. Now it is in evidence that the prices were changed by the old company on the first of January, 1901—five months after the alleged agreement for a uniform rate—and that for months thereafter each company was charging a different rate, but the decree was one of absolute dismissal—an adjudication that the ordinance of September 4 was valid, an adjudication which became *res judicata* for all future litigation, and this in the face of the finding by the commissioner, undisturbed by the court, that the rates established by it are not remunerative.

and thus work a gradual confiscation of the property belonging to the plaintiff.

We think that under the circumstances the decree should be reversed and the case remanded with instructions either to refer it to a commissioner for further findings, with leave to take additional testimony if that be deemed necessary, showing the terms and duration of the alleged agreement between the two companies, and how far it was acted upon by them, or that the court should itself undertake this investigation and make like findings.

The decree of the Circuit Court is

Reversed.

GUARDIAN TRUST AND DEPOSIT COMPANY *v.* FISHER.

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

No. 75. Argued November 28, 1905.—Decided January 2, 1906.

Section 1255 of the Code of North Carolina of 1883 provides that mortgages of corporations shall not exempt the property mortgaged from execution for judgments obtained in the state courts against the corporation for torts and certain other causes. A corporation constructed a plant for supplying a city with water, having received exclusive authority therefor from the city. It executed two mortgages, under the foreclosure of the second of which its plant was sold, subject to the first mortgage, to a new corporation, which then executed a further mortgage. Subsequently judgments were rendered in actions brought by property-owners against the new corporation for damages caused, as charged in the complaints and recited in the judgments by its negligence. On foreclosure of the outstanding mortgages the holders of these judgments were given priority over the mortgagees, notwithstanding the contention of the latter that the property owners had no contractual relations with, or right to maintain these actions against, the water company, that the judgments were not conclusive, the mortgagees not being parties thereto, and that only the equity acquired by the new company was subject to any judgment lien. In affirming the decision, *held* that:

Under the statute the mortgagees agreed to accept the judgments as conclusive of the amounts due. And the record, showing that negligence was alleged in the complaints and adjudged by the state court, discloses judgments in actions of tort.

One may by contract acquire an opportunity for acts and conduct in which parties other than those with whom he contracts are interested and for negligence in which he is liable to such other parties.

While a citizen may have no individual claim against a company contracting to supply water to a city for its failure to do anything under the contract, he may have a claim against it, after it has entered upon a contract and is engaged in supplying the city with water, for damages resulting from negligence and in such a case the action is not for breach of contract but for a tort.

Section 1255 is not a penal statute, but remedial, and should be liberally construed to give effect to the intent of the legislature to make the property of corporations security against its torts, and imposes upon the plant of a corporation responsibility for torts which cannot be avoided by a conveyance to a new corporation.

SECTION 1255 of the Code of North Carolina of 1883 reads: "Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of the State against such incorporation, for labor performed [nor for material furnished such incorporation], nor for torts committed by such incorporation, its agents or employés, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This was subsequently amended by leaving out the matter enclosed in brackets.

In 1887 a corporation was organized under the laws of North Carolina, which soon after secured the passage of an ordinance by the city of Greensboro, giving to it the exclusive right to the use of the streets, sidewalks and public grounds for the purpose of constructing, operating and maintaining a complete system of waterworks. A later ordinance provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals,

for any injury sustained from the negligence of the said company, either in the construction or operation of their plant."

The corporation constructed the waterworks and also executed a mortgage or deed of trust, conveying its entire property and plant to secure the payment of fifty thousand dollars of bonds. A subsequent mortgage or deed of trust was foreclosed and the title to the property passed to a new corporation, subject to the lien of the first mortgage. After its purchase the new corporation executed a further mortgage or deed of trust. Subsequently two fires occurred, destroying property belonging to the respondents. Actions were commenced in the Superior Court of Guilford County by the owners of the property destroyed against the new corporation and judgments recovered, the judgment entries each reciting that the recovery was "for the injury and damage done him by the negligence of the defendant." 128 N. Car. 375. Proceedings having been commenced in the Circuit Court of the United States to foreclose the existing mortgages, a decree was entered and a sale made. Thereupon the judgment creditors intervened, insisting that in the distribution of the proceeds they were entitled to priority over the mortgage liens by virtue of the statute above referred to. The Circuit Court decided in their favor. 115 Fed. Rep. 184. Its judgment was taken on appeal to the Court of Appeals, from which court the case was brought here on certiorari.

Mr. Archibald H. Taylor and *Mr. John Peirce Bruns*, with whom *Mr. W. P. Bynum* was on the brief, for petitioners:

The state court had no power to determine the question of the liability of the mortgagees to answer out of their estate to the judgment creditors, but the sole jurisdiction for the decision of these questions is with the United States court, which had taken jurisdiction of the property and of all of the parties. The decision of the state court that a water company was liable to property owners for losses by fire, by reason of its contract with

the city, and that this liability was in tort, was only made after the rights of all parties had accrued.

Judgments in state courts against corporations of which the United States courts for sufficient cause have taken jurisdiction for the purpose of selling their property, distributing proceeds and ascertaining liens, have no validity against mortgagees of such corporations, who have properly invoked or obtained the jurisdiction of the United States court, unless the latter court, on examination of the facts upon which such judgments were obtained, itself pronounces such judgment valid, and awards and enforces such claim. *Brooks* v. *Burlington R. R.*, 101 U. S. 443; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 292; *Central Trust Co.* v. *Condon*, 67 Fed. Rep. 103; *Trust Company* v. *Cincinnati*, 76 Fed. Rep. 296; *Trust Company* v. *Bridges*, 57 Fed. Rep. 753; *Trust Company* v. *Hennen*, 90 Fed. Rep. 595; *Hassell* v. *Wilcox*, 130 U. S. 503.

In determining the validity or nature of the cause of action upon which the judgments were recovered in the state court, neither the court below nor any United States court could accept the decision of the state court in these proceedings, because the questions are of general jurisprudence which a United States court must decide for itself. Curtis' Jurisprudence, 234; *Burgess* v. *Seligman*, 107 U. S. 33; *Swift* v. *Tyson*, 16 Pet. 18; *Rowan* v. *Runnels*, 5 How. 134; *Steamship Co.* v. *Insurance Co.*, 129 U. S. 397; *B. & O. R. R.* v. *Baugh*, 149 U. S. 368; *Venice* v. *Murdock*, 92 U. S. 494; *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Railroad Co.* v. *National Bank*, 102 U. S. 14; *United States* v. *Peters*, 5 Cranch, 115; *Pease* v. *Peck*, 8 How. 600; *Folsom* v. *Ninety Six*, 159 U. S. 626.

The only question presented is, what was the decision obligatory upon the United States court below and this court, after these fires had taken place and prior to the decision of the first case arising out of them, and there could have been none other, than that the water company was not liable, either in contract or in tort. If so the cases decided after the rights of all parties had accrued, cannot change the law of the United States courts.

Lake Shore R. R. v. *Prentice*, 147 U. S. 101; *Knox County* v. *National Bank*, 147 U. S. 92.

The doctrine of United States courts and of all the state courts, with one exception, and of the English courts in respect to the causes of action asserted by these intervenors, the respondents here, against the defendant, the Greensboro Water Supply Company, supplying water under ordinance or contract to the city, is that such company is not liable for its failure to furnish adequate and proper supply to a citizen not having a direct contract with the company itself, for damage to his property, whether the suit be founded on contract or tort. 2 Dillon Mun. Corp. 975; *Trust Co.* v. *Salem Water Co.*, 94 Fed. Rep. 240. In *Lumber Co.* v. *Paducah Water Co.*, 12 S. W. Rep. 554; *S. C.*, 13 S. W. Rep. 249, there were private contracts; and see *Nichols* v. *Water Co.*, 44 S. E. Rep. 292; *Atkinson* v. *Water Works Co.*, 2 Exch. 445; *Davis* v. *Water Works Co.*, 54 Iowa, 60; *Gas Company* v. *Louisiana Co.*, 115 U. S. 651; *Vrooman* v. *Turner*, 69 N. Y. 480; *Becker* v. *Water Works Co.*, 79 Iowa, 419; *Britton* v. *Water Works Co.*, 81 Wisconsin, 48; *Hayes* v. *Oshkosh*, 33 Wisconsin, 314; *Nickerson* v. *Hydraulic Co.*, 46 Connecticut, 24; *Eaton* v. *Water Co.*, 37 Nebraska, 546; *Beck* v. *Water Works Co.*, 11 Atl. Rep. 300; *Stone* v. *Water Co.*, 4 Pa. Dist. Rep. 431; *Phœnix Ins. Co.* v. *Trenton Water Co.*, 42 Mo. App. 118; *Howsmon* v. *Water Co.*, 119 Missouri, 304; *S. C.*, 24 S. W. Rep. 784; *Fitch* v. *Water Co.*, 37 N. E. Rep. 982; *Foster* v. *Water Co.*, 3 Lea, 42; *Ferris* v. *Water Co.*, 16 Nebraska, 44; *Fowler* v. *Water Co.*, 83 Georgia, 219; *Mott* v. *Manufacturing Co.*, 48 Kansas, 12; *Bush* v. *Water Co.*, 43 Pac. Rep. 69; *Wainwright* v. *Water Co.*, 78 Hun, 146; *House* v. *Water Co.*, 31 S. W. Rep. 179; *Waterworks Co.* v. *Brownless*, 10 Ohio, 620; *Wheeler* v. *Cincinnati*, 19 Ohio, 19; *Taintor* v. *Worcester*, 123 Massachusetts, 311; *Van Horn* v. *Des Moines*, 63 Iowa, 447; *Howard* v. *San Francisco*, 51 California, 52; *Black* v. *Columbia*, 19 S. Car. 412; *Mendel* v. *Wheeling*, 28 W. Va. 262; *Manufacturing Co.* v. *Water Works Co.*, 113 Louisiana, 1091; *Blunk* v. *Water Supply Co.*, 71 Ohio St., 250; *Wilkinson* v. *Water Co.*, 78 Mississippi, 401.

As to the distinction between torts and breaches of contract, and the control of the United States courts in determining these questions for itself, see 1 Chitty on Pl., 16th ed. 152; Bouvier's Law Dict. under "Torts"; Cooley on Torts, 2d ed., 2, 3, 104; Addison, 6th ed., 1, 14; 2 Jaggard, 27, 898; *Atl. & Pac. R. R. Co.* v. *Land*, 164 U. S. 399; *Langford* v. *United States*, 110 U. S. 346; *Wright* v. *Augusta*, 78 Georgia, 241; 7 Am. & Eng. Ency. Law, 977; *Fowler* v. *Water Co.*, 83 Georgia, 222; *Hodges* v. *Railroad Co.*, 105 N. Car. 171; *McCahan* v. *Hirst*, 7 Watts (Pa.), 178.

A water company owes no duty or obligation to the city, citizens or taxpayers of a community, to furnish water at all, much less of any adequate pressure or quantity, except such as may be imposed upon it by contract lawfully entered into. *Water Co.* v. *Skaneateles*, 184 U. S. 362; *Coy* v. *Gas Company*, 146 Indiana, 655, distinguished; and see *Fitch* v. *Water Co.*, 139 Indiana, 214.

Mr. Aubrey L. Brooks for respondents:

Full faith and credit must be given to the state court judgments. *Mills* v. *Duryee*, 7 Cranch, 484; *Hampton* v. *McConnell*, 3 Wheat. 234; *Crapo* v. *Kelly*, 16 Wall. 610; *Christmas* v. *Russell*, 5 Wall. 302; *Hanley* v. *Donoghue*, 116 U. S. 1; *McElmoyle* v. *Cohen*, 13 Pet. 312, 324; *Thompson* v. *Whitman*, 18 Wall. 457; *Hilton* v. *Guyot*, 159 U. S. 113; *Bryan* v. *Campbell*, 177 U. S. 648; *Harris* v. *Balk*, 198 U. S. 215; *Hampton* v. *McCall*, 3 Wheat. 234; *Mahue* v. *Thatcher*, 6 Wheat. 129; *Bank* v. *Dalton*, 9 How. 528; *Board of Public Works* v. *Columbia College*, 17 Wall. 521; *Railway Co.* v. *Wiggins Ferry Co.*, 108 U. S. 18; *Kansas City Ry.* v. *Morgan*, 21 C. C. A. 478; *Southern Railway* v. *Bouknight*, 70 Fed. Rep. 442; *Trust Co.* v. *Railway Co.*, 65 Fed. Rep. 257; *Huntington* v. *Attrill*, 146 U. S. 685.

The mortgages of the old and of the new company stand on the same footing. *Broughton* v. *Pensacola*, 102 U. S. 266; Code N. Car. § 697; 2 Cook on Stock, § 669; 1 Spelling on Corp., § 93; *Friedenwald* v. *Tobacco Works*, 117 N. Car. 544.

The mortgages of both the old and the new company are void under § 1255, Code N. Car. *Coal Co.* v. *Light Co.*, 118 N. Car. 236; Potter's Dwarris, 128; *Pennsylvania* v. *Railroad Co.*, 61 Fed. Rep. 369; *Lanston* v. *Improvement Co.*, 120 N. Car. 132; *Railroad Co.* v. *Burnett*, 123 N. Car. 214.

If the mortgagee permits the corporation to run the property he must take the risk of liability. *Brine* v. *Insurance Co.*, 96 U. S. 364; *Insurance Co.* v. *Cushman*, 108 U. S. 51; *Insurance Co.* v. *Jersey City*, 113 U. S. 506; *Railroad Co.* v. *Hamilton*, 134 U. S. 30; *Railroad Co.* v. *Frazier*, 139 U. S. 288.

These judgments in the state court are based upon a cause of action well recognized by law, and in accordance with both English and American precedents. The causes of action are based upon a breach of duty implied and imposed by law, as well as arising from contract, and the intervenors had their election to sue in contract, or in tort. They chose the latter. Keener on Quasi Contracts, 160; *Griffith* v. *Water Co.*, 122 N. Car. 206; *Young* v. *Telegraph Co.*, 107 N. Car. 384; *Robinson* v. *Threadgill*, 35 N. Car. 41; *Williamson* v. *Dickens*, 27 N. Car. 260; *Bond* v. *Hilton*, 44 N. Car. 308; *Solomon* v. *Bates*, 118 N. Car. 315; *Fisher* v. *Water Co.*, 128 N. Car. 375; *Atl. & Pac. R. R. Co.* v. *Land*, 164 U. S. 399.

For the liability and obligation of water companies under contracts, see *Water Co.* v. *Walla Walla*, 172 U. S. 1, 9; Dillon Mun. Corp., § 691.

Corporations enjoying public franchises and engaged in public employment, for which they receive toll, owe a duty to the public as well as to each individual, to perform the duties undertaken and incident thereto, which duty, in this case, was almost exclusively to furnish a sufficient pressure of water to extinguish fires, and this obligation, raised by the law, is added to and superinduced by the provisions of the contract under which the corporation is acting. Webb's Pollock on Torts, 20, 69 and cases cited; *Coy* v. *Gas Co.*, 36 L. R. A. 535; 2 Addison on Contracts, 1119; *Railroad Company* v. *Eaton*, 48 Am. Rep. 179; S. C. 94 Indiana, 474; *Brown* v. *Railroad Co.*, 41 Am.

Rep. 41; *Bank* v. *Graham*, 100 U. S. 702; *Lumber Co.* v. *Water Supply Co.*, 89 Kentucky, 340.

This court will be governed by the decisions of the state court in a matter of this kind. *Water Co.* v. *Freeport*, 180 U. S. 595; *Burgess* v. *Seligman*, 107 U. S. 20.

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

It is contended that neither the plaintiff in the pending suit nor the bondholders whom it represents were parties or privies to the actions in the state court; that therefore the judgments of the latter court were not conclusive in the foreclosure proceeding as to the nature of the causes of action; that whether they were for torts or breaches of contract is for the determination of the Federal court, and further, that when the property passed from the old to the new water company it passed subject to the fifty-thousand dollar mortgage, and that under this statute, if applicable at all, only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence. On the other hand, it is contended that the statute deals with judgments—not claims for damages caused by negligence; that the decision of the state court as to the nature of the cause of action is as much a part of the judgment as the determination of the amount to be recovered; that a judgment which in terms is for damages caused by negligence, if entered by a court having jurisdiction, is made by the statute superior to any mortgage; that by the mortgage the mortgagee and the bondholders it represents agree to accept such judgment as conclusive and to subordinate their mortgage to its lien; that to hold that the transfer of property incumbered by a mortgage from one company to another puts that mortgage outside the statute practically destroys its beneficial intent; that such has been the holding of the Supreme Court of the State, and is a holding which the Federal courts will follow.

We shall assume, without deciding, that the nature of the causes of action upon which the state judgments were rendered is open for consideration in the Federal court in the foreclosure proceeding. The statute subordinates the mortgage to judgments for torts. Now what is the judgment? It is a determination that upon the facts stated the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that upon those facts the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or if not conclusive, at least *prima facie* evidence. In this foreclosure proceeding the record of the proceedings in the state courts was introduced in evidence. Taking the *Fisher case*, for illustration, the complaint sets out fully the contract made between the city of Greensboro and the water company, and the proceedings by which the title to the property passed from the one company to the other; alleged the destruction by fire of the plaintiff's property, and that he was free from all negligence in the matter. It added:

"The plaintiff alleges that the defendant company was culpably negligent and willfully careless of its duty and obligations, both to the city of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the city of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city."

It then set forth as matters of negligence on the part of the water company the "carelessly, willfully and negligently failing to keep a sufficient quantity of water in its storage water tank in the said city of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied;" also a failure "to keep its pumping engine

ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned;" and closed with this averment: "That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the destruction of his property, whereby the defendant company becomes liable therefor."

The answer consisted mainly of denials in separate paragraphs of the averments in corresponding paragraphs of the complaint, specifically denying the validity of the contracts between the city and the original water company. Questions were submitted to the jury and answers returned, establishing the making of the contracts, the attempt on the part of the company to perform its stipulations, its failure to do so successfully, and also that the plaintiff was injured by the negligence of the defendant.

Upon this record the Supreme Court of North Carolina ruled that the action was one in tort, saying:

"We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action, and the plaintiff *so declared*. He stated the facts out of which the legal obligation arose, fully, and also the obligation itself, and the breach of it and the damage resulting from that breach. Chitty on Pleading, vol. 1, page 155; Thompson on Corpora-

tions, vol. 5, sec. 6340." *Fisher* v. *Greensboro Water Supply Company*, 128 N. Car. 375, 379.

From the conclusion thus reached we are not inclined to dissent and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested and for negligence in which he is liable in damages to such other parties. A company is chartered to construct and operate a railroad. Proceeding thereunder it constructs and operates its road. Nothing may be said in the charter in reference to the manner in which the road shall be operated or the particular acts which it must do. Yet without any such specification it is under an implied obligation to exercise reasonable care in both construction and operation. If from undue speed, failure to give proper warnings, or other like acts or omissions, individuals are injured, they may recover for such injuries, and their actions to recover sound in tort. Doubtless in the same transaction there may be negligence and breach of contract. If a railroad company contracts to carry a passenger there is an implied obligation that he will be carried with reasonable care for his safety. A failure to exercise such care, resulting in injury to the passenger, gives rise to an action *ex contractu* for breach of the contract, or as well to an action for the damages on account of the negligence—an action sounding in tort. But where there is no contract, and the injuries result from a failure of the corporation to exercise reasonable care in the discharge of the duties of its public calling, actions to recover therefor are strictly and solely actions *ex delicto*. Pollock, in his treatise, groups torts into three classes, in the last of which he specifies "breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings." Webb's Pollock on Torts, 7. This, it is said, implies the existence of some absolute duty not arising from personal contract with the other party to the action.

And here we are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct waterworks and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort. "The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby." *Osborne* v. *Morgan*, 130 Massachusetts, 102, 104. See also *Emmons* v. *Alvord*, 177 Massachusetts, 466, 470. An individual may be

under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation, in the absence of contract, to assume the treatment of an injured person, but if he does undertake such treatment he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others. Holmes on the Common Law, 278. Even if the water company was under no contract obligations to construct waterworks in the city or to supply the citizens with water, yet having undertaken to do so it comes under an implied obligation to use reasonable care, and if through its negligence injury results to an individual it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort and not for breach of contract.

With reference to the contention that only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence—a contention which, if sustained, would result in giving priority to the fifty-thousand dollar mortgage—the argument is that by the statute "mortgages of incorporate companies . . . shall not have power to exempt the property or earnings of such incorporations . . . for torts committed by such incorporation;" that the torts were committed by the second water company; that its purchase was of the property of the first company, subject to the fifty-thousand dollar mortgage, and therefore over that property thus encumbered, and that only, were the judgments given priority. There is, doubtless, force in this contention. But this is not a penal statute, to be construed strictly, but remedial in its nature, and to be construed liberally, to carry into effect the intention of the legislature and provide the adequate remedy which it in-

tended. The obvious purpose was to make the corporate property situate in the State security against torts committed by its owner, and it would materially impair if not wholly destroy the statute, and thus set at naught that purpose if the corporation constructing the plant could place a mortgage thereon for its entire value and then by sale to a new corporation enable the purchaser to use that property discharged of all substantial responsibility. In reference to a kindred question arising under the same statute the Supreme Court of North Carolina said in *Railroad Company* v. *Burnett*, 123 N. Car. 210, 214, that under such construction "this statute would be a false light held out to such claimants to induce them to furnish material and labor—thinking they had a security, when in fact they had none."

It is more reasonable to hold that the statute imposes upon the investment made by a corporate company in its plant a responsibility for torts committed by it or any subsequent corporate owner, and that that responsibility cannot be avoided by any mortgage or other incumbrance voluntarily placed upon the property. Security to the individual citizen is to go hand in hand with the franchise and privilege granted by the State. We see no other question requiring notice, and the decree of the Circuit Court is

Affirmed.

MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA dissented.

HOWARD *v.* PERRIN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 110. Submitted December 6, 1905.—Decided January 2, 1906.

Under the Atlantic & Pacific Railroad Company land grant act of July 27, 1866, title to land within the place limits passed to the company on the completion of the road without any selection or approval thereof by the Secretary of the Interior unless the tract was within the classes excepted by the act.

The two-year limitation in § 2941, Rev. Stat. Arizona, relates only to a plaintiff showing no better right than the defendant in possession and does not give to a mere occupant of public land a title by prescription against one subsequently acquiring title from the United States.

Rev. Stat., § 891 determines the question of competency of the public records therein referred to but not that of their materiality, and in this case certain certified copies of records and papers in the General Land Office were held competent evidence, and, although some may not have been material, the judgment will not be disturbed in the absence of any prejudice to appellant.

Section 1 of § 3199 Arizona Rev. Stat. 1887, declaring all rivers, creeks and streams of running water in the Territory to be public, does not apply to percolating water oozing through the soil. Whether the section applies to an actual subterranean stream undecided.

THIS action was commenced on July 13, 1898, in the District Court of Coconino County, Arizona, to recover possession of a quarter section of land, together with damages for its detention. The defendant, in addition to the denials in his answer of plaintiff's title, filed a cross complaint, praying a decree in his favor on account of certain alleged water rights. A trial resulted in a judgment for plaintiff, which was affirmed by the Supreme Court of the Territory, to review which judgment this appeal was taken. A statement of facts was prepared by the Supreme Court, which statement was in substance that the land was within the place limits and a part of the land granted to the Atlantic and Pacific Railroad Company by act of Congress, approved July 27, 1866, 14 Stat. 292; that the grant was accepted by the company, a map of definite location duly filed

and approved, and the railroad completed and accepted in the year 1884; that in April, 1894, the lands along this part of the road were surveyed and this tract found to be the northwest ¼ of section 15, township 25 north, range 3 west, of Gila and Salt River meridian; that the survey was accepted and approved by the surveyor general, and also by the Commissioner of the General Land Office; that on June 27, 1896, this tract, together with others, was duly and regularly selected by the railroad company as a portion of the lands to which it was entitled under the act of Congress; that on July 27, 1896, the filing of the list of such selections was allowed by the register and receiver of the United States Land office at Prescott, Arizona, by them approved, the land certified to be public lands of the United States within the place limits of the grant and free from all other claims; that thereupon such list so certified was forwarded to the Land Department at Washington, and has since remained on file in that office; that the cost of the survey and all fees allowed by law had been paid; that the land is nonmineral in character, neither swamp land nor claimed as such, nor within any reservation, and that there is no valid claim against it on file or of record in the land office of the district in which it is situated; and that on January 13, 1897, the railroad company conveyed the land to the plaintiff. The statement of fact further shows that the only water upon the land is percolating water, oozing through the soil beneath the surface, in an undefined and unknown channel; that in 1889 the defendant's grantor entered upon the land, then unoccupied and unsurveyed, sank a well and by running tunnels therefrom collected water in an arroyo, and conveyed the same by pipes to troughs and a reservoir for watering stock; that in 1892 the defendant's grantor conveyed the land to him by quitclaim deed, and that on July 16, 1895, he posted on the dwelling house on the premises a notice in accordance with the territorial act of 1886 (Laws Arizona, 1893, p. 135), that he had appropriated all the water in a certain defined underground channel, and recorded a copy of such notice in the public records; that the

defendant and his grantor had been in the exclusive, open and notorious possession, with the knowledge of plaintiff, of the land, improvements and water ever since the year 1889, claiming by right of possession only; that they had never diverted any water from the land, or used, or caused the same to be used, elsewhere by any person.

Mr. E. E. Ellinwood for appellant.

Mr. Edward M. Doe for appellee.

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

The statement of facts discloses a title in the plaintiff (now appellee) sufficient to sustain the judgment for the recovery of possession, although no patent had been issued. *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241.

The certified copy of the records and papers in the General Land Office was competent evidence. Rev. Stat. § 891. This section determines the question of competency but not of materiality. Some of the letters between the officials of the railroad company may not have been material, but there was nothing in them prejudicial. The certificate of the local land officers was competent to show that on the records of their office were no homestead, preëmption or other valid claims, and that the land had not been returned or denominated as swamp or mineral land. It is true there was no positive evidence that there were no minerals in the land, and of course nothing to show affirmatively that a mine might not be discovered prior to the issue of the patent, but the same could have been said of the showing in *Deseret Salt Company* v. *Tarpey*, *supra*. While the question of mineral was not discussed at that time and was first fully considered in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, it appears from the opinion of the majority in the latter case that there was no intention to disturb the former

ruling. Neither is there anything in *Corinne Company* v. *Johnson*, 156 U. S. 574, to the contrary. In that case a judgment of the Supreme Court of Utah against a grantee of the railroad company was affirmed, but it was affirmed on the ground that the record did not purport to contain all the evidence, and, under those circumstances, we could not assume that there was not evidence to fully sustain the judgment of the territorial court, or that it was not in fact based upon an adjudication by the Land Department of the presence of mineral.

It must also be noticed that this land was within the place limits of the Atlantic and Pacific Company, and that, therefore, on the completion of the road, and without any selection or approval thereof by the Secretary of the Interior, the title passed unless the tract was within the excepted classes, and there was no testimony tending to show that it was. On the contrary, the testimony pointed in the other direction.

It is further claimed by appellant that he was protected by a statute of limitations of the Territory, paragraph 2301, Rev. Stat. Arizona, 1887, reënacted as section 2941, Rev. Stat. Arizona, 1901, which reads:

"2941 (SEC. 7.) In all cases when the party in possession claims real property by right of possession only suits to recover the possession from him shall be brought in two years after the right of action accrues and not afterwards, and in such case the defendant is not required to show title or color of title from and under the sovereignty of the soil as provided in the preceding section as against the plaintiff who shows no better right."

But this applies only in cases of mere possessory rights and is without force after the passing of the full legal or equitable title from the Government. Such was the construction placed on the statute by the Supreme Court of Arizona, and is undoubtedly correct. The language is clear. The claim of the defendant is a "right of possession only," and the limitation applies solely against a "plaintiff who shows no better right." To hold that the section gives to a mere occupation of public

land a title by prescription against one subsequently acquired from the United States would limit the full control of the Government over its landed property and qualify or destroy the effect of its patent or grant. *Toltec Ranch Company* v. *Cook*, 191 U. S. 532, does not conflict with this, for there a possession sufficient for the running of the statute of limitations was held after the full equitable title had passed from the Government, and when such title has passed the land comes under dominion of the State and is subject to its laws. But in this case the possession had not been long enough to create under the Arizona laws a defense to a title, legal or equitable, and the sole reliance was upon this section, which only applies to contests between possessory rights.

The remaining question arises under the cross complaint of the appellant, who claims a prior appropriation of all the water flowing in a subterranean stream which had been reached by digging a well, relying on these provisions of the Arizona Revised Statutes of 1887:

"3199 (Sec. 1.) All rivers, creeks and streams of running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided."

"3201 (Sec. 3.) All the inhabitants of this Territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek or stream of running water."

We need not stop to inquire whether these sections apply to subterranean streams, because the finding of fact which is sustained by the testimony is "that the only water upon said land is percolating water oozing through the soil beneath the surface in an undefined and unknown channel." Of course this excludes the idea of a "river, creek or stream of running water."

We see no error in the record, and the judgment of the Supreme Court of Arizona is

Affirmed.

KOLZE *v.* HOADLEY.

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

No. 91. Submitted December 5, 1905.—Decided January 2, 1906.

In construing § 1 of the act of August 13, 1888, which provides that Circuit and District Courts shall not have cognizance of suits to recover the contents of any promissory note or chose in action in favor of an assignee or subsequent holder unless the suit could have been prosecuted in such court, if no assignment or transfer had been made, this court has held that:

A suit to recover the contents of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract or other chose in action.

A suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill.

The bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if the assignment had not been made.

A suit may be maintained between the immediate parties to a promissory note as indorser or indorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract, and in such case the original contract may be considered to ascertain the amount of damages.

Although an action of fraud might be sustained upon the facts involved in an action where the requisite diversity of citizenship exists if the suit is in substance one to foreclose a mortgage, and it appears by the bill that the fraud is a mere incident, the suit is one within the meaning of § 1 of the act of August 13, 1888, and will not lie in a Federal court unless plaintiff's assignor might have maintained the bill had no transfer been made.

THIS was an appeal from a decree of the Circuit Court in favor of the plaintiff, Charlotte E. Hoadley, a citizen of Massachusetts, against Abraham L. Day and other defendants, among whom were Fred H. Kolze, administrator of the estate of Frederich Kolze, deceased; Lina Kolze, his widow; Louisa Kolze, his daughter, and Charles E. Stade, trustee, all citizens of Illinois, foreclosing three trust deeds given by Day to secure

promissory notes in the aggregate amount of $5,400. The appeal was granted solely upon the question of jurisdiction.

The point involved requires a statement of facts at some length. They are substantially as follows:

Frederich Kolze sold and conveyed certain real estate to Day by warranty deed dated and acknowledged November 15, 1897, for a stated consideration of $45,000, namely, $1,000 in cash and the remainder in notes secured by trust deeds. To secure such notes Day executed three trust deeds to one Stade as trustee, conveying the real estate in question, which were dated November 17 and acknowledged and recorded November 24, 1897. Kolze thereupon intrusted the notes and trust deeds to Stade, a nephew, in whom he seemed to have great confidence, the notes being executed by Day to his own order and by him indorsed in blank.

On February 17, 1898, Stade took the notes and trust deeds securing the same and pledged them to Charlotte E. Hoadley as collateral security to his own notes, upon which Hoadley then advanced, or secured to be advanced, a large sum of money.

By deed dated and acknowledged November 23, 1897, but not delivered or recorded until June 30, 1898, Day reconveyed the premises to Kolze, and by deed of release, dated and acknowledged October 27, 1898, and recorded October 29, 1898, Stade as trustee fraudulently released said three trust deeds to Kolze, reciting a consideration of one dollar and other valuable considerations, and further reciting that the notes secured thereby had been cancelled.

By deed dated October 29, 1898, Kolze, now deceased, and the appellant, Lina Kolze, his wife, conveyed said premises to Louisa Kolze, their daughter, upon an expressed consideration of $12,000, although the grantee was not a *bona fide* purchaser, and said conveyance was made to her to hold for the benefit of the family.

For the ostensible purpose of securing the payment of the purchase money, said Louisa Kolze executed a trust deed to

secure her promissory note of $10,000, to Percy V. Castle, as trustee. This deed was dated October 27, 1898, acknowledged October 28, 1898, and recorded October 29, 1898, the appellant Fred H. Kolze, as administrator of the estate of his father, being the owner of said notes and trust deeds, subject, as was alleged, to the rights of the plaintiff Hoadley.

Subsequently, on or about April 21, 1899, the notes and trust deeds of Day, upon default by Stade in the payment of his note, were sold in accordance with the terms of the collateral note, and were bought in by and became the property of the appellee Hoadley.

The bill prayed that the release deed executed by Stade to Frederich Kolze be declared fraudulent and void as against the notes and trust deeds executed by Day and now owned by the plaintiff; that the rights of all the defendants be declared subject to those of the plaintiff under the notes and deeds held by her; that a receiver be appointed and an account had, and the defendants be decreed to pay whatever was due under the notes and trust deeds, and in default thereof that the premises be sold and the defendants be held liable for any deficiency upon such sale, and that they all be foreclosed of their right of redemption.

The defendants moved to dismiss the amended bill for want of a proper allegation of diversity of citizenship, which was overruled; and thereupon defendants interposed a plea to the jurisdiction upon the ground that the defendants were all citizens of the State of Illinois; that the suit was brought by plaintiff as the assignee of one William P. Smith, to whom the notes had been hypothecated by Stade to secure his (Stade's) note, and also to secure Smith for the faithful performance by Stade of a certain contract of employment; that upon the failure of Stade to pay his note and carry out his contract said mortgage notes and trust deeds signed by Day were sold on or about April 21, 1899, and were bought in by and became the property of the plaintiff; that Stade and Smith, "the successive assignors" of the appellee, were citizens of the

State of Illinois, the same State of which Day, the maker of the notes was also a resident, and that by reason of the fact that said suit could not have been prosecuted in a Federal court, if no transfer or assignment had been made, the Circuit Court had no jurisdiction of the case.

This plea was held to be insufficient, and the defendants failing to answer, were defaulted, and a decree thereafter entered to the effect that Stade as trustee had fraudulently released the trust deeds; that the trust deeds were valid as liens upon the premises; that the rights of Louisa Kolze, subsequent grantee under the warranty deed, as well as the deed of Kolze, were subject and subsequent to the rights of the plaintiff as the owner of the notes and deeds signed by Day; that the property be sold and the defendants foreclosed of their equity of redemption.

Thereupon defendants appealed to this court solely upon the question of jurisdiction.

Mr. John T. Richards for appellants:

The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees, except over (1) suits upon foreign bills of exchange; (2) suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made, and (3) suits upon choses in action payable to bearer and made by a corporation. Sec. 1, act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by act of August 13, 1888, c. 886, 25 Stat. 433. *Newgass* v. *New Orleans*, 33 Fed. Rep. 196; *New Orleans* v. *Quinlan*, 173 U. S. 191; 1 Foster's Federal Practice, 3d ed., 82.

The phrase "suits to recover the contents of a chose in action" includes suits to foreclose mortgages. Black on Mortgages, 567; 1 Foster's Fed. Prac., 83. Hence when mortgagor and mortgagee are citizens of the same State, an assignee of the mortgagee, though a citizen of another State, cannot maintain a bill for foreclosure in the Federal courts. Black

on The Law of Mortgages and Deeds of Trust, 567, citing *Sheldon* v. *Sill*, 8 How. 441; *Shoecraft* v. *Bloxham*, 124 U. S. 730; *Blacklock* v. *Small*, 127 U. S. 96; *Hill* v. *Winne*, Fed. Cases, No. 6503.

Where Federal jurisdiction is dependent upon the citizenship of the plaintiff's assignor at time of commencement of suit, the citizenship of the latter must affirmatively appear somewhere in the record. *Robertson* v. *Cease*, 97 U. S. 649; *Anderson* v. *Watt*, 138 U. S. 702; *North American Trans. Co.* v. *Morrison*, 178 U. S. 267.

The defect is ground for a motion to dismiss at any stage of the proceedings. *Florida Cent. R. R. Co.* v. *Bell*, 176 U. S. 327; *Blackburn* v. *Portland Gold M. Co.*, 175 U. S. 574; *Municipal Ins. Co.* v. *Gardiner*, 62 Fed. Rep. 954.

But the court should of its own motion dismiss the suit whenever it discovers the defect. *N. Am. Trans. Co.* v. *Morrison*, 178 U. S. 267; act of 1875, 18 Stat. 472, c. 137. The dismissal in accordance with the above section may be ordered upon motion of the defendant or by the court of its own motion. *Wetmore* v. *Ryder*, 169 U. S. 120; *Nashua &c. Ry. Co.* v. *Boston*, 136 U. S. 356, 374; *Mexican Cent. R. R. Co.* v. *Pinkney*, 149 U. S. 200; *Lake Co. Commrs.* v. *Dudley*, 173 U. S. 243.

The design of the act of 1875 was to impose a peremptory duty to dismiss whenever it is properly made to appear that the court has no jurisdiction. *Lake Co. Commrs.* v. *Dudley*, 173 U. S. 243; *Morris* v. *Gilmer*, 129 U. S. 315, 325; *Anderson* v. *Watt*, 138 U. S. 694. It is the duty of the Supreme Court on appeal to see that the jurisdiction of the Circuit Court has in no respect been imposed upon. *Morris* v. *Gilmer*, *supra*; *Nashua &c. Ry.* v. *Boston*, *supra*.

Mr. Herman W. Stillman for appellee:

The three acts passed relating to the enforcement of promissory notes and choses in action in the United States courts, by assignees, are § 11 of the Judiciary Act of 1789; the act of

March 3, 1875; and the act of March 3, 1887, as corrected by the act of August 13, 1888. See *New Orleans* v. *Quinlan*, 173 U. S. 191.

The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal courts, and in construing it the courts will look to the spirit of the act, and will consider the real relation of the parties. If it appears from all the circumstances that the assignment could not have been colorable for the purpose of conferring jurisdiction, then, the reason of the restriction being gone, the jurisdiction of the United States courts will attach. *Holmes* v. *Goldsmith*, 147 U. S. 150; *Farmington* v. *Pillsbury*, 114 U. S. 138.

The restriction against suits by assignees of promissory notes or choses in action in United States courts, "unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made," has reference to diverse citizenship only. No disqualification of the assignor, other than want of diverse citizenship, will prevent suit by the assignee. *Chase* v. *Sheldon Roller-Mills Company*, 56 Fed. Rep. 625; *Bowden* v. *Burnham*, 59 Fed. Rep. 752.

The language of the act implies, in order that the denial of jurisdiction at the suit of an assignee shall apply, that, but for the assignment, a claim would exist on the part of the assignor against the original debtor. When a claim would not exist on the part of the assignor, had no assignment been made, the reason of the act will be wanting, and jurisdiction will attach. Cases *supra* and *National Bank* v. *Stove Works*, 56 Fed. Rep. 321.

Jurisdiction depends upon the status of the parties at the commencement of the suit. *Emsheimer* v. *New Orleans*, 186 U. S. 33.

The Circuit Court of the United States has jurisdiction of a suit brought by the indorsee of a promissory note against his immediate indorser, whether a suit would lie by the in-

dorser against the mortgagor or not, upon the ground that the indorsee does not claim through an assignment, but upon a new contract between himself and the indorser. *Young* v. *Bryan*, 6 Wheat. 146; *Superior* v. *Ripley*, 138 U. S. 93; *Conolly* v. *Taylor*, 2 Pet. 556.

Under the circumstances of this case the principal relief sought was the setting aside of the release deed. Having jurisdiction for that purpose, the court properly retained it for complete relief. *Ober* v. *Gallagher*, 93 U. S. 199; *Deshler* v. *Dodge*, 16 How. 622.

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

The sole question presented by the record in this case is whether this is a suit to recover the contents of a chose in action, in favor of an assignee, which could not have been prosecuted if no assignment or transfer had been made.

By section 1 of the act of August 13, 1888, it is provided that no Circuit nor District Court "shall have cognizance of any suit . . . to recover the contents of any promissory note or chose in action in favor of any assignee, or of any subsequent holder, . . . unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made." This language is taken from the original Judiciary Act of 1789, and has been in force, except for a few years, since the foundation of the Government.

In construing this clause the decisions of this court have settled the following propositions:

1. That a suit to recover the *contents* of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract, or other chose in action. *Sere* v. *Pitot*, 6 Cranch, 332; *Deshler* v. *Dodge*, 16 How. 622, 631; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Shoecraft* v. *Bloxham*, 124 U. S. 730.

In *Corbin* v. *County of Black Hawk*, 105 U. S. 659, a suit to compel the specific performance of a contract was held to be within the statute, Mr. Justice Blatchford observing (page 665): "The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents."

2. That a suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill. *Sheldon* v. *Sill*, 8 How. 441; *Blacklock* v. *Small*, 127 U. S. 96.

3. That the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made. *Turner* v. *Bank of North America*, 4 Dall. 8; *Mollan* v. *Torrance*, 9 Wheat. 537; *Bradley* v. *Rhines' Administrator*, 8 Wall. 393; *Anderson* v. *Watt*, 138 U. S. 694, 702; *Robertson* v. *Cease*, 97 U. S. 646, 649; *Brock* v. *Northwestern Fuel Co.*, 130 U. S. 341.

4. That a suit may be maintained between the immediate parties to a promissory note as indorser and indorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract. In such case the original contract may be considered to ascertain the amount of the damages. *Young* v. *Bryan*, 6 Wheat. 146; *Bank of United States* v. *Moss*, 6 How. 31; *Superior City* v. *Ripley*, 138 U. S. 93; *Mollan* v. *Torrance*, 9 Wheat. 537; *Manufacturing Company* v. *Bradley*, 105 U. S. 175.

This is primarily a suit to foreclose certain mortgages. Instead of setting up the mortgages, their maturity and nonpayment, and their assignment to plaintiff, leaving to the defendants to plead the release by Stade of October, 1898, as an extinguishment of the mortgages, she has chosen to set forth the entire facts, to attack the release as fraudulent as against

her, and to insist that the original notes and trust deeds are valid in her hands, and to pray for a foreclosure of the same.

The gravamen of the suit and the object to be attained are unaffected by the form of her bill. The suit is still in substance a suit to foreclose the trust deeds, and to remove the release as a cloud upon her title to them.

It may be that an action for fraud might have lain against the parties implicated, regardless of the citizenship of the parties from whom the plaintiff traced her title, or possibly a bill in equity to cancel the release deed of Stade and remove a cloud from the title. But where a bill is filed to foreclose a mortgage, and it appears by the bill itself that the mortgage has been fraudulently released to the mortgagor by a deed of which plaintiff had no notice, and the fraud is a mere incident, the bill is still one to recover the contents of a mortgage within the meaning of the act, and will not lie in a Federal court unless the plaintiff's assignor might have maintained the bill, if no assignment or transfer had been made. It would advantage the plaintiff nothing to obtain a cancellation of the release without also foreclosing the mortgage in the same or a subsequent suit, while a right to foreclose the mortgage could not be established without incidentally avoiding the release.

In this aspect of the case it would seem to be immaterial whether the plaintiff derived her title directly from Stade, to whom she had advanced money and afterwards purchased the notes and trust deeds, as alleged in the bill, or through William P. Smith, who had obtained the notes and trust deeds from Stade, his debtor, since both Stade and Smith were citizens of the State of Illinois, and the inhibition of the statute would apply in either case.

The case of *Blacklock* v. *Small*, 127 U. S. 96, is similar, and we think practically decisive of the one under consideration. A suit was brought in the Circuit Court for South Carolina by two daughters of John F. Blacklock, who were citizens of Georgia, against certain defendants, who were citizens of South Carolina. It seems that Blacklock had sold a house and lot in

Charleston to the defendant Small, who had given back a bond and mortgage to secure a portion of the purchase money; that Blacklock subsequently assigned the bond to Alexander Robinson in trust, for his (Blacklock's) children; that Small pretended to pay the bond by making payment to Robinson in Confederate treasury notes; that upon receipt thereof, Robinson satisfied the mortgage and delivered up the bond to Small; that Robinson, in receiving such payment, violated his duty, and was guilty of a breach of trust; that Small, in attempting to pay the debt in illegal currency, with full notice of the trust, had not paid the debt; that the satisfaction of the mortgage was void; that its lien was still subsisting, and that Small was still liable for the amount due upon the bond. It was held that, as the suit was one against Small, founded upon contract, namely, his bond and mortgage in favor of plaintiffs, who claimed only under the assignment made by their father, John F. Blacklock, to the defendant Robinson, such suit would not lie, inasmuch as plaintiff's assignor, John F. Blacklock, was a citizen of South Carolina and of the same State as Small. In answer to this it was insisted that the suit should not be considered as one founded upon the contract of Small, but as one for the delivery of the bond and mortgage by Small to the plaintiffs, founded on their wrongful detention, and that the foreclosure and sale of the premises prayed for was merely ancillary and incidental. The contention was held to be unsound, Mr. Justice Blatchford saying that the bill was clearly one for a decree for the amount of the bond and a sale of the mortgaged premises. In other words, the foreclosure and sale were treated as the main objects of the bill, and the breach of trust of Small as a mere incident. The cases of *Deshler* v. *Dodge*, 16 How. 622, and *Bushnell* v. *Kennedy*, 9 Wall. 387, were cited and distinguished.

By analogy to *Blacklock* v. *Small*, we think the gravamen of this case must be treated as the foreclosure of the trust deeds in question, and the prayer for a cancellation of the release given by Stade to Frederich Kolze as a mere clearing of the way

to a decree establishing the title of the plaintiff to the notes and trust deeds. As the plaintiff is thus compelled to trace her title through Stade or Smith, who are both citizens of Illinois, and neither of whom could have prosecuted this suit, she is affected by the same incompetency.

The case of *Holmes* v. *Goldsmith*, 147 U. S. 150, on which the plaintiff relies, is not in point. That was an action by a non-resident against the maker of a note, who had signed it entirely for the benefit of the payee, who was really the party for whose use it was made. The maker and payee were citizens of the same State. The plaintiff, a *bona fide* holder, had paid full value for it to the payee, who had indorsed it to him. It was held the court had jurisdiction; that evidence showing the real relation of the parties was admissible, and that the jurisdiction of the Circuit Court "was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promissor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers."

The decree of the Circuit Court is therefore reversed, and the case remanded to that court with instructions to dismiss the bill.

CAMPBELL *v.* CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 70. Argued November 27, 28, 1905.—Decided January 2, 1906.

The California inheritance tax law of 1893, as amended in 1899, which imposed a tax on inheritances of and bequests to brothers and sisters, and not on those of daughters-in-law or sons-in-law, was assailed as repugnant to the Fourteenth Amendment, and having been sustained by the highest court of the State, a writ of error from this court was prosecuted. After the record was filed a new inheritance tax law was enacted in 1905, which amended and reënacted prior laws on the subject and also repealed the acts of 1893 and 1899 without any clause saving the right of the State in respect to charges already accrued thereunder. Plaintiff in error contended that as this court had jurisdiction on the constitutional question, it should reverse the judgment, on the ground that since the repeal of the acts of 1893 and 1899 the State has no power to enforce any taxes levied thereunder. *Held* that:

As the Federal question on which the writ of error is prosecuted has not become a moot one, and the affirmance of the judgment on that question alone will not prejudice the right of plaintiffs in error to have the purely local question of whether the State still has the right to enforce the taxes levied prior to the act of 1905, determined by the state court, it is the duty of this court to consider and decide the Federal question only leaving the local question open for investigation in, and adjudication by, the state courts.

The Fourteenth Amendment does not deprive a State of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion and would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority; and the statutes of California, therefore, are not unconstitutional because near relatives by affinity are preferred to collateral relatives.

THE facts are stated in the opinion.

Mr. Charles H. Garroutte, with whom *Mr. William N. Goodwin* and *Mr. Curtis H. Lindley* were on the brief, for plaintiff in error:

The act involved does not purport to regulate succession of estates. *Estate of Cope*, 191 Pa. St. 1; *Re Magnes' Estate*, 77 Pac. Rep. 854; *State ex rel.* v. *Ferris*, 53 Ohio St. 1. This

case can be distinguished from the *Magoun case*, 170 U. S. 283, 303, and *Billings* v. *Illinois*, 188 U. S. 97, one of which upheld a classification on amount of property and the other on the character of the property.

When a classification of persons *inter sese* is made, then all persons standing alike in the eyes of the law must be placed in the same class; and if some are omitted and thereby discriminated against, they are denied the equal protection of the law.

This is a tax act. *Plummer* v. *Coler*, 178 U. S. 115; Dos Passos on Inheritance Tax Laws, 37; *Est. of Wilmerding*, 117 California, 281; *Est. of Campbell*, 143 California, 627; *Eyre* v. *Jacobs*, 14 Gratt. 427; *State* v. *Hamlin*, 86 Maine, 494. As to what the classification of persons subjected to tax laws may be see *Minot* v. *Winthrop*, 162 Massachusetts, 113; *Black* v. *State*, 113 Wisconsin, 205; and as to the rule by which the constitutionality of the classification may be tested see *Gulf Co.* v. *Ellis*, 165 U. S. 150; *St. Louis Railway* v. *Paul*, 62 Am. St. Rep. 175, note. The classification must always be based on reasonable grounds. *Conolly* v. *Sewer Pipe Co.*, 184 U. S. 540, 563; *Cotting* v. *Stock Yards*, 183 U. S. 79; *Sugar Co.* v. *Louisiana*, 179 U. S. 89; *Railroad Co.* v. *Matthews*, 174 U. S. 76, 101; *Insurance Co.* v. *Daggs*, 172 U. S. 557; *M., K. & T. Ry.* v. *May*, 194 U. S. 267. In this case there is no reasonable ground for the classification which has been made and tested by the *Magoun case, supra;* it is unconstitutional. The legislative history of collateral tax laws shows that this law is improper and unusual. Connecticut Statutes of 1888 and see the California act revising this law. Statutes, 1905, 341.

Presumptions in favor of the validity of this legislation should not be indulged. Cases *supra* and *Smyth* v. *Ames*, 169 U. S. 466, 527; *Yick Wo* v. *Hopkins*, 118 U. S. 366.

While the Fourteenth Amendment as settled in *Knowlton* v. *Moore*, 178 U. S. 41, does not affect acts of Congress there is a provision of the Federal Constitution which forbids Congress from denying to citizens of the United States the

equal protection of the laws. *Hibben* v. *Smith*, 191 U. S. 310, 325.

There is no vested right in the State to the tax and it is no longer payable since the repeal of the act. Dos Passos, 423; Blackwell on Tax Titles, § 1047; 1 Desty on Taxation, 9; *Flannigan* v. *Sierra County*, 196 U. S. 553.

Mr. U. S. Webb, Attorney General of the State of California, with whom *Mr. E. B. Power*, *Mr. Lewis F. Byington* and *Mr. I. Harris* were on the brief, for defendant in error:

The rule of classification adopted by the state court is correct. *De Yoe* v. *Superior Court*, 140 California, 476; *Magoun* v. *Trust Co.*, 170 U. S. 283; *Gulf Co.* v. *Ellis*, 165 U. S. 150; *Insurance Co.* v. *Daggs*, 172 U. S. 557; *People* v. *Railroad Co.*, 105 California, 576, 584; *Ex parte Jentzsch*, 112 California, 469, 474; *Re Wilmerding*, 117 California, 281, 286.

No right guaranteed by the Fourteenth Amendment is invaded by the act. See cases *supra*. The classification need not necessarily be based upon blood relationship.

For other cases upholding, as constitutional, inheritance tax laws making discriminations between relatives, see *United States* v. *Perkins*, 163 U. S. 625; *State* v. *Dalrymple*, 70 Maryland, 294; *In re Meriam*, 141 N. Y. 479; *State* v. *Hamlin*, 86 Maine, 495; *State* v. *Alston*, 94 Tennessee, 674; *Minot* v. *Winthrop*, 162 Massachusetts, 113; *Gelsthorpe* v. *Furnell*, 51 Pac. Rep. 267; *Eyre* v. *Jacob*, 14 Gratt. (Va.) 428; *In re McPherson*, 104 N. Y. 306; *In re Shewrell's Estate*, 125 N. Y. 397; *Drake* v. *Kockersperger*, 167 Illinois, 122; *Billings* v. *People*, 189 Illinois, 472; *Scholey* v. *Rew*, 23 Wall. 331; *High* v. *Coyne*, 93 Fed. Rep. 451, sustaining the succession taxes imposed by acts of Congress in 1866 and 1898, respectively, in which similar principles were involved.

The act of 1905, even if it repeals the act of 1893 and the amendments thereto, does not affect the right of the State to its five per cent of the estates of persons who died prior to the first of July, 1905.

MR. JUSTICE WHITE delivered the opinion of the court.

In 1893 a law was enacted in California, imposing a charge on collateral inheritances and on bequests and devises. California Stat. 1893, p. 193. The burdens which the law imposed were not laid upon inheritances, bequests or devises in favor of the father, mother, husband, wife, children, brother or sister of a decedent, or wife or widow of a son, or the husband of a daughter of the decedent, adopted children and certain public and charitable corporations. In the year 1899 the law of 1893 was amended. The amendment caused the charge imposed by the prior act to become applicable in the case of brothers and sisters of a decedent. This resulted because the amendment omitted brothers and sisters from the enumeration made in the act of 1893 of persons to whom the act was not to apply. California Stat. 1899, p. 101.

In December, 1900, Cornelia E. Campbell died intestate in the city of San Francisco, and her estate was administered upon by the appropriate court. In December, 1901, a final decree was entered, apportioning the estate remaining, after the payment of certain specified amounts, among three brothers and a sister who are the plaintiffs in error in this court. One of the sums directed by the decree to be paid before distribution was a collateral inheritance charge of $488.70, under the act of 1893 as amended in 1899.

The brothers and sister appealed to the Supreme Court of California from that portion of the decree directing the payment of the charge just mentioned. The validity of the law imposing the burden was assailed upon various grounds of a local nature, and upon the Federal ground that the amendatory act of 1899, in so far as it purported to impose a charge on inheritances, bequests or devises to brothers and sisters, denied the equal protection of the laws, and was hence repugnant to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of California affirmed the decree. In doing so it held that the contentions of a local nature were without merit,

and that the act of 1893 as amended by the act of 1899 was not in conflict with the Fourteenth Amendment. 143 California 623.

With the questions of a local nature decided by the state court we are not concerned, and shall therefore confine our attention to the Federal question, that is, the alleged repugnancy to the Fourteenth Amendment, imposing the burden in question on brothers and sisters.

The asserted repugnance of the statute to the Constitution of the United States, as elaborately argued at bar, rests upon the proposition that the statute denied to brothers and sisters of a decedent the equal protection of the laws, because the statute embraced an inheritance, bequest or devise in favor of a brother or sister, and did not include bequests or devises in favor of a wife or widow of a son or the husband of a daughter of the decedent.

Before coming to consider this subject we must notice a wholly independent question, which the plaintiffs in error assert renders a reversal necessary, irrespective of the merits of the contention based upon the Federal question.

In March, 1905, since the record on this writ of error was filed in this court, the State of California enacted a new inheritance tax law. California Stat. 1905, p. 341. This act differs from the act of 1893 as amended in 1899 in many particulars. It includes within the classes subjected to the burdens imposed persons not embraced in the act of 1893 as amended, and whilst it does not except from its operation persons embraced in the prior act as amended, creates as to some of such persons a different rate and carves out exemptions as to designated amounts of property, not found in the earlier act. Besides, by the act, brothers and sisters or a descendant of such brothers and sisters, and the wife or widow of a son or a husband of a daughter of a decedent, are made subject to a like charge, less, however, in rate than the one theretofore imposed upon a brother or sister. The act of 1905, as declared in its title and as manifested by its provisions, was intended to cover generally the subject of inheritance taxes, and by necessary effect operated to amend and

reënact the prior laws on the subject. In the body of the act was contained a section (27), expressly repealing the act of 1893 and the amendments thereto, without embodying a clause saving the right of the State in respect to the charges which had accrued to the State under the prior acts.

The proposition is, that the act of 1905 relieved the plaintiffs in error from the duty to pay resulting from the prior laws, even if those laws were not repugnant to the Fourteenth Amendment, and, therefore, the contention is that it becomes our duty to so decide, and hence to reverse the judgment without passing upon the Federal question. The plaintiffs in error do not suggest that the writ of error be dismissed because by the California statute, upon which they rely, the constitutional question has become merely a moot one, but their contention is that we should maintain jurisdiction and reverse upon the ground previously stated. We cannot assent to the proposition. The statute upon which it is based was enacted subsequently to the decision of the Supreme Court of California, and if that statute had the effect, as asserted, of depriving the State of power to enforce the judgment below rendered, the right to claim relief, based upon the action of the State, taken since the Supreme Court of California decided the case, will, we assume, be open to investigation in the state courts, if, in deciding the Federal question adversely to the plaintiffs in error, we do not conclude the question referred to. Under these conditions we think it is our duty to decide the Federal question upon which the writ of error was prosecuted, and leave open the purely local question, which has arisen since the decision by the lower court.

Of course, of our own motion we must determine whether the enactment of the subsequent statute so obviously had the effect of relieving the plaintiffs in error from the burden imposed by the judgment below as to cause the Federal question to become merely a moot one. In view of the general and continuing nature of the legislation contained in the statute of 1905 (*Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1; *Steamship Co.* v. *Joliffe*, 2 Wall. 450), we are clearly of the opinion that it cannot

be said that this case has become a moot one. Especially is this true when the ruling of the Supreme Court of California in *Estate of Stanford*, 126 California, 112, is considered. In that case, in 1897, while an appeal was pending in the Supreme Court of California from a decree directing the payment by the Estate of Stanford of a charge or charges imposed by authority of the act of 1893, the legislature of California amended the act and established certain exemptions, which it declared should apply to all property which had passed by will, succession or transfer after the approval of the act of 1893, except in those cases where the tax had been paid to the treasurer of the proper county. As to enforce the amendatory act would have relieved the Estate of Stanford from the burdens of which complaint was made, the question presented to the Supreme Court of California was whether, if the burdens were authorized by the act of 1893, it was the duty of the court to apply the provisions of the amendatory act and reverse the judgment pending before it, because the right to enforce the impositions had terminated by the effect of the amendatory act. After deciding that the act of 1893 authorized the burdens complained of, the court, in considering the terms of that statute, the nature and character of an inheritance tax, and the power of the State over the disposition of property in case of death, held that it was its duty to affirm the decree because of the vested right existing in the State under the act of 1893, and because the act of 1897, in attempting to abrogate such vested right, was repugnant to specified provisions of the constitution of California. Putting aside then all question as to the operation of the statute of 1905, and reserving from any decree which we may render all rights, if any, in favor of the plaintiffs in error which may have arisen from the passage of that statute, we are brought to a consideration of the merits of the Federal question.

The contention is that the assailed law of California was repugnant to the Fourteenth Amendment, because it subjected to the burdens of an inheritance tax or charge brothers and sisters of a decedent, and did not subject to any burden such

strangers to the blood as the wife or widow of a son or the husband of a daughter of a decedent. We do not stop to refer in detail to the many forms of argument by which the contention is sought to be sustained, but content ourselves with stating that, whatever be the form in which the propositions relied on are advanced, they all reduce themselves to and must depend upon the soundness of the contention that the Fourteenth Amendment compels the States, in levying inheritance taxes, and, *a fortiori*, in regulating inheritances, to conform to blood relationship. That is to say, in their last analysis all the arguments depend upon the proposition that the Fourteenth Amendment has taken away from the States their power to regulate the passage of property by death or the burdens which may be imposed resulting therefrom, because that amendment confines the States absolutely, both as to the passage of such property and as to the burdens imposed thereon, to the rule of blood relationship. To state the proposition is to answer it. Its unsoundness is demonstrated by previous decisions of this court. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562. It is true that in the first of the cited cases it was expressly declared or impliedly recognized that in the exercise by a State of its undoubted power to regulate the burdens which might be imposed on the passage of property by death, a case might be conceived of where a burden would be so arbitrary as to amount to a denial of the equal protection of the laws. But this suggestion did not imply that the effect of the Fourteenth Amendment was to control the States in the exercise of their plenary authority to regulate inheritances and to determine the persons or objects upon which an inheritance burden should be imposed. In this case there can be no doubt, if the right of a State be conceded to select the persons who may inherit or upon whom the burden resulting from an inheritance may be imposed, the complaint against the statute is entirely without merit. The whole case, therefore, must rest upon the assumption that because the State of California has not followed the rule of blood relation-

ship, but as to particular classes has applied the rule of affinity by marriage, therefore the constitutional provision guaranteeing the equal protection of the laws was violated. But, unless the effect of the Fourteenth Amendment was inexorably to limit the States in enacting inheritance laws to the rule of blood relationship, such a regulation plainly involved the exercise of legislative discretion and judgment, with which the Fourteenth Amendment did not interfere. Such a regulation cannot in reason be said to be an exercise of merely arbitrary power. To illustrate. It assuredly would not be an arbitrary exercise of power for a State to put in one class, for the purpose of inheritance or the burdening of the privilege to inherit, all blood relatives to a designated degree, excluding brothers and sisters, and to place all other and more remote blood relatives, including brothers and sisters, in a second class along with strangers to the blood. This being true it cannot, without causing the equality clause of the Fourteenth Amendment to destroy the powers of the States on a subject of a purely local character, be held that a classification which takes near relatives by marriage and places them in a class with lineal relatives is so arbitrary as to transcend the limits of governmental power. If this were not true, state legislation preferring a wife in the distribution of the estate of her husband to a brother or sister of the husband would be void as repugnant to the Fourteenth Amendment. So also would be the provision in the California statute we are considering, preferring an adopted child of a decedent to a brother or sister. With the motives of public policy which may induce a State to prefer near relatives by affinity to collateral relatives, we are not concerned, since the Fourteenth Amendment does not deprive a State of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority.

Affirmed.

HERRICK *v.* BOQUILLAS LAND AND CATTLE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 105. Submitted December 7, 1905.—Decided January 2, 1906.

On appeal from the Supreme Court of a Territory the jurisdiction of this court, apart from reviewing exceptions to rulings on evidence, is limited to determining whether the findings support the judgment.

A finding of a territorial court that one of the parties held title to an undivided interest in the land in controversy acquired by conveyance duly made from his grantors to whom the Mexican Government had conveyed it in 1833, by good and sufficient grant, which had in 1900 been recognized and confirmed by the United States Government, is one of fact and sufficient to sustain the conclusion of law that the title to the land is in that party.

A judgment of the Court of Private Land Claims is not only tantamount to a quitclaim from the United States, subject to the rights of third parties, but it is also conclusive as to existence of a record title upon those claiming to hold under rights originating subsequently to the cession of the territory from Mexico and also upon those claiming title by adverse possession.

There was no statute of limitations in Arizona prior to 1901 barring a right of action for the recovery of lands by one claiming title against another holding merely by peaceable and adverse possession, and paragraph 2938, Rev. Stat., Arizona, 1901, requiring such an action to be instituted within ten years after the cause of action accrues has no retroactive effect making it applicable to an action commenced prior to its enactment and under the circumstances of this case.

THE facts are stated in the opinion.

Mr. Ben Goodrich for appellant.

Mr. Francis J. Heney for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

This is an action of ejectment, commenced in August, 1901, by the appellee, to recover a tract of land containing 17,355.86

said interest in and to the said lands and premises to the plaintiff herein, and that plaintiff has not since disposed of its title so acquired, or any part thereof, to said lands and premises."

In addition, the trial court, among its conclusions of law, incorporated the following:

"That plaintiff and its predecessors and grantors in interest have been since the 1st day of January, 1875, and ever since have been, and still are, the owners and entitled to the possession of the lands and premises in plaintiff's complaint, and hereinafter particularly described, and each and every part and portion thereof."

The Supreme Court of the Territory, in its opinion on the rehearing, held this latter statement to be not a mere conclusion of law but the finding of an ultimate fact, and the court therefore adopted it as part of the findings of fact upon which it based the decree of affirmance. As to possession by the defendants it was found as follows:

"That each and every of said defendants in this cause were, on the 14th of December, 1900, and had been for more than ten years next preceding that date, occupying various portions of the said lands and premises, and each and every of the said defendants who have failed to appear and answer herein have since the last-named date withheld possession of divers portions of said lands and premises from the plaintiff and its grantors and predecessors in interest, and still and now so withhold the same; that since the said December 14, 1900, the annual value of the rents, issues and profits of that part of said lands and premises so withheld from plaintiff, by the said defendants, is as follows, to wit: . . ."

This appeal was prosecuted.

On appeal from the Supreme Court of a Territory our jurisdiction, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Harrison* v. *Perea*, 168 U. S. 311, 323, and cases cited. As on this record there is no question presented as to rulings of the court in re-

spect to the admission or rejection of evidence, we can alone consider the sufficiency of the findings.

The errors assigned are sixteen in number, and resolve themselves into three classes:

1. Those which assert that the Supreme Court of the Territory refused to consider the findings made by the trial court, and this embraces the first, second and fifth assignments. But these assignments disregard the opinion of the Supreme Court of the Territory delivered on the rehearing, and do not require further notice.

2. Those which question the sufficiency of the evidence to support the findings of fact. These are numbered eight and thirteen, and likewise need not be further referred to, as they address themselves to a matter not open for our consideration.

3. Assignments which in various modes of statement attack the sufficiency of the findings made by the trial court and adopted by the Supreme Court of the Territory, which include all of the assignments not already disposed of.

The contentions concerning the insufficiency of the findings to support the judgment are resolvable into two propositions, which we shall separately consider:

First. That, irrespective of the adequacy or inadequacy of the possession asserted by the defendant below, the findings are insufficient to sustain the legal conclusion of title in the plaintiff. This proposition rests upon the premise that the matter included in the conclusions of law of the trial court, which the Supreme Court held to be a finding of fact, and which it adopted as such, was but a mere conclusion of law, and, therefore, cannot be considered in determining the sufficiency of the findings of fact to sustain the deduction of law made by the court below as to title in the plaintiff. And with this premise it is insisted that if the findings of fact proper are alone considered they are insufficient to establish title in the plaintiff, because, although they show the Mexican grant, and its confirmation and a conveyance by William R. and Phebe A. Hearst to the plaintiff of an undivided interest in the land, the findings fail as against

acres, and damages for the alleged unlawful withholding of possession. It was alleged that the plaintiff was the owner and entitled to the possession of the described land, and that title had been in it or in its grantors and predecessors in interest ever since January 1, 1875; and the defendants—thirty in number—were alleged to have unlawfully withheld possession of the premises in dispute from about November 28, 1900. Some of the defendants filed disclaimers or failed to answer. The appellants and others jointly answered, relying solely on rights alleged to result from an asserted adverse possession by each of them of a portion of the demanded premises for more than twenty years prior to the bringing of the action. The case was tried to the court without a jury. The court made findings of fact and stated its conclusions of law thereon. Thereupon judgment was entered in favor of the plaintiff. On appeal, the Supreme Court of the Territory affirmed the judgment; and the opinions delivered on the original hearing and on a rehearing are reported in 71 Pac. Rep. 924 and 76 Pac. Rep. 612. The Supreme Court adopted the findings of fact made by the trial court. The findings thus adopted as to the title and right of possession of the plaintiff were as follows:

"That on the 8th day of May, A. D. 1833, the Mexican Government, by good and sufficient grant conveyed to plaintiff's grantors and predecessors in interest the lands and premises herein described, being the lands and premises in controversy.

"That on the 14th day of December, in the year of our Lord, one thousand and nine hundred, the Government of the United States, by its letters patent, recognized and confirmed the validity of the said grant of lands in plaintiff's complaint, and hereinafter particularly described, to Ygnacio Elias Gonzales and Nepumoceno Felix, and to their heirs, successors in interest and assigns forever; and found and decreed that W. R. Hearst and Phebe A. Hearst had acquired an undivided interest in such lands and premises of the said two grantees.

"That on the 3d day of July, 1901, the said W. R. Hearst and Phebe A. Hearst, by deed in writing, conveyed all of their

defendant to show any title whatever in William R. and Phebe Hearst, or in the plaintiff as their grantee, derived from the grantees of the Mexican Government.

Conceding, merely for the sake of argument, the correctness of the premise, we think the proposition based thereon is without merit, since the findings, without reference to the action of the court in adopting the particular finding referred to, sustain as against the defendants the conclusion as to title. Those findings are that the plaintiff held title to an interest in the land in controversy, acquired by reason of a conveyance made on the third day of July, 1901, by William R. and Phebe A. Hearst. They, moreover, established that the land thus conveyed was originally acquired by the predecessors and grantors of the plaintiff through a grant made by the Mexican Government in 1833, and that "on the fourteenth day of December, in the year one thousand nine hundred, the Government of the United States, by its letters patent, recognized and confirmed" said Mexican grant to two named individuals, "and to their heirs, successors in interest and assigns forever; and found and decreed that W. R. Hearst and Phebe A. Hearst had acquired an undivided interest in such lands and premises of the said two grantors."

It is urged that the statement in the finding as to it having been decreed that there was an undivided interest in William R. and Phebe A. Hearst, was adopted from a decree to that effect rendered by the Court of Private Land Claims, established under the act of March 3, 1891. 26 Stat. 854. From this it is deduced that the recital in the patent as to the title in W. R. and Phebe A. Hearst was *res inter alios*, and that in the absence of an express and substantive finding of title in the parties named from the grantee of the Mexican Government the mere recital on the subject in the patent furnished no support whatever for the legal conclusion that there was title. This is based upon the terms of sections 8 and 13 of the act establishing the Court of Private Land Claims, wherein it was provided that the effect of a confirmation of a grant by that court should be

only to quitclaim the title and not to affect the interests of third parties. But, conceding that the patent as asserted is based on a decree of the Court of Private Land Claims, and that its recitals are controlled by the terms of the act creating that tribunal, the proposition is without merit. *Knight* v. *Land Association,* 142 U. S. 161, 188, 189. In that case it was held that although a patent which had been issued in consequence of the report of a tribunal appointed by Congress, merely quitclaimed the rights of the United States and saved the rights of third parties, it nevertheless was conclusive as to the existence of a record title upon those claiming to hold under rights which originated subsequent to the cession, and, *a fortiori,* as to a person claiming title by mere possession. By the application of this doctrine it follows that the judgment confirming the land grant and the patent thereunder, which specifically decreed an interest in the confirmed grant to the parties named, was adequate to establish a record title as against persons asserting the character of rights upon which the defendants relied.

Second. It is further insisted that, in view of the finding of the court below as to possession of the defendant for more than ten years prior to the commencement of the action, the findings are inadequate to sustain the legal conclusion of the right of the plaintiff to recover, because of the force and effect of the period of limitation prescribed in paragraph 2938 of the Revised Statutes of Arizona for 1901. That paragraph is as follows:

"Any person who has a right of action for recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward."

The court below held, and its ruling on this subject is not questioned, that prior to the adoption of this revision of the Arizona statutes there was no statute of limitations in that Territory barring a right of action for the recovery of lands by

one claiming title against another holding merely by peaceable and adverse possession. The revision went into effect on September 1, 1901, and the present action was brought a few days prior to such date, viz., on August 26, 1901.

In approaching the question whether paragraph 2938 was applicable to the case, the court below assumed that the effect of the finding as to possession by defendants was to show peaceable and adverse possession by them for the period of ten years. The court, however, decided that under no canon of construction or rule giving a retroactive effect to a new statute of limitation could paragraph 2938 be made to apply to this case. Thus, suggesting the possible constructions which might be claimed for the paragraph, it was said that if construed as absolutely barring causes of action existing at the time of its passage, it was unconstitutional, citing *Sohn* v. *Waterson*, 17 Wall. 596. Further, that even if the statute were construed as providing that all actions existing at the time of the passage of the statute should be barred if not sued upon within the time which elapsed between the date of such passage, and the date fixed for the going into effect thereof, this action was brought within such period and the statute could not operate as a bar, citing *Wrightman* v. *Boone County*, 82 Fed. Rep. 412, and various state decisions therein referred to. And, lastly, it was decided that if the paragraph was construed as not applying to a suit which, though commenced after the passage of the act, was pending at the time the same took effect, the statute had no application, citing *Vreeland* v. *Town of Bergen*, 34 N. J. Law, 438.

We think the Supreme Court of the Territory was clearly right in the views which it thus expressed, and therefore it committed no error in determining that under no possible hypothesis could the limitation prescribed in paragraph 2938 of the Revised Statutes of Arizona operate to bar the plaintiff's action, in view of the findings of fact in respect to the title of plaintiff.

Affirmed.

SUCCESSION OF SERRALLES *v.* ESBRI.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 65. Argued November 27, 1905.—Decided January 2, 1906.

A Porto Rican contracted, in 1894, to pay a certain amount of pesos in money current in the commerce, whatever may be the coinage in circulation, at the rate of one hundred centavos of the money in circulation for each peso. Section 11 of the Foraker Act, passed April 12, 1900, provided for the retiring of Porto Rican coin and the substitution thereof of United States coin and for the payment of debts at the rate of sixty cents per peso—and thereafter the debtor offered to pay the obligation at that rate but the Supreme Court of Porto Rico held that he was entitled under the contract to one hundred cents for each peso. The creditor also claimed the matter was *res judicata* under a judgment which had been obtained for an instalment of interest. In reversing this judgment *held* that;

Appellant having claimed, and been denied, the right to pay the indebtedness at the rate fixed by § 11 of the act of April 12, 1900, this court has jurisdiction under § 35 of that act to review the judgment on appeal.

Under Article 1477 of the Porto Rico Code of Civil Procedure judgments rendered in executory actions are not *res judicata*.

The contract only contemplated such change in coin as might occur while Porto Rico was under the same political power, and a strict and literal construction of the contract will not be entertained where it does not convey the real meaning of the parties.

The indebtedness should be paid at the rate of sixty cents per peso as fixed by the statute, and neither the provisions of the statute, making United States coin the circulating medium, nor the terms of the contract should be construed as making a centavo (the one-hundredth part of a peso) the equivalent of a cent in United States money.

THE appellee, plaintiff below, commenced this action, called a "declaratory action of greater import," (Law of Civil Procedure, Porto Rico, Arts. 480, 481, 482), to obtain payment of certain sums due on an indebtedness of the defendant (appellant), secured by mortgage, as stated in that instrument. She obtained judgment in her favor in the proper District Court of Porto Rico, which was affirmed by the Supreme Court of the island, and the defendant has appealed from that judgment

to this court. The sole question is whether the debt may be solved in American money at the rate of sixty cents thereof for each peso of indebtedness, or must one dollar in American money be paid for each peso.

The following are the facts: One Nicholas Cartagena y Mangual desired to sell the fractional part, owned by him, of a sugar plantation, known as "Ursula," situated in the municipal district of Juana Diaz, in the province of Porto Rico, such fractional part being eighteen per cent of the value of the whole plantation, valued at 80,000 pesos. The purchaser, Juan Serralles, agreed to pay for such share 18,000 pesos. Accordingly a deed of purchase and mortgage was made between the parties on the first day of September, 1894. That instrument contained the statement that the sale was effected "in consideration of the sum of 18,000 pesos, commercial money," which shall be paid by the purchaser in instalments, viz., "two thousand pesos on the fifteenth day of July, of the year 1898; two thousand pesos on the same day and month of the year 1899; an equal sum of two thousand pesos on the fifteenth day of July, 1900, and three thousand pesos on the fifteenth day of July, of the years 1901 to the year 1904, both inclusive, all of which to be paid in the money current in the commerce, whatever may be the coinage of the money that as such is in circulation or is accepted in this province, at the rate of one hundred centavos (cents) of the money in circulation for each peso, excluding all kinds of paper money in circulation or to be issued, even if its circulation should be compulsory."

The instalments were to bear interest at the rate of ten per cent per annum from the date of the deed, which interest was due and payable quarterly. The parties also declared "that the price for which said sale is made is the just and true value at present of the share and interest hereby sold and conveyed," they being "fully aware that that is the value that shall serve as a basis in the public sale that shall be held if the obligation is not paid, and its payment should be demanded judicially."

A few days after the execution and delivery of this instru-

ment it was discovered that Cartagena was not the owner of all of the one-eighteenth part of the plantation, because that interest was acquired during his marriage with his first wife, and was what is termed "conjugal partnership property," acquired for a valuable consideration during her life. When she died her interest went to her children, and so the seller, Cartagena, owned the above-mentioned fractional part of the plantation, with those children. It therefore became necessary to make another deed and mortgage, conveying the interest of all the owners of the fractional part of the plantation, including such children. This was accordingly done, and on the sixth of October, 1894, another instrument, in the nature of a deed and mortgage, was executed by the proper parties, in ratification and extension of the first instrument, and which contains substantially the same provisions as the first instrument, and the payments were to be made to the parties conveying the premises in the proportion in which they were interested in that property. These 18,000 pesos were to be paid by the purchaser, at the same times mentioned in the former instrument, "in current commercial money, whatever the coinage may be of money which, with such character, be in circulation or accepted in this province, at the rate of one hundred cents of the circulating medium for each peso, and to the exclusion of all paper money, created or to be created, even though its circulation be compulsory."

On the fifteenth of September, 1900, a quarterly payment of interest became due under the terms of the mortgage, and the appellant proposed to pay it in American money then current, at an amount equivalent in value to the former provincial money, which was not then in circulation. This offer was refused. The appellee then commenced an action in a municipal court, to recover the interest due September 15, 1900, in American money, at the rate of one dollar for each peso that was due. She obtained what is termed an "executory judgment" for such payment, and that judgment (of the municipal court) was affirmed by the District Court, and the appellant then paid the

same. Upon quarterly instalments of interest due December 15, 1900, and March 15, 1901, the appellant made the same offer to pay in American money of equivalent value of the provincial money or peso, which was not then in circulation, and the offer was again refused, and this declaratory action of greater import was then commenced, to recover one American dollar for each peso of indebtedness due up to the date of the commencement of suit, and to obtain a declaration that the future payments should be made in the same manner. Before the commencement of this action, in 1901, the province had been ceded to the United States, which (prior to the cession) had occupied it by its troops in 1898. On the twelfth day of April, 1900, Congress passed an act (31 Stat. 77, 80), section eleven of which (reproduced in the margin)[1] provided for retiring the Porto Rican coins and substituting American money therefor.

In the pleading on the part of the plaintiff below the fore-

[1] "SEC. 11. That for the purpose of retiring the Porto Rican coins now in circulation in Porto Rico and substituting therefor the coins of the United States, the Secretary of the Treasury is hereby authorized to redeem, on presentation in Porto Rico, all the silver coins of Porto Rico known as the peso, and all other silver and copper Porto Rican coins now in circulation in Porto Rico, not including any such coins that may be imported into Porto Rico after the first day of February, nineteen hundred, at the present established rates of sixty cents in the coins of the United States for one peso of Porto Rican coin, and for all minor or subsidiary coins the same rate of exchange shall be applied. The Porto Rican coins so purchased or redeemed shall be recoined at the expense of the United States, under the direction of the Secretary of the Treasury, into such coins of the United States now authorized by law as he may direct, and from and after three months after the date when this act shall take effect no coins shall be a legal tender, in payment of debts thereafter contracted, for any amount in Porto Rico, except those of the United States; and whatever sum may be required to carry out the provisions hereof, and to pay all expenses that may be incurred in connection therewith, is hereby appropriated, and the Secretary of the Treasury is hereby authorized to establish such regulations and employ such agencies as may be necessary to accomplish the purposes hereof: Provided, however, That all debts owing on the date when this act shall take effect shall be payable in the coins of Porto Rico now in circulation, or in the coins of the United States at the rate of exchange above named."

going facts were averred, but no averment or contention was made that the so-called "executory judgment" which plaintiff had theretofore obtained constituted *res adjudicata* as to the question now in issue.

The defendant (appellant herein) put in an answer, setting up various facts unnecessary to be here adverted to.

He also averred that under section eleven of the act of Congress, above mentioned, he had the right to pay the instalments due on the mortgage, in American money, at the established rate of sixty cents in the coin of the United States for one peso of Porto Rican coin.

The trial court, in its judgment, after reciting the existence of the executory judgment in the action above described and also all the proceedings in the case before it, decreed the payment of the interest or instalments which might then be due, or thereafter to grow due, to the plaintiff, in United States coin at the rate of one dollar thereof for each peso of indebtedness. Basing its decree wholly upon the literal language of the contract, the court said: "It appears that Don Juan Serralles y Colon bound himself to make the payments to said Cartagena, by virtue of the said contract of sale, in money current in commerce, of whatever coinage it may be, at the rate of one hundred cents of the current money for each peso, it is plain and evident that the heirs of said Serralles are bound to pay in dollars all the instalments arising from the same contract, or the interest on the same, for dollars are the money current at present in this island."

An appeal was taken by the defendant to the Supreme Court on the ground, among others, that the judgment of the District Court violated Articles 1281 and 1283 of the Civil Code. The articles are as follows:

"ART. 1281. If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of the stipulations shall be observed.

"If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail.

"ART. 1283. However general the terms of a contract may be, there should not be understood as included therein things and cases different from those with regard to which the persons interested intended to contract."

Further ground of appeal was the alleged violation of the eleventh section of the act of Congress above mentioned, under which appellant claimed the right to pay in United States coin at the equivalent value of sixty cents for each peso.

The Supreme Court, in due time, after argument, affirmed the judgment of the court below on the law, holding that the contract was clear, and its literal terms must be complied with. It did not, nor did the District Court, hold the prior judgment to be *res adjudicata*.

The court also denied the right claimed by the defendant, under the above-mentioned act of Congress, to pay his indebtedness at the rate of sixty cents of American money for each peso of such indebtedness, on the ground that the act did not apply to such cases as the one before the court.

Mr. James S. Harlan for appellants.

There was no brief for appellees.

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

The question arises herein whether this court has jurisdiction to hear the case, upon appeal or otherwise. The action is one to recover the interest due, on an indebtedness from the appellant to the appellee, on account of the purchase by the former of a certain interest in a plantation in Porto Rico, owned by the testator of appellee, which indebtedness was secured by a mortgage. This action is in its nature something like one to foreclose a mortgage. The question arising in the case is in regard to the kind of money in which the indebtedness of appellant (both that due at the time of the commencement of the

action and that accruing thereafter) should be paid, the appellee asserting her right to be paid in American money at the rate of one dollar for each peso of indebtedness, while the appellant, on the contrary, asserts his right, under section eleven of the act of Congress of April 12, 1900, already mentioned, to pay the indebtedness in money or coins of the United States, at the rate of sixty cents in such coins for each peso of his indebtedness. This right was denied by the court below on the ground that there was a clear contract to pay as demanded by the appellee, and that the act of Congress had no application to the case. Judgment was accordingly given in favor of the appellee, that the appellant should pay to the appellee the indebtedness due or thereafter to grow due to her, at the rate of one dollar in American money for each peso of his indebtedness. Appellant thus claimed a right under a statute of the United States, which was denied, and under section thirty-five of the Foraker Act (April 12, 1900), this court has jurisdiction to review the judgment. *Crowley* v. *United States*, 194 U. S. 461; *Rodriguez* v. *United States*, 198 U. S. 156.

The record also shows that a prior action had been commenced by appellee, in a municipal court of Porto Rico, between the same parties, to recover an instalment of interest due September 15, 1900, and that the same defense was there made in regard to the character of the money in which the debt should be paid. The municipal court in that case decided in favor of the appellee herein, and judgment to that effect having been duly entered, an appeal therefrom was taken to the District Court, which affirmed the judgment, and the same was thereupon paid by the appellant herein. That judgment is not set up by the appellee as *res adjudicata*, and while it is recited in the judgments in this case both in the District and Supreme Courts as having been recovered, it is not held to be such by either of the courts, but in such judgments it is referred to as an "executory judgment," and by Article 1477 of the Porto Rico "Law of Civil Procedure" (page 299) it is provided that "Judgments rendered in executory actions shall not give rise

to the exception of *res judicata*, the parties reserving their rights to institute the ordinary action on the same question." As the courts below have treated and denominated the prior judgment in the municipal court as an "executory judgment," obtained in an executory action, the reason for not holding the judgment to be *res adjudicata* becomes apparent when the above article of the code is considered.

We come, then, to a consideration of the proper construction of the provisions in the two deeds, regarding the kind of money in which the debt is to be paid. They are set forth in the foregoing statement and are substantially alike, excepting that the first deed, that of September, 1894, in speaking of the coinage, says, that the payment is to be made in money that is in circulation or is accepted in the province, at the rate of one hundred *centavos* (cents) of the money in circulation for each peso, and in the amended deed of October 6, 1894, the translator of the original Spanish leaves out the word "centavos," and gives what he regards as its proper translation, the word "cents," so that the provision reads that the money is to be paid at the rate of one hundred "cents" of the circulating medium for each peso. These two deeds represented the same transaction and were drawn, of course, in the Spanish language. In the first deed the interest of the children of Cartagena was not referred to, because of the mistaken assumption that Cartagena had the whole title, and upon discovering the mistake the second deed was made, conveying his interest and the interest of his children, amounting to one-eighteenth of the whole value of the plantation, as conveyed by that deed to the same purchaser. The later deed was regarded by all parties as a mere rectification and ratification of the first deed, and it is quite clear that the word "centavos," contained in the first deed, was used in both, and that the word "cents" is but a translation of the original Spanish word "centavos," which was used in this contract drawn in the Spanish language.

This is in truth assumed to be correct by counsel in the court below, in his communication to that court in behalf of the pres-

ent appellee (which forms part of the record herein), as he there uses the word "cents," and then follows it by the use of the word "centavos."

It may be, therefore, stated as a fact that the original contract in the deeds provided for the payment in money current in the province at the rate of one hundred centavos for each peso. There is no finding in so many words, as to the value of the peso mentioned in the contract. The Spanish word centavo is said to be, in Spanish and in South American countries, a small copper or nickel coin, in value six-tenths of a cent (actual), and one cent (nominal); the one-hundreth of a peso. See Standard Dictionary of the English language. The centavo being worth really six-tenths of a cent, and being the one-hundreth part of a peso, would, of course, make the peso worth sixty cents in American money.

The eleventh section of the act of Congress, already mentioned, provides for the redemption of all silver coins of Porto Rico known as the peso, and all other copper and Porto Rican coins in circulation in Porto Rico "at the present established rate of sixty cents in the coins of the United States for one peso of Porto Rican coin, and for all minor and subsidiary coins the same rate of exchange shall be applied." The Congress thus fixed the rate of exchange in the redemption of these coins, and it must be assumed to have been fixed at the value of the peso in American coin.

From these facts it appears to us that there is no rational doubt that at the time when this contract was executed the peso in circulation in Porto Rico was worth not to exceed sixty cents, American money. At the time when the money was due under the contract, in September, 1900, it is admitted that all the pesos and centavos theretofore in circulation had been at that time redeemed by the United States, pursuant to the provisions of the act of Congress, and the money in circulation in Porto Rico was then and thereafter the money of the United States. This was the money current in commerce in Porto Rico and was in circulation and accepted therein as such money. It

is now claimed by the appellee that, as the American money was the money of commerce and was alone in circulation, she was entitled in September, 1900, under the provisions of the contract, to be paid one hundred cents, or, in other words, one dollar of that money for every peso of indebtedness owed by the appellant, either then due or thereafter to grow due. By calling the centavo a cent in American money, while worth but six-tenths of a cent, the claim is made that the contract really provided for the payment of one hundred cents of American money for every peso of indebtedness. In other words, a centavo is made a cent, and it is said the appellant promised to pay one hundred cents per peso. This construction of the contract has been upheld by the courts below, because, as it is said, the strict and plain letter of the contract calls for it, and the result is that the appellant is adjudged to pay over sixty per cent more than the value of the interest he purchased, and that much more than the value of the peso, and also that much more than the real amount of his debt. While it is true that the silver coinage of Porto Rico, known as the peso, and all other silver and copper coins which were in circulation on April 12, 1900, had been retired before September, 1900, and that the money then current in commerce in Porto Rico was American money, we do not, on that account, think that the appellee had the right to claim payment of one dollar in American money for each peso of indebtedness. The centavo is not a cent. It is equal to but six-tenths of a cent, and the parties contracted, the one to pay and the other to receive, one hundred centavos to the peso, not one hundred cents to the peso. Although the translator seems to have assumed that the word "cents" was the correct and accurate translation of the word "centavos," it must be remembered that the contract was in fact to pay centavos, and that the centavos were in fact, as we think is plainly shown in this record, worth only about six-tenths of a cent, and that while one hundred centavos were worth one peso, one hundred American cents were worth one dollar, or above sixty per cent more than the same number of centavos. It is

entirely incredible that either party ever meant any such result as is now contended for by the appellee. Even if it were conceded that the literal and strict construction of the contract is as decided by the courts below, yet we are clear that such literal and strict construction does not express the real intention of the parties when the contract was made.

Articles 1281 and 1283 of the Civil Code of Porto Rico, set forth in the foregoing statement, show the law to be in Porto Rico substantially the same as it is here, that is, that where it is plain that a strict and literal construction of the contract does not convey the real meaning of the parties, such construction is not to be entertained. See cases cited in *United States* v. *Utah &c. Stage Co.*, 199 U. S. 414. In that case the strict and literal construction of the contract was contended, by the officers of the Government, to be its proper construction, and hence, it was argued, when the contractor might, under the provisions of his contract, be required to perform new or additional mail, messenger or transfer service, and under the authority of the Postmaster General, without additional compensation, that then such official could require such additional service as arose by reason of the establishment of what amounted to a new station, which additional service required, above the normal increase of service, an additional distance to be traveled in wagons of over 300,000 miles. This court held that the parties never meant any such thing, and the judgment of the Court of Claims for the recovery of compensation for the extra distance traveled was affirmed.

On looking at this contract we are of opinion that it evidently contemplates only such change in coins as might occur while Porto Rico was under the same political power. It speaks of the payment of the debt in the money current in commerce, whatever may be the coinage of the money that, as such, is in circulation "in this province." The words "in this province" evidently did not contemplate any change of government, but only a possible change of coinage under the same government. It may be assumed that in 1894 no one could have contracted

with reference to a war between Spain and the United States, which did not break out until four years thereafter, nor would any one have contemplated the cession of Porto Rico to the United States, and the entire substitution of American money for that which had theretofore circulated in Porto Rico, and the retirement of all the other money.

The value of the interest sold in the plantation was agreed by both parties, at the time of the execution of the instrument of deed and mortgage, to be 18,000 pesos, and so it was plainly stated in that instrument. The transaction was a *bona fide* one, providing for actual conveyance of the interest in the plantation, and there was plainly no gambling in the possible changes in the value of the coin, which might take place under a foreign government, when the various payments were to be made. The parties evidently had no thought of the war, or of being transferred to a foreign government as a result thereof. Under the circumstances it is impossible to conceive of sane persons agreeing in this case upon the value of the interest purchased and sold, and then that the purchaser should further agree to pay over sixty per cent more than the value of the thing purchased if it should so happen in the future that different coinage might be in circulation, under a different sovereignty, which would effect that result.

The question may be asked, what did the parties mean by this use of language, if they did not mean precisely what the courts below have said they did, and where is the justification for changing the interpretation as gathered from their language? It may not, perhaps, always be clear to see and determine what parties did mean by the language they used in a contract, and at the same time it may be perfectly clear they did not mean to contract with reference to what the courts below have called the literal and specific import of the language actually used. In this case we have no such difficulty. We have just stated what, in our opinion, the meaning really was, and that it was aimed at the possible change in coinage or of the value of the new coin under the decree of the government of Spain itself.

Why that contingency should have presented itself is not stated clearly as a fact in either of the judgments of the courts below. (It may be here remarked that the judgments of those courts also partake of the nature of findings of fact and opinions of the court thereon.) There is a recital in the judgment or decree of the Supreme Court of what was stated by counsel for appellant in his written communication to the court, and which is part of the record, and that statement was, in substance, that the change was contemplated by the Spanish government at that time (1894), by which the pesos then in circulation were to be retired, and another coin was to be issued which would be worth sixty instead of fifty-seven cents to the peso, and it was with that contingency in mind that the parties provided as they did in the contract in question. It is true the Supreme Court does not find the fact of the existence of this intention on the part of the Spanish government, but, in giving a statement of what it regarded as the distinction between the case at bar and one theretofore decided by the same court, in a manner seemingly inconsistent with this decision here, the Supreme Court said:

"This case being different from what occurred in the case of Dona Josefa Cayol y Julia, and the agricultural corporation 'Balseiro and Georgetti,' which case was recently decided by this Supreme Court, and in which neither of the parties had expressed their will in so clear and explicit a manner as in the present case, nor could the case offer any difficulty, since the plaintiff herself had recognized in her complaint—and it was also proven in the course of the suit—that the clause of the deed, the application of which was being considered, and on which she based her claim that the purchasers Balseiro and Georgetti should pay her the interest on that part of the price, the payment of which had been postponed, in American currency without the discount fixed by the government of the United States for the money of this country, had been established by the parties in consideration of the exchange of the Mexican money which had already been announced by the Spanish gov-

ernment on that date when the contract was made, for which reason this Supreme Court had to dismiss the appeal in cassation interposed by the plaintiff Dona Josefa Cayol, from the judgment rendered by the District Court of Arecibo, denying the claim made by the said Dona Josefa Cayol, the court basing its decision precisely on this same Article 1283 of the Civil Code, the application of which is the question at issue in the present appeal."

True, it appears to have been proved in that case, what the record does not show to have been specifically proved here, that there was at the time this contract was entered into a contemplated exchange of money to be circulated, and the contemplated change had been announced by the Spanish government at the time when the contract was made. But this fact is not a necessity, in order to maintain our view of the proper construction of the contract, for it simply furnishes what may be termed a presumption that the use of the language as to the payments was made with reference to this particular and contemplated exchange. The wholly incredible nature of the contract, if construed in the way the lower courts have done, is none the less apparent, and we cannot agree with a construction which binds the appellant to pay more than sixty per cent more than the parties agreed the interest in the plantation was worth, and just that amount more than both parties supposed was to be paid.

In truth, a careful reading of the whole decree of the Supreme Court (while also considering that the recitals in that decree of matters contained in the appellant's brief were not negatived by the court as to matters of fact, the case being decided wholly upon the asserted strict construction of the contract) rather leads one to the conclusion that the court assumed the truth of those recitals as to the contemplated change of coinage, but regarded the fact as immaterial in view of what it thought to be the plain language of the contract. Of course we do not intimate that the court below was bound to deny the truth of the recitals or else it was to be taken as admitting it. We only

refer to it in passing, in connection with the language of the whole decree, and the reasons given for the judgment, as some ground for the belief that the court in fact assumed the truth of the recitals, but thought them wholly immaterial. The court also pays no heed to the evidence which was received upon the trial of the case, showing the manner in which settlements of existing debts had been made upon instruments like the one in question, with or without the particular clause as to payments, the evidence being that the debts were paid at the rate of exchange provided for in the act of Congress. This, of course, must have been upon the ground that the words of the contract, as construed by the court, governed.

In the *City of San Juan* v. *St. John's Gas Co.*, 195 U. S. 510, the contention was that the money due the gas company for lighting the street lamps was payable in Porto Rican money, but this court said that the contract was for payment in current foreign money, exclusive of Spanish gold; and it was conceded that if foreign current money was required by the contract, money of the United States, current at the time the contract was made, was within the contemplation of the parties. Such money was also current in the island when performance was due. The case does not cover the one at bar.

Nor is the debt payable at the rate of one hundred cents for each peso, on the theory that the money in circulation at the time and place for the performance of the contract was the money in contemplation of the parties thereto in the absence of a contract for the payment in some other money. See 195 U. S. 510, cases cited, page 520.

There was, as we have seen, no contract to pay in American money at the rate contended for by appellee. In providing for the withdrawal of all coins in circulation in Porto Rico, Congress provided at the same time for fixing the equivalent between those coins and American coins for the payment of all existing debts. This was simply fixing the value of those coins relatively to their value in American coin and with reference to the payment of debts then existing. All money then unpaid

on this mortgage obligation was an existing debt within the act, and hence might be paid in American money at the rate of exchange therein specified. The withdrawal of the coins of Porto Rico in circulation at the time of the passage of the act of Congress, and provided for therein, did not take legal effect, so far as concerned debts then existing, except upon the condition that those debts might be solved in the coins of the United States, at the rate of exchange stated in the act. This did not impair or change the obligation of any contract, and was but an exercise of power to fix the value of the coins which were to be withdrawn, and to state the rate of exchange at which existing debts might be paid in American money, and as there was no contract to pay at any other rate, the act was valid and applied to this case.

We are of opinion that the appellant is entitled to pay the balance remaining unpaid of the debt secured by the mortgage in American money, at the rate of exchange prescribed by Congress.

The judgment of the court below is reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

MONTANA CATHOLIC MISSIONS *v.* MISSOULA COUNTY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 151. Submitted December 13, 1905.—Decided January 2, 1906.

In order that the Circuit Court may have jurisdiction where diverse citizenship does not exist it must appear, by a statement in legal and logical form, such as good pleading requires, that there is a controversy really involving the construction or application of the Federal Constitution or that the validity or construction of a treaty or statute made under its authority is drawn in question.

The Circuit Court has no jurisdiction of an action, where diverse citizenship does not exist, to recover taxes where the right depends upon statutes of the State and no claim to exemption is based on any provision in the Federal Constitution, or on any Federal statute or treaty with Indians; nor can it be assumed from the complaint in this case on any Federal ground that cattle, belonging to a religious organization and roaming over an Indian reservation, are exempt from taxation by the State because the organization devotes its property to purposes of charity among the Indians; nor can such exemption be claimed on the ground that the property is one of the means and instrumentalities of the Federal Government.

THE plaintiff in error commenced this action in the Circuit Court of the United States for the District of Montana, to recover from the defendant the amount of certain back taxes, which it alleged had been illegally assessed and which it had been compelled to pay in order to prevent the seizure and sale of the property owned by it, and upon which the taxes were levied. Both parties to the action were residents of the State of Montana at the time it was commenced. The defendant demurred to the complaint upon the ground, among others, that the court had no jurisdiction of the person of the defendant or of the subject matter of the action. The demurrer was sustained by the court, and the complaint dismissed on the sole ground that it had no jurisdiction, and the court has certified the question of jurisdiction directly to this court, as provided for in the fifth section of the act of 1891. 26 Stat. 826, 827; 1 Comp. Stat. U. S. 549.

The following is the complaint:

The plaintiff above named complains to the court, and alleges:

I. That it is and since prior to the year 1890 has been a corporation organized and existing under the provisions of chapter 34, fifth division of the Compiled Statutes of the State of Montana, relating to the incorporation of religious, benevolent and other like societies, and that its purposes are set forth in its articles of incorporation, as follows:

The particular business or object of said corporation shall be to hold the legal title to real estate in the Territory of Montana,

for the use and in trust for the Society of Jesus, also to hold and in trust for said society all funds, property and effects of said society, or any members thereof, or any person or persons, corporation or corporations, conveyed, transferred, delivered or assigned to the said coporation, for the use and benefit of said society; to conduct, erect, govern and maintain churches, colleges, schools and libraries, and all other such necessary and useful enterprises as may be properly connected with the society and corporation. The general business and object of said corporation shall be to inculcate and further the interests of Christian education among the inhabitants of the Territory of Montana, including the Indians and other residents on reservations within the said Territory, and also to advance the interests of the Christian religion through the erection and maintenance of churches, colleges and schools and the preaching of the gospel.

II. The Society of Jesus referred to in the said articles of incorporation is an association or order of ministers of the gospel, none of the members of which can, under the rules of the said order, hold or does hold any property in his own right.

III. Plaintiff further avers that about the year 1854 the said Society of Jesus established a mission among the Flathead Indians, then residing in the western portion of what is now the State of Montana, and stationed among them members of the said order, with directions to teach, educate, enlighten and care for the said Indians. That the said mission being so established, members of the said order so deputed went among the said Indians, and from about the year 1854 to the present time have continued in the work of teaching, educating and enlightening the said Flathead Indians.

IV. The plaintiff further avers that since the creation of the Flathead Indian reservation in the State of Montana, members of the said order, commonly known as Jesuit Fathers, have, by the direction of said order and by permission of the Indians living and entitled to live within the same, and the Government of the United States, been permitted to reside within the said

reservation for the purpose of teaching and educating the Indians residing thereon, and that they have been, during all of said period, continuously engaged in the work of teaching and educating the said Indians.

V. That with the permission of the Indians inhabiting and entitled to inhabit the said reservation and the Government of the United States, the said Jesuit Fathers have constructed on the said reservation, at great expense, extensive school buildings, with dormitories, and in connection therewith, for the purpose of teaching the said Indians the manual arts, a blacksmith shop, wagon shop, printing office, saddlery shop, shoe shops, bakeries, and other shops of like character, and with the same purpose cultivate fields and gardens.

VI. That for the more successful conduct of the training and education of the Indians, the said Jesuit Fathers take into their care and custody at tender ages the children of the said Indians, and keep them at the said schools, and clothe, feed and house them until they arrive at mature years, and that they now have and for more than ten years last past have had in their charge and care upwards of two hundred and fifty of the children of the Indians residing on and entitled to reside on the said reservation.

VII. That for many years the Government of the United States, in recognition of the value of the work of the said Jesuit Fathers in the training and education of the said Indians, appropriated and paid to them large sums of money for the purpose of carrying on the said work of educating the said Indians and caring for their children, but that such contributions are no longer made by the Government.

VIII. That with a view to provide means for the carrying on of the said work of educating the said Indians the said Jesuit Fathers have acquired a large band of neat cattle, which roam over and feed upon the said reservation. That the right to keep and graze the said cattle upon the lands included within the said reservation was, long prior to the year 1895, granted to the Jesuit Fathers by the Indians residing upon the said reservation

and entitled to reside thereon, which right was confirmed by the acquiescence and permission of the Government of the United States, and that the cattle now owned by them or by the plaintiff herein, as hereinafter set out, now graze upon the lands included within the said reservation by the express permission of the Indians residing and entitled to reside thereon, and of the Government of the United States.

IX. That a large number of the said cattle are annually killed and consumed as food by the children of the Indians so residing on and entitled to reside on the said reservation, and who are under the care of the said Jesuit Fathers, as aforesaid, and by the fathers in charge of the said children and assistants employed by them in the work of educating the said Indians, and that others of said cattle are annually shipped to Eastern markets, and the income derived from the sale of the same is devoted to, and used exclusively for, the work carried on by the said Fathers on the said reservation, of educating the said Indians, as hereinbefore set out, and that all the said income is consumed in the said work.

X. That a large portion of the work of rounding up the said cattle, branding and otherwise caring for them, slaughtering and shipping the same, is done by the Indians residing on the said reservation, under the direction of the said Fathers, and that the said Indians are enabled by this employment to earn in part a livelihood, and are instructed and gain experience in the business and occupation of cattle raising and are encouraged themselves to engage in it, a business for the conduct of which the said reservation is particularly adapted.

XI. That prior to the year 1895 all property, so as aforesaid acquired by the said Jesuit Fathers, was conveyed to the plaintiff herein, to hold the same in trust for the said Jesuit Fathers, and that by such conveyance it now has the legal title to all of the cattle acquired by the said Jesuit Fathers on the said reservation and the increase thereof. And plaintiff avers that it is and at all times since its organization has been an institution of purely public charity, and that all of the cattle now

owned by it, or which have been owned by it since the year 1895, or at any time, have been and are used exclusively for educational purposes, as hereinbefore set forth.

XII. And plaintiff further avers that it is its purpose in the future to devote all cattle now on the said reservation, or which it may acquire thereon, and any income derived from the sale of the same, to the same purposes to which they have heretofore been devoted, as hereinbefore set out, and that it has no purpose now, nor has it had at any time any purpose, to devote any portion of said cattle or any income derived from the sale of the same to any purpose other than the education and training of the Indians residing or entitled to reside on the said reservation, and that it never has made and does not contemplate making any profit out of the raising of the said cattle, with the intent to devote the same to any other purpose.

XIII. And plaintiff avers that, notwithstanding the facts aforesaid, the defendant, County of Missoula, which is one of the counties of the State of Montana, through its treasurer, annually since the year 1897 has demanded of the plaintiff that it pay to the said county taxes upon all cattle owned by it and being upon the said reservation, and threatened to seize and sell the said cattle or so much thereof as might be necessary to satisfy the taxes demanded unless the same should be paid.

XIV. That pursuant to such demand and to prevent the seizure and sale of the said cattle, or so many thereof as might be necessary, the plaintiff, under protest, on or about November 23, 1898, paid to the said county and to its treasurer, who turned the same over to the said county as taxes claimed by it to be due on account of cattle owned by the said plaintiff on the said reservation for the years 1897 and 1898, the sum of $1,257.48; that the plaintiff, under protest, on or about November 22, 1899, paid to the said county and to its treasurer, who turned the same over to the said county, as taxes claimed by it to be due on account of cattle owned by the said plaintiff on said reservation for the year 1899, the sum of $867.82; that the plaintiff, under protest, on or about November 26, 1900, paid

to the said county and its treasurer, who turned the same over to the said county, as taxes claimed by it to be due on account of cattle owned by the said plaintiff, on the said reservation for the year 1900, the sum of $661.20; and that plaintiff, under protest, on or about November 26, 1901, paid to the said county and to its treasurer, who turned the same over to said county, as taxes claimed by it to be due on account of cattle owned by the said plaintiff on the said reservation for the year 1901, the sum of $321.95, and plaintiff avers that it neither had nor owned any cattle "at any time since 1895," in the county of Missoula, State of Montana, except such cattle as it held on the said reservation as hereinbefore set out, and that the said taxes were exacted of it upon the said cattle. "All of which were reared on the said reservation and fed on grasses and herbage grown thereon."

XV. And now plaintiff avers that the defendant is indebted to it on account of said payments, by it made, as hereinbefore set out, in the sum of three thousand one hundred and eight and 45/100 dollars ($3,108.45), with interest on the sum of $1,257.48 from the 23d day of November, 1898, amounting to $345.66; for interest on $867.82 from the 22d day of November, 1899, amounting to $169.35; for interest on the sum of $661.20 from the 26th day of November, 1900, amounting to $75.55; and for interest on the sum of $321.95 from the 26th day of November, 1901, amounting to the sum of $11.03.

Wherefore plaintiff demands judgment for said amounts, together with interest as above set forth, and for its costs.

Mr. T. J. Walsh for plaintiff in error:

The Circuit Court had jurisdiction as the case was one arising under the Constitution and laws of the United States, *Osborn* v. *Bank*, 9 Wheat. 821; *New Orleans* v. *Mississippi*, 102 U. S. 135; *Gold Washing Co.* v. *Keyes*, 96 U. S. 199; *Briscoe* v. *So. Kansas Ry.*, 40 Fed. Rep. 277; *Manigault* v. *Ward*, 123 Fed. Rep. 707; *Illinois* v. *Adams*, 180 U. S. 28; *Illinois Central* v. *Chicago*, 176 U. S. 646; *Railway Co.* v. *Rail-*

road Co., 68 Fed. Rep. 2; *Railroad Co.* v. *Davis*, 132 Fed. Rep. 629.

The case comes under the rule that property of Indians is not taxable by the State. *Kansas Indians*, 5 Wall. 757; although it is conceded that the right to taxation extends to property of people other than Indians on the reservations. *Thomas* v. *Gay*, 169 U. S. 26; *Wagoner* v. *Evans*, 170 U. S. 588; *Truscott* v. *Land & Cattle Co.*, 73 Fed. Rep. 60. With regard to property on the reservations in which the Indians are interested the power does not exist. *Cosier* v. *McMillan*, 22 Montana, 489. The Indians are interested in the cattle; they are used to support them, and to tax them would be equivalent to taxing the income of the land, which would be the same as taxing the land itself. *Income Tax Case*, 157 U. S. 259; *State* v. *Collector*, 20 Atl. Rep. 292.

The property is a part of the means used by the General Government to carry out its powers. As to what the mission has accomplished and what it does to aid and assist the Government, which has appropriated money to carry on the work, see Treaty with Flathead Indians of July 16, 1855; Revision of Indian Treaties, 383; Smead's Report of September, 1898; Part I, Ann. Rep. Secy. Interior, 1901, Indian Aff. 260; Vol. 18, House Doc. 56th Cong. 1st Sess. p. 220; Rep. Commissioner Ind. Aff. 1892, p. 294.

The State can do nothing that will destroy or impair the efficiency of the guardianship of the United States over the Indians, *State* v. *Cooney*, 80 N. W. Rep. 696; *United States* v. *Rickert*, 188 U. S. 431, or to tax any means or instrumentality of the Government. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Page* v. *Pierce County*, 64 Pac. Rep. 801; *Van Allen* v. *Assessors*, 3 Wall. 573.

The cattle are property devoted to educational purposes. *Book Agents* v. *Hinton*, 19 L. R. A. 289; *State* v. *Fisk*, 87 Tennessee, 233; *New Haven* v. *Trustees*, 22 Atl. Rep. 156; *Hospital* v. *Birdsall*, 42 Atl. Rep. 853; *Sisters of Charity* v. *Chattam*, 9 L. R. A. 198; *State* v. *Johnson*, 43 Atl. Rep. 573; *Casiano*

v. *Academy*, 64 Texas, 673; *People* v. *Barton*, 63 App. Div. N. Y. 581.

The property being vested in a purely charitable association is under all the circumstances of this case impressed with a public character. *Mormon Church Case*, 136 U. S. 1.

When Federal jurisdiction is invoked on account of legislation claimed to impair the obligation of a contract, it is not necessary to prove the existence of a contract, but only that the Indians claim to have an interest in the cattle. *Railroad Co.* v. *Citizens' Co.*, 166 U. S. 557; nor is it necessary to point out the specific provision of the Constitution or the treaty or statute under which the claim is made. *Crystal Springs Co.* v. *City*, 76 Fed. Rep. 153; *Bridge* v. *Hoboken*, 1 Wall. 116, 143; *McCullough* v. *Commonwealth*, 176 U. S. 102, 118.

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

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

There is nothing on the face of the complaint above set forth to show either the existence of any question involving the construction or application of the Federal Constitution, or that the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question. This must appear in the complaint by the statement in legal and logical form, such as good pleading requires. *Arbuckle* v. *Blackburn*, 191 U. S. 405, 413; *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530. It must appear that the suit really and substantially involves a controversy of such a character. This pleading seems simply to be a claim that the plaintiff is exempt from taxation on the cattle which it owns, because it is an institution of purely public charity, and it would seem from that fact that it was claiming such exemption under some act of the State of Montana, and that its right to recover back these taxes depended upon a statute of that State.

There is no provision in the Federal Constitution, neither is there any Federal law, nor any treaty between the United States and the Indians, that is referred to in the complaint, and it is not averred therein that the claim of the plaintiff to be exempt from taxation is founded upon any constitutional provision or law or treaty of the United States. It cannot be assumed, from any averment in the complaint, that the alleged right of a private owner of property to be exempt from taxation thereon, because it was devoted to purposes of charity among the Indians, was founded upon any Federal ground. On the contrary, it would seem to be plain that it was based upon some statute of the State wherein the tax was imposed and collected which exempted from state taxation property wholly devoted to charity. The case is, therefore, not one which from the subject matter of the controversy is apparently and in its essence of a Federal nature, or one that involved any of the foregoing questions of Federal right. *Swafford* v. *Templeton*, 185 U. S. 487.

But it is now urged that the entire beneficial use or ownership of the property taxed is in tribal Indians, and that it is, therefore, not subject to taxation by or under state authority; also that the property is made use of by the Federal Government, and that it is one of the means and instrumentalities adopted by it through which it carries out its governmental purposes, and such property is, therefore, not subject to be taxed by the State.

That the entire beneficial use or ownership of the property taxed is in tribal Indians, while the legal title only is in plaintiff, is not alleged in the complaint, and such a conclusion does not follow from the allegations to be found in that pleading. It is true that the property of Indians living in the tribal state, and so recognized by the Government, is withdrawn from the operation of state laws and is exempt from taxation thereunder. *The Kansas Indians*, 5 Wall. 737, 757; *United States* v. *Rickert*, 188 U. S. 432. The expression, beneficial use or beneficial ownership or interest, in property is quite frequent in the

law, and means in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf. And one is also said to have the beneficial ownership of land who has done everything to entitle him to a patent from the Government, and who, therefore, has the legal right to such patent, and all that remains to be done is for the proper officer to issue it. *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496; *Central Pacific R. R. Co.* v. *Nevada*, 162 U. S. 512. In such case the land is taxable to such owner, though he has not the legal title. He is the beneficial owner. If such were the case here, it might then be said that the Indians really owned such property, and that it was therefore exempt from taxation. But, as we have said, there is no such averment in the complaint, and no such inference can be drawn from the facts therein set forth. Taking the complaint as it is, it shows on its face that the Indians have neither any legal nor equitable title to the property, neither have they any legal or equitable right to its beneficial use, and it also appears from the complaint that the property is owned unconditionally and absolutely by the plaintiff. The plaintiff, as the owner of these cattle, may, at any time, abandon its present manner of using them and may devote them, or any income arising from their ownership, to any other purpose it may choose, and the Indians would have no legal right of complaint. The plaintiff might refuse to spend another dollar upon the Indians upon these reservations, and refuse to further maintain or aid them in any way whatever, and no right of the Indians would be thereby violated, nor could they call upon the courts to enforce the application of the plaintiff's property, or the income thereof, to the same purposes the plaintiff had theretofore applied them. There is nothing in *Mormon Church* v. *United States*, 136 U. S. 1, which in the remotest degree applies to this case. This court has heretofore determined that the Indians' interest in this kind of property,

situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from taxation. *Thomas* v. *Gay*, 169 U. S. 264; *Wagoner* v. *Evans*, 170 U. S. 588. In the first of above-cited cases the right to graze over the reservation was leased by the Indians to the owners of the cattle, and it was alleged that if the cattle were taxed the value of the lands would be reduced, because the owners of the cattle would not pay as much for the right to graze as they would if their cattle were not subjected to taxation, and that therefore the tax was, in effect and substance, upon the land. This court held that the tax put upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians, citing *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431, and other cases, as authority for the decision. This is reaffirmed in the second case above cited. In this case the Indians have not even given a lease, and the owners are not obliged to pay anything for the privilege of grazing, and may, as we have said, devote the property, or the income thereof, to purposes wholly foreign to the Indians themselves. However meritorious the conduct of the owners of the cattle may be, in devoting the income or any portion of the principal of their property to the charitable work of improving and educating the Indians (and we cordially admit the merit of such conduct), we cannot see that there is, on that account, the least claim for exemption from taxation because of any Federal provision, constitutional or otherwise.

Nor is there any merit in the proposition that the plaintiff is made use of by the Government of the United States, and is one of the means used by it to carry out its obligations to the Indians, under the Constitution or laws of the United States, and that therefore the property of the plaintiff which is thus used is not subject to state taxation. No such averment of fact is to be found in the pleading; nor does any such conclusion arise from the facts which appear therein. The Government may lease a building from a private owner for the purpose of better carrying on its governmental duties, and yet the building is not

such an instrumentality of government as prevents its taxation by or under state authority. Congress has not constituted this corporation an agency of its own for the purpose of discharging any duties which the Government may owe to the Indians. It has, as the complaint avers, made in the past some appropriations from time to time to the corporation to aid it in its own work among the Indians, but that is far from constituting the corporation an agency of its own, to carry into effect its own governmental powers, granted by the Constitution or by law. And even such appropriations ceased years ago.

The case, in short, is one of that class where we have frequently held that the claim of a Federal question must have some foundation of plausibility, *St. Joseph &c. R. R.* v. *Steele*, 167 U. S. 659; *McCain* v. *Des Moines*, 174 U. S. 168, in order to give jurisdiction. This has none.

The Circuit Court was right in refusing jurisdiction, and its judgment dismissing the complaint on account of the lack thereof, is

Affirmed.

SPEER *v.* COLBERT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 153. Argued December 13, 14, 1905.—Decided January 2, 1906.

Institutions incorporated under special acts of Congress take their character from the act incorporating them and bequests to Georgetown College and other institutions in the District of Columbia under a will made within thirty days of the death of the testator held not void, under § 34 of the Maryland Bill of Rights, as the legatees are not sectarian institutions under any of the acts incorporating them.

There being no institution incorporated as Georgetown University separate from Georgetown College, and as it was evident that the testator intended not to leave the property to an unincorporated institution but to an

incorporated one, able to take the bequest, Georgetown College was entitled thereto.

The franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved, by the mere failure to elect trustees.

It is within the powers of an institution intended for the instruction of youth in the liberal arts and sciences to take and use a fund for the cultivation of historical research.

The trusts in this will were not such as could be defeated by the death or resignation of the trustees although the will made it their duty to supervise the administration of the fund.

Courts will not hold a bequest void for uncertainty unless actually compelled to do so by the language used, and a bequest of a sum not to exceed a specified amount, if otherwise valid, will be taken to be a bequest of that amount.

It is not an illegal placing of discretion in trustees to empower them to establish a scholarship with a bequest not exceeding a specified sum in "some medical college preferably Georgetown University in the District."

ONE of the appellants, Mrs. Speer, on the fifth of March, 1901, filed this bill in her own behalf and by her husband and next friend, Emory Speer, in the Supreme Court of the District of Columbia to obtain a judicial construction of the will of her deceased brother, Ethelbert Carroll Morgan, who died, testate, on May 5, 1891, a resident of the District of Columbia. Answers to the bill were duly filed and the Supreme Court gave judgment construing the will, which, upon appeal to the Court of Appeals of the District of Columbia, was reversed, and judgment was entered, construing the will, by the Court of Appeals. From that judgment Mrs. Speer, together with some of the parties defendant in the suit, appealed, and brought the case here for review.

The will in question was executed on the twenty-second day of April, 1891, and the testator died May 5, 1891. He was never married, and left as his next of kin and heirs at law two brothers and three sisters, viz: James D. and Cecil Morgan, and Mrs. Speer, the plaintiff in this suit, and Mrs. Anna M. Mosher and Mrs. Ada M. Hill. He appointed William J. Stephenson and John H. Magruder the executors and trustees of his will, the former of whom subsequently died and the

latter resigned, and Michael J. Colbert and James Mosher were duly appointed by the court as substituted trustees under the will. The estate of the testator was treated by him in his will as consisting of two parts, that which he had himself accumulated and that which came to him through the will of his father, who died in June, 1889. His own accumulations amounted to a little over twenty-three thousand dollars, while the estate which he received from his father somewhat exceeded fifty-five thousand dollars, the total being a trifle over seventy-eight thousand dollars. The estate of the deceased had been received by the substituted trustees, Colbert and Mosher, when this bill was filed by Mrs. Speer against them, and also against Mrs. Anna M. Mosher, the wife of James Mosher, and a sister of the testator, and also against the two corporations incorporated as St. Vincent's Orphan Asylum and as Trustees of St. Joseph's Male Orphan Asylum, both being in the District of Columbia, who were made parties because, as the plaintiff alleges in her bill, they claim to be the beneficiaries under the clauses of the will of the testator, leaving a legacy to be equally divided between St. Vincent's and St. Joseph's Catholic Orphan Asylums in the city of Washington, and in order that they might make proof of their identity, if any existed, with the St. Vincent, and also with the St. Joseph Catholic Orphan Asylums, mentioned in the will, and that they might be bound by the adjudication which might be made by the court in all respects hereafter; and also against John D. Whitney, James P. Fagan, Edward McTammany, James B. Becker and Edward I. Devitt, who, the plaintiff alleged, claimed to be, by succession, the President and Directors of Georgetown College, and who, as such, claimed an interest in the estate of the testator, under the clauses of his will mentioning Georgetown University, in the District of Columbia, and the plaintiff alleged that they were made defendants in order that they might make proof of succession to the original incorporators of Georgetown College, and that their claims to the legacy mentioned in the will might be

adjudicated by the court. The bill alleged that the will of the testator was duly admitted to probate in the proper court in the District of Columbia. After making certain provisions, not here material, the will of the testator is as follows:

"All the rest and residue of my estate real, personal and mixed of which I am now possessed or shall possess at my death (other than my share under my father's will of which I would become possessed at my mother's death) I give bequeath and devise to my trustees hereinafter named and their heirs and assigns with full power to sell convey mortgage and reinvest, in trust nevertheless to apply the income and profits to the use and benefit of my sisters Eleanora Speer wife of Emory Speer and Minnie Mosher wife of James Mosher in equal parts during their lives and at their death to deliver and convey each sister's share to her issue and if either sister die without issue living at her death, to deliver and convey said part to the survivor or her issue if any survive her.

"And if my said two sisters shall both die leaving no issue living at their deaths I direct my said trustees to deliver and convey all the said rest and remainder of my estate (excepting my share aforesaid under my father's will) to Georgetown University in the District of Columbia to be an endowment in equal shares of the literary and medical departments thereof."

* * * * * * * *

"And I hereby give bequeath and devise any and all the estate real personal and mixed devised to me under my father's will and to which I become entitled to have and possess upon my mother's death to my trustees hereinafter named their heirs and assigns forever with full power to sell convey mortgage encumber and reinvest in trust nevertheless to pay and see to the application of

"First the sum of ten thousand ($10000) dollars to Georgetown University in the District of Columbia to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia and obtaining and preserving

archives and papers having relation thereto, and known as the James Ethelbert Morgan fund.

"Second a sum not to exceed five thousand ($5000) dollars to be applied and expended under the personal supervision of my trustees to the purchase and erection of a chime of bells and either a side altar or memorial window or a bell and either a side altar or a memorial window for some one Catholic church . . . said church to be in the District and to—designated by my mother by her last will or otherwise and if she fail so to do I direct my trustees to carry out this trust as a memorial of my mother Nora Morgan and donate the same to some Catholic church . . . giving a preference, if there be one, built by the Jesuits. And in event this clause & gift be void I direct said sum not exceeding $5000 five thousand dollars shall be equally divided between Saint Vincent's and St. Joseph's Catholic orphan asylums in the city of Washington.

"Third. A sufficient sum not to exceed three thousand dollars the income to be applied to maintain a scholarship in the study of medicine preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship.

"Fourth, the sum of five thousand ($5000) dollars to form a fund known as the E. Carroll Morgan fund or scholarship to be applied as I may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department, in the University of Georgetown in the District of Columbia. That the qualifications under both or either of the two last clauses of this will shall be that the applicant be born in the District of Columbia and at the time or within a year a student in a Catholic or a public school of the District of Columbia and most excellent in a competitive examination conducted by the faculty of the University of Georgetown.

"And lastly as to all the rest and residue of my aforesaid

share of my father's estate my said trustees their heirs and assigns shall hold the same for the benefit of my aforesaid sisters Eleanora and Minnie upon the same limitations conditions remainders and powers and in the same manner as the trustees under my father's will, will then hold retain and possess the 'remainder' and bulk of the respective shares of my said two sisters I wish my brother Cecil to have my share of my father's library I nominate and appoint William J. Stephenson and John H. Magruder my executors and trustees of this my last will and testament.

"In witness whereof I have signed and sealed and published and declared this as my will this 22nd day of April, 1891."

The plaintiff alleged that the bequest and devise to Georgetown University, upon the death of the two sisters, without issue living at the time of their death, were void, because, as alleged, there was no such incorporated institution in the District of Columbia as Georgetown University, capable of taking the bequest and devise, and also upon the ground that, assuming there was a simple misnomer, and that Georgetown College was meant instead of Georgetown University, yet, even upon that assumption, Georgetown College was incapable of taking the devise and bequest, because it was under the supervision and control of the Order of Jesuits, and that the college was therefore a sectarian institution. It was also averred that the bequest of $10,000 to Georgetown University in the District of Columbia, to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, "was void, upon the same ground, and also because there was no charter power or authority in Georgetown College (assuming that institution to be meant) to receive the bequest." Also that the bequest of a sum not to exceed the amount of $5,000, to be applied and expended under the personal supervision of the trustees, for the purchase and erection of a chime of bells, etc., was void, as was also the alternative bequest of an amount not to exceed that sum for

the benefit of the two Catholic orphan asylums, in the city of Washington, the alternative bequest being void on the ground that those asylums were under the charge and control of persons belonging to religious orders, and therefore incapable of taking the bequest, and on the further ground that the amount of the bequest was uncertain. The bill averred also that the remaining bequest, of a sum not to exceed $3,000, and also the bequest of $5,000, for the purpose of maintaining and founding scholarships, etc., were void, because of their uncertainty and the want of clearly defined conditions under which the funds should be applied. The defendants answered the bill and none of them conceded the validity of the claims made therein. Colbert, one of the substituted trustees, and also John D. Whitney and others, for and on behalf of the president and directors of Georgetown College, and also the trustees of St. Joseph's Male Orphan Asylum and of St. Vincent's Orphan Asylum, all claimed the validity of the bequests contained in the will, while the answer of Mosher, the other substituted trustee, simply expressed his willingness that the provisions of the will of the testator should be given effect and carried out, only so far as they were legal and valid.

On the trial, proof was taken in regard to the name and corporate status of Georgetown College, claiming the devises and bequests made to and on behalf of Georgetown University.

The Supreme Court, in an elaborate opinion (reported in 31 Washington Law Reporter, 630, 646), held that the devises and bequests to trustees named in the will, of the testator's estate, exclusive of that which came to him under the will of his father, were valid and effectual. The court also held that all the clauses and subclauses in the will of the testator, disposing of property acquired by the testator under his father's will, were void, and that the property therein spoken of became part of the residuum of the estate of the testator, and vested in the beneficiaries entitled to take under the residuary clause of the will. The Court of Appeals, upon re-

view of this judgment, held that the clauses of the will were valid, except the bequest of "a sum not to exceed five thousand dollars," to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, and the erection of an altar or memorial window, etc.; but the alternative bequest of the sum not to exceed five thousand dollars, to be equally divided between St. Vincent and St. Joseph's Orphan Asylums in the city of Washington, was good. It also held that the clause in the will, providing for the application of five thousand dollars to form a fund to be known as the E. Carroll Morgan fund or scholarship, to be applied as "I [the testator] may hereafter verbally indicate to my trustees or if I fail, as my trustees with the advice of proper persons may decide, to the maintenance of a scientific department, or the foundation and the application of the income to a scholarship in the classical department in the University of Georgetown in the District of Columbia," was void. No appeal has been taken from this last portion of the judgment of the Court of Appeals.

Mr. Marion Erwin for appellant Speer; *Mr. Joseph R. Lamar* and *Mr. Conway Robinson* for appellants Mosher:

The history of Georgetown University shows that it is a corporation of Roman Catholic clergymen. See Maryland laws, act Nov. 1792, ch. 55; 2 Kilby's Laws; act of 1797, ch. 40; act of 1805–6, ch. 118; act of 1808, ch. 37; act of Congress, March 1, 1815, ch. 70, 6 Stat. 152; March 2, 1833, 6 Stat. 538; Papal Decree, March 30, 1833. For definitions of University, see 27 Am. & Eng. Ency. Law, 682, and Black's Law Dict.; see also, act Congress, June 10, 1844, 6 Stat. 912, and the charter of 1886 in the District of Columbia of the Medical School.

A gift to Georgetown University is a gift for a religious order and denomination within the meaning of the Bill of Rights. The acts of Congress simply conferred a new name on the existing corporation. 7 Am. & Eng. Ency. Law, 2d ed., 685; 1 Thompson, § 512; *Bosshor* v. *Dressel*, 34 Maryland, 503; *People* v. *Perrin*,

56 California, 345; nor did they repeal the old charter. *Snook* v. *Improvement Co.*, 83 Georgia, 66; *Regents* v. *University*, 9 G. & J. (Md.) 365. The testator by using the word college meant to refer to the old institution as known by that name. Even if the bequest was to the Medical Department it was a gift to a religious institution, if not to the University it was to a college without a charter and not empowered to receive it. *People* v. *Gunn*, 96 N. Y. 317. As to what is and is not a gift to a charity, see *Stratton* v. *Institute*, 148 Massachusetts, 505; *Goodell* v. *Association*, 29 N. J. Eq. 32; 2 Pomeroy Eq. Jur. 1019; *Church* v. *Smith*, 56 Maryland, 397; 2 Perry on Trusts, § 711; *James* v. *Allen*, 3 Mer. 17; *Norris* v. *Thompson*, 19 N. J. Eq. 311; *Morice* v. *Bishop*, 9 Ves. 399; *S. C.*, 10 Ves. 522; *Atty. Genl.* v. *Haberdashers*, 1 Myl. & K. 428; *Easterbrook* v. *Tillinghast*, 5 Gray (Mass.), 17; *People* v. *Powers*, 147 N. Y. 104.

As to the scope and effect of § 34 of the Bill of Rights, see *Trustees* v. *Manning*, 19 Atl. Rep. (Md.) 603; act of Congress of 1866, § 457, Rev. Stat. Dist. Col.; and as to the construction of similar statutes see Endlich, § 111; *Doe* v. *Waterton*, 3 B. & A. 151; *Price* v. *Maxwell*, 28 Pa. St. 33. Courts will go behind the cloak of a charter and ascertain the actual facts as to whether the institution is or was a religious one. *Stile* v. *Halleck*, 6 Nevada, 373; *Coats* v. *Campbell*, 37 Minnesota, 501; *Cook* v. *Industrial School*, 125 Illinois, 541; *Boyer* v. *Christian*, 69 Missouri, 492. The stated use of the Bible as a text-book is sectarian instruction. *State* v. *District Board*, 7 L. R. A. (Wis.) 330.

The bequest of $10,000 for endowing the James Ethelbert Morgan fund for prosecution and research in colonial history is void. It is not within the powers of the University to accept it—the object is not within the limits of "liberal arts and sciences." There is no beneficiary who can claim it or compel an account. *Kelly* v. *Nichols*, 19 L. R. A. 413; *Craig* v. *Lill*, 7 Cent. Rep. 659; *Goodell* v. *Union Ass'n*, 29 N. J. Eq. 52; *Gloucester* v. *Woods*, 3 Hare, 131, 136; *Atty. Genl.* v. *Oxford*, 1 Bro. ch. 444 note; *Anonymous*, 2 Freem. 261; *Atty. Genl.* v. *Whitely*,

11 Ves. Jr. 251; *Cherry* v. *Mott*, 1 Myl. & C. 123; *Clark* v. *Taylor*, 1 Drew, 642; *Carter* v. *Balfour*, 19 Alabama, 814; *Russell* v. *Kellett*, 2 Smale & G. 264; *Sinnett* v. *Herbert*, L. R. 7 Ch. 232; *Re White's Trust*, 55 L. J. Ch. N. S. 731; *Lechmere* v. *Centler*, 24 L. J. Ch. N. S. 647.

Even though the money is directed to be paid over to Georgetown University, and if that be considered as a charitable institution (which it is not), still if the purpose to which it is to be applied is not charitable within the meaning of the rule, and that purpose fails for want of a designated beneficiary capable of applying to a court of equity to enforce the trust the bequest must fail. *Cloyne* v. *Young*, 2 Ves. Sr. 91; *Robinson* v. *Waddelow*, 8 Sim. 134; *Knight* v. *Knight*, 3 Beav. 148, 174; *Williams* v. *Kershaw*, 5 Clark & F. 111; *Kendall* v. *Granger*, 5 Beav. 300; *Nichols* v. *Allen*, 130 Massachusetts, 211, 218; *M. E. Church Ex.* v. *Smith*, 56 Maryland, 362; *Grimes* v. *Harmon*, 35 Maryland, 221, 226; *Heiss* v. *Murphey*, 40 Wisconsin, 276; *Goddard* v. *Pomeroy*, 36 Barb. 548, 555; *Gumble* v. *Pfluger*, 62 How. Pr. 118; *Baptist Assn.* v. *Hart*, 4 Wheat. 1.

The rule has been modified only to the extent that gifts strictly to charitable uses are to a certain extent excepted from its operations. *Ould* v. *Washington Hospital*, 95 U. S. 303; *Russell* v. *Allen*, 107 U. S. 163; *Jones* v. *Habersham*, 107 U. S. 174; and see 2 Perry on Trusts, §§ 709, 713; *Brown* v. *Yeal*, 7 Ves. Jr. 50, note; *Briggs* v. *Hartley*, 19 L. J. Ch. N. S. 416.

As to other bequests being void and having lapsed for uncertainty, see *Bristol* v. *Bristol*, 53 Connecticut, 242; *Gambel* v. *Trippe*, 75 Maryland, 252; *Fountain* v. *Ravenal*, 17 How. 382; *Baker* v. *Fales*, 16 Massachusetts, 495.

Where the sum is uncertain or unnamed the bequest fails. 2 Perry on Trusts, § 714; *Ewen* v. *Bannerman*, 2 Dow & Ct. 74; *Flint* v. *Warren*, 15 Sim. 626; *Society* v. *F. C. Society*, 14 N. H. 315; *Russell* v. *Jackson*, 10 Hare, 204; *Coxe* v. *Bassett*, 3 Ves. 155; *Hartshorn* v. *Nichols*, 26 Beav. 58; *Mills* v. *Newberry*, 112 Illinois, 123; *Grant* v. *Colman*, 9 Ves. 323; 5 Am. & Eng. Ency. Law, 905; *Pritchard* v. *Thompson*, 95 N. Y. 76.

The alternate bequest to the two asylums is also void. Whenever a power is of a kind that indicates a personal confidence it must *prima facie* be understood to be confined to the individual to whom it is given, and will not except by express words pass to others to whom by legal transmission the same character may belong. *Cole* v. *Wade*, 16 Ves. Jr. 27; *Alexander* v. *Alexander*, 2 Ves. Sr. 643; *Powles* v. *Jordan*, 62 Maryland, 503; *Atty. General* v. *Berryman*, 1 Dickens, 168; *Fontain* v. *Ravenal*, 17 How. 369, 382.

The charters of these two asylums are in evidence and show that they organized as private charitable and educational institutions, hence the bequests are void under § 34 of the Bill of Rights.

The legacy for scholarship is void because indefinite and the discretion reposed in the executors expired with the death of one and the resignation of the other. Cases *supra*. The death of trustees given by will power to select the beneficiary of a charitable bequest from several uncertain classes defeats the bequest if valid in the first instance. Cases *supra*.

This is a lapsed legacy, and being of money falls into the residuary clause of the will. 1 Perry on Trusts, sec. (*a*); *Dawson* v. *Clarke*, 15 Ves. 417; *Brown* v. *Higgs*, 4 Ves. 708; *S. C.*, 8 Ves. 570; *Shanley* v. *Baker*, 4 Ves. 732; *O'Keys* v. *Heath*, 1 Ves. 141; *Cambridge* v. *Rous*, 8 Ves. 25; *Cooke* v. *Stationers Co.*, 3 M. & K. 264; *Bland* v. *Bland*, 2 Z. & W. 406; *Jones* v. *Mitchell*, 1 S. & S. 298; *Leake* v. *Robinson*, 2 Mer. 392.

Mr. George E. Hamilton and *Mr. M. J. Colbert* for appellee.

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

The opinion of the Court of Appeals, in this case, delivered by Chief Justice Alvey (24 App. D. C. 187), is entirely satisfactory to us, and leaves little to be said in addition. For

the purpose, however, of simply stating the opinion of this court upon the various questions, without discussing them at length, we add what follows.

The appellants insist that the gift of the property to the Georgetown University is void, as having been made to a sectarian institution less than one calendar month prior to the testator's death, and that such disposition was therefore in violation of section 457 of the Revised Statutes of the District of Columbia. That section makes valid and effectual all sales, gifts and devises prohibited by the thirty-fourth section of the Declaration of Rights of the State of Maryland, adopted in 1776, "provided, that in case of gifts and devises, the same shall be made at least one calendar month before the death of the donor or testator." 14 Stat. 232; passed July 25, 1866. The thirty-fourth section of the Maryland Bill of Rights makes void:

"Every gift, sale or devise of lands to any minister, public teacher or preacher of the gospel as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of or in trust for any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination; every gift or sale of goods or chattels to go in succession or take place after the death of the seller or donor, to or for such support, use or benefit, and also every devise of goods or chattels to or for support, use or benefit of any minister, public teacher or preacher of the gospel as such, or any religious sect, order or denomination, without leave of the legislature."

It is also insisted that there is a misnomer of the corporation, now claiming the right to the bequest, inasmuch as such corporation was incorporated under the name of the "The President and Directors of Georgetown College," while the bequest is to "Georgetown University, in the District of Columbia." It is contended that Georgetown College is a corporation, incorporated on the tenth of June, 1844, under an act of Congress (6 Stat. 912, entitled "An act to incorporate George-

town College, in the District of Columbia"), and that there was and is another institution in Georgetown, sometimes called the University of Georgetown or Georgetown University, which was distinct from the college incorporated under the above-mentioned act of Congress, and not covered by it, and that the testator knew of this so-called university, that he was a professor therein, and that such university was, at the time of the testator's death, a sectarian institution within the thirty-fourth section of the Maryland Bill of Rights above mentioned. The fourth section of the above act expressly provides that no misnomer of the corporation shall defeat or annul any donation, etc., to the corporation. We agree with the Supreme Court and the Court of Appeals of the District of Columbia in the opinion that there was not, at the time of the execution of his will by the testator, or at the time of his death, any incorporated institution existing as Georgetown University or University of Georgetown, separate and apart from, or having powers other than, those granted to "The President and Directors of Georgetown College," by the act of Congress of 1844, above cited. It appears in the evidence that this college was frequently spoken of as Georgetown University, and known as such, but the evidence entirely fails to show that there were two incorporated institutions, the one, "Georgetown University," and the other "The President and Directors of Georgetown College." And we have no doubt that the testator meant the corporation called Georgetown College when he used in his will the word university. He meant to give the property to a corporation, and to one that could take it, and the evidence shows there was no other corporation of that kind. Upon this question the Court of Appeals said: "It was expressly alleged in the bill as a fact that there is no such incorporated institution as Georgetown University, though Georgetown College is frequently referred to and spoken of as Georgetown University, notwithstanding it has never been incorporated as such. It is simply a popular designation applied to the college. It is alleged in the bill

that the defendants Whitney and others, under the name of president and directors of Georgetown College, in this District, claim to be the beneficiaries entitled to the legacies mentioned in the will of the testator as for Georgetown University. It is not attempted to be shown that there was, or is, in this District any such incorporated institution of learning as "Georgetown University," separate from and independent of "Georgetown College." It was not to any unincorporated so-called institution that the testator intended to leave the property, but to one that was incorporated and capable of taking a legacy.

Various acts of the legislature of Maryland were referred to on the argument, particularly the act of 1792, chapter 55; that of 1797, chapter 40; the act of 1805, chapter 118; that of 1808, chapter 37; also the act of Congress of March 1, 1815, chapter 70, 6 Stat. 152, entitled "An act concerning the College of Georgetown, in the District of Columbia"; also that of March 2, 1833, 6 Stat. 538, in which the Government grants certain lots in Washington city to the college above referred to. These various statutes were cited for the purpose of showing the validity of the claim that an institution called Georgetown University, as distinct from Georgetown College, was meant in the will of the testator. In regard to these particular acts we think thay do not bear upon the case other than, as remarked by the Court of Appeals, to show the origin and growth of Georgetown College, and to identify the early foundation of the school with the president and directors of Georgetown College, as that institution was fully and completely incorporated by the above-cited act of Congress of March 10, 1844. That act must be resorted to as the measure of the powers and duties, as well as to define the character, of the corporation created thereby. *Bradfield* v. *Roberts*, 175 U. S. 291.

Taking the character of the college from the act of Congress, we are of opinion that it is not a sectarian institution or within section 34 of the Maryland Bill of Rights. The reasoning upon

this subject (as well as that upon the alleged misnomer of the college) set forth in the opinion of the Supreme Court (31 Washington Law Reporter, 630), and in that of the Court of Appeals, is entirely satisfactory, and we concur therein.

There is, in our judgment, no merit in the contention that the persons claiming as president and directors of the college are not the legal successors of the original incorporation. There is no evidence that the same has been dissolved. The franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved by the mere failure to elect trustees. We do not think that in this case there was any failure to elect, nor was there any dissolution.

We now come to the consideration of the validity of the disposition made of the testator's property, which came to him from the will of his father. The testator gives and bequeaths all of that property to his trustees, thereafter named, in the will, and their heirs and assigns forever, "with full power to sell, convey, mortgage, incumber and reinvest, in trust nevertheless to pay and see to the application of: First, the sum of ($10,000) ten thousand dollars to Georgetown University in the District of Columbia, to be used and held as an endowment, for the prosecution of research in the colonial history of Maryland and the territory now embraced in the District of Columbia, and obtaining and preserving archives and papers having relation thereto, and known as the James Ethelbert Morgan fund."

Aside from the objections to the bequest to Georgetown University already considered, a further objection is made, and the disposition is alleged to be void, because there is no charter power in any institution which could take under this bequest that authorizes it to prosecute such research and obtain and preserve the archives relating thereto. It is well said, in the opinion of the Court of Appeals in this case, that the act of incorporation of Georgetown College in 1844 confers "corporate power upon the institution for the instruction of youth in the liberal arts and sciences, and also clothes the corporation

with power to take any estate whatsoever, in any lands, etc., or goods, chattels, moneys and other effects, by gift, bequest, devise, etc., and the same to grant, convey or assign, and to place out on interest for the use of said college and to apply the same. The cultivation of historical research would seem to be a part of a liberal education, such as should be encouraged by a college intended to confer degrees upon students in acquiring a liberal education in the arts and sciences." In *Jones* v. *Habersham*, 107 U. S. 174, 189, it is said that "A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not by its charter or by general laws, have authority itself to establish or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school or an asylum."

Although it is, under the will, the duty of the trustees therein named to exercise supervision over the administration of the fund, nevertheless the death or resignation of the trustees named in the will cannot, and does not, defeat the bequest. There is not such a personal trust as renders it necessary to have the personal action of the trustee named in the will, and the trust does not fail upon the death or resignation of the named trustee. The court may appoint his successor. *Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. 99, etc.

Both courts below have held that the bequest of a sum not to exceed five thousand dollars, to be expended under the personal supervision of the trustees in the purchase and erection of a chime of bells, etc., to be void. We agree with those courts in that respect. We also agree with the views of the Court of Appeals, holding that the alternative bequest of this same sum, not to exceed five thousand dollars, to be divided equally between the two orphan asylums, is valid. There is no material misnomer in either case, although they are incorporated institutions, one by the name of St. Vincent's Orphan Asylum and the other as St. Joseph's Male Orphan Asylum in the city of Washington, and they are referred to in

the will simply as St. Vincent's Orphan Asylum and St. Joseph's Catholic Orphan Asylum.

Nor does the bequest violate the thirty-fourth section of the Maryland Bill of Rights, already referred to. The same reasoning on that point governs this bequest as is applicable to the bequest to the University of Georgetown. Neither of these orphan asylums is a sectarian institution under the acts of incorporation. The other objection made is that the clause directs that a sum, not exceeding five thousand dollars, shall be equally divided between these orphan asylums; and it is said that there is such uncertainty in the amount of the bequest as to render it impossible to execute it, that it might be fulfilled by dividing a dollar between the asylums, or any other sum, within the five thousand dollars named in the bequest. But it seems to us that the intention of the testator is clear to give the full sum of, but not to exceed, five thousand dollars. That is, he gives five thousand dollars to be equally divided between these two asylums. While the amount is not to exceed five thousand dollars, the direction for an equal division, taken in connection with the other facts, render it in our opinion clear that the intention of the testator was that that sum should be the amount of the bequest. Courts are always reluctant to hold a bequest void for uncertainty, and they only do it when actually compelled to do so by the language used. *Inglis* v. *Trustees of Sailors' Snug Harbor,* 3 Pet. *supra.* If the testator had really intended that any less sum than five thousand dollars should be disposed of by and equally divided under this clause in his will, he would have said so.

Objection is also made to the bequest of "a sufficient sum, not to exceed three thousand ($3,000) dollars, the income to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown University; otherwise in some medical college in the District, to be known as the E. Carroll Morgan scholarship." The first objection, as to the uncertainty of the amount of the bequest, we do not regard as meritorious.

It is a sum sufficient to found a scholarship, and it shall not exceed, in any event, $3,000. If one can be founded, within the conditions named in the will, for a less sum than $3,000, then that less sum only can be used. The discretion to be exercised by the trustees in selecting the college with which to connect the scholarship does not render the bequest void. The testator has, by this clause in his will, himself expressed his preference for Georgetown College, if the scholarship can be maintained in that institution, but if not, it is to be a scholarship in some medical college of the District. This, we think, is not an improper or uncertain disposition of the bequest, or an illegal placing of a discretion in the trustees under the will. See *Attorney General* v. *Gleg*, 1 Atk. 356; *Attorney General* v. *Fletcher*, 5 L. J. Eq. (N. S.) 75; 2 Perry on Trusts, 4th ed., § 721.

The last bequest objected to is that of five thousand dollars, to form a fund known as the E. Carroll Morgan fund or scholarship, to be applied as the testator might thereafter indicate to his trustees, etc. This has been declared void by both courts, and no appeal has been taken from the judgment of the Court of Appeals adjudging that item to be void. That bequest being adjudicated invalid, the fund provided for therein forms part of the residue of the testator's estate, and passes under the residuary clause of the will.

These views call for an affirmance of the judgment of the Court of Appeals, with costs to the several parties, to be paid out of the residuary fund, as provided for by the judgment of that court.

Affirmed.

MEAD *v.* PORTLAND.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 56. Argued November 27, 1905.—Decided January 2, 1906.

Owners of property erected wharves on the line of an adjoining street on the river front in Portland under ordinances adopted by municipal authorities. They made an agreement with a private bridge as to keeping the street open. The city having bought the bridge proceeded under legislative authority to change the approaches and in so doing affected the access to the wharves. The owners sought to enjoin on the ground that it took their property without compensation and impaired the obligation of their contract with the bridge owners. The state court held the ordinances were merely permissive, and that the persons constructing the wharves had no interest or easement in the streets and the proposed change was merely a change of grade of street for which consequential damages were not allowed under the law of the State. *Held*, that:

While the interpretation of a local ordinance by the highest court of the State is not indisputable, and, even though it may conflict with other decisions of the courts of the State, if it does not conflict with any decision made prior to the inception of the rights involved this court will lean to an agreement with the state court. *Burgess* v. *Seligman*, 107 U. S. 20.

The power to grade streets given by a statute is not necessarily exhausted by one exercise thereof; and, where no Federal question is involved, this court must accept the interpretation of the highest court of a State of a local statute as to the extent of the power under a statute authorizing a municipality to change the grade of streets.

BILL in equity to enjoin defendants from closing a certain passageway in the approach of a bridge called the Morrison Street Bridge, in the city of Portland, Oregon. The approach leads to plaintiffs' wharves. The bill was demurred to and the demurrer sustained by the trial court, defendants declining to plead further, and a decree was entered dismissing the bill. The decree was affirmed by the Supreme Court of the State. 45 Oregon, 1.

The bill alleges that some of the plaintiffs have been for many years owners of block 76 in the city of Portland, and other plaintiffs have been the owners of block 77. These blocks are bounded on the east by the Willamette River and on the west

by Front street. Morrison street is the north boundary of block 76 and the south boundary of block 77. Attached to the properties are valuable riparian rights and wharf rights and privileges, which entitled the owners to build, maintain and use the same to the established wharf line of the river, and on them are warehouses, docks and wharfs of great value, which are occupied by tenants. The properties are located within the donation land claimed by one Daniel H. Lownsdale, under whom plaintiffs claim as owners. In the dedication by Lownsdale of the plat of the town of Portland it is, among other things, provided as follows:

"The wharves and wharfing privileges are specially reserved to the owners of the claim, and never (except by deed) subject to any but the laws of the Territory of Oregon or ordinances of the town or city corporation, as other town (private) property. . . ."

That the common council of said city of Portland adopted an ordinance, No. 2273, entitled "An ordinance authorizing the construction of a wharf on the Willamette River in front and opposite lots numbers 3 and 4, in block No. 77," approved September 26, 1878.[1]

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[1] Ordinance No. 2273.

"SEC. 1. The owner or owners of lots 3 and 4, in block 77, in the city of Portland, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette River, on and in front of the lots above mentioned, the easterly line of said wharf to run parallel with the east line of Front street from a point 100 feet north of the north line of Morrison street, the lower floor of said wharf to be as near ten feet above the base of grades as practicable; provided, that the owner or owners of said above described property shall construct and maintain, at their own expense, a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf; said pontoon to be constructed at the foot of Morrison street and to be in accordance with plan on file in the office of the auditor and clerk.

"SEC. 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block southwardly, except for a passageway, 15 feet in width along and over the north side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend south-

Also an ordinance, No. 2387, entitled "An ordinance authorizing the construction of a wharf in the Willamette River in front of and opposite lots Nos. 3 and 4, in block No. 76," approved February 21, 1879.[1]

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wardly into said street for a greater distance than six feet; provided, that the whole of said passageway and all of those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk; and provided further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

"SEC. 3. The owners of the property described in section 1 of this ordinance are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood, with the roof covered with tin, anything contained in Ordinance No. 1140, entitled 'An ordinance providing for the prevention of fires and the protection of property endangered thereby,' and the several amendments thereto to the contrary notwithstanding."

[1] Ordinance No. 2387.

"SEC. 1. The owners of lots 3 and 4, in block 76, are hereby authorized and permitted to construct a wharf of piles and timber in the Willamette River on and in front of the above described lots. The easterly side of said wharf to commence at a point 147 feet east of the east line of Front street and running from the center line of Morrison street extended in a direct course to a point 130 feet south of the center line of Morrison street extended, at a distance of 137½ feet from the east line of Front street.

"The lower floor of said wharf to conform to the grade of Coulter and Church's wharf at its connection therewith; provided, that the owner or owners of the above described property shall construct and maintain at their own expense a pontoon suitable for the landing of small boats, with suitable steps leading from the pontoon to the lower floor of the wharf, said pontoon to be constructed at the foot of Morrison street, and to be in accordance with plan in auditor's office.

"SEC. 2. The upper story or floor of said wharf shall not extend easterly beyond the lines of the lower wharf or beyond the lines of the block northwardly, except for a passageway, 15 feet in width, along and over the south side of Morrison street to within 28 feet of the easterly margin of said wharf, and for said distance of 28 feet said passageway shall not extend northwardly into said street for a greater distance than six feet; provided, that the whole of said passageway, and all those portions of said wharf extending over and into the street shall be subject to regulation by the common council as a part of said street and sidewalk; and, provided further, that a suitable trap for fire purposes shall be placed in the lower roadway, to be kept clear and in order by the owners of said wharf.

"SEC. 3. The owners of property described in section 1 of this ordinance

The predecessors in interest of plaintiffs constructed wharves in conformity with the provisions of the ordinances and the grades established therein, the wharf constructed pursuant to Ordinance No. 2387 covering the south half of the street, and that constructed pursuant to Ordinance No. 2273 covering the north half of the street. The wharves consisted of two floors or stories, with a large warehouse over the second floor. The second floors were built slightly above the level of Front street, with approaches as provided in the ordinances. The lower stories or floors of the wharves were considerably below the level of Front street, and were connected with that street by a roadway running on an incline along Morrison street from Front street down to the portion of the wharves built on Morrison street, which roadway was constructed by the respective owners of the properties. The wharves, docks and warehouses and the approach thereto have been used by plaintiffs and their predecessors for more than twenty years, and have been used as landing places for boats and vessels navigating the river and by people and teams having business at the docks and wharves, and the docks and wharves and the approach thereto have been used as a street or highway by the public. The grade of Morrison street occupied by the roadway leading from Front street and over that portion of the street upon which the wharves and docks were built has never been established except by said ordinances, and said portions of Morrison street and the roadway have been and are now improved and used, and the same are a public street and highway, and were built and have been maintained "in reliance of the rights and privileges therein [the ordinance] maintained."

In 1878 the legislature of the State of Oregon passed an act authorizing the Portland Bridge Company, or its assigns, to

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are hereby authorized and permitted to erect a one-story warehouse thereon, to be constructed of wood with the roof covered with tin, anything contained in Ordinance No. 1140, entitled 'An ordinance providing for the prevention of fires and the protection of property endangered thereby,' and the several amendments hereto, to the contrary notwithstanding."

construct and maintain a bridge crossing the Willamette River between Portland and East Portland for all purposes of travel and commerce, "at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland as may be selected or determined on by said corporation, or its assigns, on or above Morrison street of the said city of Portland and in street of said city of East Portland; . . . and provided that the approaches on the Portland side to said bridge shall conform to the present grade of Front street in said city of Portland."

The bridge was constructed in 1886, the west end of which was located at the east end of Morrison street. Between the west end of the bridge and Front street a plank road or approach was constructed over Morrison street, but the approach did not conform to the grade of Front street, but was constructed at an elevation of more than two feet above such grade at the west end of the bridge, and thence inclined to Front street, and has always been maintained at such elevation. The bridge did not cover the whole of Morrison street from Front street to the west end of bridge, but was so constructed that a portion of Morrison street, not in the center thereof and leading from Front street on an incline to the lower docks and wharves of plaintiffs, was left uncovered and unchanged, the same being about eighteen feet wide and extending easterly from Front street about ninety-five feet. The approaches constructed by the bridge company have been and are sufficient for the passage to and from the bridge for foot passengers, cars and vehicles using the bridge. The opening was left in the decking of Morrison street to provide access to the lower floors of the wharves, and as a means of ingress and egress from them and did not materially interfere with or obstruct the use of city roadways and the wharves and docks as they had been theretofore used.

In 1895 the city of Portland purchased, under legislative authority, the Morrison street bridge from the Willamette Iron Bridge Company, the successor in interest to the Portland Bridge Company, and subsequently, under the provision of an

act of the legislature, approved February 21, 1895, the County Court of Multnomah County assumed and has since had the care and operation of the bridge and its approaches.

In 1886 the Willamette Iron Bridge Company began the construction of the bridge and built two piers in the river to support the western end of the bridge in front of the outer line of plaintiffs' wharves, in such position as to obstruct navigation and to greatly interfere with the access to the wharves, and at the same time began to construct the approach to the bridge over Morrison street in such manner as to interfere with access to the wharves. The owners of the wharves in April, 1887, protested, and a compromise and settlement was effected between the parties, whereby the bridge company agreed to forever leave an opening in the bridge approach substantially as it now is, and in consideration thereof the wharf owners agreed to permit the piers to remain as constructed, and as they have ever since remained, and to waive all objection to the construction of the approach in the manner in which it was constructed, leaving the opening forever open and unobstructed for free ingress and egress to the wharves. The parties acted upon the agreement and the wharf owners did not begin or prosecute legal proceedings. In 1890, however, the company, notwithstanding the agreement, threatened to close up the opening, whereupon the wharf owners commenced a suit in equity to enjoin the threatened injury, and thereupon, in consideration of the dismissal of the suit, the bridge company entered into another agreement to refrain from the threatened acts and leave the opening and approach in the condition as the same now is.

It is alleged that the city of Portland acquired the bridge and the approach thereof subject to the said agreement, and the rights vested in the plaintiffs thereby, and that the defendants are proceeding, without tendering or offering compensation therefor, to close said opening, and thereby deprive plaintiffs of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

And it is alleged that the ordinances of the city of Portland, hereinbefore set out, constitute a contract between the city and plaintiffs' predecessors, and the acts of the legislature of the State of Oregon which have been mentioned, so far as they undertake to confer upon defendants the power to close the opening of such bridge without payment of compensation, impair the obligation of such contract, and violate section 10, Article I, of the Constitution of the United States. An injunction was prayed.

Mr. Charles H. Carey, with whom *Mr. C. E. S. Wood, Mr. S. B. Linthicum* and *Mr. J. C. Flanders* were on the brief, for plaintiffs in error:

The wharf owners have vested rights which cannot be taken without compensation. They succeeded to the rights of the original townsite proprietors who had reserved "the wharves and wharfing privileges."

By the settled rule in Oregon, abutting lot owners, by virtue of their ownership of lots facing on a street, own the fee to the middle of the street, subject to the public use of the street as a highway. *Banks* v. *Ogden,* 2 Wall. 57; *Huddleston* v. *Eugene,* 34 Oregon, 243, 352; *McQuaid* v. *Portland Ry. Co.,* 18 Oregon, 237.

This case does not come under the rule that a wharf built by a city at the terminus of a street is part of the street, free to the public, and not subject to a private use for which wharfage may be taken. *Russell* v. *The Empire State,* Fed. Cas. No. 12,145; *The Geneva,* 16 Fed. Rep. 874; *Barney* v. *Baltimore,* 1 Hughes, 118, Fed. Cas. No. 1029.

The legitimate and proper use of a street terminating at the river is a landing place, and the municipal corporation has the right to build wharves at the termini of its streets, but this does not apply where the right of wharfage is reserved. 1 Dillon, Mun. Corp., § 109.

The wharves at the foot of the street are private wharves and the builders thereof have a proprietary and vested interest

therein. Laws of Oregon, 1870, p. 125, § 38; Charter and Ordinances of Portland, Comp. 1879, p. 16.

In Oregon the owner of land abutting upon a navigable stream takes only to ordinary high water mark, the land lying below that mark being vested in the State. *Bowlby* v. *Shively*, 22 Oregon, 410; *Shively* v. *Bowlby*, 152 U. S. 1; *Lewis* v. *Portland*, 25 Oregon, 159.

Shore owners are authorized to wharf out in the stream, and the State thereby consented to the use of the submerged lands by the bank owners. Bellinger Codes, §§ 4042, 4043.

The wharves when erected under this statute are considered as aids to commerce, and lawful structures. *Parker* v. *Taylor*, 7 Oregon, 446; *McCann* v. *O. R. & N. Co.*, 13 Oregon, 463.

The privilege granted by this statute was a license, which, however, became irrevocable when once acted upon. *Lewis* v. *Portland*, 25 Oregon, 167.

Even assuming that the city itself had the right to wharf out at the foot of Morrison street, it delegated the power, as it had the right to do. *Simon* v. *Northup*, 27 Oregon, 501; *Farnum* v. *Johnson*, 62 Wisconsin, 620; *Railroad Co.* v. *Portland*, 14 Oregon, 188. The power to "regulate" wharves does not include the power to confiscate them. *Railroad Co.* v. *Joliet*, 79 Illinois, 44; *Langdon* v. *Mayor*, 93 N. Y. 161; *State* v. *Mott*, 61 Maryland, 297; *In re Hauck*, 70 Michigan, 396; *People* v. *Gadway*, 61 Michigan, 286; *McConnvill* v. *Mayor*, 39 N. J. L. 44; *Sweet* v. *Wabash*, 41 Indiana, 7; *Bronson* v. *Oberlin*, 41 Ohio St. 476; *Cantril* v. *Sainer*, 59 Iowa, 26.

The right of the owner of land bounded by a navigable river to access to the navigable part of the stream and to make a landing wharf or pier for his own use or for the use of the public, cannot be capriciously destroyed by a municipality by change of harbor lines. *Yates* v. *Milwaukee*, 10 Wall. 497. And a city must pay for obstructing a riparian owner's access to his wharf, either from the water or from the land side of his property. *Van Dolsen* v. *Mayor*, 21 Blatch. 458; *Myers*

v. *St. Louis*, 82 Missouri, 367; *Weber* v. *Harbor Comm'rs*, 18 Wall. 57; *Demopolis* v. *Webb*, 87 Alabama, 668; *Langdon* v. *Mayor*, 93 N. Y. 152.

The action of the city in cutting off access to the wharves is in effect a taking of plaintiffs' property without due process of law. *Willamette Iron Works* v. *O. R. &. N. Co.*, 26 Oregon, 233.

The injury to the plaintiffs is not an injury common to the public, but is a private nuisance, for which an action will lie, or which may be restrained by injunction. *Wilder* v. *DeCou*, 26 Minnesota, 11; *Schulte* v. *North Pac. Transp. Co.*, 50 California, 592; *Parker* v. *Taylor*, 7 Oregon, 435; *Price* v. *Knott*, 8 Oregon, 438; *Garitee* v. *Balance Co.*, 13 How. Pr. 40; *Gould* on Waters, §§ 122, 123, 124.

The right of wharfage is a property right which can be taken only by the exercise of the right of eminent domain on making compensation to the owner of the wharfage right. Dillon, Mun. Corp., § 107; *Crocker* v. *New York*, 15 Fed. Rep. 401; *Classen* v. *Guano Co.*, 81 Maryland, 258.

Even if the ordinances granted rights in the nature of a franchise, the grant was based upon ample consideration to the city, so that, if it is a license, and fully executed, it is now irrevocable. *Garrett* v. *Bishop*, 27 Oregon, 349.

Even if the bridge act is a legislative change of grade, the city cannot arbitrarily destroy the wharf rights. *Seattle* v. *Railroad Co.*, 6 Washington, 370.

In Oregon, a license, after it has been exercised and expenditures have been made in reliance thereon, is irrevocable, and the right granted cannot be destroyed without compensation. *Curtis* v. *Water Co.*, 20 Oregon, 34; *McBroom* v. *Thompson*, 25 Oregon, 567; *Garrett* v. *Bishop*, 27 Oregon, 352; *Powder Co.* v. *Coughanour*, 34 Oregon, 21; *Bowman* v. *Bowman*, 35 Oregon, 281; *Hallock* v. *Suitor*, 37 Oregon, 13; *Savage* v. *Salem*, 23 Oregon, 385.

The defendants cannot close this opening in Morrison street, because of an agreement with the bridge company to leave it

open, and because of the long acquiescence of the city in the plaintiffs' occupation and use of these wharves. Having received benefits at the expense of the other contracting party, the city is estopped. *United States* v. *Railroad Co.*, 54 Fed. Rep. 811; *In re Parker*, 11 Fed. Rep. 397; *Commonwealth* v. *Andre*, 3 Pick. 225; *Vidal* v. *Girard*, 2 How. 191; *Enfield* v. *Permit*, 5 N. H. 285; *Pengra* v. *Munz*, 29 Fed. Rep. 830; *Vermont* v. *Society*, 2 Paine, 546, 560; *Cahn* v. *Barnes*, 5 Fed. Rep. 326, 334; *Commonwealth* v. *Pejepscut*, 10 Massachusetts, 155; *People* v. *Maynard*, 15 Michigan, 470; *Menard* v. *Massey*, 8 How. 313; *State* v. *Bailey*, 19 Indiana, 454; *Opinion of Court*, 49 Missouri, 225; *Hitchcock* v. *Galveston*, 96 U. S. 351; *Railroad Co.* v. *Elgin*, 91 Illinois, 251.

The Supreme Court of Oregon erred in deciding that the effect of the bridge act was to change the grade of the street.

In Oregon an abutting proprietor has no right to compensation for damage incidental to the change of grade of a city street. *Brand* v. *Multnomah County*, 38 Oregon, 79; Laws of Oregon, 1864, p. 18, §§ 78, 79; see Laws of Oregon, 1898, 150, 165. The bridge act was in effect a "float," and may be likened to the congressional grant of lands to a railroad company. By its terms it was not to be a vested, granted franchise until the conditions precedent had been fulfilled.

When the bridge was located and the amount of space in Morrison street to be appropriated was determined upon, the election was final, and other portions of the street were excluded. *Van Wycke* v. *Knevals*, 106 U. S. 360. This is merely a statement of a familiar rule of easements. *Jennison* v. *Walker*, 11 Gray (Mass.), 426; *Bannon* v. *Angier*, 2 Allen (Mass.), 128; *Ev. L. St. J. O. H.* v. *Hydraulic Assn.*, 64 N. Y. 564; *Onthank* v. *Railroad Co.*, 71 N. Y. 194; *Warner* v. *Railroad Co.*, 39 Ohio St. 72; *Willis* v. *Winona*, 59 Minnesota, 27; see also *Allen* v. *Freeholders*, 13 N. J. Eq. 68; *Moorehead* v. *Railroad Co.*, 17 Ohio, 340; *Griffen* v. *House*, 18 Johns. (N. Y.) 397; *Cayuga Bridge Co.* v. *Mager*, 6 Wend. (N. Y.) 85;

State v. *Turnpike Co.*, 10 Connecticut, 157; *Blackmoore* v. *Glamorganshire Canal*, 1 Mylne & K. 154.

Mr. L. A. McNary, with whom *Mr. J. P. Kavanaugh* was on the brief, for defendant in error:

The question in this case is the validity of the statute that is alleged to impair the contract, and not whether it was properly construed by the state court. *Central Land Company* v. *Laidley*, 159 U. S. 103; *Commercial Bank* v. *Buckingham*, 5 How. 317.

The real question presented by plaintiffs is whether the statute was properly construed, and not whether the statute itself is valid.

The ordinances of the city of Portland authorizing the construction of the wharves do not constitute a contract between the said city and plaintiffs' predecessors in interest. Sections 4042, 4043, Bellinger's Code; *Wabash Railroad Co.* v. *Defiance*, 167 U. S. 88.

The lower floors of the private wharves extend over and upon Morrison street, but it is not alleged that they extend beyond the eastern terminus of Morrison street into the Willamette River.

The disclaimer by plaintiffs of any proprietory interest or private ownership in the wharves on Morrison street is fatal to their claim to relief by injunction. *Transportation Company* v. *Chicago*, 99 U. S. 635; *Hoboken L. & I. Co.* v. *Mayor*, 36 N. J. L. 540; *Thoyar* v. *New Bedford R. R. Co.*, 125 Massachusetts, 257.

The closing of the driveway through the approach on Morrison street is not a taking of plaintiffs' property without due process of law. The closing is merely the result of the establishment of the street grade, and that does not constitute a taking of property within the meaning of the Constitution. 2 Dillon Mun. Corp., 4th ed., § 686; *Willits Mfg. Co.* v. *Board*, 62 N. J. L. 95.

The closing of the driveway is not a confiscation of plaintiffs'

property, because the amended complaint shows that plaintiffs have other means of access to both the upper and lower wharves.

Mere inconvenience in the access to property is not a sufficient reason to prevent the city from closing the driveway. *Burns* v. *Gallagher*, 62 Maryland, 462; *Mitchell* v. *Seipel*, 53 Maryland, 251.

The wharves were not constructed under an irrevocable license. No exclusive right to or interest in the wharves was granted to or claimed by the owners of the private wharves, and in such case the license is revocable at the pleasure of the licensor. *Parish* v. *Kaspare*, 109 Indiana, 586; *Stock Yards* v. *Wiggins Ferry Co.*, 112 Illinois, 384; *Rayner* v. *Nugent*, 60 Maryland, 515.

The agreement of the bridge company to leave the driveway open does not bind the city, because when the approach was built it became a public highway under the control of the city and the company had no authority to keep a part of the street surface open. *Pittsburg Railway* v. *Point Bridge Co.*, 165 Pa. St. 37.

This alleged agreement was not of record, and it does not appear that the city had any notice of it, so that the city, being an innocent purchaser in good faith and for value, took the property free from any such arrangement.

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

If we determine what rights plaintiffs had in Morrison street and the river, we shall be able to determine their contentions. Plaintiffs claim a contract with the city based on the ordinances which authorize plaintiffs to construct their wharves, but they also claim rights which they say were attached to the property and reserved to it by Daniel H. Lownsdale, "of the wharves and wharfing privileges." The rights so reserved are made especially dominant. Indeed, the rights obtained from the city are somewhat minimized and depreciated. All the city

could do, it is said, and all the city attempted to do by its ordinances, was to authorize the riparian owners to build their wharves. Why authority from the city was necessary in view of the reservation in the Lownsdale dedication, if it was as extensive as contended, seems to call for explanation, and explanation is given by saying that the ordinance was but the exercise of the authority to regulate the manner in which the wharves were to be built by the riparian proprietors. And plaintiffs, to point their reliance on the reservation in the Lownsdale dedication, say: "Whether the ordinances do or do not purport to grant a privilege or right to use or appropriate the street or an extension thereof for wharfing purposes, the right exists, and it existed because of the reservation in the plat, long before the ordinances; and it exists independent of any action of the city. This right is different in kind from the right of the public to use the street. And it is a valuable right, which cannot be taken away or destroyed without compensation."

Plaintiffs, however, in other parts of their argument claim, by reason of the ordinances, an irrevocable license, and in the pleadings give prominence to nothing else but the rights conferred by the ordinances. On account of this probably neither the trial court nor the Supreme Court commented on the Lownsdale dedication. But we will not consider plaintiffs precluded by that omission. It is very clear to us that their contention under the Lownsdale dedication is not sound. The purpose of the dedication was an addition to the city. Streets were contemplated and power of the city over them, and this purpose and power is as clear and definite in the dedication as the reservation of rights to lot owners. This was the view of plaintiffs' predecessors when they applied for the ordinances. Therefore the fundamental proposition in the case is, the power of the city over its streets, and how far that power was limited or could be limited by the ordinance upon which plaintiffs rely.

It will be observed that the wharves were constructed on Morrison street and "used as and the same are a public street and highway." In other words, the bill alleges that the wharves

on Morrison street formed a part of the street and were open to general and public use.

What power the city of Portland had to grant rights in its streets depends upon its charter, and interpreting the ordinance upon which plaintiffs rely the Supreme Court of Oregon decided that neither the plaintiffs nor their predecessors in interest were granted rights or privileges in the street different in kind from that enjoyed by the public.

"The clear purpose of the ordinances," the court said, "was to authorize and regulate the construction of wharves in front of private property. It is so expressly stated in the title, and the granting part of the ordinances provides that the owner or owners of certain described property are authorized and permitted to construct a wharf in the river, 'on and in front of' such property. There is nowhere, in either of the ordinances, a grant of any right or privilege to build a wharf at the terminus of Morrison street. In the ordinance adopted in 1878 there is scarcely an inference that the lower floor of the wharf was to extend into Morrison street, and, as regards the upper floor, the provision is that it should not extend beyond the line of the block, except for a passageway of a certain described width, and over the north side of the street. The grantee was required to construct and maintain pontoons in the river at the foot of the street for the landing of small boats, with steps leading therefrom to the lower floor of the wharf. It was expressly provided that the whole of the passageways along the street and those portions of the wharf extending over and into the street 'shall be subject to regulation by the common council as a part of said street and sidewalks,' thus manifesting an intention to preserve the public character of the street, and not to vest in the grantee any rights or privileges therein not enjoyed by the general public. The ordinance of 1879, in describing the dimensions of the wharf authorized to be erected, says that it shall extend a certain distance south from 'the center line of Morrison street,' and indicates that the wharf constructed by the property owners on the opposite side of the street extended

to that point. The grant, however, is confined to the construction of a wharf 'on and in front of' private property; there being a provision like the one in the former ordinance requiring the grantees to construct pontoons in the river for the landing of small boats, while the right is reserved to the council to regulate the passageways along the street, and any part of the wharves extending therein 'as a part of the street and sidewalk.' The reasonable interpretation of these ordinances is that they were intended to regulate the construction of wharves by the property owners on either side of the street in front of their property, with permission, perhaps, to extend the lower floors of such wharves over and across the foot of Morrison street, for the purpose of affording access from the street to the wharves. There is, however, no grant of any privilege or right to use or appropriate the street, or an extension thereof, for wharfage purposes. On the contrary, the street and any improvements which may be put there by the abutting property owners were reserved to the use of the entire public, and the grantees had no greater rights under the ordinances than those enjoyed by the general public." And this construction, the court observed, was supported by the averments of the complaint. It was, therefore, decided that plaintiffs acquired no greater rights in the street than the general public nor a right to compensation for loss or injury caused by a change in the grade any more than a change in the grade would entitle an abutting owner to compensation because he had improved the street in front of his property. And decided also that the ordinances "did not give to the plaintiffs or to their predecessors in interest authority to build a wharf at the foot of the street for commercial purposes, but rather confer the right to improve the street by extending it into the river, so that they could the more readily reach their own property therefrom, and the fact that their improvements have been rendered valueless on account of the subsequent change in the grade of the street does not entitle them to compensation.

"Neither are they entitled to any rights under the rule ap-

plicable to an executed parol license. Their occupation of the street and construction of the wharf and landing at the foot thereof, were permissive, under ordinances of the city defining their rights. They could not acquire any interest or easement in the street not conferred by the ordinances, because their use could not, in law, be adverse. *Thayer* v. *New Bedford Railroad*, 125 Massachusetts, 253; Washburn on Easements, §§ 152, 197."

Against these conclusions plaintiffs cite other Oregon cases. We are, however, not called upon to reconcile the cases. Plaintiffs point to no case decided prior to the construction of the wharves which interprets the ordinance as they now contend for, which might bring the case within the ruling of *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, and *Lewis* v. *City of Portland*, 25 Oregon, 133, 159. And if we could say that the construction of the ordinances by the Supreme Court is not indisputable, yet we are required by the rule expressed in *Burgess* v. *Seligman*, 107 U. S. 20, and the many cases which have followed it, to incline to an agreement with the state court.

In accordance with the doctrine announced in *Brand* v. *Multnomah County*, 38 Oregon, 79, the Supreme Court decided that a change or alteration of the grade of a street may be made by lawful authority, without liability to abutting property owners for consequential damages, and that the act of October 18, 1878, was a legislative change of the grade of Morrison street for its full width. Plaintiffs do not deny that the legislature has such power. They make, however, two contentions (*a*) That the act of 1878 was not intended to change the grade of the street and did not do so. (*b*) If it did change the grade at all, it changed it as to those portions of the street only which were actually made use of on the new grade as an approach to the bridge, the remainder not being affected by the act. As to the latter point, it is contended that the power given to the bridge company to build an approach to the bridge on Morrison street to conform to the grade on Front street was exhausted with the exercise of the right, and that the defendants have no power under the act, after a lapse of twenty years, to extend the

approach of the bridge to cover the opening in Morrison street, and change the grade where it was not changed when the approach was built.

The act of 1878 is a local statute and in its interpretation involves no Federal question, nor does it become such by the circumstances of this case. It expresses the legislative authority and its interpretation by the Supreme Court of the State we must accept. And the power to grade was not exhausted by one exercise. *Goszler* v. *Georgetown*, 6 Wheat. 593, 597; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88. It is a phase of the same contention that the bridge company was given the right of election of the manner of constructing the approaches, and, being bound by that election, the city, its successor, is also bound.

Judgment affirmed.

HOWARD *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 77. Argued November 10, 13, 1905.—Decided January 2, 1906.

The provisions of the Fifth and Sixth Amendments to the Federal Constitution do not apply to proceedings in the state courts.

A State cannot be deemed guilty of violating its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, if acting within its jurisdiction.

While the words "due process of law," as used in the Fourteenth Amendment, protect fundamental rights, the Amendment was not intended to interfere with the power of the State to protect the lives, liberty and property of its citizens, nor with the power of adjudication of its courts in administering the process provided by the law of the State.

In discharging a juror in a murder trial before he was sworn, for cause sufficient to the court, and after questioning him in absence of accused and counsel but with the consent of his counsel, and substituting another juror equally competent, *held*, that the accused was not denied due process of law within the meaning of the Fourteenth Amendment.

It is the law of Kentucky that occasional absence of the accused from the trial from which no injury results to his substantial rights is not reversible error.

The Criminal Code of Kentucky, § 281, provides that decisions of the trial court upon challenges shall not be subject to exception, and as the highest court of the State in deciding that even though the action of the trial court in regard to the juror had been error it could not reverse under § 281, followed the construction of that section established by prior cases, it did not make a discriminating application of the section against the accused and he was not therefore deprived of the equal protection of the laws.

THE facts are stated in the opinion.

Mr. W. M. Smith, with whom *Mr. J. A. Violett, Mr. J. A. Scott* and *Mr. Carlos B. Little* were on the brief, for plaintiff in error:

A Federal question is seasonably presented, although made for the first time in the Appellate Court, in petition for a rehearing, provided said court passes upon same, and holds against the party invoking protection under the Constitution or laws of the United States. *Mallet* v. *North Carolina,* 181 U. S. 592; *Leigh* v. *Green,* 193 U. S. 79; U. S. Compiled Statutes, § 709; *Canal Co.,* v. *Patten Paper Co.,* 172 U. S. 58; *Powell* v. *Brunswick County,* 150 U. S. 433; *O'Neil* v. *Vermont,* 144 U. S. 359. A State can repeal any common law offense, or change the modes of criminal procedure, so long as said change does not violate any absolute and fundamental right of the accused; as to the question here involved, the State of Kentucky has adopted the common law, without modification or change, and the provision of the Fourteenth Amendment protects the fundamental rights thereby created and recognized. Section 233 present Const. Kentucky; *Ray* v. *Sweeney,* 77 Kentucky, 9; *Chisholm* v. *Georgia,* 2 Dallas, 419; *Holden* v. *Hardy,* 169 U. S. 366.

The provision of the Fourteenth Amendment that no State shall deprive any person of life, liberty or property without due process of law, having brought within the Federal jurisdiction and power the protection against state action, the judicial power of the Nation necessarily extends thereto; and it is not requisite for jurisdiction that the right or thing claimed come

from the law of the United States; though it comes from the state law, it is protected from unlawful state action. It must not be so construed, however, as to interfere with the State in its enactment and local administration of the criminal law, nor to confine it to any special mode of proceeding, so long as said law, as enforced by the State, affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental and inalienable rights that are essential to the protection of life, liberty and property. Section 11, Bill of Rights, Kentucky; *Davidson* v. *New Orleans*, 96 U. S. 99; Fifth Amendment Const. U. S.; *Holden* v. *Hardy*, 169 U. S. 366; *Lowe* v. *Kansas*, 163 U. S. 85; *Civil Rights Cases*, 109 U. S. 11; *United States* v. *Cruikshank et al.*, 92 U. S. 554; *United States* v. *Harris*, 106 U. S. 629; *Caldwell* v. *Texas*, 137 U. S. 699; *Allen* v. *Georgia*, 166 U. S. 137; *Brown* v. *New Jersey*, 175 U. S. 174; *Maxwell* v. *Dow*, 176 U. S. 582; *Hurtado* v. *California*, 110 U. S. 516; *Thompson* v. *Utah*, 170 U. S. 344; *Ex parte Ulrich*, 42 Fed. Rep. 591.

By the common law, which has been adopted by Kentucky, and by the constitution, statutes and court decisions, when the life or liberty of the accused is in peril, he not only has the right to be, but must be, present, during the whole of the trial, at every step. His presence is not only an inalienable right, but a jurisdictional fact and cannot be waived. It is the duty of the trial court to see that this right is not violated, otherwise Federal jurisdiction under the Fourteenth Amendment will attach to protect said right. 2 Story on Const., § 1791; Hale's Pleas of the Crown, 33; 3 Bacon's Abridgement, 512; Magna Charta, ch. 29; Brannon's Fourteenth Amendment, 271; Cooley, Const. Lim., 7th ed., 452; Underhill, Crim. Ev., 284, § 232; Wharton, Crim. Pl. & Pr., 8th ed., §§ 540, 545; *Schwab* v. *Berggren*, 143 U. S. 442; *Lewis* v. *United States*, 146 U. S. 370; *Hopt* v. *Utah*, 110 U. S. 574; Crim. Code Utah, § 218; Crim. Code Pr. (Ky.), § 183; Kentucky Code, §§ 212–216; *State* v. *Carmen*, 63 Iowa, 130; Bishop's New Criminal Procedure, §§ 269, 271; *Dougherty* v. *Commonwealth*, 69 Pa. St. 290; *Prine* v. *Common-*

wealth, 18 Pa. 103; *Rolls* v. *State*, 52 Mississippi, 396; *State* v. *Smith*, 90 Maryland, 37; *French* v. *State*, 21 L. R. A. 405; *Anderson* v. *State*, 2 Sneed (Tenn.); *Witt* v. *State*, 5 Coldwell (Tenn.), 11; *Gladden* v. *State*, 12 Florida, 577; *Maurer* v. *People*, 43 N. Y. 1; *Hill* v. *People*, 16 Michigan, 351; *Schick* v. *United States*, 195 U. S. 65; *West* v. *Louisiana*, 194 U. S. 258; Const. Kentucky, § 233; Criminal Code Pr., § 183; *Temple* v. *Commonwealth*, 77 Kentucky, 769; *Allen* v. *Commonwealth*, 86 Kentucky, 642; *Hite* v. *Commonwealth*, 14 Ky. Law Rep. 308; *Meece* v. *Commonwealth*, 78 Kentucky, 586; Criminal Code, §§ 229, 340; *Rutherford* v. *Commonwealth*, 78 Kentucky, 640; *Crowley* v. *United States*, 194 U. S. 461; *Rogers* v. *Alabama*, 192 U. S. 226; *Willis* v. *Commonwealth*, 86 Kentucky, 68; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 371; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 235; *Jacobi* v. *Alabama*, 187 U. S. 135; *Johnson* v. *Commonwealth*, 72 Kentucky, 224.

When the absence of the accused during the trial is shown, the law presumes that his substantial rights have been prejudiced, and the holding of the Court of Appeals that the record must affirmatively show that said rights were not prejudiced, deprived the accused of his liberty without due process of law, and denied him the equal protection of the law. *Meece* v. *Commonwealth*, 78 Kentucky, 586; *Rutherford* v. *Commonwealth*, 78 Kentucky, 640; *Allen* v. *Commonwealth*, 86 Kentucky, 642; *Crowley* v. *United States*, 194 U. S. 461.

The court, in discharging juror Alexander without cause after he had been accepted, acted beyond its power, and the Court of Appeals, in holding that under § 281, Criminal Code, it could not reverse on account of said error, deprived the accused of his liberty without due process of law and denied to him the equal protection of the law. *Klinger* v. *Missouri*, 13 Wall. 257; Crim. Code of Pr., §§ 215, 250, 281; *Munday* v. *Commonwealth*, 81 Kentucky, 233; *Wiggins* v. *Commonwealth*, 104 Kentucky, 766; *Smith* v. *Commonwealth*, 20 Ky. Law Rep. 1848; *Colvin* v. *Commonwealth*, 22 Ky. Law Rep., 1408; *O'Brian* v. *Commonwealth*, 72 Kentucky, 333; *Shelby* v. *Commonwealth*, 91 Kentucky, 566.

The Court of Appeals, in holding that under § 281, Crim. Code Pr., it was without power to revise an error committed by the trial court, in the manner of the formation or selection of the trial jury, violated the Fourteenth Amendment, and said holding deprived the accused of his liberty without due process of law, and denied to him the equal protection of the law. Crim. Code Pr., §§ 190–194; Kentucky Statutes, § 2247; *Smith* v. *Commonwealth*, 20 Ky. Law Rep. 1848; *Yick Wo* v. *San Francisco*, 118 U. S. 306.

Mr. N. B. Hays, Attorney General of the State of Kentucky, with whom *Mr. Charles H. Morris* was on the brief, for defendant in error:

The Fifth and Sixth Amendments do not apply to a criminal prosecution in a state court for the infraction of its criminal laws. *United States* v. *Cruikshank*, 92 U. S. 542; *Ex parte Spies*, 123 U. S. 131; *Brown* v. *New Jersey*, 175 U. S. 172; *Maxwell* v. *Dow*, 176 U. S. 593; *West* v. *Louisiana*, 194 U. S. 261.

Under the common law there could be no exception to the decisions of triers of jurors, and in Kentucky the court is substituted for triers and there can be no review of its action. Cooley's Blackstone, bk. 3, ch. 23, § 3; §§ 212, 281, Crim. Code Kentucky; Thompson & Merriam on Juries, § 259; *Snow* v. *Weeks*, 75 Maine, 106; Cooley's Const. Lim., 8th ed., 445, 460; *Hayden* v. *Commonwealth*, 20 Ky. Law Rep. 274.

There was no error in discharging the juror and there was no abuse of discretion by the trial court. Crim. Code Kentucky, § 202; Proffat on Jury Trials, § 194; *State* v. *Adams*, 20 Kansas, 689.

The Kentucky Court of Appeals has only appellate jurisdiction to review any error of law which appears on the record, when upon consideration of the whole case the court is satisfied that the substantial rights of the defendant have been prejudiced thereby. Constitution, § 110; Crim. Code, § 340.

No objection or exception having been made or taken in the trial court as to alleged error of the trial court in asking said

question in the absence of plaintiff in error, and no error having been assigned by plaintiff in error in his motion and reasons for a new trial for the same, there was no error appearing on the record for review by the Court of Appeals. *Rutherford* v. *Commonwealth*, 78 Kentucky, 639; *Kennedy* v. *Commonwealth*, 14 Bush, 340; *Wilkerson* v. *Commonwealth*, 88 Kentucky, 30; *Merritt* v. *Commonwealth*, 11 R. 17; *Brown* v. *Commonwealth*, 14 Bush, 400; *Ellis* v. *Commonwealth*, 9 R. 824; *Crockett* v. *Commonwealth*, 10 R. 159; *Redmon* v. *Commonwealth*, 82 Kentucky, 335; *Vinegar* v. *Commonwealth*, 104 Kentucky, 110; *Branson* v. *Commonwealth*, 92 Kentucky, 333.

The conviction was due process of law; and this question not having been presented to the trial court, or passed on adversely to him by it, it was not before the Court of Appeals and as it was without jurisdiction to consider that question, there is no Federal question. *Dreyer* v. *Illinois*, 187 U. S. 83; *Jacobi* v. *Alabama*, 187 U. S. 107; *Brooks* v. *Missouri*, 124 U. S. 456; *Baldwin* v. *Kansas*, 129 U. S. 641.

Before this court will review any Federal question, the plaintiff in error must have presented it in the highest state court, and it must have been decided there, adversely to him. Under section 281 of the Criminal Code the trial court is not only the highest court, but the only court that could pass on said question. Cases *supra* and *Layton* v. *Missouri*, 187 U. S. 214; *Tarrance* v. *Florida*, 188 U. S. 573.

When the challenge to a juror has been allowed and an impartial juror substituted in his place, the constitutional right of the accused to a fair and impartial jury has not been impaired. Thompson & Merriam on Juries, § 251; *Reynolds* v. *United States*, 98 U. S. 247; *United States* v. *Morris*, Fed. Cas. No. 15,815; *Hopt* v. *Utah*, 120 U. S. 430; *Hays* v. *Missouri*, 120 U. S. 71; *Ex parte Spies*, 123 U. S. 131.

The Federal courts will follow the interpretation and construction given the state statutes by the highest court of the State, as to rights, privileges and immunities, unless such construction is violative of the Federal laws. *Smiley* v. *Kansas*, 196 U. S.

247; *Leeper* v. *Texas*, 139 U. S. 462; *Nobles* v. *Georgia*, 168 U. S. 398; *Bergman* v. *Baecker*, 157 U. S. 655; *Fielden* v. *Illinois*, 143 U. S. 452; *Brown* v. *New Jersey*, 175 U. S. 172.

As to the consistent construction of § 281, Crim. Code, see *Smith* v. *Commonwealth*, 100 Kentucky, 137; *Collier* v. *Commonwealth*, 110 Kentucky, 518.

As to what is due process of law within the meaning of the Fourteenth Amendment, see *Hurtado* v. *California*, 110 U. S. 516; *Anderson* v. *Henry*, 45 W. Va. 319; *Kennedy* v. *Commonwealth*, 14 Bush, 340.

Mr. Justice McKenna delivered the opinion of the court.

The plaintiff in error seeks to review the judgment of the Court of Appeals of the Commonwealth of Kentucky, affirming a conviction and sentence of murder against him. He was indicted, with others, for killing one William Goebel. The grounds of review by this court are based upon certain rulings of the trial court which, plaintiff in error contends, were repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

It appears from the record that eleven jurors, including one J. C. Alexander, had been accepted by the parties. The Commonwealth had exhausted three of its peremptory challenges, and plaintiff in error eleven of his—he was given by the statutes fifteen. At this point the Commonwealth's attorney suggested that Alexander had formed and expressed an opinion on the merits of the case, and had improperly conversed with a person, not a member of the jury, on the subject connected with the case. The Commonwealth's attorney then made a motion to discharge Alexander from the jury, in support of which he filed the following affidavit of one Ben Hackett, who had been excluded as a juror in the case:

"The affiant Ben Hackett says that after the killing of William Goebel he and Mr. J. C. Alexander, who has been accepted on the jury to try this case, had many conversations and argu-

ments about the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him—these arguments and conversations occurred at different times and places in Woodford County during the time that has elapsed since the murder of Mr. Goebel—were frequent and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

"This affiant further says that on yesterday afternoon late, after Mr. Alexander had been accepted as a juror to try the case and after this affiant had been excused, after those accepted as jurors had been charged and admonished by the court, immediately after adjournment for supper, and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were passing out through the court house yard, when in passing Mr. Alexander said to this affiant, 'Hello, Ben, I am glad they cut you off this jury, as I did not want to serve on this jury with you.'

"Affiant Ben Hackett says the foregoing statements are true.

(Signed) "BEN F. HACKETT."

The following proceedings were then had as appears from the order of the court from which we quote:

"It was agreed by counsel on either side that the court might, in the absence of the defendant and counsel, question the said Alexander as to the truth of the said statements, contained in said Hackett's affidavit, that he said to said Hackett while in the custody of the sheriff, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you,' and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the court being of the opinion that such conduct on the part of said Alexander was a violation of the admonitions of the court, when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is

now, excused as a juror in this case, and he is now ordered to be discharged; and the court being thus advised, overruled defendant's objection and discharged and excused said Alexander, and defendant by counsel excepts.

"Thereupon defendant moved the court to discharge the entire panel remaining, which was objected to by the attorney for the Commonwealth, and the court being advised, sustained said objection, and refused to discharge said entire panel, to which ruling defendant by counsel excepts."

By these rulings, it is contended, that plaintiff in error was deprived of due process of law. Error is assigned under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.

Plaintiff in error cannot avail himself of the provisions of the Fifth and Sixth Amendments, for reasons we have so often expressed that it would be the extreme of superfluity to repeat them. It is enough to say that those amendments do not apply to proceedings in the state courts. The invocation of the Fourteenth Amendment is attempted to be justified on two grounds: (1) That the trial court in discharging Alexander acted beyond its power, and that the Court of Appeals of Kentucky in holding, that by reason of section 281 of the Criminal Code of the State, it cannot reverse on account of such error, deprived plaintiff in error of his liberty without due process of law. (2) By the common law which has been adopted by Kentucky, and by the constitution and statutes of the State an accused has not only the right to be present, but must be present during the whole of the trial. "His presence is not only an inalienable right, but a jurisdictional fact and cannot be waived."

The argument of plaintiff in error is very elaborate, but there is scarcely any phase of it which has not been answered adversely to his contention by decisions of this court.

He seems to make an issue with the Court of Appeals of the State upon the law of the State, and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling in *In re Converse*, 137 U. S.

624, 631, and other cases, which hold that a "State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State—common, statutory and constitutional. Our inquiry can only be, did the state law as applied afford plaintiff in error due process as those words are used in the Fourteenth Amendment? We think it did. It is not necessary to enter into a lengthy discussion of what constitutes due process of law. That has been done in a number of cases and there is nothing in the present case which calls for a repetition and an extension of the discussion. It may be admitted that the words "due process of law," as used in the Fourteenth Amendment, protect fundamental rights. What those are cannot ever be the cause of much dispute. In giving them protection, however, it was not designed, as was observed by the Chief Justice in *In re Converse, supra*, "to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State." These words are apposite in the present case. Of what does plaintiff in error complain? The discharge of a juror before he was sworn and the absence of the plaintiff in error from the examination of the juror by the presiding judge. But plaintiff in error consented through his counsel to the examination, and there is not an intimation that the juror selected in Alexander's place was not as competent as he. Nor can we say that the discharge of Alexander took from the other jurors who had been chosen their competency to try the case or to give to plaintiff in error the right to a new panel. In *Hayes* v. *Missouri*, 120 U. S. 68, it was said "the accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert*,

116 U. S. 642. The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." *Brown* v. *New Jersey*, 175 U. S. 172.

In passing on the action of the trial court in examining Alexander in the absence of plaintiff in error the Court of Appeals said that the court had been compelled to relax the rule prescribed by the statute that "The defendant must be present and shall remain in custody during trial," and cited *Hite* v. *Commonwealth*, 14 Ky. L. R. 308; *Meece* v. *Commonwealth*, 78 Kentucky, 586. In the first case absence from the court room by the accused for a few minutes at a time on account of sickness, the trial continuing in his absence, it was held did not prejudice the substantial rights of the accused.

In *Meece* v. *Commonwealth*, upon the jury coming back to the court room for further instructions, the court made certain alterations in the instructions in absence of the accused but in the presence of his counsel. It was held not to be error, the court saying:

"While we recognize the fact that the accused when on trial for a criminal offense should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence either before or after the submission of the cause to the jury, still this court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the court below, and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a criminal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist except by the legislation of the State on the subject, and when permitting an appeal the lawmaking power has the right to determine for what cause a reversal may be had."

The Court of Appeals also said, in passing on the contention of plaintiff in error, based on the examination of Alexander:

"It has also been held by this court that a trial for felony begins when the jury is sworn. *Willis* v. *Commonwealth*, 86 Kentucky, 68. At the time the examination of Alexander took place and when he was discharged, the jury had not only not been sworn, but it had not been completed.

"There are many rights, some of them guaranteed by the constitution, which one charged with crime may not waive, and should not be permitted by the courts to waive, such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in court as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jurors to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury."

It is manifest, therefore, that it is the law of Kentucky that occasional absence of the accused from the trial, from which no injury results to his substantial rights, is not reversible error. And we think, in applying that rule to the case at bar, plaintiff in error was not deprived of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

It will be observed that the Court of Appeals also decided that, even though the exclusion of Alexander had been error, a reversal of the case was forbidden by section 281 of the Criminal Code of the State, and cited *Curtis* v. *Commonwealth*, 23 Ky. L. R. 267; *Turner* v. *Commonwealth* (not reported); *Alderson* v. *Commonwealth*, 25 Ky. L. R. 32. See also *Commonwealth* v.

Powers, 114 Kentucky, 237, where section 281 was construed the same way. The court, in its construction of section 281, followed the construction established by prior cases, and did not make a discriminating application of that section against plaintiff in error. He was, therefore, not deprived of the equal protection of the laws.

Judgment affirmed.

MR. JUSTICE HARLAN, concurring: The record does not, in my judgment, show an absence of the due process of law enjoined by the Fourteenth Amendment of the Constitution of the United States, as that Amendment has been interpreted by this court. For that reason, and without approving all that is said in the opinion of the court, I concur in the judgment of affirmance.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* DEER.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 164. Submitted December 14, 1905.—Decided January 2, 1906.

Harris v. *Balk*, 198 U. S. 215, followed to the effect that full faith and credit must be given to a judgment rendered against, and paid by, defendant as plaintiff's garnishee in a State, other than that in which plaintiff resides, and in which defendant does business and is liable to process and suit.

THE facts are stated in the opinion.

Mr. George W. Jones for plaintiff in error:

Full faith and credit should have been given by the Alabama courts to the judicial proceedings of said Florida court. The garnishment judgment and its payment in Florida constituted a complete defense to the suit in Alabama. The

failure to so recognize it was a violation of § 1, Art. IV., Constitution of the United States, and act of Congress, May 26, 1790, Rev. Stat., § 905. See *Chi., R. I. & P. Ry. Co.* v. *Sturm*, 174 U. S. 710; *St. L. Ry. Co.* v. *Bartels*, 56 S. W. Rep. 152; *Railway Co.* v. *Thompson*, 31 Kansas, 194; *Fithian* v. *Railroad Co.*, 31 Pa. St. 114; *Railroad Co.* v. *Crane*, 102 Illinois, 249; *Plimpton* v. *Bigelow*, 93 N. Y. 601.

The provisions of the Florida statutes were strictly complied with and the statutes are valid. *King* v. *Cross*, 175 U. S. 396; *Rothschild* v. *Knight*, 184 U. S. 341. The Florida record was valid on its face. *Maxwell* v. *Stewart*, 21 Wall. 71. Foreign corporations doing business by agents within a State are treated as residents of the State, and debts due from them to non-residents are garnishable in that State. *Lancashire Ins. Co.* v. *Corbetts*, 165 Illinois, 592; *National Fire Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468; *Selma R. Co.* v. *Tyson*, 48 Georgia, 351; *German Bank* v. *Am. Fire Ins. Co.*, 83 Iowa, 491; *Consens* v. *Lovejoy*, 81 Maine, 467; Root on Garnishment, § 245; *C., B. & Q. Ry. Co.* v. *Moore*, 31 Nebraska, 629, and cases cited.

Unless the full faith and credit contemplated by the provisions of the Federal Constitution, and the Federal statutes quoted, be given, the plaintiff in error must suffer by twice paying the same debt. It has no alternative.

If defendant in error was aggrieved at the Florida judgment, his remedy was by appeal or other appropriate proceedings in the Florida court. The Florida judgment could not be attacked collaterally in another forum. *Laing* v. *Rigney*, 160 U. S. 542.

There was no appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action to recover a debt admitted to have been due to the plaintiff, the defendant in error. But it was agreed

in the trial court that a suit was brought by one Brock against the plaintiff in Florida, in which the railroad company, the present plaintiff in error, was summoned as garnishee, judgment was recovered against the latter as such for the sum now in suit, and the sum paid by it into court, all before the present suit was begun. The proceedings in Florida were strictly in accordance with the laws of that State. The railroad company did business there and was permanently liable to service and suit, and the defendant, the present defendant in error, was notified by such publication as the statutes of Florida prescribed. He was not, however, a resident of the State, but lived in Alabama, and the Supreme Court of the latter State affirmed a judgment in his favor on the ground that the Florida court had no jurisdiction to render the judgment relied on as a defense.

Whatever doubts may have been felt when this case was decided below are disposed of by the recent decision in *Harris* v. *Balk*, 198 U. S. 215. There the garnishee was only temporarily present in Maryland, where the first judgment was rendered, and the defendant in that judgment was absent from the State, and served only as the defendant in error was served in Florida. Yet the Maryland judgment was held valid, and a decision by the Supreme Court of North Carolina denying the jurisdiction of the Maryland court was reversed. In the present case the railroad company was permanently present in the State where it was served. In view of the full and recent discussion in *Harris* v. *Balk* we think it unnecessary to say more.

Judgment reversed.

CINCINNATI, PORTSMOUTH, BIG SANDY AND POMEROY PACKET COMPANY *v.* BAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 174. Argued December 15, 1905.—Decided January 2, 1906.

Where it appears from the record of a case in a state court that a Federal question was raised, and, in the absence of an opinion, it appears from a certificate made part of the record that it was not raised too late under the local procedure, and that it was necessarily considered and decided by the highest court of the State, this court has jurisdiction to review the judgment on writ of error.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it; and where a contract relates to commerce between points within a State, both on a boundary river, it will not be construed as falling within the prohibitions of the Sherman act because the vessels affected by the contract sail over soil belonging to the other State while passing between the intrastate points.

Even if there is some interference with interstate commerce, a contract is not necessarily void under the Sherman act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law.

A contract for sale of vessels, even if they are engaged in interstate commerce, is not necessarily void because the vendors agree, as is ordinary in case of sale of a business and its good will, to withdraw from business for a specified period.

THE facts are stated in the opinion.

Mr. Ledyard Lincoln, with whom *Mr. Julius L. Anderson* was on the brief, for plaintiff in error:

The contract is void under the Sherman act.

Repeated attempts have been made to restrict the broad and general language of the statute, but the Federal courts and especially this court have uniformly held that the act means just what it says and cannot be confined to unreasonable restraints nor such as were condemned by the common

law before its passage. *United States* v. *Freight Assn.*, 166 U. S. 290, 312, 340; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 573, 575; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271; *S. C.*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, 402; *Ches. & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 610, 619.

The commerce restrained was interstate. Both the Portsmouth Company and the Bays were engaged in steamboating between ports in Pennsylvania, West Virginia, Ohio and Kentucky. Nor was the element of restraint merely ancillary. *Tuscaloosa* v. *Williams*, 127 Alabama, 110, 119.

It cannot be questioned that the transportation of persons and property from one State to another is interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Lottery Case*, 188 U. S. 321, 345.

The transportation of goods on a through bill of lading from one point in a given State to another in the same State by way of an adjoining State or Territory is interstate commerce. *Hanley* v. *Kansas*, 187 U. S. 617.

The States of Kentucky and West Virginia extend to low water mark on the Ohio side, so that even boats plying directly from Syracuse to Cincinnati without stopping at intermediate points would necessarily at ordinary stages of the river pass through parts of West Virginia and Kentucky. *Indiana* v. *Kentucky*, 136 U. S. 479; *Hanley* v. *Anthony*, 5 Wheat. 374; *Booth* v. *Hubbard*, 8 Ohio St. 243; *McFall* v. *Commonwealth*, 2 Metcalf (Ky.), 394.

Contracts not relating directly to interstate commerce, but local in their nature, have been held not within the prohibition of the Sherman act, although the parties contracting in fact sold commodities or solicited business beyond the state line, as the contract must affect interstate commerce directly and not remotely or incidentally. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But see *United States* v. *Freight Assn.*, 166 U. S. 290, 325; *Lufkin* v. *Fringeli*,

57 Ohio St. 596; *Monongahela Co.* v. *Jutte*, 210 Pa. St. 288, and cases cited in note; 74 Am. St. Rep. 235, 273; *Bement* v. *Harrow Co.*, 186 U. S. 92.

The Sherman act prohibits any contract in restraint of trade which would be illegal at common law. As to what would be illegal see *Horner* v. *Graves*, 7 Bingham, 735, 743; 24 Am. & Eng. Ency. of Law, 850, and as to rule in the State of Ohio see *Lange* v. *Work*, 2 Ohio St. 519, 528. See also *United States* v. *Addyston Pipe Co.*, 85 Fed. Rep. 271, and cases cited, p. 290; *Texas* v. *Southern &c. Co.*, 6 So. Rep. 888; *Salt Co.* v. *Guthrie*, 35 Ohio St. 666; *Emery* v. *Candle Co.*, 47 Ohio St. 320; *State* v. *Standard Oil Co.*, 49 Ohio St. 137; *South Chicago* v. *Calumet*, 171 Illinois, 391; *Anderson* v. *Jett*, 89 Kentucky, 375 (a case of competing steamboat lines).

The two packet companies who signed the contract were not engaged in private, but in quasi-public business, and therefore any restraint upon such business would be prejudicial to the public interest and cannot be sustained. *United States* v. *Freight Assn.*, 166 U. S. 333; *Gibbs* v. *Baltimore*, 130 U. S. 396.

The Federal question was raised properly and in time.

If the Federal or jurisdictional question be raised for the first time in the assignments of errors in the Supreme Court of the State, the question is presented in time. *Farmers' Ins. Co.* v. *Dobney*, 189 U. S. 301; *Land & Water Co.* v. *San Jose*, 189 U. S. 179; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, 231; *Rothschild* v. *Knight*, 184 U. S. 334, 339; *Furman* v. *Nichol*, 8 Wall. 44, 56.

Mr. Lawrence Maxwell, Jr., and *Mr. Joseph S. Graydon* for defendants in error:

No Federal question is presented or was properly raised.

The vessels affected by the contract were not engaged in interstate commerce. *Hanley* v. *Kansas City Railway*, 187 U. S. 617, does not apply. See *Lehigh Valley* v. *Pennsylvania*, 145 U. S. 192. The court will not assume facts to make the contract illegal. *Herpolsheimer* v. *Funke*, 95 N. W. Rep. 687;

Jewett Publishing Co. v. *Butler*, 159 Massachusetts, 517; *Mills* v. *Dunham*, 1 Ch. 1891, 576, 586.

Mr. Justice Holmes delivered the opinion of the court.

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the Supreme Court of the State, although the petition in error to that court set up that the contract was illegal under the act of Congress of July 2, 1890, c. 647, 26 Stat. 209. No opinion was delivered, but a certificate that this objection was relied upon and that it necessarily was considered was made part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the State. *Farmers' & Merchants' Insurance Co.* v. *Dobney*, 189 U. S. 301.

The contract was an indenture between the Portsmouth and Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell to the latter two steamers, two deck barges, two coal flats and five hundred dollars in the stock of the Coney Island Wharf Boat Company, for $30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays $3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until the opposition has ceased. It is

further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the States. It would be an extravagant consequence to draw from *Hanley* v. *Kansas City Southern Ry.*, 187 U. S. 617, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Wedding* v. *Meyler*, 192

U. S. 573. A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. Technically, perhaps, there might be some trouble in saying that the Supreme Court of Ohio did not decide the case on the ground that the illegality was not made out as matter of fact.

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose then that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract and, so far as it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the States. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside

certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from any one, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 329, *United States* v. *Joint Traffic Association*, 171 U. S. 505, 568, and it was so decided in the case of a patent. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into consideration for that which was the consideration of his debt and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. 152, 201; *Pigot's Case*, 11 Co. Rep. 26*b*, 27*b*. The plaintiff in error did business between

Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any indirect bearing on commerce with another State, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

Judgment affirmed.

BALLMANN *v.* FAGIN.
BALLMANN *v.* UNITED STATES.

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

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 240, 308. No. 240 argued May 8, 1905.—No. 308 submitted November 27, 1905.—Decided January 2, 1906.

Where a witness is subpœnaed to produce a cash book showing transactions with certain specified persons a charge of contempt in failing to produce a cash book must be confined to a failure to produce one showing transactions with such persons.

The fact that the witness has denied the existence of a cash book showing transactions with certain specified persons does not debar him, when ordered in general terms to produce his cash book, from pleading his privilege to refuse to testify because it might incriminate him.

A person against whom criminal proceedings are pending is no more bound to produce books of account than to give testimony to the facts which they disclose.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, Jr., with whom *Mr. Miller Outcalt* and *Mr. Thomas F. Shay* were on the brief, for appellant:

The appeal was properly taken to this court under § 5, act of March 3, 1891.

The question whether the witness was required to answer the questions propounded to him by the grand jury involves the construction and application of the Fifth Amendment of the Constitution of the United States, and the claim was made in his petition for the writ of *habeas corpus* that his commitment in that respect and others was in contravention of the Constitution. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Horner* v. *United States, No.* 2, 143 U. S. 570; *Dimick* v. *Tompkins*, 194 U. S. 540; *Craemer* v. *Washington*, 168 U. S. 124.

If Ballmann was protected by the Fifth Amendment from answering the questions, the order committing him for refusing to answer is void, and he is entitled to be released on *habeas corpus*. *Ex parte Fisk*, 113 U. S. 713; *Ex parte Ayers*, 123 U. S. 443, 485.

There was no evidence and no circumstances before the District Court to justify it in rejecting the sworn statement of the witness that an answer to the questions might criminate him.

The witness is not obliged to say of what offense he has been guilty or in what way an answer might lead to his detection or conviction, for that would defeat the very object of the privilege. *Lewisohn* v. *O'Brien*, 176 N. Y. 253; *Taylor* v. *Forbes*, 143 N. Y. 219; *United States* v. *Burr*, Fed. Cas. 14,692*e*; *Janvrin* v. *Scammon*, 29 N. H. 290; *Temple* v. *Commonwealth*, 75 Virginia, 892; *Re Kantner*, 117 Fed. Rep. 356; *Chamberlain* v. *Willson*, 12 Vermont, 491; *Warner* v. *Lucas*, 10 Ohio 336.

See *Lawson* v. *Boyden*, 160 Illinois, 613, as to rule on the burden of proof. A witness cannot be deprived of his privilege, on the ground that the offense is barred by limitation, unless it appears affirmatively that no prosecution is pending against him. See also 29 Am. & Eng. Ency. of Law, 842; *Bank* v. *Henry*, 2 Denio, 156; *Henry* v. *Bank*, 1 N. Y. 87; *Southern Ry. News Co.* v. *Russell*, 91 Georgia, 808; *Marshall* v. *Riley*, 7 Georgia, 372; *Matter of Tappan*, 9 How. Pr. 395.

The evidence before the District Court suggested that an

answer to the questions or the production of his books might implicate the witness in several ways.

A witness who claims the privilege of silence is not required to admit that he is guilty. The protection of the Constitution is for the innocent as well as for the guilty. *People* v. *Forbes*, 143 N. Y. 219.

A witness or party in a Federal court is entitled to protect himself against self-crimination under a law of the State in which the court is sitting. *United States* v. *Saline Bank*, 1 Pet. 100. See statute of Ohio against bucket shops, passed February 7, 1899, 86 Ohio Laws, 12; 3 Bates' Annotated Ohio Stat., 4th ed., pp. 3350, 6931, 6934, § 1. Suits under §§ 4271-4276 are actions for penalties. *Cooper* v. *Rowley*, 29 Ohio St. 547.

It is immaterial that the answer of the witness could not be used against him directly. It is enough that it might lead to incriminating disclosures. *Counselman* v. *Hitchcock*, 142 U. S. 547, and in cases approved; *Emery's Case*, 107 Massachusetts, 172.

Where there is no legal evidence to sustain the conviction for contempt for failing to produce a cash book the petitioner is entitled to be discharged on *habeas corpus*. *Watts & Sachs*, 190 U. S. 1, 35; *Iasigi* v. *Brown*, 1 Curtis, 401; Langdell, Eq. Pl., § 211; *Hall* v. *Young*, 37 N. H. 134; *Baggott* v. *Goodwin*, 17 Ohio St. 76, 81.

In order to convict the defendant it was necessary for the Government to prove that a book answering the description of the subpœna was in existence and under his control on April 7. There was no evidence of this fact or of the existence or possession of any cash book after April 3. *Electric Co.* v. *Westinghouse Co.*, 129 Fed. Rep. 105, and cases cited 106.

The presumption of the innocence of the accused has relation to every fact that must be established to prove guilt beyond a reasonable doubt. *Kirby* v. *United States*, 174 U. S. 55; *Coffin* v. *United States*, 156 U. S. 432.

Conjecture cannot take the place of proof. *Chaffee* v. *United States*, 18 Wall. 516.

The court below overlooked the fact that it was forbidden by the act of March 16, 1878, c. 37, 20 Stat. 30, from indulging any presumption against the defendant because he did not testify, and that the court was precluded by § 860, Rev. Stat., from using against him his testimony before the grand jury that he never used a cash book. The District Court found that he was guilty because he did not prove that he was innocent.

Testimony was improperly received under § 860. *Tucker* v. *United States*, 151 U. S. 164.

The order directing Ballmann to produce all books and papers in his control, was repugnant to the Fourth Amendment. *Ex parte Brown*, 72 Missouri, 83; *Ex parte Clarke*, 126 California, 235.

The order of April 8, requiring the defendant to produce a cash book, was unlawful under the Fourth and Fifth Amendments.

Whenever a witness is excused from giving testimony upon the ground that an answer might criminate him, he cannot be compelled to produce books or papers which would have that effect. *Lawson* v. *Boyden*, 160 Illinois, 613, 618; *Boylen* v. *Smithman*, 146 Pa. St. 255, 274; *Boyd* v. *United States*, 116 U. S. 616; 3 Wigmore, Evidence, § 2264.

The Solicitor General for the United States:

The guarantee of the Fourth Amendment was founded on resistance to unwarrantable intrusion by *executive* agents. "General warrants," not naming persons or things, were finally overthrown in the cases of *Wilkes* and *Entick*. Cooley, Const. Lim., 7th ed., 426, 428; *Wilkes Case*, 2 Wils. 151; 19 State Trials, 1405; *Entick* v. *Carrington*, 2 Wils. 275; 19 State Trials, 1030. In America the chief abuse was by writs of assistance from the courts to revenue officers. John Adams' Work, vol. II, 523; 4 Bancroft's Hist. U. S., 414; Quincy Rep. (Mass.)

51, and App., p. 395, for history of writs of assistance, by Mr. Justice Gray; *Boyd* v. *United States, infra.;* 2 Story, Const., 5th ed., § 1901. Such evils have disappeared, and the remedy of the constitutional guarantee must be construed in the light of its origin and purpose, and must not be enlarged beyond its true scope.

The rule of the Fifth Amendment appears first in the canon law phrase, *Nemo tenetur seipsum prodere* (or *accusare*), which grew out of the heresy trials in England early in the seventeenth century.

This court has, however, found an intimate connection between the two Amendments, *Boyd* v. *United States,* 116 U. S. 616, and held that where the thing forbidden in the Fifth Amendment—compelling a man to be a witness against himself—is the object of a search and seizure of his private papers, it is an unreasonable search and seizure within the Fourth Amendment.

In the present case there is neither seizure, search nor arrest.

As to the extent of the protection afforded by the Fifth Amendment see *Counselman* v. *Hitchcock,* 142 U. S. 547; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447; 3 Wigmore, Evidence, 2967; *Brown* v. *Walker,* 161 U. S. 591, in which the danger of extending *Counselman* v. *Hitchcock* was pointed out.

This case is readily distinguishable from the *Counselman case.* There the question related to transactions with which Counselman was manifestly connected and which were under investigation by the grand jury. But Ballmann's real apprehension seems to be that his previous answers will be shown to be untrue.

Perjury is not privileged. It has always formed an exception in immunity statutes. Section 860, Rev. Stat.; Rev. Stat. Kentucky § 1973; *Commonwealth* v. *Turner,* 33 S. W. Rep. 88; Corrupt Practices Acts, 15, 16 Vict., c. 57; 26, 27 Vict., c. 29; *Queen* v. *Hulme,* L. R. 5 Q. B. 377. See also *State* v. *Faulkner,* 75 S. W. Rep. (Mo.) 116; *Mackin* v. *People.*

115 Illinois, 312. Irresistible considerations of public policy, which underlie the law, demand that false swearing shall be punished, and that false swearing shall not block the machinery of justice.

Barring perjury, it does not appear that direct answers to the questions asked could possibly criminate him. It is for the court to determine, in the first instance, whether a direct answer could criminate the witness. He is not the sole judge of the matter, and his mere statement that a direct answer would criminate him is insufficient. For the English rule, see *Reg.* v. *Boyes*, 1 Best. & Smith, 329; *Ex parte Reynolds*, 20 Ch. Div. 294; Best's Law of Evidence, § 128. For the American rule, see 1 Robertson's Burr's Trials, Phila., 1808, 205, 246, and 25 Fed. Cas. No. 14,692*e;* Greenleaf on Evidence, § 451; *Irvine's case*, 74 Fed. Rep. 954; *United States* v. *Miller*, 2 Cr. C. C. 247; *Sanderson's Case*, 3 Cr. C. C. 638; *United States* v. *McCarthy*, 18 Fed. Rep. 87; *Stevens* v. *State*, 50 Kansas, 712; *Ford* v. *State*, 29 Indiana, 541; *Minters* v. *People*, 139 Illinois, 363; *People* v. *Mather*, 4 Wend. 229, 254; *Ex parte Senior*, 37 Florida, 1, 20; *Richman* v. *State*, 2 Green (Iowa), 532; *Printz* v. *Cheeney*, 11 Iowa, 469; *La Fontaine* v. *Southern Underwriters*, 83 N. Car. 132, 141; *Floyd* v. *State*, 7 Texas, 215; *Miskimmons* v. *Shaver*, 8 Wyoming, 392, 418.

In nearly all, if not all, the cases in which the privilege was allowed it was apparent from the question asked that a direct answer would criminate. While not discussing whether it is for the court or the witness to determine if an answer would criminate him, it is regarded as a matter for the court. See *The King* v. *Gordon*, 2 Doug. K. B. Rep. 593; *Paxton* v. *Douglas*, 19 Ves. Ch. 224; *Maloney* v. *Bartley*, 3 Campb. 210; *Cates* v. *Hardacre*, 3 Taunt. 424; *Rex* v. *Pegler*, 5 C. & P. 687; *Fisher* v. *Ronalds*, 16 Eng. Law & Eq. 417; *Emery's Case*, 107 Massachusetts, 172; *In re Graham*, 8 Ben. 419; *Bank* v. *Henry*, 2 Den. 155; *Taylor* v. *Seaman*, 8 Misc. N. Y. 152; *Cullen* v. *Commonwealth*, 24 Gratt. 624; *Smith* v. *Smith*, 116 N. Car. 386; *Lester* v. *Boker*, 6 Blackf. (Ind.) 439; *Johnson* v. *Goss*,

2 Yerg. (Tenn.) 110; *Lea* v. *Henderson*, 1 Coldw. (Tenn.) 146; *Ex parte Clarke*, 103 California, 352.

No connection appears between the questions asked and the proceedings against Ballmann in the Ohio courts based upon his alleged violation of the gambling laws of the State. Direct answers would be that a cash book was referred to and that he used a cash book in his business. It is perfectly lawful to keep and use a cash book in one's business. If the cash book contained criminating evidence, he might doubtless refuse to produce it. But that is not his defense. His contention is merely that it is not now in his possession or under his control, and was not at the time of the service of the subpœna.

The findings of the trial court are conclusive, if there was any competent evidence to support them. *Davis* v. *Schwartz*, 155 U. S. 636; *Grayson* v. *Lynch*, 163 U. S. 472. That there was such evidence is apparent.

The right of Ballmann to control any book used in the conduct of his business cannot be doubted. The existence of the book having been both admitted and proved, it was incumbent upon him to produce it or account for its absence. This is not to require him to establish his innocence.

Nor was he entitled to the benefit of § 860, Rev. Stat., in respect to the ledger which he voluntarily produced or statements which he voluntarily made. *Tucker* v. *United States*, 151 U. S. 164; *United States* v. *Kimball*, 117 Fed. Rep. 156.

Mr. Justice Holmes delivered the opinion of the court.

One of these cases is a writ of error issued by this court to the United States District Court upon a judgment committing the plaintiff in error for contempt, the other an appeal from the Circuit Court for the same district upon a judgment denying the writ of *habeas corpus*, which was applied for on the ground that the same commitment was void.

The case so far as material to our decision, is as follows: On

April 7, 1905, Ballman was served with a subpœna to appear before the grand jury and to bring with him "cash book, ledger, letter press copy book, and all sheets showing transactions under the name of A. Smith and A. Johnson during the months of December, 1904, and January and February, 1905." He appeared before the grand jury, and on the same day the grand jury reported his failure to produce the books and papers called for by the subpœna. The court entered an order as of that day, April 7, that he should produce all books and papers pertaining to his business. On April 8 the grand jury filed charges of contempt against him, in that "being required by said subpœna to produce a certain cash book in use in his business" he refused to do so, and also that he refused to answer the following questions: (*a*) "State what on account No. 140, sheet #1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to wit: No. 349, 349, 349, 349, 349, and 351 refer to?" (*b*) "Do not these figures 349 in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?" On the same day, April 8, the court, after hearing evidence, ordered Ballmann to produce the said cash book and to answer the above questions at noon on April 10, or to be committed to jail until compliance or discharge by due process of law.

On April 10 Ballmann appeared and made the following answers: "I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the names of A. Smith or A. Johnson, and am unable to produce the same."— "I decline to answer the questions contained in said order of April 8, 1905, on the ground that it might tend to criminate me and in this connection I produce copy of a petition filed against me and others by Emanuel Oppenheimer in the court of common pleas of Hamilton county, being case No. 126,824, and I state that there are many other actions of the same kind pend-

ing against me." The petition referred to charged Ballmann and others with conducting a scheme of gambling known as a "bucket shop," criminal conduct under the laws of Ohio, the State where the case was being tried.

Thereupon, upon the same day, the court, without hearing further evidence, reciting its former order and Ballmann's failure to comply with it, ordered him to be imprisoned in accordance with the same. Afterwards a bill of exceptions was allowed, which set forth the proceedings of April 8. It appears that on that day the foreman of the grand jury testified that Ballmann was inquired of with reference to the cash book, and said that there was no such book. (It is fair to read the statement as meaning the same as his formal answer on the 10th and no more.) Other witnesses gave evidence tending to prove the existence of a cash book, although not, or at least not except by very remote inference, a cash book showing transactions under the name of A. Smith or A. Johnson. It also appears that Ballmann's counsel said to the court, "As to the book, we say to your honor that we haven't got it" and also handed the court a paper from Ballmann, reading, "As to the questions asked, I refuse to answer, as they might tend to criminate me."

It appears to us, and it hardly is denied, that the charge of contempt in failing to produce a book, is confined, as it was taken by Ballmann's answer to be confined, to a failure to produce a cash book showing transactions under the name A. Smith or A. Johnson. We assume that the commitment was upon the charge and the order of April 8, not upon the order entered as of April 7. Upon that assumption it might be enough to say that the court was not warranted in finding Ballmann guilty by any evidence which it had before it. There was nothing to show that his answer was not literally true. *In re Watts & Sachs*, 190 U. S. 1, 35, 36. But we need not stop there. Suppose that Ballmann had in his possession a book, which he was privileged from producing and which he wished not to produce. Suppose, also, that he were summoned as he was in this case, and that the book did not show the dealings

described, he could not be criticized very severely for avoiding, if possible, the discrediting claim of privilege, by an answer literally exact. If then he should be asked in general terms to produce his cash book he would not be debarred from pleading his privilege by what he had said before. And without any inclination to enlarge a witness' rights beyond the settled requirements of law, we think that the privilege might extend to any question, the manifest object of which was to prove possession or control as a preliminary to calling for the book.

To determine whether the case which we have supposed is the case at bar we must consider whether we can see reasonable grounds for believing that the book was privileged, or that it was not—it does not matter for our purposes in which form the question is put. The subject under investigation, according to the Government's statement, was the criminal liability of some employé of a national bank from the vaults of which a large amount of cash had disappeared. The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballmann kept a "bucket shop," dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under Rev. Stat. § 5209, and no more bound to produce the book than to give testimony to the facts which it disclosed. *Boyd* v. *United States*, 116 U. S. 616; *Counselman* v. *Hitchcock*, 142 U. S. 547.

Not impossibly Ballman took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a "bucket shop," and so subject to the criminal law of the State in which the grand jury was sitting. According to *United States* v. *Saline Bank*, 1 Peters, 100, he was exonerated from disclosures which would have exposed him to the penalties of the state law. See *Jack* v. *Kansas*, 199 U. S. 372, decided this term. One way or the other we are of opinion

that Ballmann could not be required to produce his cash book if he set up that it would tend to criminate him.

But it is said that he did not set it up, but on the contrary denied the existence of the book. We are not of that opinion. We think that he was giving an answer which, whether too sharp or not, might be true even if he had a cash book within his control. His denial was limited explicitly and with no disguise in the form of statement to a cash book showing transactions under the name A. Smith or A. Johnson. It called attention to the limit by its form. And when thereupon he was asked questions, the manifest meaning of which was to fasten upon him an admission that there was a cash book, he at once declined to answer. Of course it may be that he declined because he knew that further answers would disclose the falsity of his first denial. But the natural explanation of the claim of privilege is that a cash book existed, that Ballmann knew it, and that he believed that if produced it would criminate him in one of the two ways which we have explained. Nothing more need be said about the questions as distinguished from the production of the book. See *Counselman* v. *Hitchcock*, 142 U. S. 547.

We are aware that the courts below came to their conclusions upon the assumption that Ballmann denied generally the possession of a cash book, and that he was before the court for disobedience to an order to produce it. It may be that he now escapes liability as much by luck as by desert. But he is entitled to demand a judgment according to the record, and we are of opinion that on the record fairly construed the judgment of the District Court should be reversed. This decision makes any other than formal action upon the *habeas corpus* unnecessary, and therefore the judgment of the Circuit Court may be affirmed for the purpose of ending the case.

Judgment of the District Court reversed.
Judgment of the Circuit Court affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissent.

UNITED STATES, FOR THE USE OF HILL, *v.* AMERICAN SURETY COMPANY OF NEW YORK.

ERROR TO THE SUPERIOR COURT OF KING COUNTY, STATE OF WASHINGTON.

No. 39. Submitted November 3, 1905.—Decided January 2, 1906.

The act of August 13, 1894, 28 Stat. 278, was passed, as its title declares, for the protection of persons furnishing materials and labor for the construction of public works, and nothing in the statute, or in the bond therein authorized, limits the right of recovery to those furnishing material or labor to the contractor directly; but all persons supplying the contractor with labor or materials in the prosecution of the work are to be protected.

The rule which permits a surety to stand upon his strict legal rights does not prevent a construction of the bond with a view to determining the fair scope and meaning of the contract.

Such statutes are to be liberally interpreted and not to be literally construed so as to defeat the purpose of the legislature.

Under the circumstances of this case, a material man, who had complied with the provisions of the statute as to filing notice, was entitled to recover from the surety company on a bond given under the statute although the materials were furnished to a subcontractor and not directly to the contractor.

THE facts are stated in the opinion of the court.

Mr. Albert W. Buddress for plaintiffs in error:

The act of Congress and bond were intended to cover just such cases as this, and to prevent such a miscarriage of justice. The original contractor could easily kill the effects of the statute, and avoid all liability on the bond by merely subletting all of its work.

Of the two classes of laborers, the employés of subcontractors stand most in need of the protection of the statute. *Redmond* v. *Galena, &c. R. Co.*, 39 Wisconsin, 426; *Mullin* v. *United States*, 48 C. C. A. 677; *United States* v. *Farley*, distinguished, and see *Sepp* v. *McCann*, 47 Minnesota, 364; *Fidelity Co.* v. *United States*, 191 U. S. 416.

Principals and sureties on such bonds are liable, under simi-

lar state statutes, for labor and material furnished to subcontractors. Cases *supra* and *Mullin* v. *United States*, 48 C. C. A. 677; *George* v. *Washington &c. R. Co.*, 93 Maine, 134; *Branin* v. *Connecticut &c. R. Co.*, 31 Vermont, 214; *Kent* v. *New York &c. R. Co.*, 12 N. Y. 628; *Mundt* v. *Sheboygan &c. R. Co.*, 31 Wisconsin, 451; *Mann* v. *Corrigan*, 28 Kansas, 194; *Peters* v. *St. Louis &c. R. Co.*, 24 Missouri, 586; *Grannahan* v. *Hannibal &c. R. Co.*, 30 Missouri, 546; *French* v. *Powell*, 135 California, 636; *Gilmore* v. *Westerman*, 13 Washington, 390; *Abbott* v. *Morrissette*, 46 Minnesota 10; *Bassett* v. *Mills*, 89 Texas, 162; *Garrison* v. *Borio*, 61 N. J. Eq. 236; *Ferguson* v. *Despo*, 8 Ind. App. 523; 23 Am. & Eng. Ency. of Law, 2d ed., 723. Diligent search has not revealed any case holding the contrary.

The object of the bond cannot be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the beneficiary. *Guarantee Co.* v. *Mechanics' Savings &c. Co.*, 183 U. S. 402. A remedial statute should be liberally construed with reference to the purpose of its enactment. *Bechtel* v. *United States*, 101 U. S. 597. The "intent" of the law must prevail over the letter of the statute. *Lionberger* v. *Rowse*, 6 Wall. 468; *Smythe* v. *Fiske*, 23 Wall. 374; *United States* v. *Freeman*, 3 How. 556; *Durousseau* v. *United States*, 6 Cranch, 308.

What is implied in a statute is as much a part of it as what is expressed. *United States* v. *Hodson*, 10 Wall. 395; *Baltimore* v. *Root*, 8 Maryland, 95; Broom's Leg. Max., 611; *Rutledge* v. *Crawford*, 91 California, 523.

The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed. *Bell* v. *New York*, 105 N. Y. 139; *Bullock* v. *Horn*, 24 Ohio St. 420; *Tuttle* v. *Montford*, 7 California, 358; *Barnes* v. *Thompson*, 2 Swan (Tenn.),

313; Sedgwick, Stat. Con., 308; *Jones* v. *Great Southern Hotel*, 30 C. C. A. 108.

Public property cannot be the subject of a lien, unless the statutes shall expressly so provide; it is by implication excepted from lien statutes, as much as from general tax laws, and for the same reasons. *Knapp* v. *Swaney*, 56 Michigan, 345; *Bates* v. *Santa Barbara*, 90 California, 543. But it is also true that "the State when engaged in the construction of public buildings, is chargeable with a moral duty to protect persons furnishing labor and material therefor." *Korsmeyer* v. *McClay*, 43 Nebraska, 649; *Knapp* v. *Swaney*, 56 Michigan, 345; *Baker* v. *Bryan*, 64 Iowa, 561; *Philadelphia* v. *Stewart*, 195 Pa. St. 309; *St. Louis* v. *Von Phul*, 133 Missouri, 564.

The right of plaintiff in error, however, does not depend only on a substitute for a lien but also on the implied agency of the subcontractor for the contractor. *Bates* v. *Santa Barbara*, 90 California, 543; *Kent* v. *New York Central R. Co.*, 12 N. Y. 628; *Surety Co.* v. *Cement Co.*, 110 Fed. Rep. 717; *Garrison* v. *Borio*, 61 N. J. Eq. 236. See also *Parker* v. *Gray*, 7 Gray, 429.

Mr. Henry C. Willcox for defendant in error, cited *United States* v. *Farley*, 91 Fed. Rep. 477; *United States* v. *Simon*, 98 Fed. Rep. 73; *United States* v. *Mullin*, 48 C. C. A. 677.

Mr. Justice Day delivered the opinion of the court.

This case was decided on demurrer in the court below. It was held that no cause of action was stated by the plaintiff, and judgment was rendered accordingly. Plaintiffs brought action as partners against the American Surety Company upon a bond given in pursuance of the act of August 13, 1894. 28 Stat. 278, c. 280. The allegations of the petition, so far important as to be noticed here, are: The defendant is a corporation duly authorized to do a general insurance and bonding business. On February 14, 1891, the New Jersey Foundry and Machine Com-

pany entered into a written contract with the United States, for the construction of four observation towers, for the agreed compensation of $2,575. That, among other things, it was stipulated in the contract "that the said New Jersey Foundry and Machine Company shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material," the work to be completed within seven months from date of contract. The United States required of the said New Jersey Foundry and Machine Company a bond, which was executed by the company and the American Surety Company as surety, on the fourteenth day of February, 1901, in the penal sum of $4,000, to be paid unto the United States of America, which bond contained the condition: "Now, therefore, if the above bounden New Jersey Foundry and Machine Company shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements in and by said contract agreed and covenanted by said New Jersey Foundry and Machine Company to be observed and performed, according to the true intent and meaning of said contract, and as well during any period of extension of said contract that may be granted on the part of the United States, as during the original terms of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue." That afterwards the said New Jersey Foundry and Machine Company entered into a contract with the Richard Manufacturing Company for certain portions of the work, and said Richard Manufacturing Company entered upon the performance of the contract, and in the performance thereof between the third day of April and the seventeenth day of May, of the same year, Daniel H. Hill and Howard H. Hill, the plaintiffs, at the special instance and request of the said Richard Manufacturing Company, scraped and painted the four observation towers, to be constructed under the contract with the said New Jersey Foundry and Machine Company, for which said

Richard Manufacturing Company agreed to pay the said plaintiffs the sum of $246.80, of which there is unpaid the sum of $141.80. That on the eleventh day of August, 1903, plaintiffs made the affidavit required by the statute, and procured from the Secretary of War of the United States certified copies of the original contract and bonds; that the said New Jersey Foundry and Machine Company, the Richard Manufacturing Company and the United States accepted the said scraping and painting so done and performed by the plaintiffs in the necessary prosecution of the work required by the original contract.

The statute under consideration is entitled "An act for the protection of persons furnishing materials and labor for the construction of public works." It provides, in substance, that persons entering into formal contracts with the United States for the construction or repair of public buildings and works shall be required, before performing such work, to execute the usual penal bond with good and sufficient surety, with the additional obligation "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work provided for in such contract." The statute further provides for the furnishing of a copy of the contract and bond to persons furnishing an affidavit that labor and materials for the prosecution of such work have been supplied by him or them, and giving a right of action in the name of the United States for the benefit and use of said person or persons against the contractor and his sureties.

We may remark, before considering the construction to be given this act, that it has been materially amended by the act of February 24, 1905. 33 Stat. 811. The amended act makes provision for preference in payment in favor of the United States, limits the time in which actions may be brought, provides for bringing all the creditors into one action, and for the prosecution of the same in the name of the United States in the Circuit Courts of the United States in the district in which the contract was to be performed, and not elsewhere. In respect to the persons entitled to the benefit of the bond there has been

no material change in the act. While not governing the present action the amended statute has some bearing in construing the act in question, as it shows the consistent purpose of Congress to protect those who furnish labor or material in the prosecution of public work.

In considering the statute and determining the scope of the bond divergent views have been urged upon the court. Upon the one hand it is insisted that the bond is to be strictly construed and a recovery limited to those who have furnished material or labor directly to the contractor, and upon the other that a more liberal construction be given and a recovery permitted to those who have furnished labor and materials which have been used in the prosecution of the work, whether furnished under the contract directly to the contractor, or to a subcontractor.

This statute was before this court in *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, and while the question whether surety companies which are such for compensation are entitled to the same strict construction of their rights and obligations as is accorded to private sureties, who become such without reward or profit, was left open, it was nevertheless said: "The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a subcontractor, as was the case in *United States* v. *American Bonding & Trust Company*, 89 Fed. Rep. 921, 925, or to cases not otherwise within the scope of the undertaking."

The courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for

the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of buildings to be owned and enjoyed by those who profit by the contribution of such labor or materials. *Mining Co.* v. *Cullens*, 104 U. S. 176, 177. And the rule which permits a surety to stand upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determining the fair scope and meaning of the contract in the light of the language used and the circumstances surrounding the parties. *Ulster County Savings In.* v. *Young*, 161 N. Y. 23, 30.

As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual. The purpose of the law is, as its title declares: "For the protection of persons furnishing materials and labor for the construction of public works." If literally construed, the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end.

Statutes are not to be so literally construed as to defeat the purpose of the legislature. "A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter." *United States* v. *Freeman*, 3 How. 556. "The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." Chief Justice Marshall in *Durousseau* v. *United States*, 6 Cranch, 307.

Looking to the terms of this statute in its original form, and

as amended in 1905, we find the same Congressional purpose to require payment for material and labor which have been furnished for the construction of public works. The affidavit to be filed with the head of the department under the direction of which the work has been prosecuted requires the affiant to state that labor or materials for the prosecution of such work has been supplied by him, for which payment has not been made, and such persons are given a right of action on the bond in the name of the United States. Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work. There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be "supplied" to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated.

We cannot conceive that this construction works any hardship to the surety. The contractor gets the benefit of such work or material. It is distinctly averred in this case that the original contractor received the benefit of the work done and it was used in part performance of his contract. It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish

work or labor to go into the structure. In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is "to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract." This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to construct a public building, he is thereby supplied with the materials and labor for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials.

We reach the conclusion that the labor and materials furnished in this case were within the obligation of the Surety Company on the bond, and in that view

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

ALABAMA GREAT SOUTHERN RAILWAY COMPANY *v.* THOMPSON.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 58. Argued November 9, 1905.—Decided January 2, 1906.

A question certified must be one the answer to which is to aid the court in determining a case before it.

The right of a defendant jointly sued with others to remove the case into the Federal court depends upon the case made in the complaint against the defendants jointly, and that right, in the absence of showing a fraudulent joinder, does not arise from the failure of complainant to establish a joint cause of action.

In determining whether a case may be removed by one defendant the question is not what the rule of the Federal court may be as whether or not the action is joint, but whether the controversy is one made removable by Congress in § 2 of the act of March 3, 1887, August 13, 1888.

A railroad corporation may be jointly sued with the engineer and conductor of one of its trains when it is sought to make the corporation liable only by reason of their negligence, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence.

Such a suit is not removable by the corporation, as a separable controversy, even though the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, if the citizenship of the individual defendants sued with the company as joint tort-feasors is identical with that of the plaintiff.

THE facts are stated in the opinion.

Mr. Edward Colston, with whom *Mr. Judson Harmon, Mr. A. W. Goldsmith, Mr. George Hoadly* and *Mr. Edmund F. Trabue* were on the brief, for Alabama Great Southern Railway Company:

Parties cannot be guilty of a joint tort unless each has contributed to the harmful result. In the present case the company, itself, has not been an actor in that which caused the

injury. Its sole responsibility is because in law it is surety for the conduct of these servants. On that account alone it is sued. Such responsibility does not make it proper to join them with the company in an action. The liability of the individual defendants is because they did the thing that brought about the injury. Such liability is entirely separate from that of the company. The questions propounded state the case of a principal neither present at, nor directing nor concurring in, the act which produces the injury.

This liability on the part of the master is enforceable only in trespass on the case, while on the other hand, the servant is liable in trespass *vi et armis*. 4 Harv. L. Rev. 355; Holmes on Common Law, 9, 15, 20; Pollock on Torts, 6th ed., 75; *C. & O. Ry.* v. *Dixon*, 179 U. S. 131, distinguished; and see *Winston's Adm'r* v. *I. C. R. Co.*, 23 Ky. L. R. 1285; *Elliott* v. *Felton*, 119 Fed. Rep. 270; *Mulchey* v. *Methodist Society*, 125 Massachusetts, 487; *Campbell* v. *Sugar Co.*, 62 Maine, 552; *Warax* v. *C. N. O. & T. P. Ry.*, 72 Fed. Rep. 637; *Sherrod* v. *L. & N. W. R. R. Co.*, 4 Exch. *580; Pomeroy on Code Remedies, 4th ed., § 208; Bliss on Code Pleadings, § 83; 17 Am. & Eng. Ency. of Law, 1st ed., 602; *Parsons* v. *Winchell*, 5 Cush. 592; *Hewitt* v. *Swift*, 3 Allen, 420; *Bailey* v. *Bussing*, 37 Connecticut, 349; *Sellick* v. *Hall*, 47 Connecticut, 260; *Page* v. *Parker*, 40 N. H. 47; *Clark* v. *Frye*, 8 Ohio St. 377; *Bennett* v. *Fifield*, 13 R. I. 139; *Cole* v. *Lippett*, 22 R. I. 31; *Trowbridge* v. *Forepaugh*, 14 Minnesota, 133; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. Cas. 154.

For decisions of various Circuit Courts and Courts of Appeals, in which this question has been elaborately and ably discussed, and in which it has been held that in cases like the present the action is not joint and that master and servant cannot be sued jointly, see cases *supra* and *Beuttel* v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed. Rep. 50; *Fergason* v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep. 177; *Hartshorn* v. *A., T. & S. F. R. R.*, 77 Fed. Rep. 9; *Doremus* v. *Root*, 94 Fed. Rep. 760; *Helms* v. *Northern Pac. Ry.*, 120 Fed. Rep.

389; *Davenport* v. *Southern Ry.*, 124 Fed. Rep. 983; *Gustafson* v. *Chi., R. I. & P. Ry. Co.*, 128 Fed. Rep. 87, 88; *Shaffer* v. *Union Brick Co.*, 128 Fed. Rep. 99; *McIntyre* v. *Southern Ry. Co.*, 131 Fed. Rep. 985.

The argument thus far has proceeded upon the supposition of a liability on the part of the two individual defendants. But in the case represented by the questions certified no liability is shown on the part of the conductor and engineer of the train and there is no reason why they or either of them should be made parties defendant. *Lane* v. *Cotton*, 12 Modern, 472, 488; Wharton on Agency, § 536; *Cameron* v. *Reynolds*, 1 Cowp. 403; *Williams* v. *Cranston*, 2 Starkie, *82; 1 Blackstone's Comm., *431; 1 Shearman & Redfield on Negligence, 5th ed., 243; 20 Am. & Eng. Ency. of Law, 2d ed., 52; Story on Agency, 9th ed., § 308; *Denny* v. *Manhattan Co.*, 2 Denio, 115; *Colvin* v. *Holbrook*, 2 N. Y. 129; *Murray* v. *Usher*, 117 N. Y. 546; *Van Antwerp* v. *Linton*, 35 N. Y. Supp. 318.

The question has been thoroughly discussed and the same conclusion arrived at, in *Feltus* v. *Swan*, 62 Mississippi, 415; *Steinhauser* v. *Spraul*, 127 Missouri, 541; *Delaney* v. *Rochereau & Co.*, 34 La. Ann. 1128; *Henshaw* v. *Noble*, 7 Ohio St. 226, 231; *Kelly* v. *Chicago &c. Ry. Co.*, 122 Fed. Rep. 289.

One of the tests by which to determine whether parties may be sued on a joint tort is whether the same proof would make a case against each. That test fails where the master's liability depends only upon his relation of master; because, to hold the servant liable, it would be necessary only to prove the doing of the act; but in order to make the master liable it is necessary to prove, in addition thereto, the agency of the servant and also that the injurious act was within the scope of such agency.

Where there is no liability on the part of the servant as, we think, is the case here, his joinder in an action with the master should not prevent a removal and defeat the object of the removal statute.

The construction of § 2, act of March 3, 1887, August 13,

1888, presents a Federal and not a state question. Accordingly, the judgment of Federal courts and not of state courts must be the criterion. This act confers a right of removal in certain specified cases, and the state legislatures have no power to alter, amend, or abolish this Federal right, directly, or by indirection. This statute confers the right of removal, and was passed for that express purpose, upon a non-resident citizen finding himself involved in a controversy with a citizen of the State of the forum when the controversy is one determinable between them alone. This provision takes no account of who may be parties to the action in which the controversy be found, nor of what may be the rules of practice, whether common law or statutory, of the State in which the action may be pending. *Removal Cases,* 100 U. S. 457, 468; *Blake* v. *McKim,* 103 U. S. 336; *Evers* v. *Watson,* 156 U. S. 527; *Barney* v. *Latham,* 103 U. S. 205.

The statute is meant to operate in all the States, and, nevertheless, the practice in any of those States may differ from that in any other State. There is no intimation in the statute that the separableness of the controversy, or its determinability between the citizens is to be determined by the practice, or the statutes of any State. Federal jurisdiction cannot be abridged or modified by any state statute. *Hyde* v. *Stone,* 20 How. 173; *Smyth* v. *Ames,* 169 U. S. 466; *Brow* v. *Wabash,* 164 U. S. 271. *Plymouth Co.* v. *Amador,* 118 U. S. 264, distinguished.

Mr. E. S. Daniels, Mr. J. V. Williams and *Mr. John O. Benson* for Thompson:

Under the practice and laws of Tennessee, the Supreme Court of such State recognizes the right to jointly sue the master and servants under like circumstances as those existing in this case, and this being true the Federal courts in most, if not all, the cases in which the question of the state law and practice were involved, have held that they will follow the practice of the state court. *Connell* v. *Utica Railroad Co.,* 13

Fed. Rep. 241; *Railway Co.* v. *Dixon*, 179 U. S. 131; *Charman* v. *Railway Co.*, 105 Fed. Rep. 449; *Southern Ry. Co.* v. *Carson*, 194 U. S. 136; *Swain* v. *Tennessee Copper Co.*, 111 Tennessee, 433; *Jones* v. *Ducktown Co.*, 109 Tennessee, 375, 386.

Under the facts alleged in the declaration in this case, plaintiffs' right of action is based not only upon the common law, but a violation of a statute of Tennessee. Shannon's Code, § 1574, par. 4. *Railroad Co.* v. *Pratt*, 85 Tennessee, 9, distinguished.

While the authorities are in conflict as to the right of joinder under the facts certified in this case, still we believe the authorities, both in numbers and in reasoning, largely preponderate in favor of the right of joinder. Most, if not all, the Federal cases which hold a contrary doctrine seem to follow *Warax* v. *Railway Co.*, 72 Fed. Rep. 637, which has been criticised and is error; see *Riser* v. *Southern Ry. Co.*, 116 Fed. Rep. 215, and Federal cases *supra.*

There are numerous state decisions to the effect that joint liability exists under the facts of this case. *Wright* v. *Compton*, 53 Indiana, 337; *Schumper* v. *Southern Ry. Co.*, 65 S. Car. 355; *Wright* v. *Wilcox*, 19 Wend. 343; *Phelps* v. *Waite*, 30 N. Y. 78; *C. N. & O. Ry. Co.* v. *Cook*, 67 S. W. Rep. 383; *Cook* v. *Winston*, 55 L. R. A. 603; *McHugh* v. *Nor. Pacific*, 72 Pac. Rep. 450; *Howe* v. *Railroad Co.*, 70 Pac. Rep. 100; *Schaefer* v. *Osterbrink*, 67 Wisconsin, 495; *Newman* v. *Fowler*, 37 N. J. L. 89; 1 Shearman & R. on Neg., 5th ed., § 248; Cooley on Torts, 1st ed., 142; Wood on Master & Servant, 2d ed., § 325; 1 Estee's Pleading, § 1834; 15 Ency. Pl. & Pr. 560.

The rule that there can be no contribution between joint tort feasors, has no application in cases where the master is held liable for the negligence of the servant under the rule of *respondeat superior*. *Gray* v. *Boston Co.*, 114 Massachusetts, 149; Story on Partnership, § 220; *Betts* v. *Gibbons*, 2 Ad. & El. 57; *Wooley* v. *Batte*, 2 C. & P. 417; *Bailey* v. *Bussing*, 28 Connecticut, 455; 7 Am. & Eng. Ency. of Law, 364.

When the removal is based upon the allegation of a separ-

able controversy, the whole suit goes to the Federal court. *Barney* v. *Latham*, 103 U. S. 205.

The removal statute provides that before the right of removal exists, "there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them. *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 432.

At the same term at which this certificate was made, the same court held that the negligent acts of an individual defendant, under similar circumstances to those in the present case, constituted actionable negligence against him, and that no separate controversy existed. *American Bridge Co.* v. *Hunt*, 130 Fed. Rep. 302.

Mr. Justice Day delivered the opinion of the court.

This case is here on a certificate from the United States Circuit Court of Appeals for the Sixth Circuit. The certificate states the facts and propounds the questions as follows:

"This was an action in tort brought by the administrator of Florence James for the negligent killing of the intestate by the defendant railroad company.

"The suit was started in a Circuit Court of the State of Tennessee and a declaration was there filed.

"The plaintiff was a citizen of Tennessee.

"The defendants were the Alabama Great Southern Railway Company, a corporation organized under the laws of Alabama, and William H. Mills and Edgar Fuller, both citizens of the State of Tennessee.

"The case was then removed into the court below upon petition of the railroad company alone, upon the ground that a separable controversy, involving more than $2,000, exclusive of interest and costs, existed between the petitioner and the plaintiff, as to whom diversity of citizenship existed, which could be tried out without the presence of either of the indidual co-defendants of petitioner.

"A motion to remand to the state court because no removable separable controversy appeared was overruled.

"Thereupon an issue was made and the case heard by court and jury, and a judgment rendered in favor of the plaintiff and against the railroad company alone.

"From this judgment the railroad company sued out this writ of error.

"Upon the hearing in this court the court raised the question as to whether the court below had rightfully acquired jurisdiction by the removal proceedings referred to, the removal being grounded only upon the question of separable controversy appearing upon the face of the declaration of the plaintiff at the time of the application for removal.

"That declaration substantially averred that the intestate of the plaintiff had been negligently, wrongfully and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants, William H. Mills, as conductor, and Edgar Fuller, as engineer.

"Entertaining grave doubt as to whether a joint right of action was stated against the railroad company and the two individual defendants, who were servants of the railroad company, it is ordered that the foregoing statement be certified to the Supreme Court, and that the instruction of that court be requested for the proper decision of the following questions which arise upon the record:

"1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally

present or directing and not charged with any concurrent act of negligence?

"2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tort-feasors being identical with that of the plaintiff?"

A question certified must be one the answer to which is to aid the court in determining a case before it. *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266. And it is evident that the matter to be determined in the case pending, desiring which the opinion of this court is asked, is the removability of the case brought in the state court against the railroad company and the individual defendants. We shall answer the questions in that view.

The right to remove the controversy is founded upon section 2 of the act of March 3, 1887, as corrected August 13, 1888, (1 Suppl. Rev. Stat. 611). It is therein provided, among other things, "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

The case was removed upon the theory that it contains a separable controversy between the non-resident railroad company and the plaintiff. The removal act of 1875, as amended in 1887, 1888, in the part quoted above as to separable controversies, has been the subject of frequent adjudication in this court. Independent of statute, there is much conflict in the authorities as to whether a corporation, whose liability does not arise from an act of concurrence or direction on its part, but solely as a result of the relation of master and servant, may be jointly sued with the servant whose negligent conduct directly

caused the injury. In a leading case in this court, *Chesapeake & Ohio Ry. Co.* v. *Dixon*, 179 U. S. 131, many of the cases were reviewed by the Chief Justice who delivered the opinion, and it was shown that in a number of English and American cases it has been held that, as to third persons, the master is responsible for the negligence of his servant in a joint action against both, to recover damages for an injury. In the cases of *Warax* v. *Cincinnati, N. O. & T. P. Railroad Co.*, 72 Fed. Rep. 637, a case which has been much cited and sometimes followed in the Federal courts, it was held that a joint action could not be sustained against master and servant for acts done without the master's concurrence or direction, when his responsibility arises wholly from the policy of the law, which requires that he shall be held liable for the acts of those he employs in the prosecution of his business. And it was held that the petition against the engineer and the company presented a case of misjoinder, and could be removed on the application of the non-resident company.

In the case of *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, suit was brought against a railroad company and several of its servants for an injury alleged to have been caused by the joint negligence of all. Mr. Justice Gray, delivering the opinion of the court, said:

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.' A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final de-

cision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 600, 601; *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599; *Torrence* v. *Shedd*, 144 U. S. 527, 530; *Connell* v. *Smiley*, 156 U. S. 335, 340."

After thus stating the rule, the Justice commented on the *Warax case, supra*, as a departure from the former ruling of the Circuit Court. And while the *Powers case* was decided on the ground of the right to remove after the local defendants had been dismissed from the action by the plaintiff, it is patent from the language just quoted from the opinion that, conceding the misjoinder of causes of action appeared on the face of the petition, that fact was not decisive of the right of the non-resident defendant to remove the action to the Federal court.

And in *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599, 601, the same eminent judge, speaking for the court, said:

"It has often been decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the Circuit Court of the United States, under the act of March 3, 1875, c. 137, § 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. 18 Stat. 471; *Pirie* v. *Tvedt*, 115 U. S. 41; *Sloane* v. *Anderson*, 117 U. S. 275; *Plymouth Company* v. *Amador & Sacramento Co.*, 118 U. S. 264; *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535.

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner—unless the petitioner both alleges and proves that the defendants were wrongfully made

joint defendants for the purpose of preventing a removal into the Federal court."

The language quoted by Mr. Justice Gray in the *Powers case* was used by Chief Justice Waite in delivering the opinion of the court in *Louisville & Nashville Railroad Company* v. *Ide*, 114 U. S. 52. The Chief Justice said: "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith* v. *Rines*, 2 Sumner, 348. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way." It is true, as suggested by counsel, that Mr. Justice Gray used the word "seeks" instead of "elects"; but we do not perceive that this change deprives the doctrine announced of its force and effect.

The language is used of an action begun in the state court, and it is recognized that the plaintiff may select his own manner of bringing his action and must stand or fall by his election. If he has improperly joined causes of action he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal, *Wilson* v. *Oswego Township*, 151 U. S. 56, 66, and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal. *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *Graves* v. *Corbin*, 132 U. S. 571; *Little* v. *Giles*, 118 U. S. 596; *East Tennessee, V. & G. R. R.* v. *Grayson*, 119 U. S. 240; *Torrence* v. *Shedd*, 144 U. S. 527; *Chesapeake & Ohio R. R.* v. *Dixon*, 179 U. S. 131; *Southern Ry.* v. *Carson*, 194 U. S. 136.

In *Whitcomb* v. *Smithson*, 175 U. S. 635, an action was brought by Smithson in a state court of Minnesota against the Chicago Great Western Railway Company and Whitcomb

and Morris, receivers of the Wisconsin Central Company, to recover for personal injuries while serving the Chicago Great Western Railway Company as a fireman, as the result of a collision between the locomotive upon which he was at work and one operated by the receivers, who were officers of the Federal court. The railway company answered, and the receivers filed a petition for removal to the United States Circuit Court. The case was thereafter remanded by the Federal court, that court holding there was no separable controversy and that the joinder was in good faith Upon the trial in the state court a verdict was directed by the court in favor of the railway company. Thereupon the receivers asked permission to file a supplemental petition for removal, and upon proffer of a petition and bond the application was denied, and a verdict was returned against the receivers only. Of this feature of the case the Chief Justice, delivering the opinion of the court, said:

"The contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the Circuit Court. This might have been so if when the cause was called for trial in the state court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum*."

In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action.

The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders, which are shown by the petition for removal, or otherwise, to be attempts to sue in the state courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.

In the present case there is nothing in the questions propounded which suggests an attempt to commit a fraud upon the jurisdiction of the Federal courts.

As shown in the opinion of the Chief Justice in the *Carson case, supra,* the cases are in difference as to whether a common law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleged a joint cause of action.

Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy

wholly between citizens of different States. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal court.

As early as 1816 this court, in determining a question of jurisdiction, was governed by the character of the suit brought by the plaintiff. In *New Orleans* v. *Winter,* 1 Wheat. 91, it was held that a citizen of a Territory could not sue in a Federal court by joining with himself a citizen of another State. The opinion was delivered by Chief Justice Marshall, who said (p. 95): "In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

It is urged with much earnestness by the learned counsel for the company that this view works a surrender of the right of determination of Federal rights in the Federal courts, and deprives non-resident citizens of their rights to appeal to those tribunals. The decision of a state court, that such actions as the present might be joint at common law, would have no controlling effect in the Federal courts in determining the question in causes properly before them. And the question here is not what is the rule of the Federal courts in similar cases, but is, what controversies has Congress made removable in the act under consideration? Congress has not said, whatever it might do, that controversies between citizens of different States shall be removable wherein it is sought, contrary to the law as administered in the Federal courts, to hold the citizen of another State to joint liability in tort with a citizen of the State where the action is brought. The fact that the state court may take a different view from the courts of the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal.

The Federal courts in some States hold a different rule as to

the doctrine of fellow-servants from that administered in the state courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the State permits an action to be prosecuted jointly which would be held to be several only in the courts of the United States. The applicant for removal has been duly summoned into a cause in course of prosecution in the state court. All of the defendants not being non-residents it can remove only if it presents a separable controversy, which can be wholly determined between itself and the plaintiff. The test of such controversy, as this court has frequently said, is the cause of action stated in the complaint. That is joint in character, and there is no attack upon the good faith of the action. In such case we hold that no separable controversy is presented within the meaning of the act of Congress.

We answer the first question: That for the purpose of determining the right of removal the cause of action must be deemed to be joint. The views herein expressed lead to an answer to the second question in the negative.

In this opinion we have taken no account of the peculiar statute of Tennessee as to the liability of railroads for injuries to persons on the tracks, as its effect is not presented in the questions propounded, nor is it stated that the injury was received in the State of Tennessee.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY *v.* BOHON.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 177. Argued December 15, 1905.—Decided January 2, 1906.

Alabama Southern Railway v. *Thompson, ante*, p. 206, followed to effect that a railroad corporation, sued jointly with its servant for negligence of the latter for which the former is responsible, may not remove the case into the Federal court unless diversity of citizenship also exists as to the other defendants.

A State has the right by its constitution and laws to regulate actions for negligence; and where it provides, as has been done by § 241 of the constitution and § 6 of the statutes of Kentucky, that a plaintiff may proceed jointly or severally against those liable for the injury, nothing in the Federal removal statute converts such an action into a separable controversy for the purposes of removal, because of the presence of a nonresident defendant therein properly joined under the law of the State wherein it is conducting operations and is duly served with process.

THE facts are stated in the opinion.

Mr. John Galvin and *Mr. Edward Colston* for plaintiff in error.

Mr. John W. Yerkes and *Mr. Robert Harding* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case was considered by this court at the same time with the *Alabama Southern Railway Co.* v. *Thompson, ante*, p. 206, just decided, and we need not repeat the discussion therein had as to the construction of the removal act of 1887, under the decisions of this court. This case has an additional feature which we shall proceed to notice. The action was brought by

the defendant in error as administrator of Edward Cook, deceased. The petition charged that the plaintiff's intestate was engaged in the yards as a brakeman and switchman, and was uncoupling and giving attention to the cars of the defendant company, which cars and an engine attached thereto were in charge of the defendant Milligan as engineer engaged in operating, managing and controlling the same for the defendant company, and while plaintiff's intestate was thus engaged the defendant company and the defendant Milligan caught and crushed said Cook's body between the cars of the train, by and through the gross negligence of Milligan and of defendant company, in the operation, management and control of the engine and train; that the injuries to the plaintiff resulted in his death a few minutes thereafter, and when so caught and crushed said Cook was engaged in discharging his duties as brakeman to the defendant company; the death of said Cook was caused as aforesaid by the gross negligence and carelessness of defendant company and Milligan. The railroad company filed its petition in the state court for the removal of the cause to the United States Circuit Court for the Eastern District of Kentucky, upon the ground that there was a separable controversy between the petitioner, a resident and citizen of Ohio, and the plaintiff below, who was a citizen and resident of Kentucky. The Circuit Court of Mercer County refused to remove the case, and a verdict and judgment were rendered for the plaintiff below. Upon appeal to the Court of Appeals of Kentucky, the judgment was reversed for errors occurring at the trial. At a second trial the verdict and judgment were rendered for the plaintiff below, which was again reversed and remanded. On the third trial the verdict and judgment were again rendered for the plaintiff below, which judgment was affirmed by the Court of Appeals of Kentucky. The sole question argued here is as to the correctness of the state court in refusing to order the removal of the cause, which judgment was affirmed by the Kentucky Court of Appeals.

The action for death by negligence is regulated by the Ken-

tucky constitution and statutes. Section 241 of the constitution provides:

"Whenever the death of a person shall result from an injury inflicted by negligence, or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same. . . ."

Section 6 of the Kentucky statutes reads as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence, or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful and the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased. . . ."

This statute undertakes to give an action for negligence against the companies or corporations responsible therefor and their agents or servants causing the same. The statute has been before the Court of Appeals of Kentucky, and in the case of *Winston's Administrator* v. *Illinois Central Railroad Co.*, 111 Kentucky, 954, 957, that court said of the state constitution and this statute:

"The constitution and statutes of this State, as construed by the repeated adjudications of this court, make the railroad company liable for the acts of the agents and servants in charge of its trains. If a servant is guilty of such negligence, while acting for his master as will make the master responsible, then in such a case the servant is personally and equally responsible with the master for the damages resulting from the negligent act. The mere fact that the master may be responsible for the wrongful act of the servant does not relieve the servant from a joint liability with the master for the wrongful act which produced the injury and damage."

In the case under consideration, in the opinion of the court upon the question of right of removal, while it expressed the

view that the weight of authority was in favor of the right to join the master and servant in actions for negligence, it reiterates its former view of the Kentucky statutes, citing *Chesapeake & Ohio Railroad Co.* v. *Dixon's Administrator*, 104 Kentucky, 608, and the *Winston case*, above referred to, and quoted from that case, with approval:

"By the terms of this section, where death results from the negligent act, a recovery may be had therefor against the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. . . . The plaintiff has a right to proceed severally or jointly against those who are liable for the injury inflicted resulting in death."

We then have a case in which the extent of the right to recover damages for negligence is prescribed by the constitution and statutes of the State of Kentucky, and which the courts of that State have construed to give a joint cause of action against the corporation and its agents or servants causing the same. In a recent case this court had occasion to deal with the question of removal under the separable controversy clause, *Southern Railway Co.* v. *Carson*, 194 U. S. 136, on a writ of error to the Supreme Court of South Carolina. An action had been jointly brought in the state court against the Southern Railway Company, a corporation of Virginia, and Arwood, conductor, and Miller, the engineer, residents of Greenville County, South Carolina, charging the joint and concurrent negligence of the servant and the company, because of a defective coupler and the careless management of the train, and the railroad company claimed to have been deprived of the right of removal by the allegation of a joint and concurrent tort, unless the state court would charge that no recovery could be had unless a joint liability was shown, which it refused to do. After commenting upon the action, the Chief Justice, who delivered the opinion of the court, stated that the right of removal depends upon the act of Congress, that the company upon the face of the pleadings did not come within the act, and had made no effort to assert this right, and citing the passage in *Powers* v.

Chesapeake & Ohio Railway Co., 169 U. S. 92, quoted in the *Alabama Great Southern Railway Co.* v. *Thompson, supra,* said:

"The view thus expressed was reiterated in *Chesapeake & Ohio Railway Co.* v. *Dixon,* 179 U. S. 131, where the subject was much considered and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. *Schumpert* v. *Southern Railway Co.*, 65 S. Car. 332. In that case it was held that, under the state Code of Civil Procedure, in actions *ex delicto,* acts of negligence and willful tort might be commingled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant committed within the scope of his employment and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution, was without merit, as the rule was, as laid down by Mr. Cooley (Torts, page 145), that: 'As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.' And see *Gardner* v. *Railway Co.*, 65 S. Car. 341. In *Rucker* v. *Smoke,* 37 S. Car. 377, and *Skipper* v. *Clifton Mfg. Co.*, 58 S. Car. 143, it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the State deprived the company of its property by the rulings of the Supreme Court calls for no remark."

While the case did not show an attempt to remove, the discussion of the subject by the Chief Justice strongly intimates that if the action was properly joint in the forum in which it was being prosecuted it could not be removed as a separable controversy under the act of Congress. We have under consideration an action for tort which by the constitution and

laws of the State, as interpreted by the highest court in the State, gives a joint remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff elects to make joint. (See cases cited in *Alabama Great Southern Railway Co.* v. *Thompson, supra.*) A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process.

Judgment affirmed.

ARMOUR PACKING COMPANY *v.* LACY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 53. Argued November 8, 1905.—Decided January 8, 1906.

The construction, by the highest court of a State, that a license tax imposed on meat packing houses was exacted from a foreign corporation doing both interstate and domestic business only by virtue of the latter, is not open to review in this court.

The Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, or

through its undoubted power to impose different taxes upon different trades and professions; and imposing a license tax on meat packing houses is not an arbitrary and unreasonable classification which will render the tax void under the Fourteenth Amendment, as denying the equal protection of the laws. Nor is it a denial of equal protection of the law because the tax is not imposed on persons not doing a meat packing house business but selling products thereof, or because it is not imposed on persons engaged in packing articles of food other than meat.

Where the highest court of the State has so construed the act, a foreign corporation selling its products in the State, but whose packing establishments are not situated in the State, is not for that reason exempt from such a license tax.

The court will not interfere with the conclusion expressed by the highest court of the State that under the provisions of the state constitution a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.

THIS was "a controversy without action," submitted in accordance with the laws of North Carolina in that behalf, in the Superior Court of Buncombe County, that State, in which B. R. Lacy, Treasurer of North Carolina, was plaintiff, and Armour Packing Company was defendant.

By the revenue law of North Carolina of March 9, 1903, Public Laws, N. Car., p. 323, c. 247, it is provided in Schedule B:

"SEC. 26. *Defining taxes under this schedule.* Taxes in this schedule shall be imposed as license tax for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule. . . ."

"SEC. 56. *Packing houses.* Upon every meat packing house doing business in this State, one hundred dollars for each county in which said business is carried on."

"SEC. 88. *Unless prohibited, county may levy same license tax as State.* In case where a specific license tax is levied for the privilege of carrying on any business, trade or profession the county may levy the same tax, and no more: *Provided,* no provision to the contrary is made in the section levying the specific license tax."

Section 107 of chapter 251 of Public Laws of 1903 (p. 407), reads:

"SEC. 107. *State Treasurer to sue for taxes.* Upon failure to pay to the State Treasurer within thirty days after the same shall have become due, any tax which by law is made payable direct to the State Treasurer, it shall be his duty to institute an action to enforce the same in the county of Wake, or in the county in which the property taxed is located."

The third section of article V of the constitution of North Carolina provides:

"Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; . . . The general assembly may also tax trades, professions, franchises, and incomes, . . ."

It appeared from the facts agreed, as in substance stated by the Supreme Court of North Carolina, that the Armour Packing Company was incorporated in New Jersey, but has its principal office and place of business in Kansas, that business being "a meat packing house business," and that it has property in North Carolina; that "a meat packing house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other purposes is carried on. The products thus prepared consist of fresh and cured meats, such as hams, dry salt sides, bacon, lard, beef extracts, glue, blood, tankage, etc." That the Armour Packing Company "does not anywhere within the State of North Carolina slaughter, dress, cure, pack or manufacture any products hereinbefore set forth, of any animal, for food, or for commercial use, or for other purposes;" but that after the animals are slaughtered, dressed and prepared for food or other commercial purposes in Kansas, such product is shipped in bulk to Wilmington, Greensboro, Asheville, Charlotte and Fayetteville, N. C., where the company has cold storage plants and warehouses, and sold from such storage plants, some of such product to parties in North Carolina and some to parties outside of that State; that part of said products shipped to

the cold storage warehouse in Asheville, Buncombe County, remain there until disposed of in due course of trade on orders taken and received after said products have been stored or placed in said warehouse or cold storage plants. At each of said five points in North Carolina, where the company maintains a warehouse and cold storage plants, it has one or more employés, *i. e.*, bookkeepers, stenographers, shipping clerks, salesmen, drivers, laborers who box said meats and who wrap and crate goods for delivery as they are sold. There are in Wilmington and other cities of said State commission merchants, brokers and butchers who sell by wholesale and retail in competition with the Armour Packing Company, who are not engaged in a meat packing-house business in North Carolina or elsewhere, fresh, cured and salt meats and other products that have been manufactured from the carcasses of slaughtered animals for food and commercial purposes, and under the laws of North Carolina said commission merchants, brokers and butchers are not amenable to the tax levied under section 56 of said revenue act of 1903. At all points in North Carolina where the Armour Packing Company is engaged in business, and at various other places in said State, there are engaged in business, as the Armour Packing Company is engaged, packing houses which pack articles of food other than meat and offer them for sale in said State, such as peas, beans, tomatoes, corn, pumpkins, fruit, fish, oysters, etc. The products of said packing houses are articles of food and commerce and are sold in the State of North Carolina through agents, brokers, wholesale and retail merchants, just as the products packed by the Armour Packing Company are sold.

The ruling of the court was invoked on certain points stated, all of which were adjudged adversely to defendant, and judgment was rendered against it for the tax and costs, which was affirmed by the Supreme Court of North Carolina. 134 N. Car. 567.

Mr. Thomas B. Felder, Jr. for plaintiff in error:

Corporations are persons within the provisions of the Four-

teenth Amendment to the Constitution of the United States. *Santa Clara County* v. *Southern Pacific Ry.*, 118 U. S. 394; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *Missouri Pacific Ry.* v. *Mackey*, 127 U. S. 205; *Minn. & St. L. Ry.* v. *Herrick*, 127 U. S. 210; *Minn. & St. L. Ry.* v. *Beckwith*, 129 U. S. 26; *Charlotte & Col. R. R.* v. *Gibbs*, 142 U. S. 386; *Turnpike Co.* v. *Sanford*, 164 U. S. 578.

A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens. *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 154.

A tax on the privilege of selling goods is in effect a tax on the goods themselves. 117 Georgia, 969; *Welton* v. *Missouri*, 91 U. S. 275; *Brown* v. *Maryland*, 12 Wheat. 419.

What must constitute a denial of the equal protection of the law, will depend in this view, in a large measure upon what rights have been guaranteed under the constitution of the State. *N. C. & St. L. Ry.* v. *Taylor*, 86 Fed. Rep. 186.

Uniformity in taxation has been guaranteed by the constitution and laws of North Carolina. See 2 Code of 1883, 706; *State* v. *Moore*, 113 N. Car. 697; *Worth* v. *Railroad Co.*, 89 N. Car. 291; *Pruitt* v. *Commissioners*, 94 N. Car. 709; *Railroad Tax Case*, 92 U. S. 575; *State* v. *Powell*, 100 N. Car. 525; Tiedeman Lim. of Police Power 1, 101; Cooley Taxation, 403; *Re Jacobs*, 98 N. Y. 98; Cooley Const. Lim. 201, 494, 574; *Kansas City* v. *Crush*, 151 Missouri, 135; *St. Louis* v. *Sternberg*, 69 Missouri, 289; *St. Louis* v. *Speigel*, 75 Missouri, 145; Dillon Mun. Corp., § 768; *Ward* v. *Maryland*, 12 Wall. 418.

There must be no discrimination between members of a class. *Home Ins. Co.* v. *New York*, 134 U. S. 606; *Grozza* v. *Turnan*, 148 U. S. 662. The States have the power of classification subject to rule that classification must not be arbitrary or on unreasonable grounds. *Magoun* v. *Illinois Trust Co.*, 170 U. S. 298; *Atchison Railway* v. *Matthews*, 174 U. S. 156; *Cargill Co.* v. *Minnesota*, distinguished.

The act is a burden on interstate commerce. *Allen* v. *Pullman Co.*, 191 U. S. 171.

Mr. Robert D. Gilmer, Attorney General of the State of North Carolina, for defendant in error:

The Supreme Court of North Carolina has declared that the statute applies solely to business within North Carolina, and that it does not apply to or affect any interstate business; the statute does not violate the commerce clause of the Constitution. The act does not contravene the constitution of the State, sec. 3, art. V of the constitution of North Carolina, that taxation shall be by uniform rule *ad valorem* applies only to the tax upon property, for it also provides that the General Assembly may also tax trades without any requirement of uniformity as to the latter. *Gatlin* v. *Tarboro,* 78 N. Car. 119. A tax on trades is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. Burroughs on Taxation, §77; *State* v. *Stevenson,* 109 N. Car. 730.

The legislature possesses the power to classify occupations by statutory enactment, and classification in tax statutes will not contravene the rule of uniformity when the tax is imposed alike upon all of a class. *Albertson* v. *Wallace,* 81 N. Car. 479; *State* v. *Cohen,* 84 N. Car. 771; *State* v. *Powell,* 100 N. Car. 525; *State* v. *French,* 109 N. Car. 722; *Cobb* v. *Commissioners,* 122 N. Car. 307; *State* v. *Green,* 126 N. Car. 1032; *State* v. *Carter,* 129 N. Car. 560; *State* v. *Hunt,* 129 N. Car. 686; *State* v. *Roberson,* 136 N. Car. 587.

The General Assembly had the power to create as a classification for taxation "meat packing houses" as a separate and distinct class. *Ford* v. *State,* 112 Indiana, 373, 378; *Stewart* v. *Atlanta Beef Co.,* 93 Georgia, 12; *Stewart* v. *Kehrer,* 115 Georgia, 184.

The decision of the state court that the act does not contravene the constitution of North Carolina is conclusive. *Duncan* v. *McCall,* 139 U. S. 449; *Leeper* v. *Texas,* 139 U. S. 462; *O'Neill* v. *Vermont,* 144 U. S. 323; *McNulty* v. *California,* 149 U. S. 645; *Lambert* v. *Barrett,* 157 U. S. 697; *Bergemann* v. *Backer,* 157 U. S. 655; *Kohl* v. *Lehlbach,* 160 U. S. 293; *Howard* v. *Fleming,* 191 U. S. 126.

The act does not deny the plaintiff in error the equal protection of the laws.

While a foreign corporation may sell its goods in a State or solicit sales in the transaction of interstate commerce as a right, it can only establish itself in a State and do business therein as a privilege granted by the State. *Paul* v. *Virginia,* 8 Wall. 177. The whole matter rests with the State. It may absolutely exclude a corporation organized in another State. *Lafayette Ins. Co.* v. *French,* 18 How. 404; *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28; *Cable* v. *Life Ins. Co.,* 191 U. S. 288, 307.

While this court has declared that taxes imposed for revenue should be equal, and that there should be no discrimination, it has not decided that provisions for equality are applicable to license taxes. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Cotting* v. *Stock Yards Co.,* 183 U. S. 79; *Connolly* v. *Sewer Pipe Co.,* 184 U. S. 540 distinguished; and see also as to extent to which classification by legislative enactment has been upheld, *Cargill Co.* v. *Minnesota,* 180 U. S. 452; *Savannah Ry. Co.* v. *Savannah,* 198 U. S. 392; *Kidd* v. *Alabama,* 188 U. S. 730.

Assuming that uniformity and equality are applicable to a license tax, the act is valid as the tax is levied upon every packing house doing business in the State, whether domestic or foreign meat packing houses. The principle of uniformity and of "the equal protection of the laws" secured by the Fourteenth Amendment are not violated so long as the tax rests alike upon all persons or corporations belonging to the particular class as classified by legislative enactment. *Gulf, Col. & Santa Fé Ry.* v. *Ellis,* 165 U. S. 150, and cases cited, p. 155.

There is no denial of the equal protection of the laws to the plaintiff, inasmuch as it is amenable, and parties who sell packing house products by wholesale and retail are not, because those parties are not doing, either in North Carolina or elsewhere, a packing house business, and are therefore not embraced within the terms of the statute.

A statute is not void as denying the equal protection of the laws to meat packing houses because packing houses confined to articles other than meat are not amenable to the same tax. *Cook* v. *Marshall County,* 191 U. S. 261, 275.

The Armour Packing Company is exercising in North Carolina some of the functions for which the corporation was created, and is therefore doing a packing-house business in North Carolina. *Stewart* v. *Kehrer,* 115 Georgia, 184, 188.

With the disposition of state questions by the appropriate state authorities it is not the province of this court to interfere. *Lambert* v. *Barrett,* 157 U. S. 698.

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

The Supreme Court of North Carolina stated the contentions of the Armour Packing Company thus:

"1. That it is not engaged in doing a packing-house business in this State; . . . 2. That the tax is an interference with interstate commerce; 3. That the tax contravenes section three of article V of the constitution of North Carolina, which requires that taxation be 'by uniform rules;' 4. That the tax is forbidden by the Fourteenth Amendment to the Constitution of the United States; 5. That singling out 'meat packing houses' is arbitrary or class legislation, and prohibited by both State and Federal Constitutions."

The court said:

"If the business of the defendant was solely that of shipping food products into this State, consigned directly to purchasers on orders previously obtained, it is clear that this would be interstate commerce and a tax laid by the State upon such business would be illegal. But the defendant does a large business within the State, the selling of products already stored here on orders received after these products are thus stored. The tax is laid upon every meat packing house 'doing business in this State.' The evident meaning of the legislature is to

tax the agency 'doing business within this State', and not to lay any tax upon the interstate commerce of shipping products into the State to be directly or indirectly delivered to purchasers whose orders were obtained before the goods were shipped."

And, after recapitulating from the agreed statement the particulars of the business transacted in North Carolina, the court applied the rule that the legislature could prescribe such conditions as it saw fit on the transaction of business by a foreign corporation within the State, and held that the license tax was the condition upon which defendant was permitted to do the business so described; and cited *Osborne* v. *Florida*, 164 U. S. 650, as decisive on the question that the license tax applied only to business within the State and not to that which was interstate in its character; and added: "The defendant doing business in this State and the license tax being exacted only by virtue of its intrastate business, the first two grounds of objection are overruled."

As was said in *Osborne* v. *Florida*, this construction of a state statute by its highest court is not open to review; and accepting it the case plainly comes within *Kehrer* v. *Stewart*, 197 U. S. 60. That was a writ of error to the Supreme Court of Georgia (117 Georgia, 969; 115 Georgia, 184), involving the constitutionality of a statute imposing a tax upon packing house agents and the liability of an agent of Nelson Morris & Company, a meat packing firm of Chicago, to pay it. It was contended that Morris & Company did not slaughter, dress, cure, pack or manufacture the products of animals for food anywhere in the State of Georgia, and that therefore the firm was not doing a packing-house business within the State; that the statute violated the commerce clause of the Constitution, and that it was invalid in that it denied the equal protection of the laws. These contentions were overruled by the Supreme Court of Georgia and this court affirmed the judgment. And among other things it was there said:

"The act in question does not deny to the petitioner the

equal protection of the laws, as the tax is imposed alike upon the managing agent both of domestic and of foreign houses. . . . There is no discrimination in favor of the agents of domestic houses, and, while we may suspect that the act was primarily intended to apply to agents of *ultra* state houses, there is no discrimination upon the face of the act, and none, so far as the record shows, upon its practical administration. As we have frequently held, the State has the right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. *Cook* v. *Marshall County*, 196 U. S. 261, 275. What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other States, the amount and necessity of the tax are not open to criticism here." 197 U. S. 69.

This practically disposes of the fourth and fifth contentions, since the classification of meat packing houses cannot be said to be an arbitrary selection or not to rest on reasonable grounds, and the Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, or through the undoubted power of classification to impose different taxes upon different trades and professions.

"A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings." *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, 562.

And see *Cargill Company* v. *Minnesota*, 180 U. S. 452; *Kidd* v. *Alabama*, 188 U. S. 730; *Savannah, Thunderbolt &c. Ry. Co.* v. *Savannah*, 198 U. S. 392; *Minnesota Iron Company* v. *Kline*,

199 U. S. 593; *Cable* v. *United States Life Insurance Company*, 191 U. S. 288, 307.

By the act under consideration the tax is levied upon every packing house doing business in the State, which includes by its terms both domestic and foreign meat packing-houses. It is true that it appears that where the Armour Packing Company does business certain persons sell both by wholesale and retail packing-house products, and yet are not subjected to this tax, but also that those parties are not doing either in North Carolina or elsewhere a packing house business. And so it appears that in North Carolina, at the points where the Armour Packing Company is engaged in business, and at other places in the State, there are establishments engaged in business, which pack articles of food other than meats, such as peas, beans, pumpkins, etc., and offer them for sale; but we cannot accept the suggestion that the statute is void as denying the equal protection of the laws to meat packing-houses because houses packing vegetables and the like are not included in the same classification and subject to the same tax.

As to the contention that the act is in violation of section 3 of article V of the state constitution, the state Supreme Court held that this tax, although not a property or *ad valorem* tax, was controlled, even if the requirement of uniformity were applicable, by the rule that "a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed." And with that conclusion it is not our province, nor are we disposed, to interfere.

Judgment affirmed.

MR. JUSTICE BROWN, with whom was MR. JUSTICE PECKHAM, dissenting.

The main, and practically the only question in this case is whether the Armour Packing Company was a "meat packing house doing business" in the State of North Carolina within

the meaning of the statute. The seventh and eighth items of the stipulation of facts are as follows:

"7. A meat packing house is a place where the business of slaughtering animals and dressing and preparing the products of their carcasses for food and other purposes is carried on. The products thus prepared consist of fresh and cured meats, such as hams, dry salt sides, bacon, lard, beef extracts, glue, blood, tankage, etc.

"8. Said Armour Packing Company does not anywhere within the State of North Carolina slaughter, dress, cure, pack or manufacture any products hereinbefore set forth, of any animal, for food, or for commercial use, or for other purposes."

As one article of the findings defines the meat packing business to consist in doing certain things, and the very next article declares that none of these things are done within the State, it is difficult to say that, notwithstanding these findings of fact, there is a conclusion of law that the company is doing a meat packing business in that State. The Packing Company doubtless falls within the letter of the statute. It does a meat packing business in Kansas City. It does a business in North Carolina. But as we have said in numerous cases, a thing may be within the letter of a statute and not be within its spirit. *United States* v. *Babbitt*, 1 Black, 55. The letter of the statute in this case would be satisfied if the Packing Company did a furniture or dry goods business in North Carolina, yet it would clearly not be within the intent of the statute. If, for instance, the tax were upon breweries, and the beer were all manufactured out of the State and then shipped into the State for sale and distribution, is it possible that the defendant would be liable for doing business as a brewer? So if the tax were imposed upon manufacturers of carriages, and all the manufacturing were done in Chicago, and the carriages shipped into North Carolina and there sold, the defendant would be liable as a dealer in carriages, but certainly not as a manufacturer. The business done at the five cold storage plants, which consists in packing the meats and wrapping them for delivery as

they are sold, *is not mentioned* in the seventh finding, even as an incidental part of the packing business. Much less even is the business of selling meats at retail as ordinary butchers do. Yet, in the opinion of the court, the company was doing a meat packing-house business within the State. In the view of the minority the business done within the State must be a meat packing business, and not the business of selling meats either at wholesale or retail, and when the meat packing house is accurately defined in the stipulation, and no part of the business thus defined appears to have been done within the State, it is impossible to support the tax.

The case resembles that of *Kehrer* v. *Stewart*, 197 U. S. 60, in many particulars, but with the vital difference that the law of Georgia imposed a tax upon "all *agents* of packing houses doing business within this State, $200, in each county where said business is carried on." As the tax was imposed upon agents of packing houses, and not upon the packing houses themselves, the court was unanimously of the opinion that the managing agents of foreign packing houses were subject to the tax. But in this case the act attempts to reach out and tax packing houses doing business *as such* exclusively in another State.

With the utmost deference to the opinion of the court, we are constrained to dissent from its view.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA also dissented upon other grounds.

HALLENBORG *v.* COBRE GRANDE COPPER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 87. Argued November 29, December 1, 1905.—Decided January 8, 1906.

This was a minority stockholder's suit to set aside a contract made for the sale of a large block of stock of the corporation under an arrangement made by the respective owners thereof with the party making the sale who was also president of the corporation. The contract was ratified by a majority of the stockholders and by the directors but against complainant's protests. It contained provisions for payments to the president for services. Complainant charged fraud, alleged a conspiracy between the president and the purchaser and asked for a receiver and an accounting. Other suits were brought in other courts in which similar charges were made. *Held*, that:

On the record of this case the charges of fraud were not sustained and the complaint was not established.

Where the allegations in the suit in which fraud is alleged are held to be untrue, records of other suits in which like charges were made and sustained on *ex parte* statements cannot be regarded as evidence of the fraud.

THIS is a minority stockholder's suit. It was brought originally by Axel W. Hallenborg as owner of 8,617 shares of the Cobre Grande Copper Company, an Arizona corporation, and also as creditor of that corporation, for advances to the amount of $50,005. The appellant Addicks owned 5,000 shares and was allowed to intervene at the trial, and adopted Hallenborg's complaint.

In November, 1898, defendant (appellee) Greene owned certain mining properties in Sonora, Mexico, and had an option on other properties. He gave an option on these properties to defendant Mitchell. It was provided in the option that $12,500 should be paid in cash and $237,500, as follows: $37,500 on or before November 26, 1899; $100,000 on or before November 26, 1900; $100,000 on or before November 26, 1901.

In April, 1899, Greene, Mitchell and other parties, under the laws of Arizona, organized the Cobre Company. One hundred and ninety-nine thousand nine hundred and ninety-five shares of the stock were turned over to Mitchell in consideration of his option from Greene, which option was assigned to the Cobre Company subject to Greene's rights. The Cobre Company went into possession and was in possession in September, 1899. In October of that year controversies arose between Greene and the company over the option and the right to possession of the properties, and Greene entered into possession of them. Thereupon the company instituted suits in the courts of Mexico to gain possession of the properties, and also instituted a suit in the District Court of Maricopa County, Arizona, to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell, which had been assigned to the Cobre Company. In the latter suit an injunction was granted restraining Greene from demanding or receiving the deeds. A suit was also brought in New York and one in Texas to recover the product of the mines. In the suit in Arizona the Cobre Company alleged, among other things, in substance, all the facts set forth in paragraph three of the original complaint in the present suit, and prayed that Greene be required to account for the proceeds of the products of the mines and other property alleged to have been appropriated by him. Issue was joined by the defendants therein, the case tried and a judgment entered dismissing the complaint. The judgment was not appealed from. At the time of the judgment the plaintiffs were stockholders of the Cobre Company.

While the litigation was pending the stockholders of the Cobre Company, or a majority of them, comprising stockholders to the number of 115,049 shares, entered into a pooling arrangement, whereby all of their stock was delivered to defendant Gage, with power to vote the same at all meetings of the stockholders. Subsequently Gage was granted the right to dispose of and sell the stock at his discretion. Several attempts were made by Gage to sell the stock at $2.50 a share, which

failed on account of the other contracting parties not complying with their contracts. The plaintiff Hallenborg and John H. Costello opened negotiations with Gage for the stock at $2.50 a share. This also failed on account of objection by Costello to the contract which was drawn, although negotiations were kept up until December, 1900. Then Gage opened negotiations with Greene, who offered to buy the stock, upon better terms than anybody else had offered. Gage consulted the directors and they urged him to enter into a contract with Greene. The stock represented by Gage represented the entire stock of the company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates and about 6,500 shares owned by other parties. Gage entered into a contract with Greene, December 12, 1900, and it was ratified in its entirety by the directors and by a majority vote of the stockholders. Hallenborg was present by attorney at the meeting and protested against the ratification. The contract was complied with by Greene and he paid the full purchase price for the shares, and they were delivered to him and the Greene Copper Company. All of the stockholders accepted the money so paid except Hallenborg, who returned the money sent to him and declined to be bound by the contract.

The court finds that the contract was made with Greene in good faith, with full knowledge and consent of the directors and upon the advice of counsel of the Cobre Company, that the company could not successfully maintain the suit brought in Arizona, and with the full belief on the part of Gage that the contract was for the best interest of the company and its stockholders. And the court further finds that no agreement was made between Gage or other persons, whereby the directors, Adamson, Wood, O'Keefe, or any of them, were to derive benefit or did derive any benefit whatsoever, except such as they derived from the sale of their stock.

The contract of December 12, between Gage and Greene, provided for the payment of the stock in certain instalments. Greene was to pay to Gage $25,000 in cash in addition to the

$2.50 per share, and also to pay to Gage $30,000, and in addition 3,000 shares of the capital stock of the Greene Consolidated Copper Company, or, in lieu thereof, $30,000 in cash. Gage was given the privilege of taking, instead of $2.50 per share for shares of stock in the Cobre Company, stock in the Greene Consolidated Copper Company—four of the former for one of the latter—the option to be exercised before payment of the second instalment on the stock of the Cobre Company. Five thousand shares of the Greene Consolidated Copper Company were provided to be paid to Gage for his own use and benefit, and 5,000 shares for the use and benefit of L. H. Chalmers, Baker & Bennett, and Herndon & Norris, attorneys at law in Arizona.

It was also agreed that a certain promissory note given by J. H. Costello to the Cobre Company, amounting to $23,000, was to be surrendered to Costello. This note was conditioned upon the Cobre Company obtaining possession of its property in Mexico, and was not to be paid until ninety days after such recovery. It was also agreed that the suits brought by the Cobre Company in New York, Texas, and Arizona should be dismissed. The other provisions of the contract are but incident to those before given and may be omitted. The suits in New York are still pending. All the other suits were dismissed or otherwise disposed of by final judgment prior to this suit. The $25,000 mentioned in the contract of December 12 was for the purpose of taking up and discharging certain notes due by the Cobre Company. It was so paid. The $30,000 mentioned was to be and it was turned into the treasury of the company to pay its debts. The 3,000 shares in the Greene Consolidated Company, or the alternative $30,000, was also for the purpose of paying the debts of the Cobre Company outside of the $25,000 before mentioned. It was paid into the treasury. The 5,000 shares of stock in the Greene Consolidated Company was intended by all parties as compensation to Gage as president of the Cobre Company, and for the time, labor and trouble given to the company's business, and for

money advanced for it and expenses paid in attending to its affairs. Instead of shares, as provided, a cash payment of $50,000 was made to him. The shares paid to Chalmers and Baker & Bennett and Herndon & Norris were intended to be paid as compensation as attorneys for the company for their services in various litigations. Instead of the shares a cash payment of $50,000 was made, and it is found that their services were reasonably worth that sum. The note against Costello was surrendered to him.

The court also finds that the only property in possession of the Cobre Company within the jurisdiction of the court is the money paid into the treasury of the company in pursuance of the contract of December 12. And, finally, the court finds "that the temporary restraining order granted in this action, enjoining the defendants from carrying out the terms and provisions of the contract of December 12, 1900, and dismissing any and all of the actions then pending in behalf of the Cobre Grande and enjoining defendant Phœnix National Bank from delivering up any of the papers and documents held by it in escrow, evidencing the title held by the Cobre Grande Copper Company in and to the mining property described in the complaint, was modified, and the part of it enjoining the Phœnix National Bank was dissolved upon the ground that the District Court in and for Maricopa County had rendered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that as a part of the judgment of said court the Phœnix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that as this case now stands there is nothing before the court except an application for the appointment of a receiver."

Mr. Albert B. Cruikshank for appellant.

Mr. Aldis B. Browne, with whom *Mr. Eugene S. Ives, Mr. Ben Goodrich, Mr. Alexander Britton* and *Mr. Norton Chase* were on the brief, for appellees.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

Both of the lower courts held that the suit had become one for the appointment of a receiver. The Supreme Court said: "The purpose for which a receiver is asked is twofold so far as the record is concerned: First, that he may take charge of the property of the company; second, that he may prosecute its litigation." After some comment the court further observed that the District Court was well within the exercise of a sound discretion in refusing to appoint a receiver, and "that there was not any other relief which the court could properly grant the plaintiffs in the action." We do not find it necessary to decide whether, if plaintiffs' complaint were true, they would not be entitled to greater relief than the appointment of a receiver. We rest our judgment on the merits. In other words, we think the complaint has not been established.

The complaint charges a conspiracy between Greene and Mitchell, being at the time directors of the Cobre Company, to deprive the company of its mines and property and acquire it for themselves, and that in pursuance of the conspiracy they took possession of the company's property. No evidence was offered in the present suit to sustain the charge. Records of suits in which like charges were made cannot be regarded as such. The complaint also charges the contract of December 12, 1900, to be a "fraudulent and corrupt contract and conspiracy of Greene with Gage and other directors of the Cobre Company, to stop the litigation against defendants and to secure to them the undisputed possession of the mines" from which the Cobre Company had been evicted. Both of the lower courts found against the charge. They found that Gage entered into the contract with the knowledge of the directors of the Cobre Company, and in good faith, upon the advice of counsel of the futility of further pursuing the litigation against Greene and in the belief that "the contract was to the best interest of said company and its stockholders." It may be admitted that

Greene's purpose was to stop the litigation against him and quiet his possession of the property, but we cannot assume from this that he was guilty of fraud in making the contract of December 12, or that it was part of a conspiracy with the directors of the Cobre Company to deprive the company of its property. Therefore any fraud in fact is out of the case.

Plaintiffs, however, contend that the contract is fraudulent on its face, and that it was decided so to be by the Appellate Division of the Supreme Court of New York in *Hallenborg* v. *Greene*, 66 App. Div. N. Y. 590. The pleadings are not set out in the report of the case. We may assume, however, that the complaint was in most part as that in the case at bar.

The case went to the Appellate Division of the Supreme Court on an appeal from an order granting a preliminary injunction and appointing a receiver. It was heard on the complaint and affidavits of the plaintiff. The affidavits of the defendants were by stipulation omitted from the record. Upon the showing thus made the court said:

"According to the complaint and affidavits the Cobre Company was not only a solvent corporation, but its assets were exceedingly valuable; and through conspiracy, fraud and bribery the defendants Greene and Mitchell have obtained the management and control thereof to further their own schemes, in hostility to the interests of the other stockholders, and have actually obtained a contract from the Cobre Company to transfer to these rival companies controlled and managed by Greene and Mitchell all its property and property rights, without even a nominal consideration. This fraudulent contract was being consummated with dispatch at the time of the commencement of this action and the granting of the injunction herein. These allegations must be taken as true for the purposes of this appeal, and it is evident that the inevitable consequence will be, not only that the stock of the Cobre Company, of which the plaintiff is a large holder—owning one twenty-fifth of the entire capital stock—will be rendered worthless, but that there will

be no assets with which to pay the claims of creditors, of whom, also, the plaintiff is one for a substantial amount.

"It needs no refinement of the decisions to show that the cause thus presented is one for equitable cognizance."

The allegations of the plaintiff were taken to be true, and being so taken the comments of the court may claim justification. In the case at bar the allegations of the complaint, as far as they are passed on, are found to be untrue. The opinion of the Appellate Division, therefore, is of no value to plaintiffs' contention.

We are remitted, therefore, to the contract of December 12. What fraudulent element is there in that? It disposed of the shares of the stockholders and it secured the payment of money to the corporation; it settled controversies which, as far as appears, the company had no means of prosecuting, and which, wherever they were tried, had been decided against the company, and where not decided, in the opinion of the company's attorney, would also be decided against the company. We may assume that the stockholders knew or could estimate the value of the properties. They deposited their stock with Gage to sell, became, indeed, impatient at his delay. We may assume the price of the stock reflected the value of the properties—Hallenborg bought his shares at $2.50. He had an option upon all that were in Gage's hands at that price. He let the option lapse, although negotiation was kept up with him from October to December. Gage then turned to Greene, who, it is found, offered to purchase the stock on better terms than anybody else ever offered. And there was no concealment. Gage was urged by the directors of the company and a large majority of the stockholders to make the contract. It was subsequently formally ratified by the directors and by a majority vote of the stockholders at a stockholders' meeting.

But there were three other elements from which plaintiffs deduce fraud. Gage was given $50,000, as compensation as president of the Cobre Company and other services and expenses paid by him; the attorneys of the company were paid

$50,000, for legal services, and there was surrendered to Costello the note which he owed the company. There was no secrecy about these items, and it is manifest from the findings and the evidence that they constituted no inducement to the contract. Whether Gage can be compelled to pay to the Cobre Company the money received by him we need not decide. Its receipt by him did not make the whole contract fraudulent. It did not take from the stockholders the power to sell their stock, nor from the directors of the company the power to control the litigation in which the company was involved, to abandon that litigation or to compromise it. In the exercise of their power they could have done those things directly. It was a matter of form and procedure that it was done in the manner provided by the contract of December 12.

It is deceptive to call or regard the action of the directors as a transfer of the property of the corporation without consideration or for an inadequate consideration. The company had only a right to purchase the property, the conditions of which it had not fulfilled. It claimed legal excuse and brought suits against Greene, but that it had legal excuse was disputed, and seems to have been doubted by all who were interested in the property but the plaintiffs. A jury in Texas had decided against the excuse; and the court in Arizona has also done so. That the latter was subsequent to the contract of December 12 does not militate against it as proof of good faith of the settlement.

This view of the merits of the case renders it unnecessary to pass upon the contention of the defendants that a court of equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person under the circumstances presented by the complaint.

There are assignments of error upon the rulings of the trial court on the admissions of testimony, oral and documentary, which we do not think call for discussion. It is enough to say that they are not well taken.

There is also an assignment of error upon the refusal of the Supreme Court to make certain findings of fact. We think the findings made substantially cover those proposed, certainly to the extent necessary to the case as we have considered it.

Judgment affirmed.

GRAHAM, COUNTY AUDITOR FOR GREENWOOD COUNTY, *v.* FOLSOM.

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

No. 108. Argued December 8, 1905.—Decided January 8, 1906.

The power of the State to alter or destroy its municipal corporations is not, so far as the impairment of the obligation clause of the Federal Constitution is concerned, greater than the power to repeal its legislation; and the alteration or destruction of subordinate governmental divisions is not the proper exercise of legislative power when it impairs the obligations of contracts previously entered into.

Courts cannot permit themselves to be deceived; and while they will not inquire too closely into the motives of the State they will not ignore the effect of its action, and will not permit the obligation of a contract to be impaired by the abolition or change of the boundaries of a municipality. Where a tax has been provided for and there are officers to collect it the court will direct those officers to lay the tax and collect it from the property within the boundaries of the territory that constituted the municipality.

A suit to compel county officers to levy and collect a tax on property within the county to pay bonds of a municipality is not, under the circumstances of this case, a suit against the State, either because those officers are also state officers, or because the bonds were issued under legislative authority.

THE facts are stated in the opinion.

Mr. F. Barron Grier and *Mr. Joseph A. McCullough*, with whom *Mr. J. B. Parks* was on the brief, for plaintiffs in error.

Mr. R. E. L. Mountcastle and *Mr. H. J. Haynsworth* for defendants in error.

Mr. Justice McKenna delivered the opinion of the court.

This writ of error brings up for review the judgment of the Circuit Court in mandamus, requiring plaintiffs in error to assess and collect taxes to pay a judgment recovered by defendant in error against Township Ninety-six, for certain bonds issued by it in aid of the Greenville and Port Royal Railroad Company. In *Folsom* v. *Ninety Six*, 159 U. S. 611, the bonds were declared valid obligations of the township. In accordance with the opinion in that case judgment was entered in favor of the suing bondholders. Defendants in error are owners of that judgment. The legislation which authorized the issue of the bonds is recited in *Folsom* v. *Ninety Six*, and need not be repeated at length. We may say, however, that the act incorporating the railroad empowered townships interested in its construction to subscribe for its capital stock such sum as the majority of the voters, voting at an election held for that purpose, might authorize, and it was provided (section 9) that "the county auditor or other officers discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of said county, city, town or township such per centum as may be necessary to pay said interest of said sum of money subscribed, which shall be known and styled in the tax book as said railroad tax, which shall be collected by the treasurer under the same regulations as are provided by law for the collection of taxes in any of the counties, cities, towns or townships so subscribing." 19 Stat. S. Car. (1885) 237, 240.

In 1895 South Carolina adopted a new constitution, by which it was provided that the several townships of the State, with names and boundaries as then established, should continue, with power, however, in the legislature, to form other townships or change the boundaries of those established. Art. VII.

This section, by an amendment finally adopted in 1903, was made inapplicable to certain townships, including Ninety-six. It was provided that "the corporate existence of the said townships be, and the same is, hereby destroyed, and all offices in said townships are abolished and all corporate agents removed." 24 Stat. S. Car. (1903) 3.

At the time of the execution of the bonds Township Ninety-six was situated in Abbeville County, and in 1896 the county of Greenwood was organized out of portions of Abbeville and Edgefield Counties, and Township Ninety-six was included in Greenwood County.

The officers of the latter county refused to assess and collect the taxes, contending that they are not officers of the county, but officers of the State, appointed by the Governor of the State, and are termed county officers because assigned to duty in that county, but cannot exercise any function of those offices except as authorized by the laws of the State, and that they have been forbidden by an act of the general assembly of the State to assess or collect taxes for the payment of subscriptions by townships to the building of roads which have not been built. 23 Stat. S. Car. (1899) 78.

Against this defence defendants in error invoke the contract clause of the Constitution of the United States.

As we have seen, the validity of the bonds was decided in *Folsom* v. *Ninety Six, supra;* in other words, they were decided to be the contracts of the township, and that the acts which authorized their issue constituted their obligation. In this the court announced and applied the principle of many cases which are too familiar to need especial citation.

Plaintiffs in error yield to the case of *Folsom* v. *Ninety Six,* but contend that it is open to inquiry what officers, under the act authorizing the bonds, were the corporate agents or officers of the township, and, answering the inquiry, say the county commissioners were such agents and officers, not the county auditor and county treasurer, and that, it is contended, the Circuit Court has so decided. The distinction that plaintiffs

contend for, based on the opinion of the court, is merely verbal. The court distinguished the duties of the commissioners from those of the auditor and treasurer, and expressed with emphasis the continuing duty of the latter. The court said: "If the contention that the legislature had the right to destroy the corporate existence of the township be true, we are nevertheless confronted with the fact that the instrumentalities and means employed by the legislature, in this instance, for the purpose of enforcing the collection of a tax, are still unimpaired."

The purpose of the court, therefore, was to point out the temporary duties of the commissioners and to emphasize the permanent duties of the auditor and treasurer as instrumentalities of the law, with a continuing power to give its remedy and protection to the bonds, "independent of the existence of the township." And there can be do doubt about this from the words of the statute.

It is further contended that the action of the court in issuing the writ disregarded article IX of the constitution of 1868, entitled "Finance and Taxation." Section 8 of the article provides "That the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes. . . ." And the further limitation of the power of municipal corporations to levy and assess taxes, expressed in section 6, article X, of the constitution of 1895, to wit, "For educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, to pay jurors, county officers, and for litigation, quarantine and court expenses, and for ordinary county purposes, to support paupers and pay past indebtedness."

The argument is that "the 'corporate authorities' of the county cannot be vested with power to assess and collect a tax for township purposes, nor *vice versa*. That power can only be delegated to the authorities of the body contracting or about to contract the debt." And this argument, it is con-

tended, is not opposed to *Folsom* v. *Ninety Six*. There, it is said, the validity of the bonds was established, but it was not decided that the "corporate authorities" of the township might be vested with power to assess and collect a tax to pay them. Here the question is, can the auditor and treasurer, who are state officers, be made to assess and collect a tax which, under the constitution and laws of the State, can only be done by the "corporate authorities" of the township?

Plaintiffs' construction of the case of *Folsom* v. *Ninety Six* is too limited. It takes from the case about all of its value. The case decided that the bonds were issued for corporate purposes and established them as a valid indebtedness of the township. It proclaimed the validity of the laws under which the bonds were issued and made those laws and every part of them the contract with the bondholders. It did not occur to any one to urge that, because the legislature might vest the township authorities with the power to assess and collect taxes, such power could not be vested in county officers. By clear implication the contrary is decided in *State* v. *Whitesides*, 30 S. Car. 579; *State* v. *Harper*, 30 S. Car. 586; *State* v. *Neely*, 30 S. Car. 587. The offices of auditor and treasurer still exist, and through them taxes are assessed and collected in the State of South Carolina. The case at bar is not, therefore, like *Heine* v. *Levee Commission*, 19 Wall. 655, or *Meriweather* v. *Garrett*, 102 U. S. 472, 498. It is like *Von Hoffman* v. *Quincy*, 4 Wall. 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Seibert* v. *Lewis*, 122 U. S. 284; *Mobile* v. *Watson*, 116 U. S. 289, and many others.

But plaintiffs in error urge other defenses: (*a*) By an amendment of the constitution in 1903 the corporate existence of Township Ninety-six was destroyed, its offices abolished and all its corporate agents were removed. (*b*) By an act of the legislature Township Ninety-six was included in Greenwood County. At the time the bonds were issued it was situated in Abbeville County. (*c*) Plaintiffs in error are forbidden by the laws of the State from assessing and collecting taxes for Ninety-

six Township, and have no power to perform the acts enjoined upon them by the judgment of the Circuit Court.

These defenses differ only in form from those which this court held insufficient in the cases to which we have referred, and they acquire no sanctifying power because one of them, or all of them, may be said to rest upon the constitution of the State. This indeed is not denied. It is asserted that the obligation of the contract is unimpaired; that the State has done nothing but exercise an unquestionable right—the right to alter or destroy its corporations.

The power of the State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships or the change of their boundaries or the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the State, but they will not ignore the effect of its action. The cases illustrate this. There may indeed be a limitation upon the power of the court. This was seen and expressed in *Heine* v. *Levee Commission*, and *Meriweather* v. *Garrett*, *supra*. There is no limitation in the case at bar. A tax has been provided for and there are officers whose duty it is to assess and collect it. A court is within the line of its duty and powers when it directs those officers to the performance of their duty; and their objects upon which the tax can be laid. It is the property within the boundaries of the territory that constituted Township Ninety-six.

Mount Pleasant v. *Beckwith*, 100 U. S. 514, and *Mobile* v. *Watson*, 116 U. S. 289, are cases in which municipal corporations had incurred indebtedness, and afterward their municipal organization was destroyed and their territory added to other municipalities. It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate gov-

ernmental divisions was a proper exercise of legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a State from passing any law impairing the obligation of contracts. See also *Shapleigh* v. *San Angelo*, 167 U. S. 646. And this is not a limitation, as plaintiffs in error seem to think it is, of the legislative power over subordinate municipalities—either over their change or destruction. It only prevents the exercise of that power being used to defeat contracts previously entered into.

It is further contended by plaintiffs in error that this is in effect a suit against the State. The argument to support this contention is that if the auditor and treasurer are not corporate authorities, as it is insisted the Circuit Court decided, they are necessarily "state officers, and, being state officers, this proceeding is an attempt to require of the State the performance of her contract." The reasoning by which this is attempted to be sustained is rather roundabout. It is based in part on distinctions which, it is contended, were made by the Circuit Court, and on the assumption that the Circuit Court decided that the levy of taxes prescribed by section nine of the statute under which the bonds were issued, was a levy by the legislature and the taxing officers state officers. This proceeding hence, it is argued, becomes a proceeding against the State, and "the relief sought is to require of the State the performance of *her contract*" (italics ours) by the coercion of her officers to the preformance of duties which she has by a statute forbidden. And, it is said, it may be admitted that such statute "is unconstitutional and therefore void," nevertheless the relief asked against the officers is " affirmative official action," which the political body of which they are the mere servants has forbidden them to exercise, and it is not competent for a court to compel them to exercise, because of the immunity of the State from suit under the Constitution of the United States.

To sustain these contentions an elaborate argument is presented and a number of cases are cited. The most direct of the cases are *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 117 U. S. 52; *Rolston* v. *Missouri Fund Commrs.*, 120 U. S. 390, 411; *In re Ayers*, 123 U. S. 443; *Pennoyer* v. *McConnaughy*, 140 U. S. 1. It would make this opinion too long to review these cases. Nor is it necessary. It is enough to say that they do not sustain the contentions of plaintiffs in error.

Judgment affirmed.

CARTER v. HAWAII.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 144. Argued December 13, 1905.—Decided January 8, 1906.

Damon v. *Hawaii*, 194 U. S. 154, followed to effect that under the Hawaiian Act of 1846, "of Public and Private Right of Piscary," the owner of an ahupuaa is entitled to the adjacent fishing ground within the reef, and that the statute created vested rights therein within the saving clause of the organic act of the Territory repealing all laws of the Republic of Hawaii conferring exclusive fishing rights.

The Land Commission of Hawaii was established to determine title to lands against the Hawaiian Government, and, as that Commission rightly treated fisheries as not within its jurisdiction, the omission to establish the right to a fishery before that Commission does not prejudice the right of the owner thereto.

THE facts are stated in the opinion.

Mr. Sidney M. Ballou, with whom *Mr. Benjamin L. Marx* and *Mr. J. J. Darlington* were on the brief, for plaintiffs in error.

Mr. Emil C. Peters, Attorney General of the Territory of

Hawaii, and *Mr. Fred W. Milverton* for defendant in error, submitted.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding to establish the plaintiffs' rights to a several fishery of the kind described in *Damon* v. *Hawaii*, 194 U. S. 154, and comes here under the same circumstances as that case did. The fishery in question is a sea fishery within the reef in Waialae Iki, island of Oahu, and is claimed by metes and bounds in the complaint. The plaintiffs are owners of the adjacent land under a royal patent following upon an award of the Land Commission, and the only difference between this case and the former one is that in this the fishery is not described in the royal patent, and that, apart from the question of prescription, upon which we shall say nothing, the plaintiffs have to rely upon the statutes alone. They offered evidence at the trial that, before the action of the king in 1839, those under whom the plaintiffs claim title had enjoyed from time immemorial rights similar to those set out in the statutes, and also that they had been in continuous, exclusive and notorious possession of the konohiki right for sixty years. They offered in short to prove that their predecessor in title was within the statutes and therefore owned the fishery, it not being disputed that if he did, the plaintiffs own it now. The judge rejected the evidence and entered judgment for the defendant, and on exceptions this judgment and that in *Damon* v. *Hawaii* were sustained at the same time in one opinion by the Supreme Court. 14 Hawaiian, 465.

We deem it unnecessary to repeat the ground of our intimation in the former case, that the statutes there referred to created vested rights. We simply repeat that in our opinion such was their effect. The fact that they neither identified the specific grantees nor established the boundaries, is immaterial when their purport as a grant or confirmation is decided. It is enough that they afforded the means of identification, and that presumably the boundaries can be fixed by reference to existing

facts, or the application of principles which have been laid down in cases of more or less similar kind.

The omission of the plaintiffs' predecessor in title to establish his right to the fishery before the Land Commission does not prejudice their case. See *Kenoa* v. *Meek*, 6 Hawaiian, 63. That commission was established to determine the title to lands as against the Hawaiian Government. In practice it treated the fisheries as not within its jurisdiction, and it would seem to have been right in its view. See *Akeni* v. *Wong Ka Mau*, 5 Hawaiian, 91.

Judgment reversed.

WARNER *v.* GRAYSON.
TALBOTT *v.* GRAYSON.
WOOD *v.* GRAYSON.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 89, 90, 439. Argued December 4, 5, 1905.—Decided January 8, 1906.

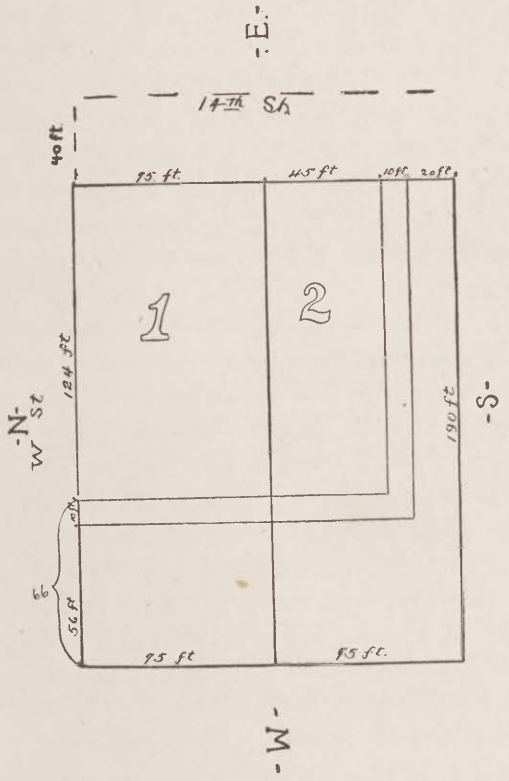
An owner of two adjoining parcels obtained on one of them a building loan and erected an apartment house so near the line of the property mortgaged that ten feet of his adjoining parcel was absolutely necessary for properly conducting the apartment. During the erection of the building, and after it was evident that such ten feet adjoining was essential thereto, he obtained money for its completion on a second mortgage; subsequently he conveyed both parcels subject to the two mortgages on the parcel built on and also to a separate mortgage on the adjoining vacant parcel. The mortgages conveyed the property, together with the improvements, ways, easements, rights, privileges and appurtenances appertaining thereto. On foreclosure of the mortgages *held*, that:

Although an easement for light and air may not have been created by implication, still, under the wording of the conveyances and the circumstances of the case, an easement was created in favor of the mortgagees of the parcel built on against the original owner, and also against his grantee who took with notice, in the ten-foot strip adjoining the parcel on which the building was erected.

It was not necessary that both parcels should be sold as an entirety, but, adequate proportionate protection as to the easement being provided for the mortgagee of the vacant plot, the plot with the building should be sold together with the easement on the ten feet adjoining as one parcel, and the vacant parcel subject to the easement, as another parcel, separately.

THESE are appeals from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District. The bill in the original case was filed by Grayson and others against Wood, Talbott, Duke and others, for the appointment of a receiver for certain property situated in Washington, known as the Victoria Flats; also praying an injunction to restrain the sale of the property by the trustees of the first mortgage; to have an adjudication of the right of an easement alleged to be appurtenant to the property, and for the sale of the Victoria Flats and certain property adjacent thereto, for the marshalling of incumbrances and for general relief. The facts necessary to an adjudication of the case, as we view it, being principally those found in the Court of Appeals, are as follows: Mrs. Alice S. Hill was the owner of lots 1 and 2 in block forty-five of Hill's subdivision, University Park, city of Washington. A diagram of these lots is herewith given.

These lots fronted 150 feet (75 feet each) on Fourteenth street, and 190 feet on Welling Place (now Douglas street). On January 13, 1897, Mrs. Hill conveyed these lots to Nicholas T. Haller. Haller intended to erect an apartment house, which was subsequently placed thereon, and became known as the Victoria Flats. To enable him to build this structure, Haller negotiated a loan of $75,000, and, on January 22, 1897, executed a deed of trust of that date to B. H. Warner and Louis D. Wine, as trustees, hereinafter called the Warner trust, describing in the deed the north 120 feet of the two lots and running westwardly to the depth of 124 feet, as shown on the plat. At the same time Haller executed a deed of trust to McReynolds and Meriweather, as trustees, hereinafter known as the McReynolds trust, upon the remaining portion of said lots 1 and 2, to



secure his notes to the amount of $12,315. There were no improvements on the lots 1 and 2 at the time of making these deeds of trust. Thereafter Haller erected the apartment house on the portions of lots 1 and 2, described in the deed of trust to Warner. In the erection of the building Haller had become indebted to mechanics and materialmen in the sum of $30,087.65 and in the further sum of $10,350 for borrowed money. To avoid mechanics' liens on the property and to secure the borrowed money, a second deed of trust was placed on the property by the same description contained in the Warner deed, Grayson and Heald being the trustees named therein, herein-

after known as the Grayson trust, and bears date December 20, 1897. These deeds of trust were duly recorded. When the Grayson trust was executed and delivered the building had been erected by Haller, the mortgagor. The building contained, upon the south and west sides, in connection with which an easement is said to arise, a large number of doors, windows and porches, the porches encroaching over the line of the property deeded n the McReynolds trust four feet and nine inches, and it is averred in the bill and not denied in the answers that the areaways encroach five feet. There are thirty-six windows in the west wall, nineteen in the south wall, twenty-two doors in the west wall, five doors in the south wall, four cellar windows each in the west and south walls. It was stipulated in the case when it went back for final decree in the Supreme Court as follows:

"The areaways on the west and south sides mentioned by the witness, William J. McClure, consist of excavations from the surface of the ground downward, projecting into the cement walk, and protected by wooden platforms, on grade with and forming part of the said walk, and provided with interstices or openings admitting light to the windows below.

"On the south side of the building there is one doorway or entrance, and, on the west side, four doorways or entrances, opening out on the said cement walk, and not otherwise accessible from the exterior of said building.

"On the said west wall, projecting out on the said cement walk, there are three garbage chutes for collection of garbage from the building, and two openings into the cellar, through which the coal supply of the building is received, the said garbage chutes and coal cellars being accessible from the exterior only by means of the said cement walk."

In both deeds of trust, in addition to the conveyance of the parcels of ground described, there is the following language:

"Together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in any wise appertaining, and all the estate,

right, title, interest, and claim, either at law or in equity, or otherwise, however, of the parties of the first part, of, in, to or out of the said land and premises, to have and to hold the said land, premises and appurtenances unto and to the only use of the parties of the second part, the survivors of them, his heirs and assigns."

A default having been made in the payment of interest due upon the notes secured by the deeds of trust, it was arranged that Warner and Wine were to collect the rents from the building, and afterwards Wood collected the rents of the building for a while. There is considerable testimony in the record tending to show an alleged combination on the part of Wood and Talbott, who had acquired the interest of Haller, to scale down the second or Grayson and Heald trust and to prevent the property being sold advantageously, all of which we deem unnecessary to consider in determining the rights of the parties, and shall not undertake to state the details concerning the same. It appears that Haller originally intended to place the building so as to leave ample space on the west and south, between the building and the lines of the lot as covered by the trust deeds, but being notified that a space of forty feet must be left on the east of the property and twenty feet on the north side, because of restrictions in the title of the property, the building was placed practically on the lines of the premises on the west and south, as described in the deeds of trust. The porches and areaways thus necessarily encroached on the adjoining property, as hereinbefore stated. In the view we take of the case it is important to state how Wood and Talbott acquired their interest in the property. In March, 1898, Wood obtained from Haller, in exchange for an equity of Wood's in another property, an undivided one-half interest in the flats property, and Haller conveyed the premises as described in the deed of trust to Warner, together with a ten-foot strip of ground on the south and west sides of the building (see plat), the deed being made for the same by Haller to one Duke, who executed a declaration (dated April 9, 1898), that he held the

property in trust for Haller and Wood, one-half each. About the same time an arrangement was undertaken to be made by Haller, with the knowledge of Wood, by the terms of which, upon the payment of $4,000 upon the McReynolds trust, the ten-foot strip would be released therefrom, and $4,000 was borrowed from the bank upon a security of $4,000 of the McReynolds notes, which loan, not having been paid, the release has not been obtained. On the first of April, 1899, Talbott purchased Haller's remaining one-half interest in the Victoria Flats property, and also one-half interest in that covered by the McReynolds trust, and Wood purchased Haller's remaining one-half interest in the McReynolds equity. The purchase price paid by Talbott was $3,100, and by Wood for the remaining one-half interest in the McReynolds equity, $250. Thus Wood and Talbott became the owners of the equities of redemption in both lots.

The Supreme Court gave the Warner trust a lien upon the ten-foot strip as part of the mortgage premises, a second lien to the Grayson trust, and ordered the property sold as an entirety, at the option of the trustees appointed to sell.

When the case was in the Court of Appeals, upon appeal from the original decree of sale, that court modified the decree below in so far as it gave the Warner trust any lien upon the ten-foot strip on the south and west sides, and ordered a decree in favor of the Grayson trust upon this strip as an easement, and that the property be sold as an entirety or in parts, according to the discretion of the trustees ordered to sell. 22 App. D. C. 432. When the case went back to the Supreme Court the modified decree of sale was entered, from which an appeal was taken to the Court of Appeals, which affirmed the decree of the Supreme Court, 24 App. D. C. 55, and these appeals were sued out to this court.

Mr. B. W. Parker, with whom *Mr. R. Golden Donaldson* was on the brief, for appellants Warner and Wine:

The holders of the notes secured by the Warner and Wine

trust are equitably entitled to the benefit of the easement over the ten-foot strip, for the reason that the $75,000 which they advanced was the means of erecting the building, and thereby creating the security.

All improvements and betterments made upon real estate, by the mortgagor, or those claiming under him, after the execution of the mortgage, inure to the benefit of the mortgagee and become a part of the security for the debt. 10 Am. & Eng. Ency. of Law, 1st ed., 260; 16 Am. & Eng. Ency. of Law, 2d ed., 119; *Owen* v. *Fields*, 102 Massachusetts, 102; 1 Jones on Mortgages, § 681; *Scanlon* v. *Geddes*, 112 Massachusetts, 17; *Snow* v. *Orleans*, 126 Massachusetts, 456; *Martin* v. *Beatty*, 54 Illinois, 100; *Rice* v. *Dewey*, 54 Barb. 455; *Water Co.* v. *Fluming Co.*, 22 California, 621; *Booream* v. *Wood*, 27 N. J. Eq. 371; *Childs* v. *Dolan*, 5 Allen (Mass.), 319; *Holmes* v. *Morse*, 50 Maine, 102; *Butler* v. *Page*, 7 Met. (Mass.) 40; *Graeme* v. *Cullen*, 23 Gratt. (Va.) 266; *Wharton* v. *Moore*, 84 N. Car. 479.

No authority need be cited to the effect that the deed of trust in question is in legal effect a mortgage.

Although there was no house upon the land mentioned in the Warner trust when it was executed, there is no doubt but these appellants have a lien upon such house. When erected it became a part of the land, and it follows that the easements did also. The easements are a part of the dominant estate and inhere in it, and cannot exist or be conveyed separate from it. *Moore* v. *Crose*, 43 Indiana, 30. They inure to the benefit of the mortgage security upon it. 10 Am. & Eng. Ency. of Law, 2d ed., 402; *Hankey* v. *Clark*, 110 Massachusetts, 262; *Shepherd* v. *Pepper*, 133 U. S. 622; *James* v. *Jenkins*. 34 Maryland, 1; *Evans* v. *Dana*, 7 R. I. 306; Washburn's Easements, 4th ed., 664; *Powell* v. *Sims*, 5 W. Va. 635; *Turner* v. *Thompson*, 58 Georgia, 268; *Rennyson's Appeal*, 94 Pa. St. 147; *Sutphen* v. *Therkelson*, 38 N. J. Eq. 318; *Whiting* v. *Olney*, 3 Mason, 280.

Under the grant of a thing whatever is parcel of it, or of the

essence of it, or necessary to its beneficial use and enjoyment, or in common intendment included in it, passes to the grantee.

This principle is based upon the maxims that no man shall derogate from his own grant, and whoever grants the same shall be understood to grant, also, whatever is indispensable to the full beneficial enjoyment of it.

The implied grant of an easement will be sustained, in cases of necessity. *Rosewell* v. *Pryor*, 6 Mod. 116; *Palmer* v. *Fletcher* 1 Lev. 122; *Buss* v. *Dyer*, 125 Massachusetts, 287; *Collier* v. *Pierce*, 7 Gray, 18; *Story* v. *Odin*, 12 Massachusetts, 157; *Insurance Co.* v. *Patterson*, 103 Indiana, 582; *Lampman* v. *Milks*, 21 N. Y. 505; *Smyles* v. *Hastings*, 22 N.Y. 217; *Clawson* v. *Primrose*, 4 Del. Ch. 643; *Cave* v. *Crafts*, 53 California, 135; *Ray* v. *Sweeney*, 14 Bush. (Ky.) 1; *Bank of British North America* v. *Miller*, 6 Fed. Rep. 545; *Sheets* v. *Selden*, 2 Wall. 177; *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190; *Rogers* v. *Sinsheimer*, 50 N. Y. 646; *Havens* v. *Klien*, 51 How. (N. Y.) 82; *Siebert* v. *Levan*, 8 Pa. St. 383; *Reiner* v. *Young*, 38 Hun, 335; *Grace Church* v. *Dobbins*, 153 Pa. St. 294; *United States* v. *Appleton*, 1 Sumner, 492.

Mr. John Ridout, and *Mr. Charles F. Carusi* for Wood and Talbott.

A written instrument will not be reformed for mistake or fraud unless clear, positive and convincing evidence be produced showing the existence of such mistake or fraud.

No one can have a *de facto* or any other kind of easement in his own land, and there is nothing in the language of the deed of trust of December 20, 1897, or in the attendant circumstances, from which any intention to convey more than the land described by metes and bounds and the improvements thereon can be gathered.

An easement must be in the lands of another. 14 Cyc. 1139.

There is nothing in the record to show that Haller or the appellees, or anybody else, conceived that Haller had a *de facto*

easement in the adjoining ground, which he tried expressly to convey to the appellees under this language in his deed.

In the District of Columbia an easement of light and air cannot be acquired by implication. In the United States the English doctrine of implied easements of light and air has been repudiated. *Leech* v. *Schroeder*, L. R. 9 Ch. App. 463; *Cherry* v. *Stein*, 11 Maryland, 1; but see *Janes* v. *Jenkins*, 34 Maryland, 1. In most of the cases cited by counsel for the Warner trust, the easement was sustained on other grounds, generally that of necessity, and the light and air element was mere *dicta*.

The doctrine of implication from necessity seems, therefore, to have existed in this country as a theory in the minds of some judges rather than as a rule of law, and there is no implied grant of the right to light and air over the grantor's other land adjoining the land conveyed. *Kennedy* v. *Burnap*, 52 Pac. Rep. (Cal.) 843; *Hutchins* v. *Munn*, 22 App. D. C. 88; *Keiper* v. *Klein*, 51 Indiana, 316; *Randall* v. *Sanderson*, 111 Massachusetts, 114; *Keats* v. *Hugo*, 115 Massachusetts, 204; *Palmer* v. *Wetmore*, 2 Sandf. 316; *Meyers* v. *Gemmel*, 10 Barb. 537; *Shipman* v. *Beers*, 2 Abb. (N. Car.) 435; *Mullen* v. *Stricker*, 19 Ohio St. 135; *Haverstick* v. *Sipe*, 33 Pa. St. 378; *Robinson* v. *Clapp*, 65 Connecticut, 365; *Turner* v. *Thompson*, 58 Georgia, 268; *Morrison* v. *Marquardt*, 24 Iowa, 35, 444; *Colier* v. *Pierce*, 7 Gray, (Mass.) 18; *Rennyson's Appeal*, 94 Pa. St. 147; *Powell* v. *Sims*, 5 W. Va. 1.

The case of *Shepherd* v. *Pepper*, 133 U. S. 626, 650, does not justify the decree in this case either as to the easement or as to the sale as an entirety. Wood and Talbott are entitled to have the ground adjoining the apartment sold separately subject to the $12,000 trust.

Mr. J. J. Darlington, with whom *Mr. Jesse E. Potbury* was on the brief, for Grayson, trustee.

It is impossible upon this record to contend that Wood and Talbott stand in a better position than Haller would do if he were still the owner of the equities in the two properties.

The case falls under *Manogue* v. *Bryant*, 15 App. D. C. 245, and see p. 256 as to appellant's contention that the appellees were negligent in not having a survey or measurement made, in order to ascertain whether the building, as erected, was within the lines of the trust deed. *Frizzell* v. *Murphy*, 19 App. D. C. 440, 446; *Shepherd* v. *Pepper*, 133 U. S. 626, 650, controls this case.

As to the application of the rule that where a man grants a thing, he grants with it everything necessary to its enjoyment, and a grant by the owner of a tenement will pass to the grantee all those continuous and apparent quasi-easements which are necessary to the reasonable enjoyment of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted, these being regarded as easements appurtenant to the land granted. In order that such an easement may pass by implication, it must be annexed to the estate granted, must be reasonably necessary for the beneficial enjoyment of the same, and must be in open, apparent and continuous use at the time of the grant, 14 Cyc. 1166; *Durkee* v. *Railroad Co.*, 24 N. H. 489, all of which conditions concur in the case at bar.

A strict or indispensable necessity is not necessarily the condition of such implication; it is sufficient if the necessity be such as to render the easement necessary for the convenient and comfortable enjoyment of the property, and as it existed before the severance was made. See as to open, visible ditches, 14 Cyc. 1169; *Thayer* v. *Payne*, 2 Cush. 327; *McElroy* v. *McLeary*, 71 Vermont, 396; *Stuyvesant* v. *Early*, 58 N. Y. App. Div. 242; *Sanderlin* v. *Baxter*, 76 Virginia, 299; *Quinlan* v. *Noble*, 75 California, 250; a furnace flue, *Ingalls* v. *Plamondon*, 75 Illinois, 118; an alley way, *Cihak* v. *Klekr*, 117 Illinois, 643; *Burns* v. *Gallagher*, 62 Maryland, 462; a water ditch and water rights, *Cave* v. *Crafts*, 53 California, 135; rights of way, *Ellis* v. *Bassett*, 128 Indiana, 118; *McTavish* v. *Carroll*, 7 Maryland, 352; stairways in a building, *Galloway* v. *Bonesteel*, 65 Wisconsin, 79; *Geible* v. *Smith*, 146 Pa. St. 276; a flow of water

forced from vendor's premises, through pipes, to the premises of the vendee, *Toothe* v. *Bryce*, 50 N. J. Eq. 589; a portion of a building projecting upon the land retained by the vendor, *Railroad Co.* v. *Needham*, 61 N. Y. Supp. 992. See also *Irvine* v. *McCrany*, 108 Kentucky, 495; *Maynard* v. *Esher*, 17 Pa. St. 222; *Dill* v. *Board of Education*, 47 N. J. Eq. 421; *Halloway* v. *Southmayd*, 139 N. Y. 390; *Whiting* v. *Gaylord*, 66 Connecticut, 337, and other cases cited on brief for Warner trust.

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

These appeals raise practically three questions:

1st. Was the Warner trust entitled to an easement, and, if so, to what extent, in the lands on the south and west of the flats building?

2d. Was the Grayson trust entitled to a like easement in the same premises? and,

3d. Was the property properly authorized to be sold as an entirety in the discretion of the trustees?

As to the first proposition, the Supreme Court was of opinion that the Warner trust was entitled to ten feet on the south and west sides of the property. The Court of Appeals was of the opinion that as the lots were not built upon at the time when the deed of trust was executed, and it was not then known that an easement would be necessary to the enjoyment of the property as constructed, the Warner trust took only the conveyances of the land by metes and bounds, without an easement, which that court held arose from the manner in which the building and its appurtenances were subsequently constructed and used.

The record discloses that the loan secured by the Warner trust was made for the purpose of erecting a hotel or apartment building. It is established that the first purpose of the proprietor was to construct the building so as to leave an adjacent space and way for its accommodation and use, between

its outer walls and the lot lands adjacent on the west and south. This purpose was changed upon notification that restrictions in the title of the property required the building to be set back from the streets. The building was thereupon constructed by the mortgagor in the manner shown. The deed of trust was a mortgage security and Haller continued to be the owner of the property to the full extent of the lots. The building was constructed in such wise that the use of some of the adjacent property, even independent of an easement for light and air, was absolutely necessary to the use and enjoyment of the building as constructed. It did not need the expert testimony which was introduced in the case to establish the fact that if another structure should be erected, practically even with the wall of the building, it would prevent access to and greatly impair the use of the south and west sides thereof. It would require the closing of the areaways, the shutting of the windows and doors, and must necessarily greatly depreciate the value of the property. The Warner trust contained the language (above quoted), conveying the described premises, with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, etc., to have and to hold to the second parties, their heirs and assigns. It is true that there was no building upon the property at the time when this deed of trust was executed, but it is equally true that it was within the knowledge and purpose of the parties that a building should be constructed, which would be the principal security for the money loaned. And no one disputes that when Haller constructed the building upon the property it became immediately subject to the mortgage. He was the owner of the adjacent premises, and when he abandoned the design to leave sufficient space about the building for its proper use and enjoyment, and erected it in such manner and so close to, and overlapping upon, other parts of his own property as to require the use of an easement therein in order to occupy the building and permit the enjoyment and use of it as constructed, we

see no reason why the express language of the conveyance above quoted would not carry with the building thus constructed the improvements, ways, appurtenances, rights and privileges necessary to the enjoyment of the same. The principle upon which subsequent buildings and fixtures annexed to the realty become a part thereof for the benefit of the mortgagee is thus stated in *Butler* v. *Page*, 7 Metcalf (Mass.), 40:

"All buildings erected and fixtures placed on mortgaged premises, by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will therefore inure to the benefit of the mortgagee so far as they increase his security for his debt; and to the same extent they enhance the value of the equity of redemption, and thereby inure to the benefit of the mortgagor. *Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306. There is no necessity to adopt any liberal rule in regard to fixtures, to enable the mortgagor to remove what he has erected at his own expense; because he has the full benefit of all such improvements when he regains the estate by redemption, which he may do, simply by payment of his actual debt. The general rule of the common law, therefore, that what is fixed to the freehold becomes part of the realty, and passes with it, has its full effect, in regard to things erected on the land by an owner, who subsequently mortgages the land, and also in regard to things erected by the mortgagor after the mortgage."

To the same effect is *Graeme* v. *Cullen*, 23 Gratt. (Va.) 266. Had Haller not owned the surrounding premises, but acquired the adjacent ten-foot strip with a view of remedying the fault which he had committed in putting the building flush upon the line, and constructed his building so as to make the easement necessary to its use, we think there could be no question that the easement thus acquired would inure to the benefit of the mortgagee. Such is the principle stated in *Hankey* v. *Clark*, 110 Massachusetts, 262. In that case tenants in common owned two adjoining tracts of land on a river, the lower one

subject to a mortgage. They sold the upper tract, reserving to themselves, their heirs and assigns, the right to draw water from a reservoir on the upper for the use of the lower (mortgaged) tract. The equity of redemption of one of them in the lower tract was sold and vested in A, who also acquired title in that tract through mesne conveyances under a foreclosure of the mortgages. The court held that A was vested with the title to draw water from the reservoir under the reservation. The court said: "Incorporeal rights of this description, acquired by the mortgagor subsequent to the date of the mortgage, for the permanent improvement of the estate, and annexed by the terms of the conveyance to the realty, may be considered as passing to the mortgagee by the foreclosure, to be exercised by him at his election. There is no reason why incorporeal rights and annexed to the realty should not inure to the benefit of the mortgage security in the same manner as improvements in the nature of fixtures inure. *Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306, 310. Until foreclosure the mortgage is deemed a lien or charge, subject to which the estate may be conveyed, improved and in other respects dealt with as the estate of the mortgagor." We cannot see that it makes any difference in principle that the easement in the present case is annexed by the mortgagor by necessity, as the result of the manner in which he has improved the property. It is not contended that, as against the McReynolds trust, created at the same time with the Warner trust, and before the erection of the building, an easement was acquired in this strip, but we are now dealing with rights in the property as between Haller and the mortgagee, and we think the granting clause quoted above included not only the improvements, ways and easements upon the property at the time, but such as became necessarily appurtenant thereto upon the adjacent property of the grantor, because of the structure which he has placed upon the premises, to the enjoyment of which these privileges and rights are essential. As to the extent of this easement, the conduct of the parties in undertaking to acquire ten feet, for the obvious purpose of

this easement, the overhangng porches, the encroaching areas, seem to us to make ten feet a reasonable width, and no more than is properly necessary. The unloading of coal, the carrying away of garbage and other necessary usages, could hardly be accomplished in a narrower space. In this vew of the case we find it unnecessary to treat this as an easement, exclusively for light and air, or to enter upon a discussion of the doctrine of easements by implication. Nor is it an answer to the effect of this annexation to the property of the easement and rights resulting from the manner of improving the premises conveyed to say that Haller, as the owner, could not create an easement for himself in his own land. The question here is, what is the effect of his conveyance, and what has he added to the realty in favor of his grantee in the mortgage? We think he annexed not only the building but the rights and privileges in his adjacent land essential to its enjoyment.

2. As to the Grayson trust. In addition to the discussion already had as to the right of the Warner trust to have an easement in this strip, it is admitted that when the Grayson trust was executed the building was up, the easement was in actual use, and it is apparent had become necessary to the building as constructed. The purpose of Haller to use this part of the property for the purposes stated is manifested in what he had done, and the subsequent purchasers of the equity took with full notice not only of the language of the recorded deed of trust, but had actual notice of the condition of the property. We think this feature of the case comes clearly within the doctrine ruled in *Shepherd* v. *Pepper*, 133 U. S. 626, 650. It is important to note in this connection that counsel for the Grayson trust do not dispute the right of the Warner trust to have a lien upon the easement in the ten-foot strip, and states that he does not desire to be heard upon that subject. The persons contesting that right (and as well the right of Grayson) in this court are Wood and Talbott, the successors of Haller, and upon the facts shown, standing in his shoes and with full notice of the necessity of this right of way or easement to the use of the

property and Haller's attempt to obtain it by release from the McReynolds and Meriweather trust. It was subsequently specifically covered in the conveyance in trust for Haller and Wood to Duke, and it is admitted in the answer of Wood and Talbott that it was the original intent to so place the building as to give room about it; the rights of Wood and Talbott are no higher or better as against either Warner or Grayson than Haller's from the facts presented in this case.

3. Was the decree right in ordering the sale of the property in its entirety in the discretion of the trustees? Sales are thus ordered in entirety when the interests of the mortgagors and incumbrancers require it. *Shepherd* v. *Pepper*, 133 U. S. 626, 651, and the authorities there cited. In this case counsel for the Grayson trust states in his brief that he does not insist upon such sale as an entirety, and in the draft of a decree, as submitted by him, no such sale is provided for. In the view we have taken of this case we cannot see that the first incumbrance, the Warner trust, requires such a sale to protect that interest. There is no dispute as to the lien of the McReynolds trust upon the property described in their deed; as against it no easement is claimed. We see no reason why, with adequate protection for the McReynolds trust, in a sum to be found sufficient in the court executing the decree, to be retained out of the purchase money of the flats property with an easement in the ten-foot strip, the flats may not be sold with the ten-foot strip as one piece and the remainder of the property as another. Such a form of decree is suggested in the brief of the counsel for the Grayson trust, and no incumbrancer seems to object to it, and the holders of the equity of redemption insist upon a separate sale. We think it would be the fairer way to all concerned to order the sale of the property as herein indicated.

We, therefore, upon the whole case modify the decree of the Court of Appeals in respect to the Warner trust and the ten-foot strip, and as to the sale of the property as an entirety, as

hereinbefore stated. In other respects the judgment of the Court of Appeals is

Affirmed.

This disposes of the appeals in Nos. 89 and 90, which were taken from the last and final decree in the Court of Appeals. The appeal in No. 439 was taken from the decree of the Court of Appeals remanding the case to the Supreme Court, which was not final, and is therefore dismissed. The other appeals raise all the questions made in the case.

GUNTER, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, *v.* ATLANTIC COAST LINE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 88. Argued December 1, 4, 1905.—Decided January 15, 1906.

A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment.

While a State may not, without its consent, be sued in a Circuit Court of the United States, such immunity may be waived; and if it voluntarily becomes a party to a cause and submits its rights for judicial determination it will be bound thereby.

An appearance "for and on behalf of the State" by the Attorney General, pursuant to statutory provisions, in an action brought against county officers, but affecting state revenues, in this case amounted to a waiver by the State of its immunity from suit; and such immunity could not be invoked in an ancillary suit subsequently brought against the successors of the original defendants to enforce the decree.

A decree of the Circuit Court of the United States, having jurisdiction of the cause and in which the State appeared, that a charter exemption existed in favor of a railroad company by virtue of a contract within the meaning of the impairment of obligation clause of the Federal Constitution is binding upon the State as to the existence and effect of the contract during the period of exemption, and the rule that a decree enjoining the collection of a tax is not *res judicata* as to the right to collect for a subsequent year does not apply.

Neither the Eleventh Amendment nor § 720, Rev. Stat. control a court of

the United States in administering relief where it is acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction; nor is a Circuit Court debarred from enforcing its decree by ancillary suit in equity restraining improper prosecutions of actions in the state courts because there is an adequate remedy at law by interposing defenses in those actions.

The rule that the collection of a tax should not be enjoined unless the amount admitted to be due is tendered does not apply where the amount due is for a period not covered by the injunction or affected by the decree.

THE facts are stated in the opinion.

Mr. W. F. Stevenson for plaintiff in error:

Conferring the powers, rights and privileges of the Northeastern Railroad Co., upon the Cheraw and Darlington Railroad Co. did not confer an exemption from taxation enjoyed by the former on the latter. *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 171, and cases cited; *Tucker* v. *Ferguson*, 22 Wall. 527.

The consideration for the alleged contract, to wit, the building of the road in pursuance of the same, being now admitted to be a myth, the exemption if granted, was a gratuity and was repealed by the constitution of 1868, and as only litigated questions are *res judicata* in a subsequent suit on the new cause of action, and as the consideration of the contract and its existence was not contested in the Pegues case, we are at liberty to make these questions. There can be no contract without a consideration and in this case there was no consideration. See Cooley Const. Lim. § 149, 335; *Wisconsin R. R. Co.* v. *Supervisors*, 93 U. S. 595; *Newton* v. *Commissioners*, 100 U. S. 548.

If there was an exemption it was a mere gratuity which could be revoked at any time. Section 1, art. ix and § 2, art. xii, Const. 1868, S. Car.; *Tomlinson* v. *Jessup*, 15 Wall. 454.

As to *res adjudicata*, *Humphrey* v. *Pegues*, 16 Wall. 244, decided only one question, that the act conferred all privileges held by the Northeastern under the acts of 1851 and 1855.

The questions in this case were not litigated. The road was not built pursuant to the exemption and therefore there was no contract and the exemption is repealable. The word "privileges" in a statute making another statute enforceable does not

carry the exemption contained in that statute. Appellant is not estopped because they might have been litigated. This is a suit for taxes for different years from those involved in the Pegues case. *Keokuk & W. R. Co.* v. *Missouri,* 152 U. S. 301; *Cromwell* v. *County of Sac,* 94 U. S. 351; *Louisville Railway* v. *Wilson,* 138 U. S. 501; *Wilmington R. R. Co.* v. *Alsbrook,* 146 U. S. 279; *Nesbit* v. *Riverside,* 144 U. S. 610; *Willoughby* v. *Railroad Co.,* 52 S. Car. 172.

The rule in South Carolina is that the question must have been adjudicated in a former suit in order to estop the parties from making it in the subsequent proceeding. *Henderson* v. *Kenner,* 1 Rich. Law, S. Car. 474; *Hart* v. *Bates,* 17 S. Car. 35; *Jones* v. *Massey,* 14 S. Car. 307; *Duren* v. *Kee,* 41 S. Car. 174; *McMakin* v. *Fowler,* 34 S. Car. 286.

The State cannot be estopped by a judgment against its officers or by any judgment where it has not voluntarily submitted to the jurisdiction as a result of legislative authority (except of course in an original proceeding in the United States Supreme Court), and to hold that a judgment against two tax collectors represented by the Attorney General bound the State so that her attorneys could not be allowed to contend in court for her rights, would be subjecting every State to the process of every court which could get personal jurisdiction of her officers as effectually as if she could be sued in her own name. Amendment XI, Const. U. S.

If Pegues indirectly sued the State, the court was without jurisdiction and the judgment was no estoppel. *Anderson* v. *Cave,* 49 S. Car. 505. If the State was in privity with the defendant and he was the State's agent, it was an attempt to do indirectly what could not be done directly. A judgment against the agent of a State is not an estoppel as to the sovereign. *United States* v. *Clarke,* 8 Pet. 444; *The Siren,* 7 Wall. 152; *The Davis,* 10 Wall. 15; *Carr* v. *United States,* 98 U. S. 433; *Tindal* v. *Wesley,* 167 U. S. 204.

As to the power of the Attorney General to waive anything for the State, see *Commissioners* v. *Rose,* 1 Des. 461.

The Attorney General claimed no right to waive the State's rights nor did the legislature accord him that right or ratify his acts.

There is plain and adequate remedy at law. If the plea of former adjudication is good, it can be set up as a defense and fully availed of and the court of equity could not interfere. *Scottish & U. N. Ins. Co.* v. *Bowland*, 196 U. S. 611, and cases cited; *Pennoyer* v. *McCannaughy*, 140 U. S. 1.

As to the rule that the immunity of a State from suit is so absolute and unqualified that its officers cannot be sued, see *Re Ayers*, 123 U. S. 443; *State* v. *Jumel*, 107 U. S. 711; *Antoni* v. *Greenhow*, 107 U. S. 769; *Cunningham* v. *Railroad Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *Osborn* v. *Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Littlefield* v. *Webster Co.*, 101 U. S. 773; *Allen* v. *Railroad Co.*, 114 U. S. 311; *Board* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270.

When the legal remedy is plain and adequate, no injunction will lie to prevent the collection of taxes. We cite the following on this point: *United States* v. *Rickert*, 188 U. S. 432; *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681; *People's Nat. Bank* v. *Marye*, 107 Fed. Rep. 570; *Douglas* v. *Stone*, 110 Fed. Rep. 812.

As it is admitted that some of the taxes sued for are due, no injunction can lie in the case, the part that is due not having been tendered. *Carrington* v. *First Nat. Bank*, 103 Fed. Rep. 524; *West. Un. Tel. Co.* v. *Missouri*, 190 U. S. 412.

Appellants are merely attorneys for the State, without any personal interest in the cause and without any intention of committing any trespass upon the property or rights of the petitioner, merely prosecuting a suit at law to recover a debt alleged to be due the State, in which suit all the defenses set up here by the petitioner may and have been set up. To enjoin all the State's counsel from prosecuting her suit is to enjoin the State from so doing, which a court has no power to do. *Chandler* v. *Dix*, 194 U. S. 590; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; § 720, Rev. Stat.; *Diggs* v. *Wal-*

cott, 4 Branch, 179; *Peck* v. *Jenness*, 7 How. 624; *Haines* v. *Carpenter*, 91 U. S. 254; *Belknap* v. *Schild*, 161 U. S. 10; *Fitts* v. *McGee*, 172 U. S. 516.

As to the contention that although the courts ordinarily will not enjoin when there is adequate remedy at law, still in an ancillary proceeding it will be done; an ancillary proceeding can only be based on a valid adjudication, and, if the original judgment is not effective against the State and its attorneys, the ancillary proceedings will not be effective either.

Mr. Theodore G. Barker and *Mr. P. A. Willcox* with whom *Mr. J. T. Barron* was on the brief, for appellee.

Mr. Justice White delivered the opinion of the court.

Before analyzing the facts particularly bearing upon the legal questions for decision, in order to a comprehension of those questions we summarize in their chronological order matters which are undisputed concerning the origin and development of this controversy.

The legislature of South Carolina in 1855 exempted the capital stock and property of the Northeastern Railroad Company from all taxation during its charter existence. In 1849 the Cheraw and Darlington Railroad Company was chartered by legislative act, and by an amendment to the charter, adopted in 1863, the last-named company was endowed with all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company; it being besides provided that the charter should not be subject to the provisions of a general law, reserving the right to repeal, alter and amend, except where otherwise specially provided.

Under the assumed authority of a law of South Carolina, providing for the assessment and taxation of property, passed in 1868 (14 S. Car. Stat. 27-67), the Cheraw and Darlington Railroad was assessed in the counties of Darlington and Chesterfield, through which the road ran. It became the duty of

the respective treasurers of the counties named to collect the state and county taxes on the assessment thus made, and they proceeded so to do. Thereupon, in 1870, Thomas E. B. Pegues, a citizen of Mississippi, a stockholder of the Cheraw and Darlington Railroad, filed his bill in the Circuit Court of the United States for the District of South Carolina against the Cheraw and Darlington Railroad Company and the treasurers of Darlington and Chesterfield counties, seeking to enjoin the corporation from paying and the county treasurers from collecting the taxes referred to. The ground stated for the relief prayed was that the taxes in question impaired the obligation of the charter contract of exemption, and were, therefore, repugnant to the Constitution of the United States. Various provisions of a law of South Carolina, adopted in 1870, as an amendment to the act of 1868 under which the taxes were levied, restricting the right of the corporation to resist the collection of taxes, or to recover back an illegal tax, if paid, were alleged as justifying the interposition of a court of equity. An injunction *pendente lite* was allowed, restraining the collection of the disputed taxes. By its answer the corporation admitted the averments of the bill. A joint answer was filed for the two county treasurers, signed by "The Attorney General for the State of South Carolina, for defendants." This answer admitted the assessment, the steps taken to collect the taxes and asserted their validity, and denied the existence of the alleged contract of exemption. It was averred that if such an exemption ever existed it was subject to the legislative power to repeal, alter and amend, and such repeal was alleged to have been operated by constitutional and legislative provisions, which were referred to. Jurisdiction of the court, in equity, was challenged on the ground that there was an adequate remedy at law. A final decree passed in favor of the complainant, recognizing the alleged exemption and perpetuating the injunction. An appeal was prosecuted to this court. The cause was decided at the December term, 1872. It was held that there was a contract of exemption, which would be impaired by enforcing the taxes

complained of, and hence the decree below was affirmed. *Humphrey* v. *Pegues*, 16 Wall. 244.

For at least twenty-five years following the decision in the Pegues case no attempt was made to tax the property of the Cheraw and Darlington Railroad Company. In the year 1897 an act was passed, directing the Attorney General to proceed to test the right of any railroad company to exemption, and under this act that official sued the Cheraw and Darlington Railroad Company to recover one hundred and thirty-four thousand dollars, the sum of taxes, penalties and interest for a period of twenty years, on the alleged ground that the company had been mistakenly treated as having a contract of exemption. The Supreme Court of the State, however, without passing upon the question of exemption, decided that the right to recover did not obtain, because in any event an assessment against the railroad as provided by law was a prerequisite to the levy and collection of taxes.

From a statement made in the argument of counsel it is to be deduced that during the year 1898 the capital stock and property of the Cheraw and Darlington Railroad Company was acquired by the Atlantic Coast Line Railroad Company of South Carolina, and as the result of a charter granted to that company by the State of South Carolina, in 1898, it is conceded that the property formerly belonging to the Cheraw and Darlington Railroad Company became taxable, and that the State has since that time levied and collected the taxes due on the property. It is, moreover, conceded that the appellee on this record, the Atlantic Coast Line Railroad Company, a Virginia corporation, acquired, in 1900, the property of the Cheraw and Darlington Railroad Company, as the successor of the South Carolina corporation which bore the same name.

In the year 1900 an act was passed in South Carolina, providing for the assessment for taxation of railroad property "which has been off the tax books for the years in which they have been off the books, and to fix the time when such taxes shall become due, and for the collection thereof." The act

created a board to make the assessment to which it referred, limited the taxes to be imposed to ten years back, provided that the assessment made by the board should be put upon the rolls separately for each of the back years, and that there should be levied upon such assessment state and county taxes for the years to which the back assessment related. The act caused the taxes for which it provided to become a lien against the property upon which they might bear, and directed a certification of the taxes as assessed and levied to the respective county treasurers, and made it their duty to collect the same. To this end such treasurers were directed to make a demand for payment upon the company in whose name the assessment was made, or, if it was found that the property assessed was "in the control of another company, demand shall be made of the company . . . in possession of the property." By the act, in addition, the Attorney General was directed, if the back taxes assessed were not paid within sixty days after demand, to bring a suit in the name of the State, with the coöperation of such counsel as the counties might employ, to enforce the collection of the back taxes against the company in whose name they were assessed or against the company found in possession of the property assessed.

A meeting of the board appointed by this act was called in May, 1900, by the Secretary of State, for the purpose of assessing the property formerly belonging to the Cheraw and Darlington Railroad Company, and in the control and possession of the Atlantic Coast Line Railroad for a period of ten years back from 1898, on the ground that during such period the property in question had not been taxed for state or county purposes. The Atlantic Coast Line Railroad Company appeared and protested against the proposed assessment. In the protest it directed the attention of the board to the exemption act, to the injunction granted and the decree rendered and affirmed by this court in the Pegues case. The board overruled the protest and valued the property of the Cheraw and Darlington Railroad Company for a period of ten years back from

1898 inclusive. The valuation so made was certified to the officials of the counties of Chesterfield, Darlington and Florence respectively, these three counties embracing the territory included in the counties of Chesterfield and Darlington at the time the decree was rendered in the Pegues case. The state and county taxes or the years covered by the assessments were placed upon the rolls, and the taxes were certified for collection to the county treasurers. These officers demanded payment of the Atlantic Coast Line Railroad, as the company in possession and control of the property taxed. The company refusing to pay, the Attorney General of the State of South Carolina and counsel associated with him commenced, in the Common Pleas Court in the respective counties, actions in the name of the State to enforce payment against the Cheraw and Darlington Railroad Company and the Atlantic Coast Line Railroad Company, as the corporation in possession of the property. Thereupon the Atlantic Coast Line Railroad Company, alleging itself to be a citizen of Virginia, commenced, in the Circuit Court of the United States for the District of South Carolina, the proceeding which is now before us against the Attorney General of the State, the counsel associated with him in the suits above referred to, and the treasurers of Chesterfield, Darlington and Florence Counties. The petition which initiated the proceeding was filed as ancillary to the original Pegues case, and was entitled and numbered as of that cause. It referred to the prior proceedings in the cause, including the perpetual injunction therein issued, and to the decree of this court which affirmed the same. It alleged the assessment of back taxes as above stated, the asserted lien resulting therefrom, the demand of payment and the suits brought to enforce payment, and charged that each and all of the acts done concerning the said assessment of the back taxes, including the bringing of the actions in the state court, were in direct violation and disregard of the injunction previously issued. The prayer was that the petitioner as successor in interest of Pegues be protected in the rights and privileges adjudged in the Pegues

case, and be accorded the benefit of the injunction issued in that case, and to that end that the Attorney General of the State and his associate counsel be enjoined from further prosecution of the actions commenced in the state courts in the name of the State to enforce payment of the taxes, and that the respective county treasurers be enjoined from any further attempt to collect such taxes.

A preliminary injunction was granted, restraining the Attorney General and his associate counsel from further prosecuting the actions brought in the state court, and also restraining the county treasurers from further proceeding to collect the taxes. In response to a rule to show cause why the preliminary injunction should not be made perpetual the defendants answered, denying the right to the relief prayed upon grounds which, as far as now material, we shall hereafter state and consider. After hearing on petition and answers, accompanied by affidavits or admissions establishing the facts to be as we have previously stated them, a final decree was entered, perpetuating the preliminary injunction. Subsequently the court, reciting that its attention had been directed to the fact that its decree was interpreted as restraining the prosecution of suits for any tax which might have accrued from the eighteenth day of July, 1898, when the exemption had been surrendered, modified its decree so as to exclude from the operation of the injunction any act of the defendants looking to the collection, "by suit or otherwise, of any sum or sums of money which may be due or charged for taxes on said property of the Cheraw and Darlington Railroad Company after said eighteenth day of July, 1898, at which date it was admitted in argument the exemption established in *Pegues* v. *Humphreys* was surrendered." This appeal was then taken.

Although the errors assigned on the record are seventeen in number, in the argument at bar but six contentions were relied upon, and we shall therefore confine ourselves to their consideration.

All the propositions involved in the assignments will be dis-

posed of by determining first, whether all the defendants on this record, including the State through its Attorney General, were parties or privies to the decree in the Pegues case; second, if they were, whether the decree in that case concluded against them the want of power to impose or collect the taxes in controversy; and, third, if it did so conclude them, whether the court below erred in granting the relief which it awarded.

First. We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the Pegues case, since it is conceded in the argument at bar that that company, as the successor to the rights of Pegues, is entitled to the protection of the original decree rendered in his favor.

On the face of the record in the Pegues case, the nominal defendants were the treasurers of the counties of Chesterfield and Darlington, in which counties the property of the railroad was situated. Those now holding the office of treasurer in each of the named counties are among the parties on this record, with the addition of the treasurer of Florence County, which county, as we have stated, consists of territory embraced in Chesterfield or Darlington County at the time of the entry of the Pegues decree. That under these circumstances the defendant treasurers, as the successors in office of the officials who were parties to the Pegues case, are privies to that decree, is established. *Prout* v. *Starr*, 188 U. S. 537, 544.

In deciding whether the State and its Attorney General were privies to the Pegues decree, some elementary propositions must be borne in mind:

a. In view of the prohibitions of the Eleventh Amendment to the Constitution of the United States, a State, without its consent, may not be sued by an individual in a Circuit Court of the United States.

b. A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment. The doctrine announced in

many previous cases on the subject was stated by Mr. Justice Harlan, delivering the opinion of the court in *Smyth* v. *Ames*, 169 U. S. 466, wherein, after holding that a suit against officers to prevent the doing of acts authorized by a state statute was not necessarily a suit against the State, or within the prohibitions of the Eleventh Amendment, it was said (pp. 518, 519):

"It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment."

And the subject was reviewed and restated in *Prout* v. *Starr*, 188 U. S. 537.

c. Although a State may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment. *Clark* v. *Barnard*, 108 U. S. 436, 447.

As, then, the State was not a party *eo nomine* in the Pegues case and as, although the suit was against officers it was not for that reason alone a suit against the State, it must follow that the ascertainment of whether the State was a party to that cause depends upon determining whether the taxing officers who were the nominal defendants were endowed by the State with the power, in a suit brought against them assailing the validity of taxes levied, to represent the State in the controversy so as to conclusively establish the rights of the State against the plaintiff if decree passed against him, and on the other hand to establish as against the State the rights of the plaintiff in that cause if decree passed in his favor. Thus the inquiry reduces itself to this: Did the State of South Carolina become, in substance and effect, a party to the Pegues case? In other words, did the State, through the authority which it had conferred upon the defendant officers, voluntarily submit

to judicial determination the question raised in the Pegues case concerning the alleged limitation of the taxing power of the State, arising from the contract on that subject which was asserted in that case?

As a prelude to the consideration of the question just stated, it is well to determine at once the interest which the State had in the controversy which was represented by the county treasurers who were the nominal defendants in the Pegues case. Coming to do so, it is plain that the controversy which that suit involved was one in which the State was directly interested, since the officers who were the nominal defendants were charged by the state law, not only with the duty of collecting the county but also the state taxes, the validity of which was assailed on grounds which challenged the power of the State to impose any tax upon the property of the corporation during the existence of its charter. The officers were, therefore, in a sense, state officers, charged with the performance of a duty imposed for the benefit of the State. And that those officers were considered as being *pro hac vice* state officers, for the purposes of the controversy which the Pegues case involved, is shown by the statement of the case made by this court in delivering its opinion affirming the decree. Thus it was said (16 Wall. 245, 246):

"These different enactments above mentioned being in force, the state officers of counties in South Carolina, where the Cheraw and Darlington Railroad was situate, acting under the authority of the legislature of the State, imposed certain taxes on the stock and property of that company, and were proceeding to enforce payment of them, when one Pegues, a stockholder in Mississippi, filed a bill in the court below, praying an injunction to restrain the collection."

The question, then, is narrowed to this: Were the officers endowed with authority to stand in judgment for the State in suits brought against such officers wherein the validity of the taxes was assailed?

The law of South Carolina under which the taxes were levied

was adopted in 1868. Now, by section 137 of that act (14 S. Car. Stat. 65), the county auditors and county treasurers were authorized to employ counsel, and the counties were made liable for the fees of such counsel as well as for any damages which might be awarded against such officials, resulting from a defense made by them of any action prosecuted against the officials "for performing or attempting to perform any duty enjoined upon them by this act, the result of which action will affect the interests of the county, if decided in favor of the plaintiff in such action." It follows from this provision that where a suit was brought against a county treasurer in respect to county taxes, that official was empowered to represent the county for the purpose of the defense of its interest, and a judgment rendered against such official was therefore made binding upon the county. It was further provided in the section that "if the State be interested in the revenue in said action, the county auditor shall, immediately upon the commencement of said action, inform the Auditor of State of its commencement, of the alleged cause thereof, and the Auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State."

We see no escape from the conclusion that the provision last quoted, where suit was brought concerning state taxes, made a county treasurer, who was the state tax collector, an agent for the State and empowered him, "for and on behalf of the State," to defend the suit, and required him, in order fully to protect the interests of the State, to be represented by the highest law officer of the State, the Attorney General. And the power, which we think the section referred to conferred upon the county officers to represent the State in suits or actions, is moreover persuasively indicated by a consideration of the act of 1870, amending in certain particulars the act of 1868. 14 S. Car. Stat. 366. Substantially, that amendment, whilst forbidding the taxpayer from enjoining the collection of taxes, created a remedial system, by which questions of asserted illegality were to be examined by the state auditor, and, where that of-

ficial disallowed the claim of illegality, made it the duty of the taxpayer to pay, and, subject to certain conditions, gave a right of action to recover back the money paid. And by section 8, where such an action was brought, it was made "the duty of the Attorney General of the State to defend any suit or proceedings against any tax collector or other officer who shall be sued for moneys collected, or property levied on, or sold on account of any tax, when the state auditor shall have ordered such collector to proceed in the collection of any such tax, . . . and any judgment against such collector or officer, finally recovered, shall be paid in the manner provided in section 81 of the act to provide for the assessment and taxation of the property aforesaid"—that is, section 81 of the act of 1868. Now, by that section, where a judgment passed against a county official concerning state taxes which had been paid, the State was in effect made liable for the amount of the judgment. Thus, in such a case, as in cases provided for in section 137 of the act of 1868, the State through its officials was made the real defendant.

If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the Pegues case, and by the action as well as non-action which followed the decision of that case by the state government in all its departments through a long period of years.

The answer in the Pegues case, which denied the existence of the alleged contract of exemption and asserted the existing and continuing power of the State to tax, was signed, for the defendants, by the Attorney General of South Carolina, who also, in his official capacity, verified such pleading. The word "defendants" cannot be construed as implying any other than the county officers empowered to represent the State, without imputing to the Attorney General a failure to discharge the

duty directly imposed upon him by the State. This must result from the command of the statute, that he should defend the suit, the state revenue being concerned, not merely for the county officers, but "for and on behalf of the State," a command which would have been wholly disregarded if the appearance of the Attorney General be treated as having been made solely for the purpose of representing the defendants as individuals. And subsequent events show that the highest law officer of the State, when he filed the answer for the defendants in the Pegues case, intended that answer to be what the statute caused it to be, that is, an answer for the defendants standing upon the record, for and in behalf of the State, in defense of the right of the State to collect the taxes. When the appeal was prosecuted from the final decree perpetually enjoining the officials who were named as the defendants (and, as we have seen, their successors in office) from any attempt in the future to collect a tax upon the property of the Cheraw and Darlington Railroad Company, such appeal was prayed by the same counsel who had signed the answer as Attorney General of the State, and who, upon the expiration of his term of office, was retained by his successor in office and the Governor of the State (as shown by an official report made to the legislature of the State) to prosecute the appeal and "to appear in behalf of the State." And when the appeal was heard in this court a printed argument was signed, not only by the counsel thus retained on behalf of the State by the Governor and the Attorney General, but also by the then incumbent of the office of Attorney General of the State. That this court, in deciding the appeal in the Pegues case, considered that the State was the real party appellant, is shown by the opinion, where it was said (16 Wall. p. 247):

"The State contends that the privileges thus granted were limited to those conferred upon the Northeastern by its original charter or act of incorporation, passed in 1851."

When to all these conclusive considerations there is added the fact that we have not been referred to any legislative action

repudiating the conduct of the Governor and the Attorney General in the defense of the Pegues suit for and on behalf of the State, and when besides we take into account the failure of the state government in all its departments, for more than twenty-five years following the decision of the Pegues case, to assert any right to tax in conflict with the contract exemption which the Pegues decree sustained, the binding efficacy of the decree in that case upon the State of South Carolina seems to us beyond the reach of serious controversy. Indeed, we are not left to conjecture that the inaction of the State was the result of what was deemed to be the conclusive effect on the State of the Pegues decree, since it is shown that in one or two instances after the decree was rendered where preliminary steps were taken by the taxing officials of the State to impose taxes on the property of the railroad, such efforts were at once abandoned in consequence of the advice of Attorneys General of the State that the decree in the Pegues case was conclusive and the property could not be taxed.

Concluding, as we do from the terms of the act of 1868, that the officers who were named as defendants in the Pegues case were, for the purpose of that litigation, the agents voluntarily appointed by the State to defend its rights and submit them to judicial determination, we content ourselves with saying that it is unnecessary to review the case of *State* v. *Corbin,* 16 S. Car. 533, and other decisions of the Supreme Court of South Carolina, pressed upon our attention, since those cases did not involve the statute of 1868 or statutes of like import. And, moreover, we must not be understood as holding that other provisions of the law of South Carolina, relied upon in argument, would be inadequate to bind the State by the action of its Attorney General, if the provisions of the act of 1868 did not exist. Into that consideration we have not entered.

Second. The State of South Carolina and its Attorney General, and his associate counsel, as the agents of the State, being, therefore, privies to and bound by the decree in the Pegues case, we must determine what was concluded by that decree.

That the issue in the case was the existence of a charter exemption from taxation in favor of the Cheraw and Darlington Railroad Company, and the consequent want of power of the State to tax the property of the railroad during the continuance of the exemption, is obvious. And that the decree rendered in the cause established the exemption embraced in the issues is also obvious. This being true, it unquestionably follows that the decree established as to the parties and their privies the very question in issue in this proceeding. Escape from this inevitable result is sought to be accomplished by several propositions, all of which we think are unsound.

a. The complaint in the Pegues case, it is said, mistakenly averred that the Cheraw and Darlington Railroad had not been built at the time the amendment of the charter was made which gave the exemption relied upon, and as this, it is asserted, was not traversed by the answer filed in the case by the Attorney General it was consequently erroneously assumed to be true in fact, and the decree, it is argued, was based upon such assumption. From this the contention is that if the truth had been established a different decree would have been rendered, because no consideration for the grant of exemption would then have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree. *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; *Fayerweather* v. *Ritch*, 195 U. S. 276, 300 *et seq.*, and cases cited. And although it be conceded for the sake of argument that the doctrine of *res judicata*, as announced in rulings of the Supreme Court of South Carolina, lends support to the contention made, our duty is to give to the decree of the Circuit Court of the United States in the Pegues case the force and effect to which it is entitled under the principles of *res judicata* as settled by this court, especially in view of the fact that the controversy in the Pegues case involved

rights protected by the Constitution of the United States. *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

b. It is urged that as the taxes, the collection of which the court enjoined, were not for the same years as were the taxes with which the Pegues case was concerned, the Pegues decree was, therefore, not *res judicata*, because it related to a different cause of action. This rests upon the assumption that a decree enjoining the collection of a tax for one year can never be the thing adjudged as to the right to collect taxes of a subsequent year. But the proposition entirely disregards the fact that the decree in the Pegues case, enjoining the collection of the taxes in controversy in that case, was rested upon the ground that there was a contract protected from impairment by the Constitution of the United States which was as controlling on future taxes as it was upon the particular taxes to which the Pegues suit related. The contention, therefore, simply asserts that a contract right of exemption was beyond the pale of judicial protection, because rights under such contract could never be sanctioned by final judicial action. Besides, the proposition is not open to controversy. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Deposit Bank* v. *Frankfort, supra.*

Third. It is insisted that the court below had no power to restrain the Attorney General of South Carolina and the counsel associated with him from prosecuting in the state courts actions authorized by the laws of the State, and hence that the court erred in awarding an injunction against said officers. Support for the proposition is rested upon the terms of the Eleventh Amendment and the provisions of section 720 of the Revised Statutes, forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted. *In re Ayers*, 123 U. S. 443; *Fitts* v. *McGhee*, 172 U. S. 516. The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statutes was originally adopted in

1793, whilst the Eleventh Amendment was in process of formation in Congress for submission to the States, and long, therefore, before the ratification of that Amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the Eleventh Amendment. Both the statute and the amendment relate to the power of courts of the United States to deal, against the will and consent of a State, with controversies between it and individuals. None of the prohibitions, therefore, of the Amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired as a result of the voluntary action of the State in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has jurisdiction and its want of authority to entertain a controversy as to which jurisdiction is not possessed. From this it follows that, as in the Pegues case, the court had acquired jurisdiction with the assent of the State of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief, to make its decree effective, cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain. In other words, the proposition relied upon is disposed of by the conclusion which we have previously expressed concerning the persons who were parties and privies to the decree rendered in the Pegues case. Indeed, the proposition that the Eleventh Amendment, or section 720 of the Revised Statutes, control a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Prout* v. *Starr*, 188 U. S. 537; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112.

And this reasoning disposes of the contention that the court

below erred in enforcing its prior decree because there was adequate remedy at law, by interposing a defense in the state courts to the actions brought by the Attorney General. That question was foreclosed by the decree in the Pegues case. So also does the reasoning dispose of the assertion that because a part of the tax for the year 1898 may have been due, therefore tender should have been made before invoking the power of the court to protect its jurisdiction and enforce the prior decree. The amendment of the decree made by the court eliminated from the controversy all question concerning the portion of the tax not covered by the decree in the Pegues case. Having acquired by that decree a right which the petitioner was entitled to enforce, whatever might have been the rule of tender as applied to other cases, that rule could not rightly be invoked to deprive the court below as a court of equity of the power to protect the petitioner in the enjoyment of rights previously secured under a decree of the court.

Affirmed.

MR. JUSTICE BROWN dissents.

CARFER, SHERIFF, *v.* CALDWELL.

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

No. 360. Submitted January 8, 1906.—Decided January 22, 1906.

As the jurisdiction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations, a Circuit Court cannot issue the writ to release a citizen from imprisonment by another citizen of the State merely because the imprisonment is illegal.

The objection of a person committed for contempt, for refusing to appear before a legislative committee, that the subject which it had been appointed to investigate was not within the jurisdiction of the legislature, under a provision in the state constitution, that neither the legislative, executive nor judicial departments should exercise powers belonging to either of the others, does not present any question under the due process clause of the Fourteenth Amendment.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, Jr., and *Mr. William E. Chilton*, for appellant:

Federal courts have no authority to discharge a person held for contempt by a committee of the legislature of a State, acting in pursuance of a law of the State and a resolution passed by a branch of the legislature, on the ground that such law and resolution are repugnant to the constitution of the State. *In re Burrus*, 136 U. S. 586, 591; *Andrews* v. *Swartz*, 156 U. S. 272; *Storti* v. *Massachusetts*, 183 U. S. 138.

The committee was acting under a resolution duly passed by the House of Delegates, and in pursuance of a law of the State, giving power to committees of either house, authorized to sit during recess, to enforce obedience to summonses issued by them; and if they did not have the power which they assumed to exercise, it was because the resolution or law or both were repugnant to the constitution of the State, and not because they were in conflict with the Constitution or any law or treaty of the United States. *Dreyer* v. *Illinois*, 187 U. S. 71, 83; *Reetz* v. *Michigan*, 188 U. S. 505; *Kilbourn* v. *Thompson*, 103 U. S. 168.

The Circuit Court held that the chairman of the committee in issuing an order for Caldwell's arrest was a mere usurper, without any authority in law, but the court reached that conclusion only upon an examination of the constitution of West Virginia. There is nothing in the Constitution of the United States on the subject.

As to the power of a legislative committee to summon witnesses see *McDonald* v. *Keeler*, 99 N. Y. 463, 487.

Mr. Charles T. Caldwell in propria persona, with whom *Mr. J. G. McClure* and *Mr. Reese Blizzard* were on the brief for appellee:

The state constitution contains a clause identical with the due process clause of the Fourteenth Amendment.

Due process of law undoubtedly means in the due course of legal proceeding according to those rules and forms which have been established for the protection of private rights. Cooley's Const. Lim., 6th ed., 433; *Pearson* v. *Yendall*, 95 U. S. 436; *Portlan* v. *Banzer*, 65 Maine, 120; *State* v. *Sponangle*, 45 W. Va. 424.

In cases where the right of appeal seems inadequate by reason of its delay, the court may hold the person entitled to the writ as a means of speedy determination of the question. *Ex parte Keiffer*, 40 Fed. Rep. 399.

In general the writ may be issued by Federal courts in every case where a party is restrained of his liberty without "due process of law" in the territorial jurisdiction of such court. *Ex parte Farley*, 40 Fed. Rep. 66; *Cunningham* v. *Nagle*, 135 U. S. 1, and authorities cited; *New York* v. *Eno*, 155 U. S. 88; *In re Huse*, 79 Fed. Rep. 305.

The legislature had no power to appoint the committee under the constitution of the State, and the legislature having adjourned *sine die* the committee of one of its branches could not exist after the adjournment.

Legislative powers are not absolute and despotic, and the Fourteenth Amendment prescribing due process of law is not too vague and indefinite to operate as a practical restraint. *Hurtado* v. *California*, 110 U. S. 516, 536.

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

This is an appeal from a final order of the Circuit Court in *habeas corpus*, discharging Charles T. Caldwell, a citizen of West Virginia, from custody, taken on the ground that the Circuit Court was without jurisdiction as a court of the United States to issue the writ or discharge the petitioner, the question of jurisdiction being certified. The case was heard on the petition, the return, and the exhibits attached. It appeared therefrom, in brief, that at a regular biennial session

of the legislature of West Virginia, the House of Delegates passed a resolution instructing the Speaker of the House to appoint a committee of three members "to investigate fully and thoroughly" certain charges and matters set forth therein. The committee was instructed by the resolution to meet as soon as practicable and select one of its members chairman; was given leave to sit after the adjournment of the session; and was empowered "to compel the attendance of witnesses and to send for persons and papers, to appoint a sergeant at arms, necessary stenographers and clerks, and to employ such counsel as may be necessary to conduct said investigation."

The committee organized and summoned Charles T. Caldwell to appear before it "to testify and the truth to speak of and concerning the matters and things in said resolution to be inquired of." He refused to appear and was taken into custody by W. H. Carfer, sheriff of Wood County, West Virginia, in pursuance of an order of attachment issued by the committee to bring him before it to answer for his contempt for failing to attend and testify. This writ was issued and Caldwell was discharged. 138 Fed. Rep. 487.

The jurisdiction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations. *In re Burrus*, 136 U. S. 586, 591; *Andrews* v. *Swartz*, 156 U. S. 272, 275; *Storti* v. *Massachusetts*, 183 U. S. 138, 142.

And it did not appear in this case that petitioner was restrained in violation of the Constitution or any law or treaty of the United States.

The Circuit Court held that the House of Delegates had no power under the constitution of West Virginia to appoint a committee for the purpose of investigating the matter set forth in the resolution and to clothe it with power to sit and compel the attendance of witnesses in vacation, but took jurisdiction, nevertheless, on the ground that the condition was

so "extraordinary" as to "warrant the intervention of the first court, state or Federal, applied to." This view ignored the settled law that a Circuit Court of the United States has no jurisdiction to issue the writ to release a citizen from imprisonment by another citizen of the same State merely because the imprisonment is wrongful. The committee was acting under a resolution of the House of Delegates, and in pursuance of a law of the State, giving power to committees of either house, authorized to sit during recess, to enforce obedience to summonses issued by them; and if they did not have the power they assumed to exercise, it was because the resolution or law, or both, was, or were, repugnant to the state constitution, and the courts of the State are the appropriate tribunals for the vindication of the state constitution and laws.

The Circuit Court was of opinion that the subject which the committee was appointed to investigate was not within the jurisdiction of the legislature, as defined by article 5 of the constitution of West Virginia, declaring that "the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others." But that objection does not "present any question under the due process of law clause of the Fourteenth Amendment." *Dreyer* v. *Illinois*, 187 U. S. 71, 83; *Reetz* v. *Michigan*, 188 U. S. 505.

Viewed in any aspect, we perceive no ground on which Caldwell's case can be considered as arising under the Constitution and laws of the United States.

Final order reversed and cause remanded with a direction to quash the writ and dismiss the petition.

GUSS *v.* NELSON.

APPEAL FROM, AND IN ERROR TO, THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 124. Argued December 12, 1905.—Decided January 15, 1906.

Oklahoma City v. *McMaster*, 196 U. S. 529, followed, to effect that the review by this court of final judgments in civil cases of the Supreme Court of Oklahoma is by writ of error under § 9 of the act of May 2, 1890, 26 Stat. 81, and not by appeal. The act of 1874 in regard to territorial courts does not apply.

An option to purchase if the buyer likes the property is essentially different from one to return the property and cancel the contract; in the former case title does not pass until the option is determined, in the latter it passes at once, subject to the right to rescind; and, as held in this case, if the option to rescind is not exercised, and the property returned according to its terms, the sale is complete, and the promise to pay the balance of the purchase price becomes absolute.

On May 28, 1900, at Guthrie, Oklahoma Territory, the parties to this action entered into the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent of the capital stock of the following coal companies located in the Creek Nation, to wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons: U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal. The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above-named companies, the seals and other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above-named property, and additional property in the way of stock hereinafter listed. The

$500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above-named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand five hundred dollars), or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above-mentioned 25 per cent of the capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered by him under this contract as follows:"

(Here follows a list of companies and number of shares of stock in each.)

"The $500.00 above mentioned is to be earnest money, to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above-named companies until such time as it may be convenient for him to resign and Guss or some one else be elected to fill the vacancy."

On April 6, 1901, Nelson brought suit in the District Court of Logan County, Oklahoma Territory, to recover the additional sum named in the contract. After answer the case was tried by the court without a jury, and judgment rendered in his favor on February 20, 1903, for $4,500 and interest. This was affirmed by the Supreme Court of the Territory, 14 Oklahoma, 296, and its judgment was brought here both by appeal and writ of error.

Mr. A. G. C. Bierer, with whom *Mr. Frank Dale* was on the brief, for appellants and plaintiffs in error:

The Supreme Court of the Territory, as well as the trial court, fell into error and failed to take a correct view of the contract, which was the basis of the action. The contract was not for a sale and transfer of the stock. It was simply one wherein the parties on the one hand contracted for a right to purchase, and on the other, for the consideration named, agreed to waive the right to sell the stock to other persons until after

the expiration of the time named in the contract. *Stevens* v. *Hertzler*, 19 So. Rep. 838, distinguished. See *Wailes* v. *Howison* 93 Alabama, 375; *Ide* v. *Leiser*, 24 Pac. Rep. 695; *Gordon* v. *Kollock*, 43 California, 564; *Sargent* v. *Gile*, 8 N. H. 325; *Music House* v. *Dusenbury*, 27 S. Car. 464; *Streeper* v. *Williams*, 48 Pa. St. 450.

If the contract were other than a mere option to purchase on March 4, 1901, it has been complied with. Appellants have been ready and willing ever since that day to turn back to him everything received from Nelson. They determined by that day not to purchase this stock and not to pay the $4,500, but to return the stock. This is undenied, but the court held that they were bound either to return the stock, seals, etc., to Nelson at Fort Smith, or wherever he might happen to be that day, or to pay the $4,500. This is not the law. The contract did not stipulate where they were to turn the property back to Nelson. 2 Coke Littleton, 55; *Smith* v. *Smith*, 25 Wend. 405; *Allhouse* v. *Ramsey*, 6 Whart. (Pa.) 331; *Hale* v. *Patton*, 60 N. Y. 236; Bacon Abrid't, *sub.* Tender, c; *Hill* v. *Bradley*, 21 Minnesota, 20; *Tasker* v. *Bartlett*, 5 Cushing, 359; *Jones* v. *Perkins*, 20 Mississippi, 139; *Wilmouth* v. *Patton*, 5 Kentucky, 280; *Burns* v. *McCubbin*, 3 Kansas, 212; 3 Schouler Per. Pr. 281; *Patterson* v. *Jones*, 13 Arkansas, 69; *Howard* v. *Minot*, 20 Maine, 330.

Time of turning back to Nelson of the stock, certificates and stock paraphernalia received by defendants was not of the essence of the contract, and substantial compliance was made, and is all that was required. Section 850, Stat. Oklahoma, 1893, 219.

The retention of the royalty by the defendant McNeal as treasurer of these corporations is immaterial here.

Mr. W. R. Biddle, Mr. W. P. Dillard, Mr. Selwyn Douglas, Mr. George S. Green and *Mr. H. B. Martin* for appellee and defendant in error:

The appeal may be disregarded because the proper method of obtaining a review in the Federal Supreme Court of the final

judgment of the Oklahoma Supreme Court under the act of May 2, 1890, is by writ of error and this court has no jurisdiction of the appeal. *Oklahoma City* v. *McMaster*, 196 U. S. 529; *Heicht* v. *Boughton*, 105 U. S. 235.

There are no special findings of fact or conclusions of law. The Supreme Court of Oklahoma failed to make findings of fact or conclusions of law and no declarations of law nor request to make findings of fact were requested of said courts. As there are no exceptions in this record that are suggested by the assignments of error herein, it is clearly evident that this court must affirm the judgment. *Marshall* v. *Burtis*, 172 U. S. 630; *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109; *Cohn* v. *Daly*, 174 U. S. 539; *Cannon* v. *Pratt*, 99 U. S. 619; *Thompson* v. *Ferry*, 180 U. S. 484; *Saltonstal* v. *Birtwell*, 150 U. S. 417; *Stoner* v. *United States*, 164 U. S. 380.

A contract to return certain shares of stock within a time limited, or pay a fixed amount per share therefor, is not a bailment, and upon a failure to return the stock within the limit, the holder becomes liable for the amount agreed upon. *Haskins* v. *Dern*, 56 Pac. Rep. 953; *Stephen* v. *Hertzler*, 19 So. Rep. 838; 21 Am. & Eng. Ency. of Law, 647; *Foley* v. *Felrath*, 98 Alabama, 176; *Transportation Co.* v. *Kavanaugh*, 93 Alabama, 324; *Buswell* v. *Bicknell*, 35 Am. Dec. 262.

Transfer of chattels, by which an option is given to the transferee, either to return or pay for the same by a certain day, is a valid sale and vests the property in the transferee. *Crocker* v. *Gullifer*, 44 Maine, 491; *McKinney* v. *Bradlee*, 117 Massachusetts, 322; *Hunt* v. *Wyman*, 100 Massachusetts, 198; *Potter* v. *Lee*, 53 N. W. Rep. (Mich.) 1047; *Henderson* v. *Wheaton* 28 N. E. Rep. (Ill.) 1100; *Tex. Pac. Ry.* v. *Marlor*, 123 U. S. 687; *Orvis* v. *Waite*, 58 Ill. App. 504; *Page* v. *Shainwald*, 62 N. E. Rep. (N. Y.) 356; 5 Wait, Actions & Defenses, *sub.* Sale or Return, citing *Moss* v. *Sweet*, 16 Ad. and El. (N. S.) 493; *Jameson* v. *Gregory*, 4 Metc. (Ky.) 363; *Spickler* v. *Marsh*, 36 Maryland, 222; *Schlesinger* v. *Stratton*, 9 R. I. 578; *Buffum* v. *Marry*, 3 Massachusetts, 478; *Chamberlain* v. *Smith*, 44

Pa. St. 431; *Hall* v. *Etna Mfg. Co.*, 30 Iowa, 215; *Crocker* v. *Gullifer*, 44 Maine, 491.

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

The appeal must be dismissed. *Oklahoma City* v. *McMaster*, 196 U. S. 529.

Considering the writ of error, we remark that no rulings were made in respect to the admission or rejection of testimony presenting anything worthy of consideration. No special findings of fact were made by either the District or Supreme Court, the former finding generally the issues in favor of the plaintiff and rendering judgment upon such general finding, and the latter merely discussing the right of recovery upon the pleadings and such general finding.

Plaintiffs in error contend that this is a mere option contract, and that no liability could attach to them except upon an election to purchase the property, which they never made, but, on the contrary, declined to make, and notified the plaintiff thereof by letter. They call attention to the clause providing that "the $500 is to be considered an option," refer to the fact that there is nothing in the contract in terms mentioning "sale" or "purchase." There is always danger in applying a generic term to a contract and then subjecting it to the general rules controlling contracts of that nature, irrespective of its special stipulations. While an option is given by the contract, and the price paid for the option is named, yet it contains other clauses which are equally binding and from which liability arises. Option contracts are not all alike. As said in *Hunt* v. *Wyman*, 100 Massachusetts, 198, 200, quoted approvingly by this court in *Sturm* v. *Boker*, 150 U. S. 312, 329:

"An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

In the contract before us, while an option running until the fourth of March, 1901, is given, for which $500 is to be paid, the stipulation for such option is followed by this: "At that date the above-named parties are to pay to Nelson an additional sum of $4,500 (four thousand five hundred dollars), or in lieu thereof to turn back to said Nelson all the property delivered by him." Here is an absolute promise on the part of plaintiffs in error to pay an additional sum of $4,500 at a specified date, or in lieu thereof to turn back the property. They did not return the property. The amount to be paid and the time of the payment are expressly named, and that stipulation in the contract is as significant and binding as any other. It shows that the option given is an option to return, and that if it is not exercised at the time named the sale is complete, and the promise to pay the balance of the purchase price becomes absolute. This construction of the contract is reinforced by the fact that not only was the stock to be delivered to the plaintiffs in error, but also Nelson agreed to give, and did give, his proxy as director in each of the companies, so that the possession of the stock and all the rights which attached to it passed to the plaintiffs in error, to be exercised by them subject to the right at any time before the fourth of March to return the property. *Haskins* v. *Dern*, Supreme Court of Utah, 19 Utah, 89, is directly in point.

We see no error in the ruling of the Supreme Court of Oklahoma, and its judgment is

Affirmed.

Mr. Justice McKenna took no part in the decision of this case.

SAN ANTONIO TRACTION COMPANY *v.* ALTGELT.

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

No. 131. Argued December 13, 1905.—Decided January 22, 1906.

Even though an ordinance extending a franchise may be construed as a contract, it is still subject to the control of the legislature if the constitution of the State then in force provides that no irrevocable or uncontrollable grant of privileges shall be made and that all privileges granted by the legislature, or under its authority, shall be subject to its control; nor is the legislature deprived of this control because the contract was not made by it but by a municipal corporation, as the latter is for such purpose merely an agency of the State.

Where, after a new constitution has been adopted, a railway, chartered prior to such adoption, is consolidated with other roads or accepts new privileges, all contracts, privileges and franchises conferred are subject to the provisions of the new constitution.

Where a corporation chartered prior to the existing constitution of a State is wound up and all of its property, contracts and obligations transferred by ordinance to a new corporation, the ordinance must be construed in connection with the constitution and the provisions for further control therein contained.

THIS was a petition by Altgelt, suing by his next friend, originally filed in the District Court of Bexar County, for a peremptory mandamus against the Traction Company, a Texas corporation operating a street railway system, commanding it to issue to the plaintiff twenty half-fare street car tickets upon the payment of fifty cents, the same being at the rate of two and a half cents per ticket.

Both parties relied upon the legal effect of certain legislation of the State of Texas hereafter set forth. The mandamus was granted by the District Court, whose action was affirmed by the Court of Civil Appeals. An application for a writ of error from the Supreme Court was denied.

Mr. Charles W. Ogden for plaintiff in error.

There was no appearance for defendant in error.

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

This case depends upon the construction and validity of certain legislative acts of the State of Texas from 1874, the date of the original charter, to 1903, the date of the act complained of as an impairment of the Traction Company's contract.

The Constitution of 1869, in force at the time the original company was chartered, contained no limitation upon the power of the legislature to grant franchises in towns, cities and other subdivisions of the State. The San Antonio Street Railway Company was incorporated in 1874 by special act, in which it was provided, section 8, that "all contracts made and entered into between the mayor and aldermen of the city of San Antonio and said company, or any privileges and rights granted . . . to said company, shall be in all respects legal and binding on the aforesaid contracting parties," and by section 9, that the charter "shall remain in full force and effect for the period of fifty years."

By ordinance of the city council of October 5, 1875, privilege was granted to the San Antonio Street Railway Company to construct a first class horse railway, during the term of its charter, upon the streets of said city upon certain routes; but the ordinance did not fix the rate of fare to be charged for the transportation of persons over its projected lines.

By article X, section 7, of the constitution of Texas of 1876, it was provided that "no law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway."

Section 17 of article I of the bill of rights of the same constitution provides that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or

created under its authority, shall be subject to the control thereof."

On March 16, 1899, twenty-three years after the adoption of this constitution, an ordinance of the city was passed granting an extension of time to the San Antonio Street Railway, and the San Antonio Edison Company, and imposing certain limitations upon the exercise of their franchises, among which was that "*said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other.*"

It was also provided, by section 11 of the same ordinance, that "the rights, privileges and franchises, or either of them herein referred to and hereby extended, may be assigned by the grantee or grantees to any person or corporation, and the limitations of this ordinance shall apply to the assignee thereof."

On April 4, 1900, all the property of this company was sold under the decree of a state court to a trustee for the stockholders, subject to the payment of the debts of the company, and to the performance of all outstanding contract obligations, which were declared "a preference lien" against all the property sold in the hands of the purchaser. The conveyance expressly stipulated that "within the meaning of the words 'contract obligations' shall be understood any and all existing contracts of the said San Antonio Street Railway Company for street railway service over its road, or any portion thereof, had with any person or persons, now binding on said street railway company."

On August 7, 1900, the common council of the city passed an ordinance reciting the sale of the property and privileges of the former corporations, the San Antonio and Edison Companies, to the Traction Company, and enacting that all the rights and privileges theretofore granted to the former companies, which were said to be "now defunct," with all the limitations, duties, contracts and obligations imposed and required of the said San Antonio Street Railway Company were

imposed upon the Traction Company. This ordinance was accepted.

The legislation remained in this condition until April 10, 1903, when the legislature of the State passed a new act, the second section of which reads as follows:

"SEC. 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age, in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same, of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets."

It is insisted by the plaintiff in error that, under section 7, article X, of the state constitution, above quoted, the power to grant street railways the property rights and franchises, to construct and operate a street railway within a city, is withdrawn from the legislature and conferred, if not by express words, then by necessary implication, upon the municipal authorities. We do not so read the section. It merely provides that no such law shall be passed by the legislature granting the right to construct and operate a street railway without first acquiring the consent of the local authorities, but we see nothing to prevent the legislature from chartering a street railway,

provided such consent be acquired. Such we understand to be the ruling of the Supreme Court of that State in *Taylor* v. *Dunn*, 80 Texas, 652, 659, and *Mayor* v. *Houston Street Railway Company*, 83 Texas, 548. But whether an act of the legislature be necessary to charter a street railway is not involved in this case, as we are cited only to the original charter of the San Antonio Street Railway Company of 1874; although it is clear that a new charter would be inoperative to authorize the construction of the road without the consent of the municipal authorities.

Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract *pro tanto*, the question still remains whether the provision "that said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other," constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provisions of the constitution of 1876, which in section 17 of the bill of rights declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof.

An important consideration in this connection is that the alleged contract was made twenty-three years after the constitution of 1876 was adopted, declaring that all privileges granted by the legislature shall be subject to its control. Clearly it was not deprived of that control by the fact that the contract was not entered into by the legislature itself, but by a municipal corporation, since that is but an agency of the State, to which is delegated the power to regulate street railways and other municipal franchises. We have repeatedly held that where a railway was originally chartered before a new constitution took effect (and hence such charter was not limited

thereby), yet if such road be subsequently consolidated with other roads, or accepts new privileges, after a new constitution takes effect, all contracts, privileges and franchises conferred after the adoption of such constitution are subject to its provisions. *Shields* v. *Ohio*, 95 U. S. 319; *Railroad Co.* v. *Maine*, 96 U. S. 499; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Keokuk &c. R. R.* v. *Missouri*, 152 U. S. 301; *Yazoo &c. Railroad Co.* v. *Adams*, 180 U. S. 1, 23.

In this case not only did the original San Antonio Street Railway Company become extinct by the foreclosure and sale of its property, but under the ordinance of August 17, 1900, declaring the prior companies to be "now defunct," the Traction Company also became the owner of all the property, assets, rights and privileges of another company, known as the San Antonio Edison Company, which thus became absorbed with the street railway company in the new corporation known as the Traction Company, which is admitted to have been incorporated since 1876, though the charter is not in the record. We are clearly of the opinion that under these circumstances it received its franchise under the constitution of 1876, which forbade either the legislature or the municipal authorities to make any irrevocable contract.

It is true that in this ordinance it was provided that all rights and privileges previously granted to the Street Railway Company and the Edison Company were conferred unto the Traction Company, including all the limitations, contracts and obligations, but this ordinance must be construed in connection with the constitution of 1876, which made all such privileges and franchises subject to the control thereof. Such was the view taken by the Court of Civil Appeals of Texas in this case, which expressly waived the question whether the provision of the former ordinance fixing a five-cent fare constituted a contract or not, declaring that if it did it was subject to further legislative control.

Under the bill of rights of that constitution the legislature could not reduce the fares to a confiscatory amount or to an

amount which would render it unprofitable to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenues. Indeed, it was found in the opinion of the court below that it was not contended there, and that there was nothing in the evidence tending to show, that the rate of fare claimed by the appellee under the act of 1903 is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment.

The judgment of the Court of Civil Appeals is

Affirmed.

HIBERNIA SAVINGS & LOAN SOCIETY *v.* SAN FRANCISCO.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 154. Submitted December 14, 1905.—Decided January 29, 1906.

The principle that the States cannot tax official agencies of the Federal Government does not apply to obligations such as checks and warrants available for immediate use. A tax upon them is virtually a tax upon the money which can be drawn upon their presentation.

THIS was an action by the plaintiff in error, begun in the state Superior Court to recover certain taxes paid under protest upon two checks or orders for $120,000 and $1,875, respectively, signed by the Treasurer of the United States and addressed to the Treasurer or an Assistant Treasurer of the United States, for interest accrued upon certain registered bonds of the United States, owned by the plaintiff. These checks were issued in compliance with Rev. Stat. § 3698, which requires that "the Secretary of the Treasury shall cause to be paid, out of any money in the Treasury not otherwise appropriated, any interest falling due, or accruing, on any portion of the public debt authorized by law." The checks,

which were payable at the United States Treasury at San Francisco at any time within four months from their date, were not presented immediately for payment, but were withheld by the plaintiff until the first Monday in March, 1899, the day when the *status* of property, for the purpose of taxation, is determined. Plaintiff did not list these checks for assessment; but the assessor, in making up his roll for the ensuing year, included them, and, after a fruitless effort to be relieved from the assessment, plaintiff paid the amount of the tax and brought this suit to recover it back. There were claims for other taxes included in the action, upon which plaintiff was successful, but in respect to the tax upon the two orders above mentioned judgment went for the defendant, which was affirmed by the Supreme Court. 139 California, 205.

Mr. T. C. Van Ness for plaintiff in error:

The obligation referred to is simply a check or order drawn by the Treasurer of the United States upon the Federal Treasury, in favor of plaintiff in error, for a designated amount. It shows the purpose for which it is issued, and the time and place of payment.

All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value. Const. of California, art. XIII, § 1. All stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state, or municipal or local authority. Rev. Stat. § 3701.

That this check is an obligation see Webster's Dict.; Civ. Code California, § 1427.

If the Treasury Department had not issued this order, the obligation of the Government to meet the interest upon its bonds would not have been changed; nor could the property right of plaintiff in this, as yet, uncollected interest be made the subject of taxation by state authority. *Bank of Kentucky* v. *Commonwealth*, 9 Kentucky Law Rep. 46.

As a general rule the tendency of the decisions of this court upon analogous questions is to sustain the exemption of all Federal obligations from municipal taxation. *McCulloch* v. *Maryland*, 4 Wheat. 314; *Howard Sav. Inst.* v. *Newark*, 44 Atl. Rep. 654; *Society of Savings* v. *Coite*, 6 Wall. 594; *New York* v. *Connolly*, 7 Wall. 16; *Osborn* v. *Bank of U. S.*, 9 Wheat. 738; *Bank of Commerce* v. *New York*, 2 Black, 620; *New Jersey* v. *Wilson*, 7 Cranch, 164. And as to treasury notes see *People ex rel.* v. *Supervisors*, 7 Wall. 26, which was decided prior to the act of Congress of 1894, subjecting such notes to the taxing power of the States. 2 Supp. Rev. Stat. 236.

Mr. Percy V. Long and *Mr. William I. Brobeck* for defendant in error:

The decision of this cause reduces itself to a determining whether the tax imposed upon the checks issued by the United States Treasurer in payment of interest due upon United States bonds did impede, retard, burden, or in any manner control the operations of the Federal Government in the exercise of its constitutional power to borrow money or otherwise employ the National credit. If this question can be answered in the negative, the judgment must stand.

The checks have been issued, payable *in præsenti* and drawn against unappropriated revenues which were at the time of issue and must always be sufficient to meet such drafts. Under such conditions the check constitutes payment in and of itself. It is equivalent to cash. *People* v. *Stockton and Visalia R. R.*, 45 California, 306; *Matter of Staten Island &c. R. R. Co.*, 37 Hun, 422; *S. C.*, 101 N. Y. 636; *S. C.*, 38 Hun, 382; *Metropolitan Bank* v. *Sirret*, 97 N. Y. 320; *Wells* v. *Brigham*, 6 Cush. (Mass.) 6; *Cruger* v. *Armstrong*, 3 Johns. Cas. (N. Y.) 5; *Nords* v. *Schroeder*, 4 Harris and J. (Md.) 276; *Wis. Cent. R. R. Co.* v. *Price*, 133 U. S. 496.

One who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the Government to avoid his just share of taxation. *Northern*

Pacific R. R. v. *Patterson*, 154 U. S. 139; *Mitchell* v. *Commissioners*, 91 U. S. 206; *Shotwell* v. *Moore*, 129 U. S. 590, 596. And see *Bank* v. *Commonwealth*, 9 Wall. 353.

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

This case involves the question whether the two checks or orders upon which the tax was imposed are exempt from state taxation under Rev. Stat. § 3701, declaring that "all stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority." The basis of this exemption is the fact that a tax upon the obligations of the United States is virtually a tax upon the credit of the Government, and upon its power to raise money for the purpose of carrying on its civil and military operations. The efficiency of the Government service cannot be impaired by a taxation of the agencies which it employs for such service, and, as one of the most valuable and best known of these agencies is the borrowing of money, a tax which diminishes in the slightest degree the value of the obligations issued by the Government for that purpose impairs *pro tanto* their market value.

The inability of the States to tax the official agencies of the Federal Government, whether in the form of banks chartered under its authority, or of obligations issued by it as a means of providing a revenue, or for the payment of its debts, was applied in *McCulloch* v. *Maryland*, 4 Wheat. 316, to a stamp tax upon notes of the United States Bank; in *Weston* v. *Charleston*, 2 Pet. 449, and in *Bank of Commerce* v. *New York*, 2 Black, 620, to stock issued for loans made to the Government of the United States; and in the *Bank Tax Case*, 2 Wall. 200, to a tax laid on banks on a valuation equal to the amount of their capital stock, when their property consisted of stocks of the Federal Government; in *The Banks* v. *The Mayor*, 7 Wall. 16, to certificates of indebtedness of the United States issued to

the creditors of the Goverment for supplies furnished in carrying on the Civil War; in *Bank* v. *Supervisors*, 7 Wall. 26, to notes of the United States intended to circulate as money; and in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, to land purchased by the United States for the amount of a direct tax laid thereon.

The principle, however, upon which this exemption is claimed does not apply to obligations, such as checks and warrants intended for immediate use, and designed merely to stand in the place of money, until presented at the Treasury and the money actually drawn thereon. In such case the tax is virtually a tax upon the money which may be drawn immediately upon presentation of the checks. As was said by Mr. Justice Miller in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362: "That limitation (upon the power to tax) is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair, their efficiency in performing the functions by which they are designed to serve that Government."

In *Railroad Company* v. *Peniston*, 18 Wall. 5, it was insisted by the plaintiff in error that the property of the Union Pacific Railroad Company was exempted from state taxation by virtue of the incorporation of the company by the United States, as a means for the performance of certain public duties of the Government enjoined and authorized by the Constitution. It was said, however, by Mr. Justice Strong, in delivering the opinion of the court, that no constitutional implications prohibited a state tax upon the property of an agent of the Government merely because it is the property of such agent, but "that the agencies of the Federal Government are uncontrollable by state legislation, so far as it may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government.

"It is, therefore, manifest that the exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon

the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Had the Government, in the absence of money for the immediate payment of interest upon its bonds, issued new obligations for the payment of this interest at a future day, it might well be claimed that these were not taxable, as the taxation of such notes would, to the extent of the tax, impair their value and negotiability in the hands of the holder. This was practically the case in *The Banks* v. *The Mayor*, 7 Wall. 16, where certificates were issued at a time when the Government had no money to pay its obligations, and made use of its credit to obtain further time. But where checks are issued payable immediately they merely stand in the place of coin, which may be immediately drawn thereon. As observed by the court below, the checks were for all practical purposes the money itself. *People* v. *Stockton &c. R. R. Co.*, 45 California, 306, 313; *Metropolitan National Bank* v. *Sirret*, 97 N. Y. 320, 325; *Matter of Staten Island R. R. Co.*, 38 Hun, 381; *S. C.*, 101 N. Y. 636. A check may be given in evidence under the money counts. *Wells* v. *Brigham*, 6 Cush. 6; *Cruger* v. *Armstrong*, 3 Johns. Cas. 5.

While Congress has not amended Rev. Stat. § 3701, upon which plaintiff relies in this case, it did by act approved August 13, 1894, 28 Stat. 278, declare "That circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency, . . . shall be subject to (state) taxation as money on hand or on deposit."

Although the checks in question were not intended to circu-

late as money, and therefore do not fall within the letter of the statute, the reasons that apply to that class of obligations we think apply with equal force to checks intended for immediate payment, though not intended to circulate as money. While the checks are obligations of the United States and within the letter of § 3701, they are not within its spirit, and are proper subjects of taxation.

Had the plaintiff drawn the money upon them immediately, it would have become at once a part of the general property of the bank, and the fact that the money had been derived from the United States and paid to the bank as interest on its obligations would not have prevented its becoming part of the general property of the bank, and subject to state taxation.

Affirmed.

MARTIN *v.* TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 170. Submitted January 25, 1906.—Decided February 19, 1906.

While an accused person of African descent on trial in a state court is entitled under the Constitution of the United States to demand that in organizing the grand jury, and empanelling the petit jury, there shall be no exclusion of his race on account of race and color, such discrimination cannot be established by merely proving that no one of his race was on either of the juries; and motions to quash, based on alleged discriminations of that nature, must be supported by evidence introduced or by an actual offer of proof in regard thereto. *Smith* v. *Mississippi*, 162 U. S. 592, 600, followed.

An accused person cannot of right demand a mixed jury some of which shall be of his race, nor is a jury of that kind guaranteed by the Fourteenth Amendment to any race.

THE facts are stated in the opinion.

Mr. Watson E. Coleman, Mr. O. P. Easterwood and *Mr. O. E. Smith* for plaintiff in error:

Whenever by any action of a State, whether through its legislature, courts, executive or administrative officers, all persons of the African race are excluded, solely because of race and color, from serving as grand jurors in the criminal prosecution of a person of that race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment. *Carter* v. *Texas,* 177 U. S. 442; and see *Strauder* v. *West Virginia,* 100 U. S. 303; *Neal* v. *Delaware,* 103 U. S. 370; *Gibson* v. *Mississippi,* 162 U. S. 565; *Wood* v. *Brush,* 140 U. S. 278; *Rogers* v. *Alabama,* 192 U. S. 226.

Mr. Robert V. Davidson, Attorney Gen. of the State of Texas, *Mr. C. K. Bell* and *Mr. Claude Pollard* for defendant in error:

As the motions to quash were based on allegations of fact not in the record and controverted by the attorney for the State, they must be supported by evidence. *Smith* v. *Mississippi,* 162 U. S. 592, 601; *Williams* v. *Mississippi,* 170 U. S. 213; *Carter* v. *Texas,* 177 U. S. 442.

A motion to quash an indictment against a person of African descent on the ground that it was found by a grand jury from which persons of accused's race were excluded, because of their race, can be sustained only by evidence independent of the facts stated in the motion. *Smith* v. *Mississippi,* 162 U. S. 592; *Bush* v. *Kentucky,* 107 U. S. 110; *Ex parte Virginia,* 100 U. S. 313, 339; *Neal* v. *Delaware,* 103 U. S. 370.

Plaintiff in error is not entitled, as a matter of constitutional right, to have his race represented upon the grand jury that may indict, or the petit jury that may try, him. *Jugiro* v. *Brush,* 140 U. S. 291; *Wood* v. *Brush,* 140 U. S. 276.

Plaintiff in error should have presented the question for decision to the highest court of the State having jurisdiction of criminal cases; failing to do so, he can not have the adverse decision of the District Court of this State reviewed here. *In re Wood,* 140 U. S. 278; *Ewing* v. *Howard,* 7 Wall. 503.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an indictment returned in the District Court of Tarrant County, Texas, the plaintiff in error was charged with the crime of murder. Having been duly arraigned and pleaded not guilty, the accused (a negro) moved to quash the indictment, on the ground, stated in writing under oath, that all persons of the African race had been excluded from the grand jury, *because of their race*, although about one-fourth of the inhabitants of the county, competent under the law to act as grand jurors, were of that race. The facts upon which the motion was based were set out, and the accused, in the written motion, prayed that testimony be heard in support of its grounds. The State's attorney, in writing, denied such discrimination and offered to prove that only about one hundred and fifty persons of the African race in the county, as compared with twelve thousand whites, were competent under the law to act as grand jurors.

The accused then moved in writing, verified by his oath, to quash the panel of petit jurors, upon the ground that from the panel had been excluded all persons of the African race, *because of their race*, although about one-fourth of the persons in the county competent under the law to serve as jurors were of that race. The facts set out in that motion were also denied in writing by the State's attorney.

Both motions were overruled by the court, the accused excepting. There was a verdict of guilty of murder in the first degree, and the accused was sentenced to suffer death. The judgment of conviction was affirmed in the Court of Criminal Appeals, the highest court of the State in which a decision of the case could be had. One of the assignments of error in that court was the overruling of the motion to quash the indictment, but no error was there assigned in respect of the overruling of the motion to quash the panel of petit jurors.

It is not contended that the constitution or laws of Texas authorized any discrimination, on account of race merely, in the selection of grand or petit jurors. Nor is it contended that

the prescribed qualifications for jurors were not appropriate in order to secure an impartial jury for the trial of an accused. Nevertheless, if upon the hearing of the written motion to quash the indictment, the facts stated in the motion had been established by affirmative proof, or if the trial court had refused to admit evidence to prove them, we should not hesitate to reverse the judgment. For, it is the settled doctrine of this court that "whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States." *Carter* v. *Texas*, 177 U. S. 442, 447; *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370, 397; *Gibson* v. *Mississippi*, 162 U. S. 565; *Rogers* v. *Alabama*, 192 U. S. 226, 231. So if, upon the hearing of the written motion to quash the panel of the petit jurors, facts stated in that motion had been proved, or if the opportunity to establish them by evidence had been denied to the accused, the judgment would be reversed.

But the record before us makes no such case. Although the accused in each of his written motions prayed the court to hear evidence thereon, it does not appear that he introduced any evidence whatever to prove discrimination against his race, because of their color, or made any actual offer of evidence in support of either motion. The reasonable inference from the record is that he did not offer any evidence on the charge of discrimination, but was content to rely simply on his verified written motions, although the facts stated in them were controverted by the State. The trial court, it must be assumed from the record, had nothing before it, when deciding the motions to quash, except the written motions and the written answers thereto. In *Charley Smith* v. *Mississippi*, 162 U. S. 592, 600, 601—which was a prosecution of a negro for the crime

of murder—it appeared that the accused, upon grounds stated in writing and similar to those assigned in this case, moved to quash the indictment. He moved, also, upon similar grounds, in writing, to quash the panel of petit jurors. Each motion was overruled. This court said: "No evidence was offered in support of the motion by the accused to quash the indictment, unless the facts set out in the written motion to quash, verified 'to the best of his knowledge and belief,' can be regarded as evidence in support of the motion. We are of opinion that it could not properly be so regarded. . . . The facts stated in the written motion to quash, although that motion was verified by the affidavit of the accused, could not be used as evidence to establish those facts, except with the consent of the state prosecutor or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced or offered to be introduced by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was, therefore, unsupported by any competent evidence; consequently, it cannot be held to have been erroneously denied." To the same effect were *Tarrance* v. *Florida*, 188 U. S. 519, 521, and *Brownfield* v. *South Carolina*, 189 U. S. 426, 428. The present case cannot be distinguished from the *Smith case;* and we are unable to hold, upon this record, that it was error to overrule the motions to quash; for, as already stated, it does not appear that the facts stated in those motions were established by evidence, or that the accused, after filing his motions, made any separate offer to prove them by witnesses or was denied the opportunity to make such proof.

A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the

petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color. *Virginia* v. *Rives*, 100 U. S. 313, 323; *In re Wood*, 140 U. S. 278, 285. Whether such discrimination was practiced in this case could have been manifested only by proof overcoming the denial on the part of the State of the facts set out in the written motions to quash. The absence of any such proof from the record in this case is fatal to the charge of the accused that his rights under the Fourteenth Amendment were violated.

Judgment affirmed.

UNITED STATES v. DETROIT TIMBER AND LUMBER COMPANY.

MARTIN-ALEXANDER LUMBER COMPANY v. UNITED STATES.

APPEAL AND CROSS APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 106, 165. Argued December 7, 1905.—Decided February 19, 1906.

The rule of law concerning good faith is the same in respect to purchases of land and timber as that which obtains in other commercial transactions, and no one is bound to assume that the party with whom he deals is a wrongdoer; but, on paying full value for the property presented, the title to which is apparently valid and in regard to which there are no suspicious circumstances, he will acquire the rights of a *bona fide* purchaser.

Equity looks at the substance and not at the mere form in which a transaction takes place, and constructive fraud in the entries of land pur-

chased by one company from another will not be charged to the purchaser where there is nothing which casts imputation on its conduct, or tends to show that it was not a purchaser in good faith, because after the actual purchase and payment therefor, but prior to the final conveyance, an officer of the vendee company became an officer of the vendor company for the purpose of closing up its business.

Although the doctrine of relation is but a fiction of law it is resorted to whenever justice requires, and under it patents for lands when issued by the United States become operative as of the dates of the entries,—the inception of the equitable right upon which the patent is based—and the doctrine can be applied to protect a *bona fide* purchaser of timber notwithstanding the wrongful character of the entries of which he is ignorant. But the doctrine of relation never carries a patent back to the date of any entry other than that on which it is issued.

The headnotes to the opinions of this court are not the work of the court but are simply the work of the Reporter, giving his understanding of the decision, prepared for the convenience of the profession.

A final receipt is an acknowledgment by the Government that it has received full pay for the land and holds the title in trust for the entryman and will in due course issue to him a patent, and thereupon he becomes the equitable owner of the land.

Until the patent which passes the legal title is issued the legal title remains in the Government and is subject to investigation and determination by the Land Department, but this power will not be exercised arbitrarily or without notice, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has been issued to other parties.

The principles of equity exist independently of, and anterior to, all Congressional legislation, and the statutes are either annunciations of those principles or their applications to particular cases, and a party dealing with an entryman the evidences of whose entry are in form good and sufficient is justly entitled to the consideration of a court of equity, and one who has in good faith cut and removed timber under contract with such an entryman whose entry is subsequently cancelled and purchase money retained by the Government, cannot be compelled to account to the Government for the timber cut and removed in reliance on such contract.

THESE are cross appeals from a decree of the Circuit Court of Appeals for the Eighth Circuit, affirming in part and reversing in part a decree of the Circuit Court for the Western District of Arkansas.

The bill was filed on April 5, 1902, by the United States against the Detroit Timber and Lumber Company, the Martin-

Alexander Lumber Company and a number of individual defendants. The object of the bill was to set aside patents to forty-four tracts of land issued to the individual defendants and all conveyances, contracts and leases from them purporting to convey title to or a right to cut and remove timber from the lands, and also for an accounting of the timber cut and removed from the lands by the two companies, and judgment therefor.

The charge was that the lands were entered under the timber act of June 3, 1878, 20 Stat. 89, and in fraud of its provisions, in that the purchase money was advanced by the Martin-Alexander Company under contracts with the entrymen that after the entries they should convey to it all the standing timber thereon. The Martin-Alexander Company denied that there were any such contracts, and the Detroit Company in addition pleaded that it was a *bona fide* purchaser from the former company. It appeared from the testimony that for some time prior to January 14, 1901, the Martin-Alexander Company owned and operated a sawmill plant in the vicinity of these lands; that most, if not all, of the entrymen were its employés; that it furnished all the money for the purchase prices of these lands as well as for the expenses connected with the entries, and that after the entries the entrymen, with three exceptions, executed conveyances to it of all the standing timber. Fifty-eight and one-half per cent of the stock of the Martin-Alexander Company belonged to E. B. Martin, while A. V. Alexander controlled the remainder, which was owned by himself, his wife, and J. O. Means.

On January 14, 1901, the Detroit Company purchased the entire property of the Martin-Alexander Company for $60,000 cash and an assumption of its obligations, amounting to $17,456.79. Prior to May 9, 1901, patents were issued for all the lands, thirteen having been issued before January 14, 1901. After the purchase from the Martin-Alexander Company the Detroit Company obtained deeds of the lands from the patentees of twenty-seven of the tracts.

The Circuit Court found that the transactions between the entrymen and the Martin-Alexander Company were not in conflict with the statute, that there were no agreements between them and it prior to the entries in respect to conveyances of the standing timber, and that there was only the mere expectation on the part of the company that it would be able to purchase the timber. Thereupon it dismissed the bill. 124 Fed. Rep. 393. The Court of Appeals, reviewing the testimony, held that there were contracts between the parties making the entries and the Martin-Alexander Company prior to the entries, and that therefore those entries were in fraud of the act, but it also found that the purchase by the Detroit Company was in good faith, and that therefore that company was entitled to protection in its purchase. It ordered the bill dismissed as to the twenty-seven tracts for which patents had been issued and conveyances made to the Detroit Company. As to the seventeen which had not been conveyed, it ordered a decree cancelling the patents, but dismissing the bill so far as respects any relief claimed against the Detroit Company. 67 C. C. A. 1.

Mr. Marsden C. Burch and *Mr. Fred A. Maynard*, Special Assistants to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

This case is the same in principle and fact as *United States* v. *Trinidad Coal & Coke Co.*, 137 U. S. 160, 166, and is not controlled by *United States* v. *Budd*, 144 U. S. 154. In the latter case there was but one entry; in the case at bar there was a gigantic conspiracy to gather in an immense tract of land through a premeditated scheme. The testimony bears this out.

The Detroit Company had actual notice. Clark & Marshall on Private Corporations, §§ 348, 354, and cases cited; 2 Morawetz on Corp., 2d ed., p. 943.

The so-called purchase by the Detroit Company was merely a merger, although appellees claim that the transaction cannot

be regarded as a merger for the reason that they had not the legislative authority to bring about a merger; but as to this proposition no corporation can defend its acts or change their character in law by the claim that such acts are *ultra vires;* and legislative authority is not necessarily a condition precedent to a legal merger. Such a merger may always be ratified by the legislature after it has taken place. *Bishop* v. *Brainerd,* 28 Connecticut, 289; *Mead* v. *New York &c. R. Co.,* 45 Connecticut, 199.

The Detroit Company also had constructive notice. It was put on notice as to all the circumstances of the case.

The appellees contend that their duty stopped with the mere assurance from the vendor that the title was all right. They knew that the company had no record title to the lands described. They had no legal right to rely upon the bare statement of interested parties whose interest might prompt them to make false or misleading statements. *Price* v. *MacDonald,* 54 Am. Dec. 657.

Passive good faith will not serve to excuse willful ignorance. 2 Pomeroy on Eq. Jur. § 762; 21 Am. & Eng. Ency. of Law, 584, and 23 Am. & Eng. Ency. of Law, 515, and authorities cited, and see also *Hawley* v. *Diller,* 178 U. S. 476, which holds that one cannot be a *bona fide* purchaser who does not make a searching inquiry as to the property acquired.

Mr. James F. Read, with whom *Mr. U. M. Rose, Mr. Thomas C. McRae* and *Mr. George B. Rose* were on the brief, for appellees in No. 106.

Mr. W. E. Hemingway, with whom *Mr. U. M. Rose* and *Mr. George B. Rose* were on the brief, for appellants in No. 165:

The case of the Government fails for want of proof. It will be presumed that the Martin-Alexander Company preferred legal to illegal entries. *United States* v. *Budd,* 144 U. S. 154, 163. Legal sales of timber lands subsequent to entries do not prove illegal prior contracts to sell. The finding of the judge in the Circuit Court who heard the testimony

that there was no fraud or violation of law is entitled to great respect.

The testimony may indicate improvidence and loose business methods by the entrymen, but it does not show any purpose to enter land for the benefit of anyone else. Buying for sale at a profit, could not have been what the act meant by speculation. As it applies only to land valuable for timber or stone, the entrymen could derive no benefit from the land except by selling it. Only a mill man could make the entry for the purpose of using the timber, and it would not be contended that the benefits of the act were intended to be confined to them.

The meaning of the word "speculation" in the act is not obvious. If used in its ordinary meaning the purpose of the act would be defeated, and therefore that cannot be the meaning intended. It means only that the entryman does not intend to speculate on the privilege acquired by the application; but to complete the entry and acquire the land for the benefit to result to him by reason of owning it. *Myers* v. *Croft*, 13 Wall. 294; Sec'y of Interior MSS. Op., Dec. 10, 1903, *Re Donahue et al.;* see sub. "Speculation," Bouvier's Law Dict.; Century Dictionary; Webster's Dictionary of 1896 and 1903, changing definitions of edition of 1887. And as to construction of the act see *United States* v. *Budd, supra; United States* v. *Clark*, 125 Fed. Rep. 774. *United States* v. *Bailey*, 17 L. D. 468, and *Hawley* v. *Diller*, 178 U. S. 476, 495, distinguished.

The Detroit Company was an innocent purchaser for value. The testimony is clearly to the effect that it had no affirmative notice or knowledge.

Where it is sought to charge a purchaser for value with *mala fides* the burden is upon the complainant to show, either actual knowledge of the fraud, or knowledge of some fact, that would make it his duty to inquire, and his failure to do so an act of gross or culpable negligence. *Townsend* v. *Little*, 109 U. S. 504; *Meehon* v. *Williams*, 48 Pa. St. 238; *Wilson* v. *Wall*,

6 Wall. 83; Devlin on Deeds, 1st ed., § 729; *Hall* v. *Livingston*, 3 Del. Ch. 348; *Shepherd* v. *Shepherd*, 36 Michigan, 173; *Hardy* v. *Harbin*, 1 Sawyer, 194; *Mills* v. *Smith*, 8 Wall. 27; *Colorado C. & I. Co.* v. *United States*, 123 U. S. 307; *Crawford* v. *Neal*, 144 U. S. 585; *Jones* v. *Simpson*, 116 U. S. 609.

The officers of the Detroit Company were only bound to investigate the public records. According to those there was no illegality. They were correct according to statute, 2 U. S. Comp. Stat., p. 1546, and see *Lea* v. *Polk County Copper Co.*, 21 How. 493; *Bagnell* v. *Broderick*, 13 Pet. 448; *United States* v. *California & Oregon Land Co.*, 148 U. S. 31; *United States* v. *Minor*, 29 Fed. Rep. 134; *Simmons* v. *Moore*, 2 Fed. Rep. 325.

A vendee is not bound to inquire of the parties to a conveyance whether they are committing a fraud by suppressing anterior deed, etc., for it is evidence that if fraud was intended, deception would be carried out by denial. Such inquiries are not resorted to in practice in business transactions. 2 Hare & Wallace Notes to Leading Cases in Equity, 66; *Miller* v. *Froley*, 23 Arkansas, 745; *Ferguson* v. *May*, 4 Ky. Law. Rep. 989.

A concealed defect or secret equity arising from the conduct of those who originally owned the property of which the purchaser had no notice cannot be set up against him. *Danberry* v. *Robinson*, 14 N. J. Eq. 213.

To secure in equity all the rights of a *bona fide* and duly vigilant purchaser one is not required to make inquiry whether there is fraud or trust where the title and possession give no indication that there is either. *Leach* v. *Ausbacher*, 55 Pa. St. 85; *Yardly* v. *Torr*, 67 Fed. Rep. 857; *Fletcher* v. *Peck*, 6 Cranch, 135; *Anderson* v. *Roberts*, 18 Johns. Rep. 531; 21 Am. & Eng. Ency. of Law, 588.

Even if the officers of the Detroit Company knew of the facts they still acted in good faith as they were in no way connected with the frauds alleged. *United States* v. *Southern Pacific Co.*, 184 U. S. 54.

At the time this suit was brought the Detroit Company had not only the equitable but the legal title to the property. Kirby's Stat. of Arkansas, § 734. As to *Hawley* v. *Diller, supra,* see 1 Story's Eq. Jur. 64; 2 Pomeroy Eq. Jur. §§ 740, 766; *United States* v. *Winona & St. Peters R. R. Co.,* 165 U. S. 463.

There is no testimony that the Detroit Company procured the lands for an inadequate consideration. But had they done so in fact, there are authorities that hold that all that was necessary was that the consideration should be valuable. 23 Am. & Eng. Ency. of Law, 488; *Bullock* v. *Sadlier,* Ambler, 763; *Dean* v. *Anderson,* 34 N. J. Eq. 508; Wait on Fraud. Convey. and Creditors' Bills, 1st ed., § 369.

It does not matter in this case that the Detroit Company did not acquire the legal title when it paid the purchase price. It acquired a right to call for a legal estate. Pomeroy's Equity, § 727; Adams's Equity, 161; *Deuber Co.* v. *Daugherty,* 62 Ohio St. 589. And that is sufficient. 23 Am. & Eng. Ency. of Law, 486; *St. Johnsbury* v. *Morrill,* 55 Vermont, 165; notes to *Bassett* v. *Nosworthy,* 2 Leading Cases in Equity, 102; *United States* v. *Clark,* 125 Fed. Rep. 774.

There was no merger of the two companies but an actual transfer. 1 Thompson on Corp. § 315; 6 Am. & Eng. Ency. of Law, 802; *The Key City,* 14 Wall. 653; *McAlpine* v. *Union Pacific Railway Co.,* 23 Fed. Rep. 168.

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

The able and elaborate opinions of both the Circuit Court and the Court of Appeals relieve us from much labor. There are two questions of fact: First, whether the parties making the entries had, prior to acquiring title from the Government, made any agreement with the Martin-Alexander Company for a conveyance of an interest in the properties, or were seeking to acquire title solely for their own benefit. Second, whether

the Detroit Company was a purchaser in good faith from the Martin-Alexander Company. With reference to the first question, the Circuit Court was of the opinion that there were no agreements between the parties. The Court of Appeals was of a different opinion, and held that the entries were made in pursuance of such agreements. This is a case in equity, and while in such a case questions of fact are always open to consideration by an appellate court, great respect is paid to the conclusions of the trial court in respect to them. Certainly, if the Circuit Court and the Court of Appeals had agreed we should be very loath to disturb their conclusions. Differing as they do in the present case, we have examined this question, and agree with the Court of Appeals. The entire management of these entries was in the hands of an agent of the Martin-Alexander Company. It furnished the moneys, both for the purchase prices and all expenses, and it is not easy to believe that it did all this on a mere expectation that after the entries had been made it could purchase the timber. It is a much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. It is quite likely that the entrymen were not conscious of wronging the Government, and thought that if it received the full price demanded that was enough. The testimony of one witness suggests at least that they may have been advised that there was no contract unless it was in writing, and that hence they could conscientiously take the oath required in connection with an entry. So, without casting any imputation of intentional perjury on those parties, we agree with the Court of Appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Company, that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price.

With reference to the second question of fact, the Circuit Court made no finding, having disposed of the case by its conclusion in respect to the first. The Court of Appeals found

that the Detroit Company was a purchaser in good faith from the Martin-Alexander Company. Here, too, we have examined the testimony, and are satisfied that the conclusion of the Court of Appeals was correct. A brief statement of the salient facts may be not unimportant. The headquarters of the Detroit Company were in St. Louis, of the Martin-Alexander Company in southwest Arkansas. They dealt at arm's length. On December 20, 1900, Alexander, of the Martin-Alexander Company, applied to U. L. Clark, president of the Detroit Company, at St. Louis, to purchase Martin's interest in the Martin-Alexander Company. Clark declined, stating that the Detroit Company would make no purchase of a fractional interest in the property. Thereupon it was arranged that he should make an examination with a view to the purchase of the entire property. The Detroit Company's inspector was sent to Arkansas to examine the lands. Clark himself went down in the January following, and, after receiving the report of the inspector, terms of sale were, on January 14, agreed upon; $60,000 cash and the assumption of the Martin-Alexander Company's debts. The $60,000, by agreement between the stockholders of the Martin-Alexander Company, were divided, $34,850 to Martin, $24,850 to Mrs. Alexander, $150 to A. V. Alexander, and $150 to J. O. Means. Martin and Means were paid at once; the debts were also promptly paid. Alexander desired to take stock in the Detroit Lumber Company in lieu of the money coming to his wife and himself. Clark was not then authorized to make such arrangement, but subsequently the stock of the Detroit Lumber Company was increased and the Alexanders were paid in full in that stock. The entire property of the Martin-Alexander Company, included in which were the sawmill, tram and logging roads, these timber contracts and other like contracts and also all stock on hand, was at the time of the purchase, January 14, turned over to the Detroit Lumber Company, which thereafter continued the business. The Martin-Alexander Company had no deeds of the lands in controversy, but simply contracts for the timber

thereon, and in order to be relieved from the necessity of keeping accounts with respect to the different tracts the Detroit Company proceeded to obtain deeds from twenty-seven of the patentees, paying on an average $25 apiece therefor, which was a fair price for the lands after the timber had been cut off. It had no knowledge or intimation that there was anything wrong in the titles until the last of September or the first of October, 1901,—more than four months after the Government had issued its patents for all the lands—when it received a notice to that effect from a Government inspector.

Now we remark that there is no intimation in the testimony that the purchase price was not paid by the Detroit Company in cash and stock as agreed upon, no suggestion that the price was an unreasonable one. There was nothing strange or unnatural in the contract between the companies; on the contrary it was one which might well be entered into by parties situated as these were. But it is contended by the Government that if the Detroit Company had examined with care the books of the Martin-Alexander Company, and the papers which it turned over as evidences of its titles, it would have perceived that the timber contracts were made shortly after the issue of the final receiver's receipts, that the parties making the contracts were all or nearly all employés of the Martin-Alexander Company, to whom moneys had been advanced, and with each of whom an account was being kept; that it was its duty to critically examine these matters in order to be sure that the titles which it was acquiring were good. In their brief counsel for the Government say:

"We claim that the law as laid down in *Hawley* v. *Diller*, that one who takes title before the issuance of patent cannot claim to be a *bona fide* purchaser, made it the duty of the Detroit Company to make the most searching inquiry at least as to all of the timber contracts except the thirteen for which patents to the land had issued."

We do not understand the law to be as stated, or that one who enters into an ordinary and reasonable contract for the

purchase of property from another is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of law in respect to purchases of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. *Jones* v. *Simpson*, 116 U. S. 609, 615. He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title.

It is further said that the written contract of sale from the Martin-Alexander Company to the Detroit Company was not executed till March 1, 1901, and that on the fourteenth of January, 1901, Martin resigned his position as president of the Martin-Alexander Company, and Clark, the president of the Detroit Company, was elected president of the former company; that, as the chief executive of that company, he was charged with knowledge of all that the company knew, and that therefore, before the written contract was entered into, he and the Detroit Company had constructive notice of the wrongful character of these timber contracts. But that is a mere evasive technicality. The bill charges and the answer admits the sale on January 14, and the facts, as disclosed by the testimony, are that Martin desired to leave at once on receipt of his money and return to his home in Illinois; that Clark was put in his place as president to enable the Martin-Alexander Company to close up its outstanding affairs. The real contract between the parties was entered into before Clark became president, and all that was afterwards done was simply to put in writing the terms of the contract which had been

agreed upon. Equity looks at the substance and not at the mere form in which a transaction takes place. The rule in respect to constructive notice was thus stated in *Wilson* v. *Wall*, 6 Wall. 83, 90, 91:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, p. 622, where he says: 'In *Ware* v. *Lord Egmont* the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.' "

And, again, in *Townsend* v. *Little*, 109 U. S. 504, 511:

"Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. *Plumb* v. *Fluitt*, 2 Anst. 432; *Kennedy* v. *Green*, 3 My. & K. 699. . . . As said by Strong, J., in *Meehan* v. *Williams*, 48 Penn. State, 238, what makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. See also *Holmes* v. *Stout*, 3 Green Ch. 492; *McMechan* v. *Griffing*, 3 Pick. 149; *Harwick* v. *Thompson*, 9 Alabama, 409."

In the light of these authorities we see nothing which casts any imputation on the conduct of the Detroit Company, or

that tends to show that it was not a purchaser in absolute good faith.

Now, what is the law controlling under these circumstances? Much reliance is placed by the Government on *Hawley* v. *Diller*, 178 U. S. 476, which, affirming prior cases, holds that an entryman under the timber act acquires only an equity, and that a purchaser from him cannot be regarded as a *bona fide* purchaser within the meaning of the act. But the Detroit Company purchased twenty-seven tracts after the issue of the patents therefor. And in making these purchases it dealt, not with the Martin-Alexander Company, but directly with the patentees. While the amounts paid were small, yet, as counsel for the Government admit in their brief that "the land without the timber is of no value," there can be no suggestion of inadequacy of price. As, also, it had no knowledge or suspicion of wrong in the titles, it is, as to these tracts, strictly and technically, within the language of the act, a *bona fide* purchaser. If it be contended that, by virtue of the contracts for the sale of timber, it had acquired some interest in the lands prior to the issue of patents, it is sufficient to say that by the doctrine of relation the patents, when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application, designed to promote justice. Thus, a sheriff's deed takes effect not of its date, but of the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in presenti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant. *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733; *St. Paul &c. Railway Co.* v. *Phelps*, 137 U. S. 528; *St. Paul & Pacific* v. *Northern Pacific*, 139 U. S. 1; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570. A patent from the United States operates to transfer the title, not merely from the date of the

patent, but from the inception of the equitable right upon which it is based. *Shepley* v. *Cowan*, 91 U. S. 330. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries. This doctrine has frequently been recognized by this and other courts. *Landes* v. *Brant*, 10 How. 348; *Lessee of French and Wife* v. *Spencer*, 21 How. 228; *Stark* v. *Starrs*, 6 Wall. 402; *Lynch* v. *Bernal*, 9 Wall. 315; *Gibson* v. *Chouteau*, 13 Wall. 92; *Simmons* v. *Wagner*, 101 U. S. 260; *Jackson* v. *Ramsey*, 3 Cow. 75; *Welch* v. *Dutton*, 79 Illinois, 465; *Ormiston, Guardian*, v. *Trumbo, Admr.*, 77 Mo. App. 310. In the first of these cases it was said (p. 372):

"To protect purchasers, the rule applies, 'that where there are divers acts concurrent to make a conveyance estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation,' as stated in Viner's Abr. tit. Relation, 290. . . .

"Cruise on Real Property, vol. V, pp. 510, 511, lays down the doctrine with great distinctness. He says: 'There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.' . . .

"Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, 'as one act,' then the confirmation of 1811 and the patent of 1845 must be taken to relate to the first act; that of filing the claim in 1805."

In *Simmons* v. *Wagner*, p. 261:

"Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of

the officers charged with that duty. *Barney* v. *Dolph*, 97 U. S. 652."

See also *United States* v. *Freyberg*, 32 Fed. Rep. 195, a case in the Circuit Court for the Eastern District of Wisconsin, in which it was held by Judge Dyer that an action brought by the Government to recover for timber cut from land, which had been entered as a homestead, but the full equitable title of which had not then passed to the entryman, either by the required occupation of the premises or by a commuting of the homestead to a preëmption entry—an action maintainable at the time it was commenced—was defeated by the issue of the final receiver's receipt and the consequent perfection of a full equitable title.

Counsel for the Government deny the application of this principle in the present case on the ground, first, that it gives vitality and validity to a wrongful acquisition of title from the Government. They say that equity is never founded on a wrong, and that because the original entries were wrongful the doctrine of relation will not be applied. But this is a clear misunderstanding of the purpose and scope of the doctrine of relation. If the original entries were rightful there is no need of its application, for the patents would pass perfect titles. The equity is founded on the rightful conduct of the purchaser and not on the wrongful conduct of the entrymen. It upholds the purchaser in his honest purchase notwithstanding the wrongful character of the entries. This is akin to the ordinary rule in respect to a *bona fide* purchaser. Equity sustains the title in spite of the fact that his grantor may have wrongfully obtained it, and upholds it because of his rightful conduct.

Counsel also say that the question is settled by the decision in *Hawley* v. *Diller*, *supra*, relying upon the second paragraph in the headnotes:

"An entryman under this act acquires only an equity, and a purchaser from him cannot be regarded as a *bona fide* purchaser within the meaning of the act of Congress unless he becomes

such after the Government, by issuing a patent, has parted with the legal title."

There are two or three answers to this contention. In the first place, the headnote is not the work of the court, nor does it state its decision—though a different rule, it is true, is prescribed by statute in some States. It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports. In the second place, if the patent referred to in that headnote is a patent issued upon a wrongful entry, no such fact appeared in the case, because no patent was issued upon the entry charged to have been wrongful, but after that entry had been cancelled, a patent was issued to Diller on a new entry. If it refers to some other patent than one issued upon a wrongful entry, it has no pertinency, for the doctrine of relation never carries a patent back to the date of any other entry than that upon which it is issued. And finally the headnote is a misinterpretation of the scope of the decision.

With reference to the other tracts and the denial of any relief, by accounting or otherwise, against the Detroit Company, it is contended that as prior to the issue of a patent the Land Department could have set aside the entries on account of the fraudulent contracts, the courts will now grant the same relief; and further, that inasmuch as the patents are by this decree cancelled and the title restored to the Government the Detroit Company must be regarded as a wrongdoer in respect to the timber which it took from the lands prior to the decree, and an accounting should have been ordered. But this ignores the fact that the Detroit Company acted in good faith and purchased the timber from those having an apparently perfect equitable title thereto. It becomes necessary to inquire what is the significance of a final receiver's receipt and the effect of a cancellation by the Land Department of such a receipt. The receipt is an acknowledgment by the Government that it has received full pay for the land, that it holds the legal title in trust for the entryman and will in due course issue to

him a patent. He is the equitable owner of the land. It becomes subject to state taxation, and under the control of state laws in respect to conveyances, inheritances, etc. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Simmons* v. *Wagner*, *supra*; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526; *Cornelius* v. *Kessel*, 128 U. S. 456; *Hastings & Dakota R. R. Co.* v. *Whitney*, 132 U. S. 357; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428.

Indeed, in some of the opinions of this court, emphasizing the value of a receiver's receipt, there are expressions which seem to underestimate the significance of a patent. *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 510; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 251. For it must be remembered that the latter is the instrument which passes the legal title, and that until it is issued the legal title remains with the Government and is subject to investigation and determination by the Land Department. *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288, 326; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592; *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448. But while until the issue of the patent the land is under the control of the Land Department, which, upon proper investigation and for sufficient reasons, may set aside the certificate of entry, yet this power of the Land Department cannot arbitrarily be exercised without notice to the entryman, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has issued to other parties. *Guaranty Savings Bank* v. *Bladow*, *supra*. It is true, as against the Government, and while the title remains in the Government, he may not be able to enforce his equity, because no action can be maintained against the Government, except upon contract, express or implied. *United States* v. *Jones*, 131 U. S. 1. But while he may not sue on his equity, he may protect that equity when sued by the Government. It is sometimes said that a legal title with an equity is paramount to an equity alone, but this is not strictly true unless the equities are equal, for sometimes a superior equity

may be adjudged paramount to a legal title and an inferior equity. *Garland* v. *Wynn*, 20 How. 6; *Lytle* v. *Arkansas*, 22 How. 193; *Lindsey* v. *Hawes*, 2 Black, 554; *Wirth* v. *Branson*, 98 U. S. 118; 2 Pomeroy's Eq. Jur. § 678, and following. But we need not stop to inquire what rights the Detroit Company will have after a patent has issued. It is enough now to hold that it can defend its equities against the suit of the Government.

It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the Government and its vendees we must bear in mind the general principles of equity and determine rights upon those principles except as they are limited by special statutory provisions. And clearly upon those principles a party purchasing an equitable right is entitled to be protected in his purchase so far as it can be done without trespassing upon the rights of other parties. The statute provides that if an entry is wrongfully made it may, prior to patent, be set aside by the Land Department, the entryman forfeiting the money which he has paid. In other words, by the action of the Department the equitable title is cancelled and restored to the Government. It then has both the full title to the land and the money which had been paid for it. And this is the penalty which is imposed for the wrongful entry. Certainly when the Government retains the full price which it has placed upon the land and also recovers the land itself it is abundantly compensated for any wrong which has been attempted by the entryman. And a party who deals with such entryman—relying upon the evidences of his entry, which are in all respects in form good and sufficient, and are an acknowledgment by the Government officials of a rightful entry—is justly entitled to the consideration of a court of equity. In this case, finding

the entrymen holding apparently valid equitable titles to the lands, it entered into contracts with them for the purchase of the timber. It cut and removed the timber—all in good faith. It is equitable that, having thus acted in good faith, it should not be held to account for the timber which it has already paid for and cut and removed in reliance upon these contracts. The Government has every dollar which it would have received in case of a perfectly valid entry, and has also recovered the land. Surely it is not just for it to ask further payment, and from a party who dealt in good faith with the entrymen, relying upon the titles which it had created. If the Detroit Company has taken some timber from the land it has once paid for it, and ought not to be compelled to pay a second time, and to the Government, which has already received full pay for the land, timber and all. It is inequitable to give to the Government not merely the land, and the price which it charged for the land, but also the value of the timber obtained by the Detroit Company. It is doubling the penalty which the statute imposes, or if not doubling, at least largely increasing it.

We think the decision of the Court of Appeals was right, and it is

Affirmed.

Mr. Justice Harlan and Mr. Justice McKenna dissent.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

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

No. 141. Argued January 24, 1906.—Decided February 19, 1906.

Although a suit in equity cannot be maintained where there is an adequate remedy at law, and this objection may be taken for the first time in the appellate court, still, if not raised until then, the court need not, if the subject matter of the suit is of a class over which it has jurisdiction, dismiss the bill; and so held in regard to a suit brought by the Government, under an act of Congress, to recover from a railroad company the value of lands erroneously patented to and sold by it to numerous persons, some of whom were made defendants as representatives of the class, the bill also praying for cancellation of patents, quieting of titles, discovery and accounting.

Discovery, although now seldom the object of a suit in equity, and not always sufficient to uphold a suit when the full information is obtainable by proceedings at law, was a well-recognized ground of equity jurisdiction.

When by mistake a tract of land is conveyed, and the vendee prior to discovery of the mistake, conveys to a *bona fide* purchaser, the original owner is not limited to a suit to cancel the conveyances and reëstablish his own title, but may elect to confirm the title of the innocent purchaser and recover of his own vendee the value of the land up to at least the sum received by him. The conveyance to the innocent purchaser is equivalent to a conversion of personal property.

The acts of March 3, 1887, 24 Stat. 556, of February 12, 1896, 29 Stat. 6, and of March 2, 1896, 29 Stat. 42, do not in providing for adjustment of railroad land grants, amount to a taking of the railroad companies' property without compensation because they confirm sales made to *bona fide* purchasers of lands erroneously patented to railroad companies and require such companies to account for and pay to the Government the amounts received by them from such purchasers up to the regular Government price.

THIS was a suit begun in the Circuit Court of the United States for the Southern District of California, by bill filed April 13, 1899. The parties named as defendants were the Southern Pacific Railroad Company, the trustees in certain mortgages, and a number of individuals sued as representatives

of a class. In a general way it may be said that the bill averred that a large body of lands, some thirty thousand acres and over, had been erroneously patented to the railroad company, and that portions thereof had been conveyed by it to *bona fide* purchasers. The relief sought was the confirmation of the titles of *bona fide* purchasers, the cancellation of the patents to the other lands, and the recovery from the railroad company of the value of the lands conveyed by it to *bona fide* purchasers in accordance with the terms of the acts of Congress of March 3, 1887, 24 Stat. 556; February 12, 1896, 29 Stat. 6; March 2, 1896, 29 Stat. 42, providing for the adjustment of railroad land grants. After answers by the railroad company and some of the individual defendants, proofs were taken, and upon a hearing a decree was entered which in separate paragraphs specifically confirmed the titles to the several tracts held by *bona fide* purchasers, and adjudged that the United States recover from the railroad company the value of those lands, a sum amounting in the aggregate to $33,596.92. 117 Fed. Rep. 544. This decree was affirmed by the Court of Appeals (66 C. C. A. 581; 133 Fed. Rep. 651), from whose decision the railroad company and the trustees appealed to this court.

Mr. Maxwell Evarts for appellants:

As complainant had a complete remedy at law there is no jurisdiction of the case in equity. The case is nothing more than an action of debt, *Litchfield* v. *Ballou*, 114 U. S. 190, and a judgment at law would be the exact equivalent of what complainant could obtain in the suit. *Lewis* v. *Cocks*, 23 Wall. 466; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 574; *Allen* v. *Pullman Co.*, 139 U. S. 658; *Mills* v. *Knapp*, 39 Fed. Rep. 592; *Hoey* v. *Coleman*, 46 Fed. Rep. 221. *Kilbourn* v. *Sunderland*, 130 U. S. 505, and *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, do not control this case. See *Jones* v. *Bradshaw*, 16 Grat. (Va.) 361; *Green* v. *Massie*, 21 Grat. (Va.) 362; § 723, Rev. Stat.; Amendment VII, Const. U. S.; *Scott* v.

Neely, 140 U. S. 106; *Buzzard* v. *Houston*, 119 U. S. 347; cases cited p. 351.

No patent is sought to be avoided nor any multiplicity of suits. No ground of equitable jurisdiction can be suggested. The case is not difficult or complex. *Lacombe* v. *Forstall*, 123 U. S. 562, 570; *United States* v. *Winona R. R. Co.*, 165 U. S. 463, 481. Nor does the fact that discovery and an accounting is sought justify going into equity. *Ex parte Boyd*, 105 U. S. 647; Tiedeman on Eq. Jur., 1893, § 550. And as to accounting not justifying equity jurisdiction see *French* v. *Hay*, 22 Wall. 231.

The act of Congress of March 2, 1896, so far as it purports to give a right of action in favor of the United States to recover the Government price of all land erroneously patented to the railroad and sold by it to *bona fide* purchasers is unconstitutional.

The United States might confirm the title to such purchasers or it might cancel their patents, but the railroad company was not a party to the passage of the act, and without its consent the United States could not confirm the title and compel the railroad company to pay the Government any part of the amount received therefor.

The passage of the act amounted to a judicial finding that the railroad company owed the Government, and that $1.25 per acre was the measure of damages. This was a judicial finding beyond the legislative power of Congress. *United States* v. *Union Pacific R. R. Co.*, 11 Blatchf. 385, 392; aff'd 98 U. S. 569, 606; *United States* v. *Klein*, 13 Wall. 128; *Sinking Fund Cases*, 99 U. S. 700, 759; *Medford* v. *Learned*, 16 Massachusetts, 215; *Towle* v. *Railroad Co.*, 18 N. H. 547; *Pittsburgh Railway Co.* v. *Gazzam*, 32 Pa. St. 340, 350; *Craft* v. *Lofinck*, 34 Kansas, 365, 376; *Lane* v. *Doe*, 4 Illinois, 238, 241; *Isom* v. *Railroad Co.*, 36 Mississippi, 300, 310; *Coosa River Steamboat Co.* v. *Barclay*, 30 Alabama, 120, 127; *State* v. *Hampton*, 13 Nevada, 439. The statute is void because its effect is to deprive the railroad company of its property without due

process of law in violation of the Fifth Amendment of the Federal Constitution and its construction as in the present case to create an indebtedness out of past transactions, when no such indebtedness before existed, would make it unconstitutional.

Mr. Joseph H. Call, Special Assistant to the Attorney General, for the United States:

Defendants having answered to the merits without demurrer or plea to the jurisdiction in equity, and put the Government to the expense of taking of testimony, they have waived any right to object to the final determination in this cause, as one in equity, the court having power to grant the relief sought. *Brown* v. *Lake Superior Co.,* 134 U. S. 530, 535; *Insley* v. *United States,* 150 U. S. 512; *Perrego* v. *Dodge,* 163 U. S. 160; *Kilbourn* v. *Sunderland,* 130 U. S. 505, 514.

This bill is cognizable in equity as one to relieve against a mistake and error in issuing patents to defendant for lands not granted by the act of Congress, and to establish a trust against and accounting for the proceeds of sales of such lands, they or most of them having been sold to *bona fide* purchasers. Equity not only takes jurisdiction but will grant the relief sought.

These lands were excepted from the grant to the defendant railroad by the terms of the acts of March 3, 1871, and July 27, 1866, and were erroneously patented to the Southern Pacific. *United States* v. *Southern Pacific Railroad,* 146 U. S. 570, 619; *Southern Pacific Railroad* v. *United States,* 168 U. S. 1. The right of the United States to vacate and annul patents erroneously issued by the Land Department by bill in equity is sustained by an unbroken line of authority. Story, Eq. Jur. § 134; *United States* v. *Stone,* 2 Wall. 525, 535; *United States* v. *Minor,* 114 U. S. 233; *Mullan* v. *United States,* 118 U. S. 271; *United States* v. *Bell,* 128 U. S. 315, 362; *Colorado Co.* v. *United States,* 123 U. S. 307, 313; *Wisconsin Railroad* v. *United States,*

164 U. S. 190, 211; *Germania Iron Co.* v. *United States,* 165 U. S. 379, 383.

The jurisdiction in such cases is maintained in equity as arising in fraud, accident or mistake.

The United States also has a right to maintain a bill in equity to quiet and determine title to lands claimed adversely to the Government.

Section 738, Stat. California, Code of Civ. Pro., authorizes suits in equity to quiet and determine title to lands. *Pennie* v. *Hildredth,* 81 California, 127; *Pierce* v. *Felter,* 53 California, 18. The Federal courts will administer such relief in equity where authorized by state statute. *Reynolds* v. *Crawfordsville,* 112 U. S. 405, 412; *Chapman* v. *Brewer,* 114 U. S. 158, 170; *More* v. *Steinbach,* 127 U. S. 70, 84; *Hammer* v. *Garfield,* 130 U. S. 291, 295.

This bill is cognizable in equity as one brought to avoid multiplicity of suits. Pomeroy's Eq. Jur., 255, 269; *Brown* v. *Guarantee Trust Co.,* 128 U. S. 403, 410; *Ogden* v. *Armstrong,* 168 U. S. 224, 237; *Smyth* v. *Ames,* 169 U. S. 466; *Hayden* v. *Thompson,* 71 Fed. Rep. 60, 67; *Kelley* v. *Boettcher,* 85 Fed. Rep. 55, 64; *Barcus* v. *Gates,* 89 Fed. Rep. 783, 791; *Bailey* v. *Tillinghast,* 99 Fed. Rep. 801; *Whitehead* v. *Sweet,* 126 California, 67, 75; *Southern Pacific Co.* v. *Robinson,* 132 California, 408.

Where it is impracticable to make all the persons who are interested parties defendant, the court may proceed to a final decree, where such persons are sufficiently represented by others. The defendants before the court fairly represent a class of purchasers claiming protection under the acts of 1887 and 1896, and the courts below so found, and in such a case the court may proceed to a final decree. Equity Rules, 48; Story's Eq. Pl. §§ 95, 97; *Davis* v. *Gray,* 16 Wall. 203, 232.

Special jurisdiction in equity has been conferred by Congress upon the Circuit Court to confirm titles of *bona fide* purchasers and render judgment against the railroad company for value of lands. Act of Congress of March 2, 1896.

This is a constitutional exercise of power by Congress and creates an additional and new ground of equity which may be administered. *Holland* v. *Challen*, 110 U. S. 15; *Arndt* v. *Griggs*, 134 U. S. 316, 320; *Bardon* v. *Land Co.*, 157 U. S. 327, 330; *Cowley* v. *Railroad Co.*, 159 U. S. 569, 583.

Where land or other property has been transferred from one to another wrongfully or under a mistake, the court will establish and construct a trust in the property, and in its proceeds, in favor of the beneficiary, and against the person wrongfully holding it, and will require the trustee to return the property or its value.

It was not within the intention of the United States to convey the lands to the defendant, and that intent is shown by the granting act. The defendant is therefore bound in equity to reconvey the lands to the United States if still within its power to do so, and if not, then to pay to the United States what it received for them or their reasonable value. *Chapman* v. *Douglas County*, 107 U. S. 348, 360; Perry on Trusts, § 186; Story's Eq. Jur. §§ 134, 1261, 1263; Story Eq. Pl. § 221; Pomeroy's Equity Jur. §§ 155, 156, 1044; *May* v. *Le Claire*, 11 Wall. 217, 236; *Cook* v. *Tullis*, 18 Wall. 332, 341; *Angle* v. *Chicago Railroad*, 151 U. S. 1, 26; *Townsend* v. *Vanderwerker*, 160 U. S. 171, 179; *New Orleans* v. *Warner*, 175 U. S. 120, 129; *Clews* v. *Jamieson*, 182 U. S. 461, 479; *Taylor* v. *Benham*, 5 How. 233, 274.

The bill is maintainable as one for accounting and discovery. Story's Eq. Jur. §§ 441–456; Pomeroy's Eq. Jur. § 1420; *Kirby* v. *Lake Shore Railroad*, 120 U. S. 130, 134; *Colonial Mortgage Co.* v. *Hutchinson Mortgage Co.*, 44 Fed. Rep. 219.

The jurisdiction of courts of equity in matters of account is well settled, especially where discovery is sought, and always where discovery is made. *United States* v. *Old Settlers*, 148 U. S. 427, 465; *Fowle* v. *Lawrason*, 5 Pet. 495; *Magic & Co.* v. *Elm*, 14 Blatch. 114; *Kelley* v. *Boettcher*, 85 Fed. Rep. 55; *Gas Co.* v. *Indianapolis*, 90 Fed. Rep. 196; *McMullen* v. *Strother*, 136 Fed. Rep. 295.

The jurisdiction in equity in this case is sustained because the final relief sought and the mode of obtaining it is more efficient than in a court of law. Cases *supra* and *Oelrichs* v. *Spain*, 15 Wall. 211, 228; *Joy* v. *St. Louis*, 138 U. S. 1, 11, 50; *Chicago Railroad* v. *Union Pac. Railroad*, 47 Fed. Rep. 15, 26; *United States* v. *Union Pac. Railroad*, 50 Fed. Rep. 28, 43.

The legislation of Congress, acts of 1866 and 1871, for the construction of the railroad, its public uses, grant of lands, and their sale by the road, and requiring repayment of value of lands erroneously patented as required by the acts of 1887 and 1896, shows that the railroad company was a trustee of the Government for those purposes. *United States* v. *Michigan*, 190 U. S. 379; *California* v. *Southern Pacific Railroad*, 127 U. S. 1.

And the power and right to consummate those ends were franchises conferred by the United States for National purposes.

Where a court of equity takes jurisdiction of a cause upon one ground, pertaining either to its exclusive or concurrent jurisdiction, it will retain it to do complete justice, even to granting legal remedies. *Ober* v. *Gallagher*, 93 U. S. 199; *Root* v. *Railway*, 105 U. S. 189, 205; *Ward* v. *Todd*, 103 U. S. 327; *Hopkins* v. *Grimshaw*, 165 U. S. 342, 358; *Smyth* v. *Ames*, 169 U. S. 466, 516; *United States* v. *Winona Railroad*, 165 U. S. 481, distinguished. See *Oregon Railroad* v. *United States*, 189 U. S. 103, 115.

The acts of March 3, 1887, and March 2, 1896, requiring repayment for lands erroneously patented and sold to *bona fide* purchasers are amendatory of the act of 1866 and authorized by the provision reserved to alter, amend or repeal the act of July 27, 1866. Cases *supra* and *Shields* v. *Ohio*, 95 U. S. 319; *United States* v. *Oregon Railroad*, 176 U. S. 47, 48.

The Southern Pacific Company has fully accepted the benefits of the acts of 1887, and 1896, and is bound by their obligations. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Grand Rapids* v. *Osborn*, 193 U. S. 17, 29; § 1589, Cal. Civil Code.

The legal presumption of acceptance is supplemented by the

fact that the company accepted the provisions of this act and claimed its benefits, not alone in this suit, but in other litigations between the United States and the Southern Pacific Railroad Company.

Lands within the granted limits of the Atlantic and Pacific grant of July 27, 1866, cannot be taken by the Southern Pacific as indemnity under its grant of same date or later grant of March 3, 1871. *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 615, 619; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 46, 47; *Germania Iron Co.* v. *United States*, 165 U. S. 379, 383.

These lands described in the bill were set apart by act of Congress for the construction of the Atlantic and Pacific Railroad, and as these lands were granted to another railroad than the Southern Pacific for another and different object of internal improvement, the Southern Pacific cannot obtain any benefit from that grant, or by taking indemnity for them, which would amount to the same thing. *Southern Pacific* v. *United States*, 168 U. S. 1, 47; *Clark* v. *Herrington*, 186 U. S. 206, 208; *Southern Pacific* v. *United States*, 189 U. S. 147, 452; *Chicago Railroad* v. *United States*, 159 U. S. 372; *Sioux City Railroad* v. *United States*, 159 U. S. 349, 366; *St. Paul Railroad* v. *Winona Railroad*, 112 U. S. 720; *Sioux City Railroad* v. *Chicago Railroad*, 117 U. S. 406; *United States* v. *Missouri Railroad*, 141 U. S. 358; *Southern Pacific Railroad*, 6 L. D. 349, 350; *Southern Pacific Railroad*, 6 L. D. 816; *Southern Pacific Railroad* v. *Moore*, 11 L. D. 534; *Smead* v. *Southern Pacific*, 29 L. D. 135.

Neither the dismissal of the lands in this suit from a former litigation, nor the adjudication in such former litigation, as to the rights and claims of the Southern Pacific under its grants, nor the adjudication of title to other lands, estops the Government from maintaining this bill.

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

The appellants challenge the decree on two grounds: First, that a suit in equity cannot be maintained, because there is a plain, adequate and complete remedy at law; and, second, that the United States cannot by legislation create an obligation of the railroad company for the value of the land patented to and conveyed by it to *bona fide* purchasers.

No objection was made to the jurisdiction of the court as a court of equity by any pleading or before the hearing. It is undoubtedly true that a suit in equity cannot be maintained when there is a plain, adequate and complete remedy at law. Such is the mandate of the Revised Statutes, § 723, as well as the general rule in equity. *Lewis* v. *Cocks*, 23 Wall. 466; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *Litchfield* v. *Ballou*, 114 U. S. 190; *Allen* v. *Pullman's Palace Car Company*, 139 U. S. 658. It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing even in the appellate court, and if not suggested by counsel may be enforced by the court on its own motion. See authorities just cited. But on the other hand it is equally true that where the objection that the plaintiff has an adequate remedy at law is not made until the hearing, and the subject matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though if taken *in limine* it might have been worthy of attention. *Wylie* v. *Coxe*, 15 How. 415, 420; *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; *Brown* v. *Lake Superior Iron Company*, 134 U. S. 530; *Insley* v. *United States*, 150 U. S. 512, 515; *Perego* v. *Dodge*, 163 U. S. 160, 164; 1 Daniell's Chan. Pl. & Pr. (4th ed.), p. 555. It is necessary, therefore, to notice more in detail the allegations in the bill. That sets forth land grants to the Atlantic and Pacific Railroad Company, the Southern Pacific Railroad Company and the Texas Pacific Railroad Company. It shows the acceptance by the Altantic and Pacific Company of its grant, the filing of its maps of definite location, a failure to complete its road within the State of California, an act of Congress forfeit-

ing the lands along the line of said road within that State, a claim of the Southern Pacific Company to some of those lands, the erroneous patenting of them to that company, a demand for a reconveyance, and the acts of Congress in respect to the adjustment of railroad land grants. The bill further alleges that more than one thousand persons, among whom are the individual defendants named in the bill, who are sued as representatives of the class, had purchased by immediate or mesne conveyances from the Southern Pacific Company certain of those lands specifically described in Exhibit A; that all these purchasers claim an interest in the lands, but the nature and extent of their claims are unknown; that a prior suit, brought to vacate and annul patents, included those lands, and had been dismissed as to them without prejudice, upon the claim of the Southern Pacific Company that it had conveyed them to *bona fide* purchasers. In an amendment to the bill is a prayer (in order to secure an accounting with the railroad company) for a statement of the sales of these tracts, with the names of the purchasers, dates of sales, purchase prices and amounts paid. The bill also alleges that there is a dispute between the railroad company and the persons purchasing or contracting with it in respect to the validity of the title conveyed, or attempted to be conveyed, by the company; avers that the United States has no desire to question the title of *bona fide* purchasers, but on the contrary seeks to have such title confirmed. It prays for a determination of the tracts sold to *bona fide* purchasers, to the end that the titles thereto may be confirmed, for a decree vacating and annulling the patents for any lands not so sold, and quieting the title of the United States thereto, and that the railroad company be required to account to the United States for the value of the lands sold to *bona fide* purchasers, or such sum as had been received by the company from those sales, not exceeding $1.25 per acre, and for such other and further relief as is just and equitable.

It is contended by the railroad company that this is merely

an action in assumpsit to recover the amount claimed to be due for the lands patented to and sold by it to *bona fide* purchasers. But this ignores the full scope of the suit. The bill asked cancellation of the patents and a quieting of the title of the plaintiff to those lands still held by the company, or not sold to *bona fide* purchasers. It prayed a discovery of all sales and conveyances, with the dates of the sales and the amounts received thereon. It also sought a confirmation specifically of the titles of *bona fide* purchasers, and finally an accounting with and recovery from the company. A cancellation of patents and a quieting of title is obtainable in equity. *Hughes* v. *United States*, 4 Wall. 232; *Moore* v. *Robbins*, 96 U. S. 530; *Mullan* v. *United States*, 118 U. S. 271; *Williams* v. *United States*, 138 U. S. 514; *Germania Iron Company* v. *United States*, 165 U. S. 379. It is true no decree was entered for the cancellation of any patents, and that matter was thus eliminated from the litigation. But the confirmation of the title of specific tracts to *bona fide* purchasers, which did pass into decree, is equally within the jurisdiction of a court of equity. While discovery is now seldom the object of a suit in equity, and doubtless would not uphold such a suit when the full information was obtainable by proceedings at law, yet it was a well recognized ground of equity jurisdiction, *Kennedy* v. *Creswell*, 101 U. S. 641, 645; 1 Story's Eq. Jur., 11th ed., secs. 689 and following; 1 Pomeroy's Eq. Jur. sec. 193 and cases cited in notes, and whether in any given case a court of equity would be justified in acting is a question for its determination. It is unnecessary to determine whether, if properly challenged, the allegations in this bill were sufficient. Possibly not. *United States* v. *Bitter Root Development Company*, decided this day, *post*, p. 451. It is enough that discovery was sought, that discovery is not obtainable in an action at law, but only in a suit in equity. It may be that in order to support a recovery from the railroad company it was not necessary that there be a formal confirmation of the titles of the purchasers from it, or that the purchasers be made parties defend-

ant, yet it was competent for the court under the pleadings to enter such a decree, and the Government was justified in asking for it. Indeed, such action seems to have been contemplated by the statute, for in the second section of the act of March 2, 1896, it is provided: "An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided."

If only an action at law had been brought to recover the value of these lands from the railroad company, unless the verdict had been for the full amount claimed, $1.25 an acre, or unless there had been specific findings of fact showing the particular tracts on account of which recovery was given, it would be open to grave doubt whether any titles would be confirmed, even by inference, and a cloud would be left hanging over the titles of each of these purchasers. Clearly the case here presented was within the jurisdiction of a court of equity, and if there was any objection to that jurisdiction it should have been made *in limine* and not after pleadings had been perfected and proofs taken.

Passing to the other question, it is charged in the bill that these statutes constituted a valid contract between the Government and the railroad company. Now whether that be strictly true we need not stop to consider. It is enough that upon the facts the Government was entitled to recover from the company. Erroneously and by mistake the officers of the Government executed patents to the railroad company conveying the legal title to the lands. The railroad company accepted such title and subsequently conveyed the lands to

parties who dealt with it in good faith. When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and reëstablish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. Irrespective, therefore, of the act of Congress the Government had the right, when it found that these lands had been erroneously patented to the railroad company and by it sold to persons who dealt with it in good faith, to sue the railroad company and recover the value of the lands so wrongfully received and subsequently conveyed. The acts of Congress really inure to the benefit of the railroad company and restrict the right of the Government, for they provide that the recovery shall in no case be more than the minimum Government price. In other words, the Government asks only its minimum price for public land, no matter what the value of the tracts or the amounts received by the company may be.

It may be noticed in this connection that in no case was the value of any land sold fixed in the decree above the sum received by the company therefor, and that in many instances that sum exceeded the minimum price of $1.25 per acre. It may also be noticed that by stipulation it appears that within the indemnity limits there still remains a large body of lands from which the railroad company can select lands in lieu of those involved in the suit.

We see nothing in this decision of which the railroad company can complain. The decree of the Circuit Court of Appeals is

Affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

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

No. 142. Argued January 24, 25, 1906.—Decided February 19, 1906.

Southern Pacific Railroad v. *United States*, *No.* 1, *ante*, p. 341, followed as to the power of the court to maintain this suit in equity and as to the validity of the acts of Congress of 1887 and 1896 for the adjustment of railroad land grants. *Held*, also that:

Lands which at the time a railroad grant attached by the filing and approval of the map of definite location were within the claimed but undetermined limits of a Mexican grant did not pass to the railroad company although within the place limits of its grant, and this notwithstanding the fact that by the final survey and patent they were excluded from the Mexican grant.

A survey of the Mexican grant made by the proper officers at the instance of the applicant and before the railroad grant attached included the disputed lands. The applicant did not repudiate the survey, but sought a patent based upon it. It was in legal effect his claim to the lands. The Government, not questioning the right to have such a survey at the time it was applied for and made, ordered a resurvey on the ground that the boundaries shown in the first survey were incorrect. The second survey was made after the railroad grant attached and excluded the lands. *Held*, that the lands were *sub judice* at the time the railroad grant attached and were not included within it.

THIS case, in which on February 28, 1901, the United States filed its bill in the Circuit Court for the Southern District of California, resembles the one immediately preceding, in that it was a suit to cancel certain patents erroneously issued to the Southern Pacific Railroad Company, and to quiet the title of the Government to the lands mentioned therein; to confirm the title of certain other lands erroneously patented to the company and by it conveyed to *bona fide* purchasers; and to obtain an accounting and recovery from the company of the value of the lands so conveyed to *bona fide* purchasers. By the decree the full relief asked, cancellation, confirmation and recovery was granted. The question presented is different in that the railroad company denies that the patents were erroneously issued. The lands were within the place limits of the railroad company's grant, but the plaintiff contends that they

were excluded from the grant because within the claimed and undetermined limits of a Mexican land grant.

In 1838 one Juan Bandini received from the Mexican gov ernment a grant of what is termed the Jurupa Ranch. After California was acquired under the treaty of Guadalupe Hidalgo, and on September 25, 1852, Bandini presented his petition to the commissioners appointed under the act of Congress of March 3, 1851, 9 Stat. 631, asking confirmation of his title, and on October 17, 1854, it was confirmed, the order of confirmation describing the boundaries of the rancho in substantially the language of the act of judicial possession.

An appeal was taken to the District Court of the United States for the Southern District of California, as authorized by the statute, which court, on April 5, 1861, sustained the action of the commissioners. The boundaries of the grant were thus described:

"The said boundaries being as follows: Commencing at the foot of a small hill, standing alone, at the cañada which the Messrs. Yorba recognize as their boundary, on the further side of the river of Jurupa, which hill the Indians in their tongue call 'Pachappa,' which was taken for a landmark, placing on it certain stones on top of others; thence course westerly along the bank of the said river thirty thousand varas to the point of the same table land on which Mr. Bandini had established his house; and where the said river makes a bend, where a stake was driven for a landmark; thence northerly, fronting towards the mountains of Cucamonga, seven thousand varas, passing between the two springs of Guspar, ending at the first white sand bank which there is on said course towards Cucamonga; thence easterly the same thirty thousand varas to a small lone mountain on the left hand of the high road going from San Gabriel to San Bernardino, called by the Indians 'Catalmacay,' and which was designated as a landmark; thence southerly seven thousand varas to the point of beginning at the foot of the small hill called 'Pachappa,' which makes a corner east, west."

The confirmation was made in the name of Abel Stearns, a purchaser pending the proceedings, and substituted of record for the original petitioner. On January 14, 1869, the surveyor general of California, on application of the claimant and deposit by him of the estimated cost thereof, directed a survey of the rancho. This was made, and on February 26, 1872, the survey and field notes were filed in the office of the surveyor general of California and by him approved. On May 13, 1876, the Commissioner of the General Land Office at Washington directed a correction of some alleged errors in this survey. On appeal from this order the Secretary of the Interior, on February 21, 1877, ordered a resurvey. This was made, and on May 23, 1879, a patent was issued conforming to such resurvey. The lands in dispute are within the limits of the first but outside those of the second survey, and are not included in the patent.

On May 1, 1862, an appeal to this court was prayed and allowed in the District Court of California. On January, 8 1875, an order was here entered which, after stating that an appeal had been allowed by the District Court, as shown by an inspection of the certificate of the clerk of that court, recites:

"And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy-four, the said cause came on to be heard before the said Supreme Court, and it appearing that the said appellant has failed to have its cause filed and docketed in conformity to the rules of this court, it is now here ordered, adjudged and decreed by this court that this appeal from the District Court of the United States for the District of California be, and the same is hereby, docketed and dismissed."

Upon these facts a decree in favor of the plaintiff was entered by the Circuit Court, June 15, 1903 (123 Fed. Rep. 1007), which was affirmed by the Circuit Court of Appeals on October 17, 1904 (133 Fed. Rep. 662), and thereupon this appeal was taken.

Mr. Maxwell Evarts for appellant.

Mr. Joseph H. Call, special assistant to the Attorney General, for the United States.

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

The single question is whether these lands were between the dates of the two surveys *sub judice*, and therefore not passing under the grant to the railroad company. The map of definite location was filed and approved in 1874, and at that time, which was between the dates of the two surveys, the grant took effect. The description of the lands in the grant and in the decree of confirmation was not in the language of the United States land legislation by section, township and range, nor was it such that without a survey the exact boundaries could be determined. No one could say from reading this description whether the true north boundary was shown by the first or the second survey. The regular land surveys made by the Government establishing section, township and range lines would not locate the boundaries of the grant nor would they identify either of those lines with any particular boundary. There was that generality of description which required a special survey to locate the grant. It is said that the patentee never claimed the land north of the boundary line established by the second survey, and therefore that it was in no just sense *sub judice*. But the boundaries being uncertain he applied to the department authorized by Congress to determine them. It acted upon his application and by its survey located the boundaries. He made no challenge of its action, but so far as the record shows was content therewith. While a new survey was subsequently ordered, it was not at his instance. So, at least until the first survey was set aside, it was the measure of his claim, and the lands within the boundaries established by it were *sub judice*. No affirmative declaration that he insisted

upon his right to them was essential to make them a part of his claim.

But the special contention of the appellants is that the first survey was without any authority of law, because the statute provides that upon final confirmation of the claim a survey may be ordered, and it is insisted that there was no final confirmation until the order made by this court in 1875; that although the confirmation by the District Court was in 1861, yet an appeal was allowed which transferred the case to this court and held the question of confirmation in abeyance until the order here made in 1875. The statute (sec. 13) provides:

" . . . And for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same."

Hence it is contended that the entire proceedings under the first survey were void and may be put out of consideration in determining whether the lands were *sub judice*. But this ignores the fact that anterior to the first survey the United States had practically abandoned its appeal from the order of the District Court. It had for ten years failed to file any transcript in this court and the petitioner had been entitled to the formal entry of docket and dismissal which he obtained in 1875, an entry implying an abandoned appeal and made to place that fact upon record. The Government, which was the party interested against the petitioner, and the party taking the appeal, did not, when the application was made in 1869 to the surveyor general of California, question the right to a survey. It did not suggest that there had been no final order of confirmation nor has it at any time raised any question of the right to that survey, and the Land Department ordered

the second only upon a doubt of the accuracy of the first. It does not lie within the mouth of a third party to say that the Government had a right to appeal, could have insisted on that right, and could have objected to the first survey on the ground of a failure to obtain a final order of confirmation. It is enough that the Government recognized that it had abandoned its appeal, and was willing that proceedings should be taken looking to survey and patent. Nor were the proceedings so absolutely void that it can be said that no claim was pending. The surveyor general was the official of the Government placed in charge of surveys, who on application was to determine whether the conditions had arisen which justified him in acting. If he decided erroneously his action could be set aside on review, but it was not a nullity. Even between individuals, if one brings a suit in a Federal court to quiet his title to a tract of land and obtains a decree in accordance with his bill, and on appeal this court sets aside the decree and orders the suit to be dismissed for lack of proper allegations in respect to diverse citizenship, while it may be that the proceedings are ineffectual to determine the title, yet can it be said that no suit was pending, no claim was made? Put the question in another aspect; suppose no challenge of the first survey had been made and the Land Department, acting on that survey, had caused a patent to be issued, could the Government obtain a decree setting it aside upon that showing alone and without a disclosure of equities? In *Williams* v. *United States*, 138 U. S. 514, and *Germania Iron Company* v. *United States*, 165 U. S. 379, something more than premature action in certificate and patent was shown—something which presented an equity entitling the United States to maintain its suit for cancellation.

Another matter; at the time the map of definite location was filed and approved, this first survey had been made and approved by the surveyor general of California, and by that survey the lands in dispute were included within the Mexican grant. The railroad company, therefore, took title to its land grant with this fact apparent on the records of the Land De-

partment. In an early case in this court, *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629, in which the question of the relative rights of railroads to granted lands and individuals claiming rights to separate tracts within the place limits, was presented, we said (p. 641):

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations.

"The reasonable purpose of the Government undoubtedly is that which is expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a preëmption or homestead right to attach. No right to such land passes by this grant."

And this proposition has been repeatedly reaffirmed in later cases. *Hastings & Dakota Railroad Campany* v. *Whitney*, 132 U. S. 357; *Sioux City &c. Land Company* v. *Griffey*, 143 U. S. 32; *Whitney* v. *Taylor*, 158 U. S. 85.

One thing more: it appears from a stipulation of counsel that within the indemnity limits of the grant to the Southern Pacific Railroad there remain more than fifty thousand acres of surveyed public lands for which there has been no selection or application to select by the company. So that there is no such equity in favor of the company as was suggested in the case of *United States* v. *Winona &c. Railroad Company*, 165 U. S. 463, 482.

The decree of the Court of Appeals is

Affirmed.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

INTERSTATE COMMERCE COMMISSION *v.* CHESAPEAKE AND OHIO RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Nos. 24, 27. Argued October 25, 26, 1905.—Decided February 19, 1906.

A carrier, not expressly authorized so to do by charter obtained prior to the Interstate Commerce Act, cannot contract to sell, and to transport in completion of the contract the commodity sold, when the stipulated price does not pay the cost of purchase, the cost of delivery, and the published freight rates.

The Interstate Commerce Act was enacted to secure equality of rates and to destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as to reasonably accomplish them; its prohibitions against directly or indirectly charging less than published rates are all embracing and applicable to every method by which the forbidden results could be brought about.

Where a contract of a carrier for sale and transportation is illegal under the Interstate Commerce Act because the amount charged for transportation is less than the published rates, the contract is not made legal because the carrier is also released by the same shipper from a claim, admitted by the carrier and amounting to more than the difference between the published rate and the amount charged, for breach of a prior contract, where it appears that such prior contract was also illegal for the same reason.

Whatever powers a carrier may possess as to its commerce not interstate, it is subject as to its interstate commerce to the Interstate Commerce Act, the application of whose prohibitions depends not upon whether the carrier intends to violate them but upon whether it actually does so.

Congress has undoubted power to subject to regulations adopted by it every carrier engaged in interstate commerce, and although the Interstate Commerce Act may not contain an express prohibition against a carrier becoming a dealer in commodities transported by it the court will enforce the general provisions of the act although in so doing it may render it impossible for a carrier to deal in such commodities.

While the construction of a statute by a body charged with its enforcement which has long obtained, and which has been impliedly sanctioned by the reënactment of the statute without alteration, must be treated, when not

plainly erroneous, as read into the statute, the binding force of such construction on the court is restricted to the precise conditions passed on; and a ruling by the Interstate Commerce Commission as to the right of a carrier, possessing charter rights granted prior to the passage of the act, to also be a vendor is not applicable to the case of a carrier which does not possess such rights.

Where a carrier has violated the provisions of the Interstate Commerce Act in a particular manner in regard to a particular commodity the court may perpetually enjoin it from further violations of that act by the means employed and as to that commodity, but should not enjoin the carrier in general terms not to violate the act in any particular.

THE facts are stated in the opinion of the court.

Mr. John W. Daniel, with whom *Mr. Fred Harper* was on the brief, for New York, New Haven and Hartford Railroad Company, appellant in No. 24 and appellee in No. 27:

The petition charges the defendants with violating the Interstate Commerce Act by carrying out the verbal agreement of 1903, involving a carriage of coal for less than the published rates on file and a discrimination forbidden by law.

That contract is justified on two grounds: It does not involve a violation of the act, and if there is a seeming violation of the act, it is only a seeming one. It is based upon a legal, adjusted and enforceable claim for damages asserted by the New Haven Company against the Chesapeake and Ohio; and the freight rate is fully paid by the claim in part and by the purchase price received for the coal added thereto.

Thus the contract of 1896 is the real transaction to which this cause must have reference and under which it must stand or fall. If that contract be valid and legal, so were also the claim for damages and the 1903 contract. If the 1896 contract be illegal, then no breach thereof could furnish a basis for any new contract and the new contract must stand alone.

The contract of 1896 was simply a sale of coal by the Chesapeake and Ohio to the New Haven Company for a sum certain per ton delivered. The Chesapeake and Ohio was likewise the shipper of the coal sold. It is true that various coal operators furnished the coal under contract with the Chesapeake and Ohio,

and various companies and individuals superintended the shipments. But in each instance they acted for the Chesapeake and Ohio and the latter was always the shipper of the coal over its own lines and the water route.

The question of *ultra vires* is not involved. The Chesapeake and Ohio being the seller of the coal to be furnished under the contract of 1896 the Interstate Commerce Commission cannot question the contract as a sale of coal merely, because it has no interest in the mere vending of the coal that would give it a status in any court. Whether or not the Chesapeake and Ohio had the legal right to buy and sell coal is a question with which the court below—and this court as well—has nothing to do so far as this case is concerned.

The *ultra vires* acts of a corporation can only be attacked by the sovereignty granting the charter or by some stockholder or other person interested in the corporation. They cannot be assailed by third parties. Green's Brice's *Ultra Vires*, 2d ed., 695; 4 Thomp. Corp. 5638; 5 Thomp. Corp. 6030 *et seq.*

The West Virginia statutes prohibiting railroad companies from buying and selling coal and coke, have no application to this contract. The reasoning of the court below in disposing of this question is unassailable.

If the contract in question be held to be illegal and void on any ground at all, it must be so held because of the terms of the Federal statutes regulating interstate commerce. Only §§ 2 and 6 were alleged in the court below to have been violated and it is admitted that if the contract of December 3, 1896, were made for the purpose and with the intention of giving to the New Haven Company a "special rate, rebate or drawback" with reference to the transportation of the coal to be delivered thereunder, then the contract would have been a device; and it would have been in violation of § 2; but there can be no question that the contract was one for the sale and transportation of coal made in the utmost good faith and without any intent to give such "special rate, rebate or drawback."

The Chesapeake and Ohio entered the field as a dealer and

made this contract in order to save itself as a carrier and if the contract be held illegal under § 2 (or any other provision of law), it must be so held because of its necessary legal effect apart from the intent with which it was made.

Section 2 of the Interstate Commerce Act prohibits any "special rate, rebate or drawback" whether given "directly or indirectly." There is absolutely no evidence in the record of such direct special rate, rebate or drawback. The absence of the intent to violate the law, as found by the court below, would dispose of that feature of the case. The only remaining question, therefore, under this section is: Was there any "special rate, rebate or drawback" on the transportation of the coal in question over the line of the Chesapeake and Ohio given indirectly?

The reasoning of the court below, in its opinion on this point, seems to us to be unanswerable. The Chesapeake and Ohio was the vendor of the coal. It was also the carrier thereof. It charged the New Haven Company a fixed sum per ton for both the coal and its transportation. It had a perfect legal right to charge any losses that may have occurred to its account as vendor rather than to its account as carrier. Indeed, the provisions of the law required that its full freight rate shall be charged and collected and the company could not legally charge any losses to its account as carrier, just as it could not charge any profits from the contract to its freight rate account. So long as there was a sufficient sum paid to it under the contract to pay its transportation charges, and this was always the case in the matter now under investigation, then the law makes the application to those charges.

So long as the vendor-carrier realized a sufficient sum from the sale of the coal to cover its transportation charges, bearing in mind that the contract of sale is not a mere device to evade the law, there can be no unjust discrimination in the freight rates. *Haddock* v. *Del., Lack. & West. R. R. Co.*, 4 I. C. C. Rep. 296; *Coxe* v. *Lehigh Valley R. R. Co.*, 4 I. C. C. Rep. 535.

The Chesapeake and Ohio, so far as the parties to this case

are concerned, having a perfect legal right to buy and sell and ship coal, to purchase at such price as it might be willing to pay, and to sell at such price as it might be willing to accept and able to obtain, it is impracticable to cause the discontinuance of such buying and selling.

As was intimated in *Coxe* v. *Lehigh Valley Railroad Company, supra*, the fact that a vendor-carrier was willing to sell coal and transport it for such sum as was insufficient to pay all expenses, cost of coal, and transportation charges, would be evidence that its rates were too high and that it was willing to carry such freight at a cheaper rate. So here, if the facts proved show that the Chesapeake and Ohio is willing to contract for the sale and transportation of coal at a less sum than will pay all costs, expenses and its full published freight rates, it is evidence that such rates are too high and that the Chesapeake and Ohio is willing to transport such coal at a cheaper rate.

But there is no allegation in the petition that the rates are excessive or unreasonable. There is no prayer that the court will so hold. And so long as there is a sufficient sum realized from a sale honestly made by a vendor-carrier to pay its full transportation charges, there can be no discrimination with respect to those charges, and there is no violation of § 2 of the act.

If the conclusion reached with reference to section 2 of the act is correct, then no discussion of section 6 is necessary. If the Chesapeake and Ohio has a right to charge its losses under the contract of 1896 to its account as dealer, paying itself its full freight rates for the transportation of the coal in question, then it did not charge the New Haven Company less than its published rates on file, as alleged, and there was no violation of section 6 of the act.

Two charges are made—one that the Chesapeake and Ohio carried freight at less than its published rates and the other that the New Haven Company knowingly received rebates.

The Circuit Court, however, having held that the Chesapeake and Ohio had not carried freight at less than its published rates on file and had not committed the alleged discrimination forbidden by law, the case ended as to the New Haven Company, which could not, of course, have received the concession that had not been made.

The case as decided was one invented by the court, not presented by the pleadings, and one that should not have been considered at all. Even if that case had been properly before the court upon the pleadings, the decision thereof was not justified by a proper interpretation of the language of § 3 of the act. The court held that the Chesapeake and Ohio owed the New Haven Company $103,000 damages for failure to make deliveries under the prior contract. The transaction is legal and conducted in good faith, which at periods produced a net profit and at other times produced a loss to the Chesapeake and Ohio, the latter being estimated by the court as over 23 cents per ton on actual deliveries.

Under the provisions of the Interstate Commerce Act, in § 3, it held that the transaction between the Chesapeake and Ohio and the New Haven Company was null and void.

There was no charge in the petition that any offense had been committed by this appellant against § 3 of the act nor was there any in the affidavits of the relators.

While the Elkins Act provides remedies and procedure in cases arising under the act to regulate commerce, its terms must be looked to in determining general questions of pleading in such cases. *Missouri Pacific R. R. Co.* v. *United States,* 189 U. S. 284.

Section 3 of the Elkins Act provides that the Circuit Courts of the United States having jurisdiction, sitting in equity, shall proceed summarily to inquire into the circumstances upon such notice and in such manner as the court shall direct and without the formal pleadings applicable to ordinary suits in equity; but however informal the pleadings may be in interstate commerce proceedings, and however untechnical a

court is allowed to be under § 3 of the Elkins Act, it was not within the purview of that act to wipe away the landmarks and bulwarks of jurisprudence and to permit a cause uncharged to be heard and adjudicated; or to engraft upon a charge that is made one that is wholly different and to which no one has been summoned to answer.

Section 3 of the Interstate Commerce Act prohibits "undue or unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage."

As there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact, *Texas and Pac. R. R. Co.* v. *Interstate C. C.*, 162 U. S. 219, the violation should be pleaded or alleged.

The intent of the legislative body, as expressed in the words of the statute, must control the courts in their construction of such statute. And in seeking this legislative intent resort may be had to every part of a statute, or, when there is more than one *in pari materia*, to the whole system. *Kohlsaat* v. *Murphy*, 96 U. S. 153, 159.

The only sections other than § 3 of the act to regulate commerce having any bearing on the policy and intent of the law refer only to: Transportation of passengers or property; Any service in connection therewith; Receiving, delivering, storage, or handling of such property; Terminal charges; Time schedules, carriage in different cars; False billing, false classification, false weighing or false report of weight; The furnishing of cars or other facilities for transportation.

The sole intent and spirit of the act is to provide for reasonable rates, equal charges, fair dealing and equal facilities in the "transportation of passengers and property." Section 3 must be read in the light of this spirit and intent, and in clause 2 not to legislate except in these particulars, the intent is plainly manifest.

The general subject and purpose of the statute, read as a whole will restrict the meaning of general words in some por-

tion of the statute in order to effectuate the true legislative intent. *Pennington* v. *Coxe*, 2 Cranch, 33, 52.

Where this intent is found to be limited to a narrower field than the use of certain general expressions would ordinarily imply if considered alone the courts do not hesitate to limit the scope of the general words and expressions so as to conform them to the real legislative intent as gathered from the whole act. *Brewer* v. *Blougher*, 14 Pet. 198; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 116; *Petri* v. *Commercial Bank*, 142 U. S. 644; *United States* v. *Am. Bell Tel. Co.*, 159 U. S. 649; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 320.

The words of general scope in § 3 should be so restricted in their meaning as to conform them to the general intent of Congress as disclosed by a consideration of the whole act.

Only common carriers engaged in interstate carriage are subject to the provisions of the act and they only when engaged in and about such carriage. *McKee* v. *United States*, 164 U. S. 287, 293.

This contention is further strengthened by an examination of the Elkins Act which is *in pari materia* with the original act. They both belong to the same "system."

Even if the court below was correct in its view that the provisions of § 3 were properly involved in the case, it erred in the interpretation it gave to those provisions and in the application it made of them to the case under consideration.

The only preference or advantage that is denounced by § 3 is that which is "undue or unreasonable," which cannot be imputed to an honest transaction made without any intent to violate any law and conforming itself to every principle of legal and moral rectitude and being fully understood by intelligent parties, each pursuing his own business. The reasonableness of the transaction to the Chesapeake and Ohio was governed by the honest consideration imputed to its president by the court below of endeavoring to find a market

for coal produced on his line. The relator who instigated these proceedings was offered the same rate for his coal. And the evidence shows there was not any discrimination.

The imputation of discrimination by the transaction in question against some or all of the persons concerned with Kanawha coal destined for points beyond the Capes, is not only unfounded; but is overwhelmingly disproved by the openness of it to general participation of the operators of the only place held to be discriminated against; and the proof of the negative is in the record, with only a vague imagination against it which can neither discover or suggest the name nor describe the particular person, company, firm, corporation, or locality or species of traffic which has been either preferred or prejudiced in any respect whatsoever.

The error in the Circuit Court's opinion was in not separating the advantages which must necessarily belong to the stimulation of trade and must necessarily and wholesomely attach to those who become wisely associated in it from that other class of advantages which flow from sinister devices and from improper considerations. An undue advantage must be founded upon an improper consideration. No improper consideration of any kind is suggested for the contract herein considered.

To hold that it would be possible for some one to suffer because of a particular transaction does not of necessity thereby make that transaction a discrimination of any kind such as the law has noticed or can notice. For, in fact and in legal contemplation, no person can suffer from a transaction which is honest and legal. If a railroad company takes away its works and track from a station, holders of property located in the abandoned vicinage must suffer. If a railroad company puts its shops or tracks at any place, adjoining property holders of necessity derive an advantage. But any loss suffered on the one hand is *damnum absque injuria* or rather is no damage at all in legal contemplation; and on the other hand any benefit derived is no discrimination.

The question presenting itself for decision is whether or not

a carrier acting in good faith and with entire honesty and making a contract unquestionable in its legal aspects, can by the mere fact that it loses upon that transaction thereby pass into a stage in which such loss may be legally regarded as an undue preference or advantage to the party who gets the benefit of such loss, or an undue prejudice or disadvantage to some unknown party who has not participated in the transaction. To state this question is to answer it.

No wrong can arise from any preference or advantage casually or incidentally flowing out of contracts legal and honest in themselves, for the reason that they are not undue. Nor is any person prejudiced by the granting of a preference or advantage that is not undue to another. It is the undue thing, and only the undue thing, that is prohibited by the Interstate Commerce Act.

The undue thing is "that which is not right;" "not legal or lawful;" "improper," as Bacon says, quoted in Webster's Dictionary.

This is the sense in which the word "undue" is used in the statute and is the natural interpretation thereof.

The court below correctly overruled the motion for the enlargement of the injunctive decree. Every decree of a court should be specific and certain in its character, so that it should clearly apprise the parties to the proceedings of their rights and duties thereunder. This is particularly true of injunctive orders whereby parties are directed to, or are restrained from, the performance of specific acts.

This idea of certainty and definiteness is exemplified by the very definition of the term. 16 Am. & Eng. Ency. of Law, 342; 2 Story's Equity, 861; Spelling on Injunctions, § 3; Anderson's Law Dictionary, "Injunction;" High on Injunctions, § 1; *Robinson* v. *Clapp*, 65 Connecticut, 365; *Lyon* v. *Botchford*, 25 Hun, 57; *Sullivan* v. *Judah*, 4 Paige, 444; *Moal* v. *Holbein*, 2 Edw. Ch. 188; *Laurie* v. *Laurie*, 9 Paige Ch. 235; *So. Pac. Co.* v. *Colorado F. & I. Co.*, 42 C. C. A. 12; *Swift & Co.* v. *United States*, 196 U. S. 375.

So far as the terms of the injunction order that was entered in the case at bar is concerned, assuming that the case was correctly decided by the court below, it complies with the requirements for injunctive orders as laid down in the authorities above cited and is without objection. The enlargement urged by the Interstate Commerce Commission, however, would violate the "first principles of justice."

The injunctions in *United States* v. *Michigan Central,* 122 Fed. Rep. 544, and *Re Debs,* 158 U. S. 568, are not parallel.

In any consideration of this transaction the time at which it was made, the conditions under which it was made, and the gigantic nature of the commerce and industry of the country which have rendered such transactions indispensable to society, should not be overlooked. The time was one succeeding crises, when strikes, lockouts and paralysis of trade had deeply affected the whole nation. The conditions which had produced all manner of disorders were starvation and cold and riot and murder menacing the great centers. To stop coal or bread in a city was to organize anarchy.

The New Haven Railroad is a great company, moving thousands of tons of freight and thousands of passengers per day. It could not feed itself from hand to mouth. A day's stoppage of its trains meant far more than ruin to itself and paralysis to commerce; to the mails; to the bread of families, to remittances to and from banks; to pensions for invalids; to medicine for the sick; to concerns which embraced everybody of the human society to be served, and everything that concerns society. It meant distraction and damage. To provide coal for its enormous and myriad transactions the company had to make these great contracts.

If the reasoning of the lower court is sound, then such contracts can no longer be made with safety, however clothed with legality. If the validity, legality, fairness and commercial wisdom of a contract at the time of its execution do not give it a character that will survive changing commercial conditions, then the New Haven Road and other railroad companies

must tremble for the constancy and volume of their coal supply, and for the stability of their institution and its business. The commerce and the welfare of the people must tremble with them.

The whole question comes back to the character of the original contract and the subsequent contract which is but an extension thereof. The Chesapeake and Ohio has a right, so far as this case or like cases may be concerned, to go into the coal business. If this be true then it has a perfect legal right to lose money in that business as it has to make a profit therein. It does not matter whether the contract here involved was profitable or unprofitable, the Chesapeake and Ohio always got its freight rate on the shipments made under it. What the Chesapeake and Ohio as a coal dealer got for its share of the proceeds is not a question with which the Federal statutes concern themselves. This is, of course, always assuming that the transaction, as here, is one of good faith and free from device to evade the law. *Interstate Com. Com.* v. *Baird,* 194 U. S. 44.

Mr. John W. Griggs also for New York, New Haven and Hartford Railroad Company:

The Circuit Court correctly decided that the Chesapeake and Ohio was, in fact, the vendor of the coal and must be treated as a carrier which purchased coal at its mines on its road for delivery to a purchaser in New England. It also correctly decided that the contract between the two companies was made in good faith; that there was no intention to violate or evade the provisions of the Interstate Commerce Act, and especially that there was no intention to carry at less than the published rates and also correctly decided that the provisions of neither § 2 nor § 6 of the act had been violated. The court held that unless the transaction was a ruse or device to carry at less than legal rates, or unless there was, directly or indirectly, a carriage at too low a rate, the provisions of the second section did not apply, and that the loss suffered

by the Chesapeake and Ohio on the contract could not be treated as carriage at too low a rate, as that would be to assert that the honest loss of the vendor-carrier must be treated as a reduction in freight rates, and not as dealer's loss, which would be incorrect.

The court below erred in holding that the railroad companies, especially the New Haven Company, were violating § 3 of the Interstate Commerce Act.

The complaint, neither in express terms nor by just legal inference, alleged any violation of § 3, and irrespective of the sufficiency of the complaint, the transactions in question did not constitute a violation of § 3.

This is not a case of shipper and carrier, but of vendor and vendee. The contract is to sell and deliver. Carriage is merely incidental to the contract of sale, and not the principal obligation of the vendor. Transportation is necessary merely in order to deliver the articles sold into the hands of the buyer.

It was not the purpose and is not within the fair scope of the Interstate Commerce Act to hold that merely incidental carriage performed, not as a part of the transportation business, but as the part of the business of a dealer, is governed by the act, where the transaction is honest and not intended as a ruse or device to defeat the statute and give undue or unreasonable preference or advantage to some particular person. Had Congress intended to make the act as broad and far-reaching as this, it would have used apt terms to express such an intention. The proper construction of the statute is that it applies to transportation as such when undertaken by a common carrier, exercising the functions of a carrier, and dealing, not with a vendee, but with a shipper of goods.

Even if the arrangement did give an advantage to the New Haven Company, it was not, under the circumstances disclosed in the record, an undue or unreasonable advantage. The contract of 1896 was not only made in good faith, but was intended to benefit generally all the producers of coal in the regions reached by the Chesapeake and Ohio. The transac-

tion was open and public, unobjected to for more than the full period of five years, and is objected to now only with reference to a very small proportion of the quantity of coal contracted to be furnished by that company to the New Haven Company. The contract worked no injury to any shipper of coal.

The decision of the Circuit Court accords to the vendor in this case the right to cease to perform its contract of sale, made in good faith, whenever the cost of the article, or the other cost items, go to such a point that the contract price does not equal, or practically equal, the cost items and the carrier's published freight rates. This is an extension by construction of the act, which is unjustified, unnecessary and impolitic.

The cases cited by the circuit judge as analogous are all cases where the contracts voluntarily abrogated by the carriers were contracts relating exclusively to transportation, and were made between the carrier and shippers of goods, not between the carrier and vendees.

The decree of the court below, which practically forbids the New Haven Company from recovering damages on a contract of purchase honestly entered into, merely because it incidentally and collaterally may affect some shippers of coal on the line of the Chesapeake and Ohio, is inequitable and unjust.

Mr. Randolph Harrison, with whom *Mr. A. R. Long* was on the brief, for the Chesapeake and Ohio Railway Company, appellee in No. 27:

The Commission's petition alleged that in delivering the coal in May and June, 1903, to complete the tonange called for by its contract with the New Haven Company the Chesapeake and Ohio was engaged in "the carriage of freight traffic at less than its published rates on file and was committing discrimination forbidden by law." There was no complaint that the published rates were excessive or unreasonable, but the petition was based upon the alleged violation of §§ 2 and 6, forbidding a departure from the published freight rate, or the charging of one person a higher rate than another for transporting

traffic of the same kind and under substantially similar circumstances. It is alleged that this discrimination is shown by the fact that the Chesapeake and Ohio did not realize out of the price obtained for the coal delivered in May and June, 1903, after payment of the cost of the same and the expense of transportation more than 23 cents per ton to represent the freight earned, whereas its published rate on file for the transportation of similar coal to tidewater was $1.45 per ton. The fact is that the Chesapeake and Ohio not only realized 39½ cents net for each ton of coal delivered in May and June, 1903, over all costs and expense incident to its purchase and delivery, but also settled a liquidated claim against it amounting to $103,910.69, which amount should be taken into account in any just estimate of the consideration to be received on the one side and to be paid on the other for the coal furnished and to be furnished on account of the remnant due under its contract with the New Haven Road; but notwithstanding the fact that the charge of discrimination in freight rate set up in the petition is predicated solely on the price of said coal, the petition takes no account of said claim as a part of the consideration.

But it is apparent that this matter did not involve a question of transportation or rates. The New Haven Company was not a shipper of coal and had no interest in the freight charges of the Chesapeake and Ohio and could not be benefited or injured by the reduction or increase of such charges. The purpose of § 2 is to prevent unjust discrimination between shippers. *Tex. and Pac. R. R. Company* v. *I. C. C.*, 162 U. S. 219. There must be competition between shippers before there can be unjust discrimination. No such question is presented by this record. The New Haven Company made no contract for transportation, and the question of transportation as such is not involved in this case. The New Haven Road simply bought coal from the Chesapeake and Ohio as it would have bought it from any other seller at a fixed price to be delivered in its bins on its line. The Chesapeake and Ohio was the vendor of the coal as well as the carrier. The

Interstate Commerce Act does not forbid a carrier to be interested in a commodity transported by it—nor does it undertake to regulate or prescribe prices at which articles shall be sold, in order to realize established freight rates thereon. A carrier may in good faith engage in transporting a commodity of which it is the owner, or in which it is interested, and if it sustains a loss on the transaction, such loss would be in its capacity as dealer and not as carrier. *Haddock* v. *Del. &c. R. R. Co.*, 4 I. C. C. Rep. 266; *Coxe Bros.* v. *Lehigh &c. R. R. Co.*, 4 I. C. C. Rep. 535. In the former case, decided in 1890, it was held that when the carrier is the owner of or interested in the commodity transported, the provision against unjust discrimination, etc., does not apply; and that in such case the only question which could be inquired into was as to the reasonableness of the published rate.

The court having thus disposed of the case stated in the petition adverse to the contention of the Commission, nevertheless held that the contract of 1896, though valid when made, subsequently became invalid under § 3 of the Commerce Act by reason of the fact that the contract, because of the increased cost of delivering the coal, subsequently became unprofitable to the Chesapeake and Ohio and thereby resulted in an undue preference to the New Haven Company, and an undue prejudice to some party or parties unknown, and that the demand of said company in April, 1903, for $103,910.69 for damages for breach of said contract was, therefore, an illegal and unenforceable demand.

The conclusion of the court was not justified by the case stated or proved, as there was no allegation in the petition that this section had been violated, and no proof was introduced on that theory, nor was any fact alleged which, if proved, constituted an offense against said section. *Texas &c. R. R. Co.* v. *I. C. C.*, 162 U. S. 238.

The petition was based on the theory that §§ 2 and 6 had been violated. Section 2 relates solely to moneys exacted unjustly from the individual shipper in excess of moneys received

from any other shipper for a like service, and § 6 forbids a departure from the published freight rate. The court held that neither of these sections had been violated. The protection afforded by § 3 relates to any unjust advantage, or preference, given to any particular person, or to a locality, or with regard to any particular description of traffic, or to any unjust discrimination by one carrier against another carrier as to rates, charges or facilities in operating connecting lines, or in making joint rates over connecting lines.

None of these offenses is charged, or proved, nor was it contended that the New Haven Company received any preference such as is contemplated by this section.

The conclusion of the court that a "particular kind of traffic" had suffered disadvantage is based upon a finding of fact that "some person or persons" had been prejudiced. But this finding of fact, which is wholly indefinite as to persons, and the time, place, character, extent and manner of the supposed prejudice, is qualified by the statement of the court that it is "unable to say who suffered" the supposed disadvantage. A finding involving penal liability should be supported by clear and specific proof, and the court could not be in doubt as to facts essential to constitute the offense if its finding of fact were based on sufficient evidence. If the finding of fact was not supported by sufficient evidence the conclusion based on it falls with it.

The cases cited by the court in support of this conclusion are not analogous to the case at bar. They were cases wherein the contracts were held to be invalid in their inception, or where, relating to a matter subject to legislative control, they conflicted with legislation subsequently enacted regulating the subject of said contracts, or where there was a conflict between a state statute and the National law operating on the same subject matter, in which latter case the state statute had to yield. But no case holds that a contract, valid when made, can be rendered invalid by a change of circumstances or conditions affecting its results.

If the conclusion of the court be sound, it is equivalent to a denial of the right to a railroad company to be the carrier of coal or any other traffic as interstate commerce of which it is the owner, as no one would be willing to enter upon a contract which depended for its stability upon such an uncertain element as the cost of labor or other circumstances materially affecting its results. The court erred in holding the contract of 1896 void under § 3 of the Interstate Commerce Act.

The lower court was right in not entering the omnibus injunction prayed for by the Commission. See cases cited in argument for New Haven Company.

Mr. Assistant Attorney General McReynolds, with whom *Mr. William A. Day* was on the brief, for the Interstate Commerce Commission, appellee in No. 24 and appellant in No. 27:

The Interstate Commerce Act as amended provides for the enforcement and observance of published rates upon petition filed by the Commission by proper orders, writs and process.

It is important to know how broad injunctions issued in proceedings under this act should be, and to secure an authoritative ruling the question is here presented.

The Interstate Commerce Act was intended to cut up by the roots the entire system of rebates and discriminations and to put all shippers on an absolute equality. *U. P. Railway Co.* v. *Goodridge*, 149 U. S. 680, 690.

The Elkins Act was intended to strengthen the former statutes and to give the courts power to enforce them. It should, of course, be interpreted with that end in view. If when a railroad is detected in willfully violating the law by transporting any article at less than schedule rates the only remedy in equity is to restrain it from thereafter so carrying that article for that person, little may be accomplished. But if under the circumstances suggested a broad order forbidding transportation of the article for anybody must be issued, the results may

be much more wholesome, and the true purpose of the law may be more fully effectuated.

In the case of *In re Debs*, 158 U. S. 564, 570, an injunction issued commanding the defendants and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the railroads referred to.

Debs violated the order and was punished for contempt. If strikers may properly be restrained by such a sweeping injunction, why may not a railroad be enjoined from carrying coal for anybody below published rates?

The case of *Swift and Company* v. *United States*, 196 U. S. 375, did not arise under the Interstate Commerce Act and was controlled by different principles. The defendant in that case was in a different position from the common carriers in this case.

Respondents set up the 1896 agreement and transactions under it to justify what otherwise would be manifestly illegal. They say that as the Chesapeake and Ohio Railway has admitted the alleged liability the legality of the same cannot be questioned in this proceeding.

No extended argument is required to show that a railroad cannot avoid the statutes to regulate commerce or escape its public duties by simply admitting a liability which has no foundation in law. The public is vitally interested that no common carrier should admit a baseless liability, for in the last analysis the public will probably have to pay it. A defense bottomed on the recognition of a liability springing from a void contract would be clearly without merit.

In *Union Pacific Railway Co.* v. *Goodridge*, 149 U. S. 680, 691,—a proceeding under a provision of the Colorado statute in substantial accord with the Interstate Commerce Act—the railway company, to justify allowance of rebates, relied on an unliquidated claim for damages against it held by the consignee. This court said that to sustain such a defense would

open the door to the grossest frauds and held that such a contract could not be supported.

The agreement of 1896 was at most a gratuitous option or offer by the Chesapeake and Ohio Railway to sell and deliver coal, given with the evident hope of getting business, and subject to revocation at any time before acceptance.

It was *ultra vires* of the Chesapeake and Ohio Railway to contract with the New Haven Railroad to sell and deliver coal. The railway owned no coal and its charter gave it no right to carry on the business of dealing in such merchandise.

All doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation. *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 685.

Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto. The general rule is that a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel. *Union Pacific Railway Company* v. *Chicago &c. Railway Co.*, 163 U. S. 564, 581; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24.

If performance of the 1896 agreement required the Chesapeake and Ohio Railway to do anything prohibited by law its duty was not to perform and no liability for damages could have arisen because of the failure. *Gulf, Colorado &c. Ry.* v. *Hefley*, 158 U. S. 98, 102; *Southern Railway Co.* v. *Wilcox*, 99 Virginia, 394, 408, 409; *Fitzgerald & Co.* v. *Grand Trunk Railroad Co.*, 63 Vermont, 169; *Savannah, F. & W. Ry. Co.* v. *Bundick* (Ga.), 21 S. E. Rep. 995; *Southern Railway Co.* v. *Harrison* (Ala.), 43 L. R. A. 385; *Bullard* v. *Northern Pacific Railroad Co.*, 10 Montana, 168.

Transactions under the 1896 agreement show that the net results to the carrying company were insufficient to pay freight according to published schedules. The public is not less damnified when a carrier sustains loss upon a contract for de-

livery of coal because the same is charged to merchandise rather than to the freight account; and it appears absurd to say a railroad may render the selfsame transaction legal or illegal by the way it keeps its books. Transportation is the railroad's business and from that source its earnings come. Other permissible transactions must be regarded as incidental and intended to enable it to earn freight, and if loss occurs it should be charged to the freight, for the transportation is, in a broad sense, the only thing contributed by the carriers.

The deleterious effect of permitting railroads to act as dealers in merchandise is lucidly pointed out by the vice-chancellor in *The Attorney General* v. *The Great Northern Railway Company*, 38 Law Journal, 794 (New Series, vol. 29); and by Cockburn, C. J., in *Baxendale* v. *Great Western Ry. Co.*, 28 L. J. C. P. 81; 5 C. B. (N. S.) 336. See also *Haddock* v. *Delaware, Lackawanna & Western Railway Company*, opinion by Cooley, chairman, 4 I. C. C. Rep., 296; *Coxe Bros. & Co.* v. *Lehigh Valley Railroad Co.*, 4 I. C. C. Rep., 535; *Grain Rate Case*, 7 I. C. C. Rep., 33; 1 Wood on Railroads, Minor's ed., 652, and cases cited; *Baxendale* v. *North Devon Ry. Co.*, 3 C. B. (N. S.) 324.

If the claim presented by the New Haven Railroad was an indefinite and unadjusted one for damages *Union Pacific Railway* v. *Goodridge*, *supra*, seems conclusive against the contention that it can be treated as part of the consideration for carriage.

MR. JUSTICE WHITE delivered the opinion of the court.

Following an inquiry begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce (32 Stat. 847), in the Circuit Court of the United States for the Western District of Virginia, this proceeding against the Chesapeake and Ohio Railway Company,

a Virginia corporation, and the New York, New Haven and Hartford Railroad Company, a corporation of the State of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake and Ohio, and the New Haven. The petition averred that the Chesapeake and Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of 1903 the Chesapeake and Ohio made a verbal agreement with the New Haven to sell to that road sixty thousand tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton.

Referring to the developments before the Commission, and annexing as part thereof the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake and Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination for two reasons: First. Because if such difference existed,

it was a loss suffered by the Chesapeake and Ohio, not from taking less than its published rates, but because it had received less as purchaser than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake and Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made the New Haven had a claim exceeding one hundred thousand dollars against the Chesapeake and Ohio, arising from a previous written contract to deliver coal, which was to be extinguished by the completion of the delivery of the coal, and this caused that price largely to exceed the cost of the coal to the Chesapeake and Ohio, including its published rates. Averring that the prior contract was in itself void because it also embodied an agreement to take less than the published rates and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake and Ohio, knowing that they were in violation of the Interstate Commerce Law. The prayer was that the Chesapeake and Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal and the other from seeking to enforce it; that the Chesapeake and Ohio be enjoined from "accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported . . . at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practiced." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it."

A preliminary restraining order was issued conforming to the prayer of the petition. The Chesapeake and Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about sixty thousand tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was admitted that the purchase price agreed to be paid was less than the market price of the coal plus the published rates, and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about one hundred thousand dollars, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake and Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that at about the time the original contract was made arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of one hundred thousand dollars to the Chesapeake and Ohio was occasioned.

The New Haven road in its answer asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake and Ohio, and not a shipper over that road; that the coal bought was intended for its own use

in the operation of its railroad; that it had no knowledge of the price which the Chesapeake and Ohio would be obliged to pay for the coal or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not equal the market price of the coal, the cost of delivery and the published rate of the Chesapeake and Ohio. It averred the validity of the agreement, the legality of the debt of one hundred thousand dollars which resulted from it, and charged that, taking that debt into consideration, the sum which it paid the Chesapeake and Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake and Ohio. It denied that there was any departure from the public rates or any discrimination, asserted that at the time the original contract was made the price was sufficient to have enabled the Chesapeake and Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if in execution of the contract a condition arose where a loss was suffered by the Chesapeake and Ohio in either capacity, it was caused by subsequent events which could not affect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake and Ohio of less than its published rates.

The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel.

For reasons to which we shall hereafter have occasion to advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the second and sixth sections of the act to regulate commerce, forbidding the taking of less than the published rates. It, however, held that the contracts amounted to an undue discrimination and a violation of the third section of the act. The court, hence, permanently enjoined the Ches-

apeake and Ohio from discharging any obligation arising from the original contract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the Commission, that the injunction be expanded so as in general terms to command the Chesapeake and Ohio perpetually to observe in the future its published rates.

The New Haven appealed. The Commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake and Ohio general in its nature, and that company, in an elaborate and separate printed argument in its own behalf, assails the judgment below on the merits and, in effect, asks its reversal on the merits.

It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must consider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy as considered by the Commission on the inquiry by it conducted and as decided below, and as here presented, involves an analysis of all the dealings under both contracts and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are indisputably established, reserving such questions of fact as are in dispute for separate consideration when we approach the legal propositions which arise from the undisputed facts.

The Chesapeake and Ohio, chartered by the State of Virginia,

operates a road which reaches both the New River and the Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the State of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy between July 1, 1897, and July 1, 1902, not to exceed two million gross tons of bituminous coal to be taken from the line of the Chesapeake and Ohio road; deliveries to be made not exceeding four hundred thousand tons per annum. The price agreed upon was $2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The contract is reproduced in the margin.[1]

The Chesapeake and Ohio, not in its own name but through others who really although not ostensibly acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfill the contract which had been made with the New Haven. In consequence

[1] Contract made between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company.

Said Chesapeake and Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.

And said Chesapeake and Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if its delivery be unnecessarily delayed.

And said Chesapeake and Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake and Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton, New Haven basis, settlement to be made *monthly*.

of failure of some of the operators to perform their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900–1901, when, because of strikes and other difficulties, delivery ceased and the New Haven bought coal in the open market and presented to the Chesapeake and Ohio a bill for the increased price which it had paid, and the Chesapeake and Ohio paid one hundred and sixty thousand dollars to cover such loss. Subsequently in 1902 further strikes supervened and deliveries again ceased, at a time when about sixty thousand tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to one hundred and three thousand dollars. Thereupon the verbal agreement of 1903 was made, by which it was provided that the shortage of sixty thousand tons upon the original contract might be discharged by delivery on the part of the Chesapeake and Ohio of that amount of coal from the Kanawha district at the contract price of $2.75, and when this delivery was consummated it was agreed that the Chesapeake and Ohio would be absolutely relieved from the payment of the damage claim just referred to.

At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake and Ohio to Newport News, and the charges thence to the point of delivery. To put itself in a position to carry out the agreement

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Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this the 3d day of December, 1896.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
By M. E. INGALLS, President.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By C. E. MELLEN, Second Vice President.

For value received, I hereby guarantee that the Chesapeake and Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN.

an individual who represented the Chesapeake and Ohio made contracts in his own name with operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake and Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery.

Undoubtedly long prior to the making of the first contract the Chesapeake and Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows:

"The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company."

And the same official testified that he made the contract of 1896 as a continuation of this system.

In 1895, however, the State of West Virginia passed "An act to prevent railroad companies from buying or selling coal or coke and to prevent discrimination." The first section of this act made it unlawful for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake and Ohio, when it contracted with operators in West Virginia to procure as to both contracts the coal for delivery to the New Haven to do so not in its own name but through another.

Before applying to these undisputed facts the legal question

arising for decision, we must determine a question of fact as to which there is some dispute; that is, was the price at which the Chesapeake and Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence we content ourselves with saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract and during the whole period thereof, except for a brief time, caused by a lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff.

We are brought then to determine whether the contract made in 1896 for the two million tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we for the moment put out of view the provisions of the West Virginia statute and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake and Ohio had obligated itself to deliver. We shall also assume for the purpose of the inquiry that the Chesapeake and Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions.

The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity

sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates?

The previous decisions of this court concerning the Interstate Commerce Act do not afford much aid in determining this question. This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions against discrimination, favoritism or rebates, but have mainly concerned the meaning of the act in other respects, that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission.

There are several leading cases decided by the Commission, which are relied upon by the two railroads, directly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them.

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, "di-

rectly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must

result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately and not merely remotely to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake and Ohio, as a result of its being a dealer, had become, long prior to the adoption of the Interstate Commerce Law and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of *The Attorney General* v. *The Great Northern Railway Company*, 29 Law Journal (N. S. Equity), 794. In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public. In deciding that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p. 798):

"... These large companies, joint stock companies gen-

erally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money—large amounts of property—and if they were to apply that money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways."

Illustrating the danger to the public, as established by the case before him, the Vice Chancellor said (p. 799):

"Here we find this company, having the traffic from the north of England, where the great coal fields are (at least some of the principal coal fields), supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has),—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic, that is, the dealing in all the coal in the large districts supplying coal to the country. They have to a considerable extent done so, and there is no reason why it should not go on progressing. I observe that in the eight (?) years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore,

great detriment to the interests of the public, for this reason, taking merely the article of coal."

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers as between themselves and in their dealings with the carrier would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage" and "unjust discrimination" are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and as such dealer to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates, would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions

urged at bar to establish the right of the carrier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

(*a*) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

(*b*) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proof shows an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which the carrier had no control. The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake and Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device

for avoiding the operation of the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake and Ohio was wholly indifferent to and did not concern itself with the prohibitions of the statute, of which, of course, it must be assumed, to have had full knowledge. As we have seen, the president of the Chesapeake and Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line and sold it, relying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that the Chesapeake and Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof leaves no doubt upon our minds that, in making the contract, the Chesapeake and Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the Interstate Commerce Act. In other words, we think it is established beyond doubt that, desiring to stimulate the production of coal along its line and thereby, as it conceived, to increase the carriage of that commodity and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake and Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would

besides have caused other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake and Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake and Ohio of the economic conceptions upon which the Interstate Commerce Law rests, and a substitution in their stead of the conceptions of the Chesapeake and Ohio, as to what was best for itself and for the public. Further, as the prohibition of the Interstate Commerce Act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake and Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake and Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depend not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

(*c*) It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

But it is in effect said, conceding this to be true as an original question, the prohibitions of the act ought not now to be interpreted as applying to a carrier who is a dealer in commodities, because of an administrative construction long since given to the act by the Interstate Commerce Commission, the body primarily charged with its enforcement, and which has become a rule of property affecting vast interests which should not be judicially departed from, especially as such construction, it is asserted, has been impliedly sanctioned by Congress by frequently amending the act without changing it in this particular.

Passing, for the present, the legal conclusion, let us first ascertain whether the premise itself is well founded. The two rulings of the Interstate Commerce Commission upon which

the premise is based are *Haddock* v. *Delaware, L. & W. R. Co.*, 4 I. C. C. Rep. 296, 3 Inters. Com. Rep. 302, and *Coxe Bros. & Co.* v. *Lehigh Valley R. R. Co.*, 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460, decided respectively in 1890 and 1891.

Without going into detail we content ourselves with saying that in both of the cases complaints were made to the Interstate Commerce Commission concerning the defendant railroads and it was charged that whilst acting as common carriers they were dealing in coal, and as a result violating the prohibitions of the Interstate Commerce Act as to rates and undue preferences and discriminations. It was shown in both cases that the carriers prior to the adoption of the Interstate Commerce Act were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined and transporting the same to market. Indeed it was found in both cases that the functions of producing and transporting, as authorized, were so interblended that it was impossible to separate one from the other. Whilst it is true that in both of the cases it was also shown that the carriers bought, sold and transported some coal which was not produced in the mines which they owned, this fact was evidently treated in view of the other circumstances of the case as of minor importance, since the commingled powers of producing, selling and transporting were alone made the basis of the conclusion reached by the Commission as to the character of relief which could be afforded. Solely in view of the lawful power of the carriers to mine, sell and transport existing before the passage of the act to regulate commerce the Commission decided that its authority, under that statute and under the circumstances of the case, was confined to compelling the exaction of rates which were just and reasonable. The fact that the rulings in the two cases just referred to were solely placed upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the Interstate Commerce Act was pointed out by the Commission in *Grain Rates of Chicago Great Western Ry. Co.*, 7 Inters. Com. Rep. 33. In that case, in de-

ciding that the defendant carrier was without power to purchase grain for the purpose of securing the right to transport it, and thus evade the law which would have applied to its transportation had it been owned by any other party, the Commission, in distinguishing the case before it from the *Haddock* and *Coxe* cases, said (p. 38):

"Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act, and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property, and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to enquire whether the rate charged the complainant was a reasonable one."

Now, without at all intimating that as an original question we would concur in the view expressed in the case last cited that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling and transporting as presented in the *Haddock* and *Coxe* cases, would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical

execution, and has been impliedly sanctioned by the reënactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with. The concessions thus made, however, are wholly irrelevant to the case before us. This follows, since the Chesapeake and Ohio was, neither by its charter nor by legislative grant existing at the time of the adoption of the act to regulate commerce, possessed of the commingled attributes of carrier and producer, which was the controlling consideration in the decisions made in the *Haddock* and *Coxe* cases.

Concluding, therefore, that both the contracts made by the Chesapeake and Ohio with the New Haven were contrary to public policy and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the New Haven, and afforded no legal basis for a claim of the New Haven against the Chesapeake and Ohio, and therefore the court below was correct in so deciding.

This leaves only for consideration the question raised by the cross appeal of the Interstate Commerce Commission. That proposition is thus stated in the first of the assignments of error filed on behalf of the Commission:

"That the Circuit Court of the United States for the Western District of Virginia, after finding that the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from a partial non-performance by said railway company of a contract of December 3, 1896, set

out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake and Ohio Railway Company, its officers, agents, and employés from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the Chesapeake and Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake and Ohio Railway Company from transporting coal from one State to or through any other State for the New York, New Haven and Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven and Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage, and said decree, entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven and Hart-

ford Railroad Company and its officers and agents from seeking or accepting, in any manner, any direct or indirect rebate of the duly established freight rates of the Chesapeake and Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Company* v. *United States*, 196 U. S. 375. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs*, 158 U. S. 564, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

As the court below did not decide that the second and sixth

sections of the act, relating to the maintenance of rates, had been violated, the injunction, by it issued, was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake and Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal. And, as thus modified, the decree below is

Affirmed.

RECTOR *v.* CITY DEPOSIT BANK COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 137. Submitted December 12, 1905.—Decided February 19, 1906.

Where a trustee in bankruptcy seeks to recover in a state court what is asserted to be an asset under the bankrupt law, the denial of the asserted right is a denial of a right or title specially claimed under a law of the United States, and presents a Federal question, reviewable in this court by writ of error under section 709, Rev. Stat.

While a certificate of a court of last resort of a State may not import into a record a Federal question not otherwise existing, such certificate serves to elucidate whether such Federal question does exist.

While this court is bound by the facts found by a state court, where that court does not find the facts but instructs a verdict on the ground that the evidence justifies no other verdict, a question of law, reviewable by this court, is raised as to whether the jury could have found otherwise under any reasonable view of the evidence.

Where a bank fails and the clearing house having notice of such failure returns all of the debit items to the other banks it cannot apply the credit item to payment of claims of other banks against the insolvent bank; under the provisions of the bankrupt act forbidding preferences, it is its duty to pay those funds over to the trustee in bankruptcy.

See also *Rector* v. *Commercial National Bank*, *post*, p. 420.

THE facts are stated in the opinion.

Mr. D. F. Pugh and *Mr. Fred C. Rector*, for plaintiff in error: On the question of jurisdiction.

The defendant in error's defense is that the money never passed to the trustee of the bankrupt; that the clearing house had the right to pay it to the defendant in error as a creditor of the bankrupts. The plaintiff in error maintained that the transfer and payment of the money to the defendant in error by the clearing house amounted to a voidable preference under the United States bankrupt law, and that he as a trustee was entitled to have the moneys or the credit paid to him by the clearing house. The state courts, by their decisions, denied to the plaintiff in error as trustee his right to the moneys or credits which he derived from the bankrupt law.

When the question in a state court is not whether if the bankrupt had title, it would pass to his assignee under the bankrupt act, but whether he had title at all, and the state court decides that he had not, no question of which this court can take jurisdiction under section 709 of the Revised Statutes is presented. *Scott* v. *Kelley*, 22 Wall. 57.

But if the title of the bankrupt is not questioned, and if the question is whether the property passed to his trustee under the bankrupt act, then this court has jurisdiction. *McKenna* v. *Simpson*, 129 U. S. 506; *Cramer* v. *Wilson*, 195 U. S. 408; *Thompson* v. *Fairbanks*, 196 U. S. 516, distinguished. See also *Williams* v. *Heard*, 140 U. S. 529; *Dushane* v. *Beall*, 161 U. S. 513.

It is not necessary that the petition should aver, in so many words, or positively, that the right which the petitioner claimed was derived from or under the bankrupt law; but it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question, as indispensable to that judgment. *Crowell* v. *Randall*, 10 Pet. 368; *Miller* v. *Nichols*, 4 Wheat. 311; *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Hoyt* v. *Sheldon*, 1 Black, 518; *Maxwell* v. *Newbold*, 18 How. 515.

The motion of the defendant in error to withdraw the case

from the jury was an admission of all the facts which the evidence tended to prove, and there was presented only a question of law to the court.

When a question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. *Dower* v. *Richards,* 151 U. S. 658; *Mackay* v. *Dillon,* 4 How. 421.

The payment to the bank was a preference under the bankrupt law. Sections 60*a*, 60*b*, 57*g*. The fact that the payment was made circuitously was immaterial. A preference was nevertheless given and received. *In re Lyon,* 114 Fed. Rep. 327; *Gibson* v. *Dobie,* 5 Biss. 198; *Crooks* v. *People's National Bank,* 46 App. Div. N. Y. 339.

The clearing house and its manager were agents of all the banks which belonged to the clearing house. The clearing house was created by a voluntary contract entered into between the banks that formed the same. It was a common banker of the members of the association. *Merchants' National Bank* v. *National Bank,* 139 Massachusetts, 513. See also *Yardley* v. *Philler,* 167 U. S. 344, 359.

The bankrupt statute required plaintiff in error to prove that defendant in error had reasonable cause to believe that a preference was intended. No more was required. Section 60*b;* Loveland's Bankruptcy, pp. 468–471. The plaintiff in error was not required to prove a "conscious participation" in the bankrupt and his creditor in giving and receiving a preference. *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438.

The test of a voidable preference is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend out of the estate of the bankrupt than that estate will pay on other claims. It is the effect which it has upon the distribution of the estate of the bankrupt, and not its effect upon the creditor that gives character to the preference. This is the controlling purpose of the statute. *In re Bashline,* 109

Fed. Rep. 966; *Kimball* v. *Rosenbaum Co.*, 114 Fed. Rep. 85; *Pirie* v. *Chicago Title & Trust Co., supra; Toof* v. *Martin*, 13 Wall. 40.

Plaintiff in error could not have maintained an action against the clearing house; the express provision or stipulation in the articles of agreement entered into by the banks composing the clearing house, which expressly provided that "in no case is the association to be held responsible for any loss that may occur," would have defeated such an action.

Mr. Talfourd P. Linn for defendant in error:

The record shows that no Federal question occurred to counsel for plaintiff in error until after the decision of the Supreme Court of Ohio.

Having submitted to the jurisdiction of the Ohio courts, and having failed at any stage of the proceedings to indicate to those courts that a Federal question was involved, or that some right or title was claimed under a statute of the United States, plaintiff in error cannot have the decision of the court below reviewed.

In order to entitle him to relief, the record must affirmatively show that the Federal question was raised, or the right or title claimed. *Sayward* v. *Denny*, 158 U. S. 180; *Turner* v. *Richardson*, 180 U. S. 87; *Yazoo &c. R. R. Co.* v. *Adams*, 180 U. S. 1.

The question cannot be raised for the first time in the assignment of error. *Jacobi* v. *Alabama*, 187 U. S. 133; *Johnson* v. *Insurance Co.*, 187 U. S. 491.

Even if the petition filed by plaintiff in error should be considered as if it had directly alleged a preference in violation of §§ 60*a* and 60*b*, the facts disclosed by the record do not bring the action within the jurisdiction of this court.

The court will not review on error mere questions of construction of Federal statutes, or applications of facts to those statutes, when the validity of the act or statute is not involved, and where no right to proceed under the statute is

denied by the state court. *Cameron* v. *United States,* 146 U. S. 533; *Choteau* v. *Marguerite,* 12 Pet. 509; *Cook Co.* v. *Dock Co.,* 138 U. S. 635; *Osborne* v. *Florida,* 164 U. S. 650; *Kinnard* v. *Nebraska,* 186 U. S. 304.

This question was decided in the recent case of *Thompson* v. *Fairbanks,* 196 U. S. 516. To the same effect is *Dresser* v. *Wilson,* 195 U. S. 409.

The decision of the Supreme Court of Ohio confirming the lower courts, is final, and not subject to review by this court. *Kaufman* v. *Treadway,* 195 U. S. 271.

The record does not disclose any intention on the part of the bank to obtain a preference.

An unlawful preference within the meaning of the bankruptcy act, must have been a preference obtained by the creditor with full knowledge of the insolvency, and with a deliberate intent to obtain the preference at the expense of other creditors. Collier on Bankruptcy, 4th ed., 418 *et seq.*

Mr. Justice White delivered the opinion of the court.

The firm of Reinhard & Company, composed of John G. Reinhard and Henry A. Reinhard, carried on a banking business in Columbus, Ohio. On April 10, 1900, the firm made a general assignment under the insolvent laws of Ohio. On the following day a petition in involuntary bankruptcy under the laws of the United States was filed against the firm, and on August 10, 1900, it was adjudged bankrupt, and subsequently Rector, the plaintiff in error, was appointed the trustee.

In a Court of Common Pleas of the State of Ohio the trustee began this suit against the defendant in error to recover the sum of $1,300, which it was subsequently agreed was only $1,161.74. The petition alleged the adjudication in bankruptcy and the appointment of the trustee, and based his right to recover upon the ground that on April 10, 1900, the firm had transferred and assigned to the defendant bank, who had received the same the sum of money sued for, which it was

alleged was the property of Reinhard & Company, and, in substance, the payment to the bank was alleged to constitute a voidable preference.

The answer admitted the making of the general assignment, the adjudication of the firm as an involuntary bankrupt, and the appointment and qualification of the plaintiff as trustee. The other averments of the petition were denied.

A trial was had to a jury. At the close of the evidence for the plaintiff the court at the request of the defendant instructed a verdict in its favor and judgment was entered dismissing the action. The Circuit Court of Franklin County affirmed the judgment, which was thereafter affirmed by the Supreme Court of Ohio, without opinion. The Chief Justice of the Supreme Court of Ohio made and the court caused to be filed and entered on its journal the certificate which is in the margin.[1]

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[1] On motion of the plaintiff in error, Fred C. Rector, trustee, this court orders it to be certified and made part of the record in this case, and the Honorable William T. Spear, Chief Justice of said Supreme Court, does now certify, that in said cause, and on the hearing before this court, it was claimed, contended and alleged by the said plaintiff in error that, on the tenth day of April, A. D. 1900, Reinhard & Company, a partnership, by deeds of its individual members committed an act of bankruptcy, to wit: made a general assignment for the benefit of creditors; that on the eleventh day of April, A. D. 1900, a petition in bankruptcy was filed in the District Court of the United States of the Southern District of Ohio, Eastern Division; that on the tenth day of August, A. D. 1900, said Reinhard & Company were, by said court, adjudged bankrupt, and on September 13, A. D. 1900, said plaintiff in error was appointed trustee thereof; that on the tenth day of April, A. D. 1900, said Reinhard & Company, then being to the knowledge of the defendant in error, insolvent, assigned and transferred to the defendant in error, The City Deposit Bank Company, and that the said last named company then and there received from said Reinhard & Company the sum of $1,161.74 of moneys belonging to said Reinhard & Company; that said assignment and transfer was an unlawful preference, given to the said defendant in error, and violated the provisions of section 60*a* and section 60*b* of the United States bankrupt law; that it became and was material to the said cause for this court to determine whether the said sum of $1,161.74 was so assigned and transferred; whether it was an unlawful preference; whether it was a violation of said section 60*a* and section 60*b* of the said bankrupt law; and whether the said plaintiff in error, under said law, was entitled to have the said assignment and transfer set

It is contended that this court is without jurisdiction. The argument upon which this proposition is rested is this: First. It is said that whilst in the petition the right of recovery was based upon the ground of fraudulent preference, it was not disclosed therein whether the preference relied upon was in violation of the bankrupt law of the United States or of the insolvent laws of the State of Ohio, and therefore a Federal question was not raised, as it was necessary to specially direct the attention of the state court to such a question if it was intended to rely upon it. Second. But even if a Federal question was referred to in the petition, as the cause of action stated in nowise involved the construction or validity of any provision of the bankrupt act, therefore there is no right to review under section 709 of the Revised Statutes.

Both these contentions might well be disposed of by saying that the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States. *Peck* v. *Jenness*, 7 How. 612; *Barton* v. *Geiler*, 108 U. S. 161; *Williams* v. *Heard* 140 U. S. 529; *Dushane* v. *Beall*, 161 U. S. 513; *Stanley* v. *Schwalby*, 162 U. S. 255. Whether expressions, relied upon in argument, contained in *Cramer* v. *Wilson*, 195 U. S. 408, 416, must be taken as not in harmony with the previous cases, or whether those expressions simply implied that where a right claimed by a trustee in bankruptcy in its final aspect depended

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aside and declared null and void, and to have a judgment and order for the recovery of said money against said defendant in error; that the decision of this court was adverse to the claims and contentions of the said plaintiff in error, in this that said court decided that said assignment and transfer of said sum of $1,161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law, and that the said plaintiff in error was not deprived of any right under said law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $1,161.74 from said defendant in error.

solely upon a state law, the courts of the United States would follow the construction given by the highest courts of the State to the state law, we do not deem it necessary now to say, for, without reference to the doctrine announced in the previous cases and without regard to the import of the case of *Cramer* v. *Wilson*, the contention as to the want of jurisdiction is without merit. It is to be observed that the matter certified by the Supreme Court of Ohio was made by that court a part of the record, and, if it be considered as having the force of an opinion of that court, would clearly establish the fact that the court had considered and decided a Federal question, which, apart from other considerations, would obviously give jurisdiction. But even if the action of the court be treated as not an opinion, but a mere certificate, the same result would follow. It is elementary that the certificate of a court of last resort of a State may not import a Federal question into a record where otherwise such question does not arise, it is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists. Applying this principle, we think as the suit was brought by a trustee in bankruptcy in virtue of the power and authority conferred upon him by a law of the United States, the certificate makes clear the fact, if it were otherwise doubtful, that rights under the bankrupt law were relied upon and passed upon below. And as, this being true, the right of the trustee in bankruptcy to recover thus depended upon a law of the United States, there was clearly jurisdiction within the purview of section 709 of the Revised Statutes. *Nutt* v. *Knut*, 200 U. S. 12.

Coming to the merits, we premise that if the court below had found the facts we should be bound thereby. Here, however, as we have seen, the court below did not find the facts, but instructed a verdict for the defendant, being of the opinion that upon no view of the evidence was there a case made which would have justified a verdict for the plaintiff. This raises a question of law, which is this: Was the evidence such as would have justified the jury, under any reasonable view thereof, to

find for the plaintiff; in other words, was there sufficient evidence to warrant the submission of the case to the jury? This brings us to consider the evidence, in order to ascertain what inferences, one way or the other, might reasonably have been drawn by the jury therefrom.

Outside the testimony of the trustee, as to the insolvency of the bankrupt estate, the only evidence introduced was the testimony of John Field, manager of the Columbus Clearing House Association. By that testimony the following facts were disclosed:

Prior to the bankruptcy of Reinhard & Company that firm carried on a banking business in the city of Columbus, Ohio, and the firm, as well as the City Deposit Bank Company, were members of the clearing house association. In order to accomplish the purpose of its existence the clearing house association was an agent, for a limited purpose, of the banks composing the association, that is, its duty was to clear or balance daily the claims of the respective banks, one against the other, resulting from the checks drawn upon and held by the different members. The only source from which the association derived the means to carry on its operations was from assessments upon the members, which were made solely for the purpose of paying rent, salaries, and similar expenditures. To effect the clearings each member of the association, on banking days, sent to the clearing house, at a specified hour, the checks held by it against other banks. The checks sent by each member were considered as remaining the property of the member, the association being simply an agent for collection. Where the sum of the checks presented by one bank exceeded the sum of the checks against it presented by other members of the association, that bank had, of course, a credit balance. Where the checks presented by a particular bank against other banks were less than the sum of the checks against it presented by other banks, that bank had a debit balance. Where a bank was entitled to a credit or payment corresponding to the excess which the sum of the checks presented by it exceeded the sum

of the checks against it, the clearing house paid that bank the difference by drawing its check upon one or more of the debtor banks; and each member constituted the manager of the association its agent to draw a check or checks upon such member for any balance found to be due by that member.

In making the clearings on April 9, 1900, the day before the assignment of Reinhard & Company, the checks presented against that firm in the clearings exceeded the checks presented by it against other banks by $1,161.74, that is, Reinhard & Company, as a result of the clearing, was indebted in that amount. On the same day the City Deposit Bank presented in the clearings checks drawn upon other banks which exceeded by $10,245.63 the amount of the checks presented against that bank; in other words, as a result of the clearings it was entitled to receive the amount of money just stated. In payment of the balance the clearing house gave to the City Deposit Bank a check on Reinhard & Company for the sum due by that firm, viz., $1,161.74, and a check upon the Capital City Bank for $9,083.89. There was nothing in the evidence to show upon what bank the checks were drawn which were held by the City Deposit Bank on April 9, and which it presented for clearing on that day, nor was there anything in the evidence to show upon what banks the checks were drawn which were presented by Reinhard & Company for clearing on the same day. The check of the clearing house on Reinhard & Company for the balance due by that firm in the clearings, and which, as we have said, was given to the City Deposit Bank, was not on that day presented by the City Deposit Bank to Reinhard & Company for payment. On the contrary, the City Deposit Bank held the clearing house check until the next day. When on the morning of the tenth of April the City Deposit Bank presented its checks for clearing, it treated the clearing house check on Reinhard & Company as being entitled to participate in the clearing and included it in the checks presented for that purpose.

On the morning of April 10 the checks as presented to the

clearing house by the City Deposit Bank, including the clearing house check, exceeded the amount of the checks presented against it by other banks in the sum of $4,875.98; and the clearing house gave to the City Deposit Bank its check on the Deshler National Bank for that sum. On that day the checks presented by Reinhard & Company against other banks aggregated $2,132.19, whilst the checks against it presented by other banks amounted to $6,369.30, leaving a balance due by Reinhard & Company in the clearing of $4,237.11. Shortly after the clearing was made it developed that Reinhard & Company had made a general assignment for the benefit of their creditors and had suspended payment, and as a result, of course, it was certain that the firm of Reinhard & Company would not meet its obligations. The rules of the clearing house had provided for such a contingency as follows:

"In case of failure to respond promptly to the checks of the manager, on the part of any member of the association, they shall be immediately returned to the manager, who shall call upon the other banks or bankers to make up the sum for which payment has been refused in proportion to the amount of checks upon the defaulting member sent into the clearing house at the preceding settlement, which sums so furnished or contributed shall constitute claims in the hands of the responding members respectively against the defaulting members, and it is hereby agreed that the checks received from the clearing house by the defaulting members shall be delivered, if required, to the member owning the same without mutilation; the agency of the clearing house in the matter, it is understood, is only as a trustee, and in no case is the association to be held responsible for any loss that may occur."

All the checks drawn against Reinhard & Company and which figured in the morning settlement were returned to the clearing house with the information that Reinhard & Company had failed. The clearing house thereupon revised the previous settlements by deducting, wherever appearing, the credits which had been given for checks drawn on Reinhard & Com-

pany, which had been presented by other banks, and changed the balances to correspond with such deductions, and the dishonored checks were returned to the respective banks. Having thus returned all the checks which had been presented against Reinhard & Company on that morning, the entire sum which had been collected on the checks sent to the clearing house by Reinhard & Company on the same morning for the purpose of the clearing, viz., $2,132.19, remained in the hands of the clearing house without any debit against it. Being thus in possession of the sum referred to, the manager testified that he paid $970.45 thereof to the Commercial Bank and the balance of $1,161.74 to the City Deposit Bank. With a view of making the payment to the last named bank, the manager went to the office of the City Deposit Bank. Conflicting versions were given of what took place at the interview, which was had with an officer of the City Deposit Bank named Jennings. The manager at first testified:

"I told him that the Reinhards had failed, and that his check had been returned, and that I had a balance due Reinhard & Company, and that I would substitute a check on the Capital City Bank for this check on Reinhard, which had been returned. Mr. Jennings said that he would—I think he said he would telephone Mr. Outhwaite, and if it was all right he would return my check, the Reinhard check. . . ."

Subsequently, referring to checks which the witness had carried to the City Deposit Bank to give to that bank in exchange for the prior check of $4,875.98, he said:

"It runs in my mind . . . that I told him that I wanted to substitute those, and that he asked me what for, and I told him not to ask any questions—I am not sure about that—that I wanted to substitute those checks."

Certain it is, however, that the manager took up the checks for $4,875.98 drawn on the Deshler Bank, which had been given to the City Deposit Bank in discharge of the credit balance in its favor as the result of the previous clearing of that day, and substituted for it a check for $3,714.24, drawn on the Deshler

National Bank, and in addition gave a check drawn on the Capital City Bank for $1,161.74, the exact amount of the clearing house check which had been thrown out of the clearings.

Analyzing these facts for the purpose of arriving at the inferences which may reasonably be deduced from them, this plainly results: When on the morning of April 10, 1900, as the result of the failure of Reinhard & Company, the clearings of that day required revision, the clearing house having received back the checks drawn on Reinhard & Company which it had cleared for its members that morning, made new settlements with those members based upon deductions from the original settlements of the sum of the checks which had been put in the clearings on that morning and were afterwards dishonored. The result of each new settlement was that the amount due to the member was reduced or the indebtedness shown on the original settlement was increased, according as by the original settlement the member was a creditor of or a debtor in the clearing; and, as a necessary consequence of the new settlements having eliminated all the debits against Reinhard & Company, the clearing house held, as the property of that firm, the proceeds of the checks on other banks which that firm had sent for clearing on that morning.

The statements of the manager as to what was done with the clearing house check which had been put in the clearings by the City Deposit Bank are not perfectly clear. In one aspect he returned that check to the City Deposit Bank as he had returned the other dishonored checks, and then gave to the City Deposit Bank a check for the amount due it on the revision of the clearing ($3,714.24), and also delivered a check for $1,161.74, to take up the dishonored clearing house check. In another aspect the same result was brought about without any return of the dishonored check. The mere form of the transaction, however, does not affect its nature. The payment out of this fund by the manager, in part to the City Deposit Bank and in part to another bank, therefore amounted simply to

this, that in the revision of the clearings, although the clearing house eliminated, and returned the checks which had been debited against Reinhard & Company, and were subsequently dishonored, it retained and appropriated the credits arising from the checks put in by Reinhard & Company for the purpose of the clearing of the morning. Having thus appropriated those credits, it used them *pro tanto* to pay the clearing house check on Reinhard & Company held by the City Deposit Bank as the result of the clearings of the previous day. But as the clearing house had received the checks from Reinhard & Company on the morning of April 10, 1900, for the purpose of making the clearing on that day, such agent was without power, after returning to the banks which had presented the same, the checks debited against the firm, to hold on to the credits of Reinhard & Company, and treat them as subject to be appropriated. Indeed when the inferences from the proof are thus accurately fixed it is apparent that the transaction was in substance like the one which was held by this court in *Yardley* v. *Philler*, 167 U. S. 344, to be a misappropriation and besides to constitute a fraudulent preference within the meaning of the National Banking Act.

The result, however, of the proof would not be different, even if it be conceded that under the rule, as to clearings, which we have quoted, the clearing house would have had the power, upon the default of one of its members, simply to call upon the other members to pay in a *pro rata* proportion of the amount of the check or checks which had been drawn upon the defaulting member, and to treat the credit standing in the clearing in favor of the defaulting member as belonging proportionately to the contributing members. We say this because even under such hypothesis the clearing house check held by the City Deposit Bank would not have been entitled to so participate. That check was the result of the clearings of the previous day, and, under the hypothesis as to the meaning of the rule in which we have indulged, the holder was only entitled to obtain payment, *pro rata*, from those who had presented checks

against Reinhard & Company in the clearing wherein the check was given.

Was the receipt and appropriation of the $1,161.74 by the City Deposit Bank a preference within the bankruptcy law is, then, the question. It is said that it was not, because to constitute a preference under that law the transfer or payment must have been the act of the bankrupt. *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502. Here it is insisted that it cannot be so held, because there was nothing in the proof warranting the implication that the firm authorized or ratified the misappropriation or that the clearing house was the agent of the firm when it made such misappropriation. The latter proposition rests on the contention that whatever agency the association possessed in virtue of its authority to make clearings was revoked by the fact of the voluntary assignment made by Reinhard & Company before the money was appropriated to the City Deposit Bank. Whilst it may be conceded that these propositions are well founded, it does not follow that the inferences deducible from the evidence did not warrant the conclusion that under the bankrupt law of the United States there was a duty on the part of the City Deposit Bank to pay over to the trustee the sum received by it of the funds of Reinhard & Company deposited on April 10, 1900, with the clearing house for the purposes of the clearing of that date. From the inferences which we have stated were properly deducible from the evidence, it follows that the jury would have been amply justified in finding that the clearing house had made a wrongful disposition of a trust fund in favor of the City Deposit Bank, which institution had notice, either actual or constructive, of the misappropriation. *Western Tie & Timber Co.* v. *Brown*, *supra*.

We interpret the certificate of the Supreme Court of Ohio as establishing that that court did not rest its affirmance of the judgment rendered by the trial court against the trustees upon the mere technical ground that the petition counted upon a voidable preference, and there could not be a recovery unless

the facts constituted such preference, even although the evidence justified the inference that the money which the City Deposit Bank received from the clearing house association, under the circumstances we have stated, was the property of Reinhard & Company, which the bank by operation of the bankrupt law was obliged to account for to the bankrupt estate. We so conclude, because the Supreme Court of Ohio not only certified that its decision "was adverse to the claims and contentions of the said plaintiffs in error, in this, that said court decided that said assignment and transfer of said sum of $1,161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law," but in addition, moreover, certified that the case was decided against the trustees, because under the facts proved the trustee "was not deprived of any right under said (bankrupt) law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $1,161.74 from said defendant in error."

The judgment of the Supreme Court of Ohio must be reversed and the cause be remanded to that court for further proceedings, not inconsistent with this opinion.

RECTOR *v.* COMMERCIAL NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 138. Submitted December 12, 1905.—Decided February 19, 1906.

Rector v. *City Deposit Bank, ante,* p. 405, followed.

THE facts are stated in the opinion.

Mr. D. F. Pugh and *Mr. Fred C. Rector* for plaintiff in error.

Mr. F. F. D. Albery for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

This case is governed by the principles which controlled the decision just announced in the case of the same plaintiff in error against the City Deposit Bank Company, No. 137.

In the trial court judgment was prayed for $970.45, on the ground that on April 10, 1900, that amount of money, the property of Reinhard & Company, had been by that firm transferred to the defendant in error, and that the transaction constituted a voidable preference. The answer was in substance a general denial of the allegations of the petition in the particulars just stated.

The case was submitted to the court upon the pleadings and the following agreed statement of facts:

"For ten years or more prior to April 10, 1900, Reinhard & Company kept an open account with the Commercial National Bank, depositing their outside items on places where they had no correspondent, for the purpose of saving themselves the exchange or collection charges on some of these items. The balance with the Commercial National Bank on the morning of April 10, 1900, was ten hundred and sixty-seven and 76-100 dollars ($1,067.76). On that morning John G. Reinhard came to the Commercial National Bank with Reinhard & Company's draft on New York for two thousand ($2,000.00) dollars, for which the Commercial National Bank gave him the currency. This money was used by Reinhard & Company to pay checks drawn on them, and was paid out over their counter on April 10 to their customers.

"At 12.15 o'clock, P. M., on said day, Reinhard & Company, a partnership, composed of John G. Reinhard and Henry A. Reinhard, said partnership and each of said partners being then insolvent, filed a deed of assignment in the probate court of Franklin County, Ohio, and at about the same hour and afternoon of said day their banking house was closed, at the same time each of said partners filed deeds of assignment.

"The following day a petition was filed in the District Court

of the United States for the Southern District of Ohio by certain creditors, alleging that said assignment was an act of bankruptcy; and thereafter such proceedings were had that said Reinhard & Company were on August 11, 1900, adjudged bankrupt, and the plaintiff became their trustee, pending which election of trustee one Walter Zinn was appointed and acted as receiver of Reinhard & Company, but the fact of such insolvency and the making of said assignment were not known to said The Commercial National Bank except by hearsay until after said amount of two thousand ($2,000.00) dollars was charged back on the account of Reinhard & Company, and until after it had received the check of the manager of the clearing house for said sum of nine hundred and seventy and 45-100 ($970.45) dollars.

"During said day of April 10, 1900, the Commercial National Bank learned by street rumor that Reinhard & Company's draft on New York would probably not be paid, and it charged the same back on the account of Reinhard & Company, which overdrew their account nine hundred and thirty-two and 24-100 ($932.24) dollars.

"On the tenth day of April, 1900, Reinhard & Company sent their representative to the clearing house as usual at 12.30 P. M. They received checks from the clearing house as usual, which their representative took back to their bank, and the checks which they brought to the clearing house were cleared on the respective banks as usual in all cases. Then about one o'clock P. M., after the manager of the clearing house had made his adjustment of balances for the day and had made out the checks to pay for the same, Reinhard's representative brought back the checks which the different banks of the clearing house had cleared on them that day.

"The manager took these checks back to the different banks that had cleared them and deducted the amounts of their clearings that day. This left a balance of $—— due to Reinhard & Company from the clearing house for that day. Out of this balance he gave a check for $—— to the City Deposit Bank,

and for the balance of $970.45 he gave a check to the Commercial National Bank.

"When Mr. Field, the manager of the clearing house, went to the Commercial National Bank to return the checks which they had cleared on Reinhard & Company that day he informed Mr. Hoffman, the cashier, that that bank had suspended, and that he had a balance on hand due Reinhard & Company of $——, $—— of which he was going to pay to the City Deposit Bank, leaving a balance of $970.45 due the said Reinhard & Company, which he did not know what to do with. Mr. Hoffman informed him that he had advanced Reinhard & Company $2,000.00 on that morning and suggested that he pay the balance to him. He agreed to this and gave him the check as suggested. Said amount was credited by the Commercial National Bank to Reinhard & Company, leaving a balance, as shown by the books of the Commercial National Bank, due from said bank to Reinhard & Company of thirty-eight and 21-100 ($38.21) dollars, which amount was paid over to Walter Zinn, as receiver of Reinhard & Company, upon his check as such receiver, drawn on the Commercial National Bank on the sixteenth day of May, 1900."

Judgment was entered against the trustee, and that judgment was affirmed by the appellate courts. The Supreme Court of Ohio entered upon its journal a certificate, made by its Chief Justice, which is precisely like that set out in the opinion delivered in the *City Deposit Bank case.*

A motion assailing the power of this court to entertain this writ of error is overruled, for the reasons given in passing upon a similar motion filed in case No. 137. And, applying the principles announced in the case just referred to, it inevitably follows that the payment made on April 10, 1900, by the clearing house association, out of the credits of Reinhard & Company in the hands of the clearing house association, was a transfer of property belonging to Reinhard & Company which the trustee in bankruptcy was entitled to demand and receive from the defendant in error. We need not dwell upon the conten-

tion made in argument that because the defendant in error on the morning of April 10, 1900, gave Reinhard & Company two thousand dollars in currency in return for Reinhard & Company's draft on New York for a like sum, the transaction, even if fraudulent, invested the defendant in error with the right, upon the suspension of Reinhard & Company, to appropriate any property belonging to Reinhard & Company which they might be able to possess themselves of and to apply the same in reduction of the advance made upon the security of the draft. The doctrine of rescission and following of trust funds can have no application, especially when, as expressly agreed in the statement of facts, the money which the defendant in error gave to Reinhard & Company in exchange for its draft "was used by Reinhard & Company to pay checks drawn on them, and was paid out over their counter on April 10, 1900, to their customers."

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

FIRST NATIONAL BANK OF OTTAWA *v.* CONVERSE.

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

No. 176. Argued January 25, 1906.—Decided February 19, 1906.

A Minnesota manufacturing corporation having failed, the creditors, a national bank among them, organized a new corporation under the laws of Minnesota for the purchase of the capital stock, evidences of indebtedness and assets of the corporation and for the manufacture of the same articles that it had manufactured. The bank and other creditors exchanged their claims against the old corporation for stock in the new corporation. After the incorporation, and prior to the failure, of the new corporation the laws of Minnesota imposing double liability on stockholders of certain corporations were amended and a new method of procedure for enforcing them was provided. Stockholders of corporations organized exclusively for manufacturing purposes are not subject to double liability. Proceedings having been taken under the statute to enforce the double liability of the stockholders, a receiver was appointed, an assessment determined, and a judgment for the *pro rata* amount obtained against the national bank, which denied liability, claiming that the corporation was organized for manufacturing purposes only, and therefore the stockholders were exempt from double liability; that the provisions in the statute providing for enforcing double liability were unconstitutional under the impairment of obligation clause of the Federal Constitution; and that the original taking of the stock by it as a national bank was *ultra vires*. *Held*, that:

Under the construction given by the Supreme Court of Minnesota to its articles of association the corporation was organized to engage in a purely speculative business in buying and selling the stock and assets of another corporation with power, but without any obligation, to engage independently in a manufacturing business and did not fall within the class of corporations whose stockholders were exempted from liability.

A national bank has no power to engage in or promote a purely speculative business or to take stock in a corporation organized for that purpose, nor can the power to take such stock as a means of protecting itself from loss on preëxisting indebtedness be inferred from the right to accept it as security for a present loan.

Notwithstanding its subscription, a national bank, taking stock in a corporation organized for purely speculative purposes, may plead its want of authority so to do as a defense to the claim of a receiver of such corporation for the double liability imposed by a state statute on the stockholders thereof.

For brevity, the plaintiff in error will be hereafter referred to as the bank and the defendant in error as the receiver.

The receiver commenced this action against the bank in the Circuit Court of the United States for the Northern District of Illinois. The object of the action was to recover from the bank, as the owner of 274 shares of preferred stock in the Minnesota Thresher Manufacturing Company, the amount of an assessment of eighteen dollars per share, levied upon said stock for the payment of the debts of the thresher company. A demurrer to an amended declaration having been overruled, and the bank electing not to plead further, judgment was entered for the receiver, and, on account of constitutional questions raised by the demurrer, the case was brought directly to this court.

The averments of the amended declaration may be summarized as follows: In May, 1884, the Northwestern Manufacturing and Car Company was a corporation, engaged in the manufacturing business at Stillwater, Minnesota. At the date mentioned the car company owed a large amount of debt, which it was unable to pay, among which was a sum due to the bank for money lent. In that month a receiver was appointed for the car company by a court of the State of Minnesota having jurisdiction. Some time afterwards, in November, 1884, the bank with other creditors, and some of the stockholders of the car company, organized under the laws of Minnesota a new corporation, styled the Minnesota Thresher Manufacturing Company. The articles of incorporation of the new company provided "that the objects for which said corporation was formed were the purchase of the capital stock, evidences of indebtedness issued by and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines, of all kinds, farm implements and machinery of all kinds, and the manufacture and

sale of all articles, implements and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used."

The thresher company exchanged its preferred stock at par for the debts of the car company and issued common stock in exchange for the preferred stock of the car company. Subsequently at a judicial sale the new company acquired all the assets of the car company and paid for the same with the claims which it had acquired for issuing its common stock as above stated. The stock held by the bank upon which the assessment was sought to be enforced was alleged to have been acquired by the bank in the manner above stated, that is, by an exchange of its claim against the car company for the preferred stock of the new corporation. The declaration alleged that at the time of the acquisition of the stock by the bank, as above stated, under the constitution and laws of Minnesota, there was a double liability imposed upon the stockholders to pay the debts of the corporation in the event of its insolvency.

After the organization of the thresher company and the purchase of the assets of the car company, as above stated, the thresher company carried on the manufacturing business authorized by its charter. In 1901 it became insolvent. A creditor having sued and obtained judgment, and an execution having been issued and returned unsatisfied, the creditor procured, under the provisions of chapter 76 of the General Statutes of Minnesota and the amendments thereto, the appointment of a receiver of the property of the thresher company, who duly qualified and entered upon the discharge of his duties. In the proceeding in which the receiver was appointed creditors exhibited claims and demands against the thresher company, aggregating $443,752.17, but no property or assets of the corporation existed available to pay this indebtedness or any portion thereof.

Thereafter, upon petition of the receiver, pursuant to the provisions of chapter 272 of the General Laws of Minnesota

for 1899, copied in the margin,[1] steps were taken to provide a fund for the payment of the debts of the corporation, by enforcing contribution from its stockholders upon the double liability alleged to result from the ownership of its stock. The bank did not appear in the proceeding.

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[1] General Laws of Minnesota for 1899.

Chapter 272.

"An act to provide for the better enforcement of the liability of stockholders of corporations.

"SEC. 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders or any of them are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said State, or otherwise, has heretofore made, or shall hereafter make an assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any District Court of this State, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota and the acts amendatory thereof, or under or pursuant to any other statute of this State or under the general equity powers and practice of such court; the District Court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided.

"SEC. 2. Under the petition of the assignee or the receiver of any such corporation, or of any creditor of such corporation who has filed his claim in such assignment or receivership proceedings, the said District Court shall by order appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the clerk of said court, and shall direct such notice of such hearing to be given by the party presenting said petition, by publication or otherwise, as the court in its discretion may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the court shall direct that notice of such hearing be personally served on such assignee or receiver.

"SEC. 3. At such hearing the court shall consider such proofs by affidavit or otherwise as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation who may appear in person or by attorney, as to the probable indebtedness of said corporation and the expenses of said assignment or receivership, and the probable amount of assets available for the payment of such indebtedness and ex-

After compliance with the requirements of the act of 1899 the court made an assessment of eighteen dollars upon each of the shares of the stock of the thresher company, and the receiver was authorized and directed, in the event of the failure

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penses; and also as to what parties are or may be liable as stockholders of said corporation and the nature and extent of such liability. And if it appear to the satisfaction of the court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay its indebtedness and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of its stockholders: the said court shall thereupon by order direct and levy a ratable assessment upon all parties liable as stockholders or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify in said order.

"SEC. 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the amount so assessed against the same within the time specified in said order, to prosecute action against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

"SEC. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided.

"SEC. 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment of the amount to be assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of such stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this State or in any other State or country where such stockholder, or any property subject to attachment, garnishment, or other process

of a stockholder to pay, after due notice by mail, "to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation or party liable in any court having jurisdiction, whether in this State or elsewhere, which said receiver may deem necessary or proper for the recovery of the amount due from such person, persons, corporation or party under the terms of this order." After alleging the default of the bank to pay the assessment, the amended declaration prayed for a judgment against the bank for the sum of the assessment, that is, eighteen dollars per share on the 274 shares of stock of the thresher company, which stood on the books of that company in the name of the bank.

As stated at the outset, the bank demurred to the amended declaration, and, on the demurrer being overruled, stood upon the demurrer and judgment was entered against it as prayed for. The grounds upon which the amended declaration was demurred to were as follows:

"1. It does not state facts sufficient to constitute a cause of action against the defendant.

"2. It does not show that plaintiff has legal capacity to institute and maintain the present action.

"3. It shows that said supposed Laws of Minnesota for 1899 are in contravention of clause 1 of section 10 of article I of the Constitution of the United States.

"4. It shows that said supposed Laws of Minnesota for

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in an action against such stockholder, may be found. But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of disadvantage to the estate and the interest of creditors to prosecute the same, said assignee or receiver shall so report to said court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said court. And in such case said court shall not require said receiver to institute or maintain such action unless said court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation; except as hereinafter provided."

1899 are in contravention of the Fourteenth Amendment of the Constitution of the United States.

"5. It shows that said supposed Laws of Minnesota for 1899, being 'An act to provide for the better enforcement of the liability of stockholders of corporations,' are in contravention of the Constitution of the United States.

"6. It shows that said supposed Laws of Minnesota for 1899 unjustly discriminate against non-resident stockholders and are such as will not be enforced in this jurisdiction.

"7. It shows that the supposed order of the court levied an assessment on stockholders that is excessive and beyond reason.

"8. It does not show that the supposed corporate indebtedness is contractual or that it has been judicially determined as against this defendant.

"9. It does not show that all the necessary steps prescribed by the supposed laws of Minnesota have been taken.

"10. It shows, as a basis of liability, supposed acts of the defendant which are *ultra vires* and void under the national bank act.

"11. It states conclusions of the pleader instead of facts.

"12. It does not allege a case within the jurisdiction of this court.

"13. It is, in other respects, uncertain, informal and insufficient."

Mr. Lester H. Strawn and *Mr. Lawrence Arnold Tanzer* for plaintiff in error:

On the question of the double liability of the stockholders in the thresher company:

When it appears from the articles of association that the real and only purpose of the organization of the corporation is the carrying on of a manufacturing or mechanical business, and such other business as may be incidental thereto, the shareholders are exempt from the constitutional and statutory additional liability. *Hastings Malting Co.* v. *Iron Range Brewing*

Co., 65 Minnesota, 28; *Cowling* v. *Zenith Iron Co.*, 65 Minnesota, 263; *Cuyler* v. *City Power Co.*, 74 Minnesota, 22; *Senour Mfg. Co.* v. *Church Paint Co.*, 81 Minnesota, 294.

The acts of the bank set out as a basis of liability were *ultra vires* and void. The power of national banks to deal in stocks is not conferred and therefore prohibited. *First National Bank* v. *Hawkins*, 174 U. S. 364; *California National Bank* v. *Kennedy*, 167 U. S. 362.

Even though the bank might take stock to secure a debt, it could not lawfully enter into a scheme to create a corporation in the hope that the corporation would earn money enough to pay the debt to the bank.

United States courts will permit a national bank to plead *ultra vires*. *First National Bank* v. *Hawkins*, 174 U. S. 364; *California National Bank* v. *Kennedy*, 167 U. S. 362; *Ward* v. *Joslin*, 186 U. S. 142; *Building Association* v. *Home Savings Bank*, 181 Illinois, 35; *Nassau Bank* v. *Jones*, 95 N. Y. 115; *Jemison* v. *Citizens' Savings Bank*, 122 N. Y. 135.

Mr. C. A. Severance, with whom *Mr. Frank B. Kellogg*, *Mr. Robert E. Olds* and *Mr. J. H. Chandler* were on the brief, for defendant in error:

The acquisition of the stock by the plaintiff in error was not *ultra vires* and it is liable to the same extent as any other stockholder.

This transaction presented none of the elements of an investment or a speculation on the part of the creditors of the old company. It was simply an attempt to realize the most that they could upon their claims by taking preferred stock in the new company organized to liquidate the business. It was the logical and necessary outcome of a legitimate banking transaction.

The decisions of this court settle the question of *ultra vires* beyond all controversy. *First National Bank* v. *National Exchange Bank*, 92 U. S. 122. See also *National Bank* v. *Case*, 99 U. S. 628. *California Bank* v. *Kennedy*, 167 U. S.

362, distinguished; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364.

In the recent well considered case, *Tourtelot* v. *Whithead*, 84 N. W. Rep. (N. Dak.) 8, it was held, after a careful review of the authorities, that a national bank had power to exchange notes held by it against a milling corporation, for preferred stock of that corporation issued for the purpose of raising additional capital, to be used to relieve the corporation from financial embarrassment.

It is always held to be within the powers of an ordinary mercantile corporation, which finds itself involved in debt so as to make the course reasonably advisable, to exchange all of its property for stock in a new corporation organized to take over and carry on the business. *Treadwell* v. *Salisbury Mfg. Co.* 7 Gray (Mass.), 393; *Hodges* v. *New England Screw Co.*, 1 R. I. 312; *Holmes & Griggs Mfg. Co.* v. *Holmes & Wessell Metal Co.*, 127 N. Y. 252; *Miner's Ditch Co.* v. *Zellerbach*, 37 California, 543.

So also may a trading corporation, not specifically authorized by law to hold stock in another corporation, take the same in payment of a debt. *Hodges* v. *New Eng. Screw Co.*, *supra*; *Howe* v. *Boston Carpet Co.*, 16 Gray (Mass.), 493.

The Supreme Court of Minnesota has not only held that the stockholder is a surety for the corporation and therefore bound for anything for which the corporation is bound, but has also held that a judgment against a corporation is of itself sufficient evidence of the claim of the judgment creditor against the stockholder. *Frost* v. *St. Paul Banking & Inv. Co.*, 57 Minnesota, 331.

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

The questions principally discussed at bar relate to the alleged repugnancy to the Constitution of the United States of the Minnesota law of 1899, by virtue of which the receiver

asserted his power and authority to sue in a court of another jurisdiction than that of Minnesota to enforce the assessment made by the court of Minnesota on the stockholders of the thresher company. But antecedent to that question we must consider and dispose of the propositions arising from the tenth ground of the demurrer, that is, that under the averments of the bill there was no liability on the bank, as the facts alleged from which it is asserted the liability arose showed that the act of the bank in subscribing to the stock was *ultra vires* and prohibited by the provisions of the national banking act. We say this is antecedent because, if from the averments of the declaration, aside from the validity or invalidity of the act of 1899, there could be no liability on the bank to pay the assessment, it will be unnecessary to consider whether the Minnesota statute added such conditions to the obligation resulting from the stock subscription at the time it was made as to cause the statute to be repugnant to the contract or any other clause of the Constitution of the United States.

At the time the bank took the stock in the thresher company it was provided in section 3 of article X of the constitution of Minnesota as follows: "Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

If the thresher company was organized solely for manufacturing purposes, it is of course apparent that under this provision of the Minnesota constitution the stockholders of the company would not be liable for its debts. *Senour Mfg. Co.* v. *Church Paint & Mfg. Co.*, 81 Minnesota, 294. It has, however, been decided by the Supreme Court of Minnesota that unless it unquestionably appears that a Minnesota corporation claiming to be a manufacturing corporation was organized for the exclusive purpose of engaging in manufacturing and such incidental business as might be reasonably necessary for effecting that purpose, the exception in the Minnesota constitution to which reference has been made would not apply,

and the double liability would result. *State* v. *Minnesota Thresher Co.*, 40 Minnesota, 213; *Merchants' Nat. Bank* v. *Thresher Mfg. Co.*, 90 Minnesota, 144. These cases, it is to be observed, referred to the very act of incorporation upon which the liability of the bank, if at all, must rest. It clearly appears, from the comments of the Supreme Court of Minnesota upon the charter, that in the articles of association the thresher company was declared to be organized under the law of Minnesota relating to manufacturing corporations as a class exempt from double liability, and that the motives of the incorporators were to obtain immunity from the double liability. The court, however, held that the mere law under which the corporation was organized, and the motive therefor, would not suffice to bring the incorporators within the control of the exemption accorded by the constitutional provision, if from the articles of association it did not clearly appear that the corporation was confined solely to a manufacturing business and its incidents. The doctrine of the court was thus clearly stated (90 Minnesota, 147):

"It is immaterial that the corporation was organized under the statute providing for organizing manufacturing corporations or what the actual intention of the incorporators was, or that the corporation in fact carried on only a manufacturing business, but its articles of incorporation are the sole criterion as to such intention and the purposes for which the corporation was organized; and, unless it fairly appears therefrom that it was organized for the exclusive purpose of engaging in manufacturing and such incidental business as may be reasonably necessary for effectuating the purpose of its organization, its stockholders are not within the exception to the general rule of constitutional liability of stockholders for the debts of their corporation."

And further along in the opinion the declaration was reiterated (p. 148) that the intention of the corporators could not be ascertained by reference to matters not appearing on the face of the articles of association, and that the articles were the

sole criterion as to the purpose for which a corporation was formed, "that is, for ascertaining the intention of the associates." Applying this rule to the articles of association of the thresher company, the court found that the acquisition of the stock, etc., of the car company was a business independently to be engaged in and was not incidental to that of manufacturing, and, hence, that the corporation was not within the exception embodied in the constitutional provision imposing a double liability upon stockholders.

Now, the exclusive and only ground upon which the Supreme Court of Minnesota, in construing the articles of association of the thresher company, held that the articles embodied a distinct business from that of manufacturing, is plainly made manifest by the opinions expressed by the court in the two cases to which we have referred. In the earlier case the court said (40 Minnesota, 223):

"It is clear, therefore, to our minds that, under the act of 1873, a corporation can only be organized for carrying on an exclusively manufacturing or mechanical business, which, of course, includes anything that is properly incidental to or necessarily connected with such business. A corporation organized to carry on manufacturing and also some other lawful, but independent, business, belongs to the class authorized by title 2, c. 34 (sections 109–119).

"With this construction of the law in mind, it is not difficult, on examination of respondent's articles of association, to determine to what class it belongs. One of the declared objects of its formation is to purchase the capital stock and evidences of indebtedness of the car company, a business in nowise incident to or properly connected with that of manufacturing. The contention of counsel to the contrary cannot be seriously entertained for a moment. If a manufacturing corporation desires to buy the plant of another corporation formerly engaged in the same business, that is legitimate; and if, in order to get it, it becomes necessary to buy with it some other property, not needed for nor connected with the manufacturing

business, this also would be permissible, if done as incidental to the main purpose of securing the plant; but no such reason or excuse existed for buying the stock and indebtedness of the car company. Indeed, it would be difficult to imagine anything more foreign to or inconsistent with a legitimate manufacturing business than for a corporation to invest all its capital in the stock and indebtedness of another and insolvent corporation. Under title 2, a corporation can be organized to carry on any lawful business, and, if parties desire to deal in such speculative property, they can do so under that title, but not under the act of 1873, even by connecting it with manufacturing. Our conclusion, therefore, is that respondent is a corporation of the class authorized by title 2. That is what the corporators themselves have characterized it by their statement of the objects of its formation."

In the latter case, after restating the rule that the face of the articles of association was the sole criterion as to the purpose for which the corporation was formed, the court said (90 Minnesota, 148):

"Now, taking the articles in question by the four corners, and reading them in the light of the rule we have stated, without resorting to technicalities, does it fairly appear therefrom that the corporation was organized for the exclusive purpose of engaging in manufacturing and business incidental thereto and reasonably necessary for carrying into effect such purpose? We answer the question in the negative. There are two general purposes for which the corporation was organized as declared by the articles—one the purchase of the capital stock, evidence of indebtedness, and assets of an existing corporation; and the other the manufacture and sale of all articles, implements, and machinery made of wood and iron, or either of them, and the manufacture of the materials therein used. The first purpose does not appear to be a necessary incident to the second one. On the contrary, the corporation was authorized to buy and sell the stock, choses in action, and assets of the Northwestern Manufacturing & Car Company mentioned in the

articles, without ever engaging in the business of manufacturing. The first purpose appears to be independent of the second one, for the power to buy necessarily includes the incidental power to use, collect, deal with, or sell the stock and assets of the then existing corporation. Nor does it fairly appear, expressly or by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood and iron, or either of them."

Accepting this construction given by the Supreme Court of Minnesota to the articles of association by which alone the incorporators under those articles can be taken out of the exemption accorded by the constitution of Minnesota, it follows that the thresher company was organized to embark in the purely speculative business of buying and selling the stock and assets of an existing and insolvent corporation, with power, but without the obligation, to engage as an independent enterprise in a manufacturing business.

Now, the limitations upon the powers of national banks were clearly pointed out in *California National Bank* v. *Kennedy*, 167 U. S. 362, where it was said (p. 366):

"It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank* v. *Townsend*, 139 U. S. 67, 73. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank* v. *Case*, 99 U. S. 628. So, also, a national bank may be con-

ceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank* v. *National Exchange Bank*, 92 U. S. 128."

As no authority, express or implied, has ever been conferred by the statutes of the United States upon a national bank to engage in or promote a purely speculative business or adventure, accepting the view of the articles of association by which the bank was denied the benefit of the exemption accorded by the constitution of Minnesota, it follows that the bank had no power to engage in such business by taking stock or otherwise. The power of a national bank to engage in the character of business which the articles of association of the thresher company manifested, as defined by the Supreme Court of Minnesota, cannot be inferred to have been possessed by the bank as an incident of securing a present loan of money or as a means of protecting itself from loss upon a preëxisting indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a preëxisting debt, does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held cannot be done.

The speculative venture, therefore, which the bank undertook, as held by the Minnesota court, when it engaged in taking the stock in the thresher company being *ultra vires*, it follows, under the settled rules hitherto applied by this court, that the bank, despite the subscription, was entitled to plead its want of authority as a defense to the claim of the receiver. The doctrine on the subject was stated in *De la Vergne Co.* v. *German Savings Inst.*, 175 U. S. 40, where it was said (p. 59):

"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized."

And, moreover, the authorities cited in the case just referred to conclusively establish that the principle which the case announced as to the power of a corporation to avail of the defense of *ultra vires* had been previously conclusively settled in this court. Indeed, the case arising on the record presents an obvious dilemma, which is this: If the construction of the articles of association given by the Supreme Court of the State of Minnesota, by which alone the double liability can be enforced, is accepted, then there was no liability because of *ultra vires*. If, on the other hand, we were to disregard the construction given by the Supreme Court of Minnesota to the articles of association we should be constrained to the conclusion that those articles but endowed the incorporators of the thresher company with the power to carry on a manufacturing business, and as a mere incident to acquire for the purposes of such business the property of the car company; and it would follow that there was no double liability, by force of the exception created in the constitution of Minnesota.

The judgment must be reversed and the case remanded with directions to sustain the demurrer and enter judgment for the bank.

MR. JUSTICE HARLAN concurs solely upon the authority of *California National Bank* v. *Kennedy* and the previous cases, announcing the doctrine which was adhered to and applied in that case.

MR. JUSTICE BREWER, dissenting.

I am unable to concur in the opinion and judgment in this case, and will briefly state the grounds of my dissent.

There is nothing in the organization of a national bank that puts it outside of the ordinary rules governing corporations, whether we consider the rights, obligations or the remedies in actions by or against it. Section 5136, Rev. Stat., prescribes the terms of its charter. It is authorized to do a banking business, and, like any other corporation, its powers are limited by the terms of the charter. A national bank may not engage in manufacturing, for its charter gives it no authority therefor. Neither can a manufacturing corporation engage in banking, and for a like reason. Neither one can engage in the business of buying and selling stocks, because authority therefor is not granted in the charter of either, but nevertheless each has authority to take stock in another corporation as security for or in payment of a debt. It was so long since decided by this court, *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 126, 127, 128, in which the question presented, as stated in the opinion of the court, announced by Mr. Chief Justice Waite, was:

"Whether a national bank, organized under the national banking act, may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished."

And answering that question in the affirmative, it was said:

"Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the

power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances.

* * * * * * * *

"Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner* v. *Bank of United States*, 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions."

In *California Bank* v. *Kennedy*, 167 U. S. 362, the right to take stock of another corporation as collateral security was affirmed.

In the case before us the bank had a claim against the Northwestern Manufacturing and Car Company. This was in 1884. The car company was in financial trouble and had been placed in charge of a receiver appointed by a state court. The bank, in connection with other creditors of the car company, organized a new corporation—the Minnesota Thresher Manufacturing Company—to buy the entire plant of the car

company. It was so purchased and the bank surrendered its claim, taking in payment thereof preferred stock in the thresher company. The latter company carried on business until it failed, and then proceedings were had by which the defendant in error was appointed receiver and an assessment made by order of the court, which assessment is the basis of this action. Now, in accordance with the decision of this court in 92 U. S., *supra*, the bank had a right to surrender its claim and take stock in payment thereof. It did so, and, so far as the record shows, everything was done in good faith and in the belief that the best interests of the bank would be promoted thereby. Having thus become a stockholder in the thresher company it was entitled to all the benefits and subject to all the liabilities which attached to ownership of the stock. The fact that the arrangement antedated the organization of the thresher company is immaterial, for until the arrangement was carried into effect the claim of the bank against the car company was undisturbed. To hold that a national bank may take, in satisfaction of a claim, stock in a corporation already existing, and cannot agree to take in such satisfaction stock in a corporation to be created, and which is afterwards created, and whose stock is issued to it in payment of the claim, is to create a distinction without a difference and to sacrifice substance to form. The transaction is precisely the same as though the thresher company had been fully organized and thereafter the bank surrendered its claim against the car company for stock in the thresher company, and that, as held in 92 U. S., is perfectly legitimate. It held that stock for nearly a score of years, its right to so hold being, so far as the record shows, unchallenged by the Government or any stockholders, and enjoying during that time all the benefits and profits resulting from such holding. Finally the thresher company became embarrassed. Its creditors proceeded against it, and then for the first time is it discovered that the holding by the bank of stock in the thresher company was unauthorized and illegal, and now it repudiates its liabiltiy as stockholder and leaves the burden of the thresher

company's debts to be borne by the other stockholders. Certainly there is little in this to appeal to the sense of justice.

The bank was not, as suggested, investing in any merely speculative business. It was not accepting stock in a corporation organized for the business of buying and selling. It was no more engaged in a speculative transaction than if it had taken a piece of real estate in satisfaction of a debt, hoping that the time would come when the real estate would be worth as much or more than the debt. The object of the organization of the thresher company, as stated in its charter, was to purchase the plant of the Northwestern Manufacturing and Car Company—that is, to buy a single property which was then in the hands of the court and likely to be sacrificed in judicial proceedings. Clearly the creditors thought that by acquiring title and possession of the entire plant they could realize more than by a receiver's sale to outside parties; and at the same time, contemplating the possibilities of the future, they provided in the charter for the carrying on of a general manufacturing business. The scheme is clearly set forth in the following passage from the opinion of the Supreme Court of Minnesota, quoted in the opinion of this court:

"There are two general purposes for which the corporation was organized as declared by the articles—one the purchase of the capital stock, evidence of indebtedness, and assets of an existing corporation; and the other the manufacture and sale of all articles, implements, and machinery made of wood and iron, or either of them, and the manufacture of the materials therein used. The first purpose does not appear to be a necessary incident to the second one. On the contrary, the corporation was authorized to buy and sell the stock, choses in action and assets of the Northwestern Manufacturing and Car Company mentioned in the articles, without ever engaging in the business of manufacturing. The first purpose appears to be independent of the second one, for the power to buy necessarily includes the incidental power to use, collect, deal with, or sell the stock and assets of the then existing corporation.

Nor does it fairly appear, expressly or by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood and iron, or either of them."

Clearly the thresher company was no speculative corporation, but an ordinary and legitimate business venture. Suppose the bank had been the only creditor, is it possible that it could not have taken the whole car company's plant in satisfaction of its claim, and then held it in the hopes of being able to realize fully on the property? And if it could do so, acting alone and for its single interest, what is there in the organization of a national bank which prevents it doing the like thing in conjunction with other creditors?

Of course, as held by the Supreme Court of Minnesota, unless the thresher company was organized solely for the purpose of carrying on a manufacturing business, its stockholders would, under section 3 of article X of the constitution of Minnesota, be subject to the double liability. For if a power to engage in manufacturing exempts stockholders from double liability, no matter what other business the corporation is chartered to carry on, every corporation organizing under the Minnesota statutes would include that among its charter powers. We ordinarily accept the construction by a state supreme court of its constitution and laws as conclusive. In this case the construction placed by the Supreme Court of Minnesota upon this clause in the constitution is so obviously right as to preclude the necessity of defense.

For these reasons, thus briefly stated, I am constrained to dissent from the opinion and judgment of the court, and am authorized to say that MR. JUSTICE BROWN concurs in this dissent.

SECURITY MUTUAL LIFE INSURANCE COMPANY *v.* PREWITT, INSURANCE COMMISSIONER OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 178. Argued January 16, 1906.—Decided February 19, 1906.

Where, in a suit to cancel the revocation of an annual permit to do business in a State, the permit has ceased, since the writ of error was filed, to have any effect, and the plaintiff in error could not do business even if successful without obtaining a new permit, an event has occurred which renders it impossible for this court to grant any relief, and, as only an abstract question remains to be decided, the writ of error will be dismissed.

THE plaintiff in error seeks by this writ to review the judgment of the Court of Appeals of Kentucky, reversing the judgment of the court below and dismissing the petition of plaintiff in error. The trial court granted such petition, which was to cancel the revocation, by the state Insurance Commissioner, of the permit granted by him to the plaintiff in error to do business in the State.

The facts are as follows: The company is an insurance company, existing under the laws of the State of New York and having its principal office in the city of Binghampton, in that State. In the year 1900 the company, pursuant to the laws of the State of Kentucky, applied to the Insurance Commissioner of that State for a permit to do business therein, and it was granted for one year from the date of such permit, which was annually renewed thereafter. On July 1, 1904, it was renewed for the last time, and the permit contained a statement that it was granted for one year, provided it was not sooner revoked. Section 635, Kentucky Statutes, provides that these licenses or permits must be renewed annually. At the time of the first application by the company for admission (A. D.

1900), the following statute of Kentucky was, and it ever since has been, in existence. It is known as section 631, Kentucky Statutes. The section reads as follows:

"Before authority is granted to any foreign insurance company to do business in the State, it must file with the Commissioner, a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

In September, 1904, certain parties, named Crain and Gayle, sued the company in a state court of Kentucky, and the company, without their consent, removed the suit to the Circuit Court of the United States for the Eastern District of Kentucky. Thereupon Crain and Gayle notified the state Insurance Commissioner of such removal, and demanded that the Commissioner should revoke the authority of the company to do business in the State, as provided for by the above statute.

The company avers that the Insurance Commissioner did, on the sole ground of such removal, revoke the authority of the company to do business after September 29, 1904. The company thereupon demanded of the Commissioner that he should set aside such revocation and cancel the same, which the Commissioner refused to do.

The company then commenced these proceedings in the proper state court of Kentucky, asking that the Insurance Commissioner be required to cancel the revocation of the authority of the plaintiff and its agents to do business in the State, and that he should grant, or continue, the authority to the plaintiff, and its agents, to transact the business of life insurance in the State; and that the Commissioner should be required to publish in a newspaper the fact of such cancelation, and that he should be restrained and enjoined from notifying the general agents of the plaintiff of the suspension of its license. The company specially set up the claim that, under the Constitution and laws of the United States, it was entitled to remove the suit mentioned from the state court into the United States Circuit Court for the Eastern District of Kentucky, and that any statute of the State of Kentucky in anywise restricting or affecting that right was void as a violation of the Federal Constitution.

The defendant demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, and the defendant Commissioner declining to plead further, the prayer of the insurance company was granted, and judgment was entered (1) directing the defendant to cancel the revocation of the permit; (2) granting authority to the company to transact business in the State; (3) restraining the Commissioner from notifying the general agents of the company of the suspension of its license and its right to do business in the State; (4) enjoining the Commissioner from applying to any judge for an injunction restraining the company from further proceeding with its business. The defendant prayed an appeal to the Court of Appeals of the State, which was granted, and that court reversed the judgment of the trial court, and remanded the case with instructions to dismiss the petition, and judgment to that effect was thereupon entered. 83 S. W. Rep. 611.

Mr. Wm. Marshall Bullitt, with whom *Mr. F. W. Jenkins,*

Mr. Julien T. Davies and *Mr. Charles S. Grubbs* were on the brief, for plaintiff in error.

Mr. J. H. Hazelrigg, with whom *Mr. N. B. Hays*, Attorney General of the State of Kentucky, and *Mr. H. R. Prewitt* were on the brief, for defendant in error.

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

It appears that the laws of Kentucky require the annual renewal of the permit to any foreign insurance company, in order that the company may continue to do business in the State, and without such license the company is prohibited from doing any business therein.

The writ of error in this case was filed January 27, 1905, and the license was granted July 1, 1904, and expired by its terms, if not sooner revoked, on the first day of July, 1905. The permit, even if illegally revoked prior to that time, became a dead letter on July 1, 1905, so far as constituting any authority to the company to remain in the State and do business therein. If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired, and the company would still be without power to do business in the State until another permit should be granted. To adjudge that the old permit remained good until the expiration of the year is to adjudge an abstract question, as no relief can be now awarded concerning it. The refusal on the part of the Insurance Commissioner to grant authority to plaintiff to transact business after the old permit had expired does not raise a Federal question. Since the writ of error was filed the permit has ceased to have any effect, and, therefore, an event has occurred which renders it impossible for this court to grant any effectual relief in favor of plaintiff in error. In such case the court will dismiss the writ of error. *Mills* v.

Green, 159 U. S. 651; *Tennessee* v. *Condon*, 189 U. S. 64; *Jones* v. *Montague*, 194 U. S. 147.

It would seem to be plain that the cancelation of a revocation of a permit, when the permit itself has become of no effect by virtue of the lapse of time, would be useless business, and would give no practical relief to the company.

Writ dismissed.

TRAVELERS INSURANCE COMPANY *v.* PREWITT, INSURANCE COMMISSIONER OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 184. Argued January 16, 1906.—Decided February 19, 1906.

Security Life Ins. Co. v. *Prewitt*, *ante*, p. 446, followed.

Mr. John G. Johnson and *Mr. Edmund F. Trabue*, with whom *Mr. John D. Doolan*, *Mr. Attilla Cox, Jr.*, and *Mr. William Bro Smith* were on the brief, for plaintiff in error.

Mr. J. H. Hazelrigg, with whom *Mr. N. B. Hays*, Attorney General of the State of Kentucky, and *Mr. H. R. Prewitt* were on the brief, for defendant in error.

MR. JUSTICE PECKHAM:

This case involves the same principle as that decided in the foregoing case, and, for the reasons stated in the opinion above, the writ of error to the Court of Appeals of the State of Kentucky is

Dismissed.

UNITED STATES *v.* BITTER ROOT DEVELOPMENT COMPANY.

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

No. 223. Argued January 8, 9, 1906.—Decided February 19, 1906.

Notwithstanding averments in the bill of fraud, conspiracy and violation of trust, if the action is really one of trespass or trover to recover damages for wrongful cutting and conversion of timber from complainant's lands, and there is no question of defendant's financial responsibility, and the recovery of a money judgment and not of specific property is sought, complainant's remedy at law is adequate and equity has no jurisdiction; nor can equity take jurisdiction merely because of the difficulty of proving the case on account of various devices alleged to have been used by defendants, or because the principal defendant is an executor of a party, whose estate is solvent, alleged to have been the chief wrongdoer.

Complainant, in an action at law of this nature, is entitled to the same inspection of books and papers that he could have in a suit in equity.

The holder of permits to cut timber from certain specified government lands, who wilfully and fraudulently cuts from other lands, is not a trustee *ex maleficio* as to timber wrongfully cut, but a mere trespasser and liable for damages in action at law, and equity has no jurisdiction either on the ground of trusteeship or accounting.

This court cannot take judicial notice of the contents of permits to cut timber which are issued in different forms and subject to the discretion of the Department giving them.

Prevention of multiplicity of suits is not a ground for equity jurisdiction if all persons must be made parties, whether the suit be at law or in equity, and where a class does not exist of which a few can be made defendants as representatives thereof.

THE appellant filed this bill of complaint in the Circuit Court of the United States for the District of Montana, on the equity side of the court, for the purpose of recovering from the defendants the value of certain timber, alleged to have been wrongfully cut and taken by the defendants and converted to their own use from the public lands belonging to the complainant in the State of Montana. The defendants, those of them who appeared, demurred to the bill on the ground, among others, that a court of equity had no jurisdiction over the

cause of action set up in the bill, for the reason that complainant had a plain, full, and adequate remedy at law therefor. The Circuit Court sustained the demurrer and granted leave to the complainant to amend, but the complainant elected to stand by the bill, and the same was thereupon, finally, dismissed. The case was taken to the Circuit Court of Appeals for the Ninth Circuit, where the judgment of the Circuit Court was affirmed, 133 Fed. Rep. 274, and the complainant has appealed here.

(It appears from the return of the marshal that, after diligent search, no service of process could be made on the defendants, Bitter Root Development Company, Anaconda Mining Company and Anaconda Copper Company [corporations], as they could not be found.)

The bill alleged that on April 1, 1888, the complainant was, and at the time of the filing of the bill continued to be, the owner in fee and in the possession of certain lands in Montana, described in the bill. Description of the lands from which the timber was cut and carried off was given at great length and a large number of sections of land were included therein:

"2. Your orator further shows that on the day and year last aforesaid, on these vast tracts of land there were then growing and standing great forests of pine, fir, and other kinds of trees of various dimensions, fit to manufacture into lumber for mining, commercial, and all other purposes for which lumber is used; that said forests were of great value, to wit, of the value of two million dollars ($2,000,000) and upwards, the exact value thereof being to your orator unknown; that these forests and the land upon which they were growing and standing were the absolute property of the complainant, the United States of America, and was a portion of its public domain.

"3. Your orator further shows that on this the day of filing its bill of complaint in this court the lands above described have for the most part been stripped of the pine and other trees and timber that were standing and growing upon them as aforesaid, and, except very small portions thereof, were so denuded without license, authority or permission of the United States

or any one authorized to represent the complainant; and this was done in violation of its laws, both civil and criminal, and thereby and in consequence of said spoliation the complainant has lost millions of dollars' worth of its property under circumstances named in the succeeding paragraphs of this bill of complaint.

"4. Your orator further shows that one Marcus Daly, who is now dead, but who was on the date and year aforesaid a citizen of the State of Montana, and a resident thereof, well knowing of the location of these lands, their accessibility, and the great value of the timber then growing thereon, did, on or about the 1st day of January, 1890, determine that he would convert and appropriate to his own use all of the merchantable and marketable timber growing and standing thereon, without buying said timber or obtaining any right or authority, except as hereinafter stated, from your orator, the United States of America. That in order to more effectually carry out these designs and purposes, to conceal his identity, to enrich himself individually, to escape personal liability, and to better deceive the public and the lawful officers and agents of the complainant, he determined that he would organize a corporation under the laws of the State of Montana; and for that purpose the said Daly called to his aid and assistance certain other persons, namely, John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcom B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy and Joseph V. Long, and by conspiracy and confederation with said parties, and in pursuance of such fraudulent purpose as aforesaid, they organized, on or about the 12th day of August, 1890, the Bitter Root Development Company, the defendant. In its articles of incorporation, which were duly filed with the Secretary of State of Montana, said John R. Toole, William Toole, and James W. Hamilton were named as incorporators, and James W. Hamilton, William Toole, Daniel J. Hennessy, John R. Toole, and William W. Dixon were named as trustees to manage the affairs of the com-

pany for the first three months of its existence, and the town of Hamilton, in said State, was named as the principal office of said corporation. The capital stock of said corporation was fixed at the sum of three hundred thousand dollars ($300,000.00), divided into one hundred thousand shares, of the par value of three dollars ($3.00) per share.

"5. Your orator further shows that said incorporators and trustees had but a nominal interest in said incorporation, but certain of them were agents, and others, attorneys of said Marcus Daly, and as such conspired with him as to the manner and means by which his said purpose to denude said lands of your orator could be best carried out. In pursuance of such conspiracy it was necessary that a certain number should subscribe for stock in said corporation, which was done, but all of said shares were in fact subscribed for the use of and controlled by said Marcus Daly. Your orator charges that not only in the formation of said corporation and other corporations to be hereinafter named said John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long aided and assisted said Marcus Daly, but in many other ways up to the time of his death they engaged with him in the work of spoliation, which, in pursuance of such conspiracy, had been planned and was later carried out as hereinafter particularly described; and said parties other than Daly participated in the profits thereof, but just how and to what extent is to your orator unknown; and your orator shows that such of the above as are not made defendants herein are either dead, outside of the jurisdiction of this court, or have no estate.

"6. Your orator further shows that at once on the organization of this corporation, and under the corporate name thereof, said parties heretofore named commenced the work of cutting and carrying away from said lands the trees and timber then growing and standing thereon, using at first in their operations several portable sawmills, but later, on or about the year 1892,

a large lumber and sawmill was erected at the town of Hamilton or Bitter Root River, in close proximity to a portion of the lands above described and the timber growing thereon. The work of cutting, hauling, transporting to the river, and driving the timber to said mill and manufacturing the same into lumber was prosecuted with great and unremitting industry for several years thereafter, to the great profit and advantage of the said conspirators and to the great loss of your orator.

"7. Your orator further shows that not only at the time of the organization of said corporation, but at all times while it was doing business, its officers, directors, trustees and stockholders acted for and in behalf of said Marcus Daly as his agents, and had knowledge of its principal operations, and well knew that the logs that were being brought to its mill and converted into lumber were taken, without right or authority, from the public domain of your orator, and that they had no legal right or title to the same, except as to a small fraction thereof, as hereinafter stated.

"8. Your orator further shows that in pursuance of such fraudulent conspiracy, for the purpose of carrying out the same, and in order to conceal such action, said Marcus Daly, aided by the other parties and as aforesaid, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations apply to and obtain from the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described, and under cover of such permits said conspirators not only cut, carried away and manufactured the timber growing upon the lands included in such licenses, but well knowing that such permits gave them no right or authority to enter upon other lands of your orator, they willfully and fraudulently entered upon large tracts of lands adjacent thereto, and cut, carried away, drove and manufactured the timber growing thereon, and afterwards sold the lumber and timber to persons and corporations to your orator unknown and known only to Marcus Daly, his agents and the officers of said Bitter Root Development Company, and appro-

priated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom beside said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time, it is impossible for your orator to say, as all books of account, of every kind and character, were then and are now in their possession, under their control, or with their assigns.

"9. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, in order to more effectually conceal the same from your orator, its officers and agents, the said Marcus Daly and the other parties before mentioned engaged the services of a large number of men, falsely representing that they had authority from your orator to cut the growing timber on tracts of land not included in any license, and made contracts with such men, by the terms of which the said conspirators were to pay a certain amount for logs delivered at the river bank by the parties so employed, by reason of which representations and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank, and transport said logs to the company's mill at Hamilton, and thereby innocently aided the conspirators in their unlawful acts and enabled them to successfully prosecute the same.

"10. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, the said Daly and his associates, acting through and under the corporate name of the defendant, Bitter Root Development Company, entered into other contracts or agreements with other parties, namely, Kendall Brothers, Harper Brothers, G. L. Shook, William Toole, Andrew Kennedy, D. V. Bean, John Ailport and divers other persons to your orator unknown, by the terms of which they were to be paid specified prices per thousand feet board measure for logs delivered at the sawmill at Hamilton, both parties to said agreements well knowing at the time that the timber belonged to your orator and was to be unlawfully cut and removed. Said contractors, so called, acting for and in

behalf of said Marcus Daly and his said confederates under the name of the Bitter Root Development Company, during the year 1891 and for several years next thereafter, willfully trespassed upon the hereinbefore-described lands of the complainant, cutting millions of feet of logs and hauling them to the Bitter Root River and thence to the mill of the defendant, Bitter Root Development Company, at Hamilton, where they were converted into lumber and sold to the general public, and the proceeds thereof appropriated in large part by said Marcus Daly and the balance by his associates in said conspiracy, but just how much, and in what proportion, your orator, for the reasons above stated, is unable to say.

"11. Your orator further shows that the said Marcus Daly and his associates, in further execution of said conspiracy, organized other corporations for the purpose of concealing their illegal acts and complicating and confusing the situation, so as to make detection and proof of the same difficult, if not impossible. One of these schemes was as follows: On or about the 14th day of January, 1891, they organized a corporation known as the Anaconda Mining Company, with an organized capital stock of $12,500,000, divided into 500,000 shares of the par value of $25 per share; that within less than one year thereafter, namely, on the 5th day of December, 1891, a stockholders' meeting was held in the city of Butte, Montana, and at said meeting the capital stock of said corporation was increased to twenty-five million dollars ($25,000,000.00) and the shares thereof increased to one million (1,000,000) shares; that at said stockholders' meeting it appeared that no one of the incorporators or the trustees that were named at the time of its incorporation a few months before had any substantial interest therein; and later, namely, on the 31st day of December, another meeting of said stockholders was held, at which time it was voted to extend the term of existence of said corporation for forty years from the date of its original incorporation, and at that meeting it appeared that Marcus Daly, either in his own person or as trustee or as a proxy, controlled nearly seven

hundred thousand (700,000) shares of the million shares of the capital stock of said company, and in less than six months thereafter the capital stock was reduced from twenty-five million dollars ($25,000,000.00) to one million dollars ($1,000,000.00), and the shares from one million to forty thousand (40,000).

"12. Your orator further shows that in furtherance of the conspiracy aforesaid the said Marcus Daly on the 27th day of April, 1894, through his agents procured to be conveyed unto himself all of the property of said Bitter Root Development Company, receiving a deed from said Bitter Root Development Company, executed by William Toole as its president and Joseph Kerrigan as its secretary, which said deed was duly recorded on page 302 of book 16 in the proper office for the recording of deeds in the county of Ravalli, State of Montana. In said deed appear these words: 'The Bitter Root Development Company, for and in consideration of one dollar, transfers all of its property of every kind and description, real and personal, timber lands, timber cutting privileges and rights, timber, logs, mills, water rights, and water ditches, flumes, pipe lines, and rights of way—in fact, everything belonging to the Bitter Root Development Company — to Marcus Daly.'

"Your orator further says that four days after so receiving this deed, namely, on the 1st day of May, 1894, said Marcus Daly deeded the same property to the other of his corporations, the above-named Anaconda Mining Company, for the express consideration of one million four hundred and forty-two thousand three hundred and seventy-nine dollars and forty-six cents ($1,442,379.46), which said deed was duly recorded in said book 16, on page 280. Your orator expressly charges that said Marcus Daly did in fact receive the consideration named in said deed, the whole thereof being directly the result of the spoliation of the lands of your orator as aforesaid, and that the moneys so received by him belonged in fact to your orator; but your orator charges on information that said Marcus Daly did not receive all of the same in cash, but a portion of same

was taken in stock in said Anaconda Mining Company, but just how much he received in cash and how much was carried over and appeared in stock of said company your orator is unable to state.

"13. Your orator further shows that in furtherance of the conspiracy aforesaid, said defendants, Moses Kirkpatrick, William Scallon, and Malcolm B. Bromley, acting for and in behalf of said Marcus Daly, on the 6th day of June, 1895, pursuant to and in conformity with the statutes of Montana relating to corporations for industrial and productive purposes, organized the Anaconda Copper Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into three hundred thousand (300,000) shares of the par value of one hundred dollars ($100.00) each, with an authorized term of existence of forty years, and the following-named persons were named as trustees for the first three months of its existence, to wit, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long, with its principal office at Butte, Silverbow County, Montana.

"14. Your orator further shows that nine days thereafter the same persons, named as incorporators of the corporation last named, organized under the same law the defendant corporation, the Anaconda Copper Mining Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into one million two hundred thousand shares (1,200,000) of the par value of twenty-five dollars ($25.00) each, with the same seven trustees to manage the affairs of said corporation for the first three months of its existence, with its principal office at Anaconda, in said State.

"15. Your orator shows that in the execution of said conspiracy, and for the purpose of complicating the situation, said Marcus Daly, through his agents, did again, and within one year and twenty-nine days after having transferred his property to the Anaconda Mining Company, convey the identical property that was named in said deeds to the above-named

Anaconda Copper Mining Company for and in consideration of the sum of one dollar, the Anaconda Mining Company executing a deed through and by its president, W. W. Dixon, and its secretary, F. E. Sergeant, and said deed is recorded in the same book of records on page 441.

"16. Your orator further shows and charges that these several conveyances were made in the main in furtherance of said conspiracy, and in pursuance of a purpose to so complicate the situation as to make detection difficult, if not impossible. That the conveyance by the Bitter Root Development Company to said Marcus Daly, for one dollar, of all of its property was fraudulent, and that said Marcus Daly did, under the name of the Anaconda Mining Company, carry on the same work of spoliation of your orator's trees, timber, and lands, and that later, and from the time of the conveyance of all its corporate property to the Anaconda Copper Mining Company, he carried on the work under that name until the date of his death. That he continued to use the same means, the same mill at Hamilton, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and so knowing continued the same. And your orator expressly charges that all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations or was appropriated by Marcus Daly and his assistants to their own use and benefit; but just how much was carried over in the said corporations, and how much was divided previous to the last deed named herein, and how much of the property of your orator was converted by said last-named company between the date of its organization and the death of said Marcus Daly hereinafter described, and how much thereof was appropriated by said company and how much by Daly and his associates, it is impossible for your orator, with the means at hand, to state.

"17. Your orator further shows that by reason of such spoliation, continued and carried on during the period of about

ten years, it has lost property of great value, to wit, of the value of two million dollars and upwards, and that Marcus Daly and the other defendants named herein occasioned this loss by willfully trespassing upon said lands of your orator, and without its consent, or the consent of any of its authorized officers, and in violation of its laws, both civil and criminal, appropriated and converted to their own use the trees and timber growing thereon. That said defendants, or some of them, have had at all times and now have possession of the sawmill at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them; but by reason of the frauds practiced by said defendants, as aforesaid, and their acts performed for the express purpose of concealing from your orator the facts of the case by means of the formation and the dissolving and the reforming of corporations, and by reason of said defendants having possession of all books of account it is impossible for your orator to set forth to a greater extent the details of this conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just when and to whom the logs when manufactured into lumber were sold, or just when and by whom the proceeds thereof were obtained and when the same were divided.

"18. Your orator further shows that at the time that these trespasses were committed the territory on which the same took place was but sparsely settled, and was thousands of miles away from the seat of government, and it was impossible with the means that your orator had at hand to properly patrol and protect its domain from the willful trespasses of the defendants, and that the Government of the United States used such care in the protection thereof as it had the means to do. That the agents employed by your orator were misled by the defendants' assertion of ownership, as aforesaid; that the frauds and trespasses of the defendants, which have resulted in the denuding of these lands of your orator and in depriving your orator of property of the value of several millions of dollars,

were not discovered in their entirety until a comparatively short time ago.

"19. Your orator further shows that it has commenced several actions at law in this honorable court to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this court, but that, by reason of the frauds and conspiracies above set forth and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given your orator by said actions at law, and your orator is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

"20. Your orator further shows that Marcus Daly died in the city of New York on the 12th day of November, A. D. 1900; that at the time of his death he was a resident of the county of Deerlodge, State and District of Montana, and left an estate worth about $12,000,000, consisting of real and personal property located in said county and State and elsewhere, and your orator expressly charges that a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator, as hereinbefore charged, and converting the proceeds of the sale of the timber, growing thereon to his own use and benefit; that in his lifetime he made and published his last will and testament, whereby he appointed the defendant, Margaret P. Daly, executrix thereof; that on the 14th day of February, A. D. 1901, at the city of Anaconda, said last will and testament was duly proved and duly admitted to probate in the District Court of the county of Deerlodge, District of Montana; that thereupon, on the 15th day of February, A. D. 1901, letters of administration were duly issued thereon to the said defendant, Margaret P. Daly, by the said court; that the said defendant, Margaret P. Daly, duly qualified and entered upon the discharge of her duties as executrix, and that the said letters testamentary have not been revoked and are now in full force and effect.

"21. Your orator further shows that the said Margaret P. Daly, under and by virtue of the terms of said will and, as the wife of said Marcus Daly, is now the owner of a large portion of his estate.

"In consideration whereof, and forasmuch as your orator is, for the reasons stated, remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and relievable, to the end that your orator may have that relief which it can only obtain in a court of equity; and that each one of the defendants above named may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, your orator prays the court as follows:

"First. That the defendant, Margaret P. Daly, both in her own person, and as executrix of the last will and testament of her husband, Marcus Daly, deceased, and each of the defendants above named, be decreed to hold in trust for the use and benefit of your orator so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the conversion of the timber of your orator, as aforesaid.

"Second. That the complainant have and recover from Margaret P. Daly, both personally and as executrix, and from each of the other defendants above named, the profits, gains and advantages which the said defendants, or either of them, have received or made or which have arisen or accrued to them, or either of them, by reason of the willful trespasses upon the public domain of your orator, hereinbefore particularly described, and by reason of the fraudulent conversion of the trees and timber growing thereon, the logs had therefrom, and the lumber manufactured from the same.

"Third. That each of the defendants may make a full and true discovery and disclosure of and concerning the transactions and matters aforesaid, and that an accounting may be taken by and under the direction and decree of this honorable court

of all the dealings and transactions between your orator and the defendants. That on such accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they, or any of them, may have received from your orator, by which they, or any of them, claim, or claimed, the right to enter upon any of said lands of your orator and cut and remove the trees and timber then growing thereon.

"Fourth. That the defendants and each of them account for the number of logs received by them and manufactured into lumber at the sawmill at Hamilton, in said district, or at any other mill or mills owned or used by them in the manufacture of said logs into lumber, and also the gains, profits, and advantages which the said defendants, or either of them, or the estate of said Marcus Daly, have received or made, or which have arisen or accrued to them, or either of them, from trespassing upon the lands of the complainant, above described and set forth, and in converting to their own use and benefit the trees and timber growing thereon.

"Fifth. That the said defendants and each of them discover and set forth full, true, and particular accounts of all and every sum or sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their, use, for or in respect of the said sale or sales of logs cut from said lands of said complainant, or the lumber obtained from said logs, and when and from whom each and every of such sums were, respectively, received, and how the same, respectively, have been applied or disposed of, and to show when and where the proceeds of said sales were invested by each of said defendants, and in what form of real or personal estate they now exist.

"Sixth. That the defendants, and each of them, may set forth a list or schedule and description of all books or account of every kind and character, and of all deeds, documents, letters, papers, or writings of every kind whatsoever relating to the matters aforesaid, or any of them, wherein or whereupon

there is any note, memorandum, or writing relating in any manner thereto, which are now or ever were in their, or either of their, possession or power, and more particularly described, which now are in their, or either of their, possession or power, and may deposit the same with the clerk of this court or with the standing master in chancery thereof for the purposes of inspection and examination by your orator, and for all other legitimate and usual purposes, in order that your orator may ascertain therefrom and thereby the particular facts and circumstances, which is absolutely necessary in order to enable your orator to obtain possession and knowledge of the details of this conspiracy; and that when such accounting shall be made, and it shall be ascertained that said defendants have received and taken into their possession money or other forms of property directly resulting from their participation in the conspiracy aforesaid, and in the spoliation of the lands of your orator as aforesaid, that this court shall decree that they pay the amount thereof, with interest from the date they so received the same, to your orator, with costs of this suit, and that your orator may have such other and further relief in the premises as the nature and the circumstances of this case may require and as may be agreeable to equity and good conscience.

"May it please the court to grant to your orator a writ of subpœna to be directed to the said Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; Bitter Root Development Company, Anaconda Mining Company, Anaconda Copper Company, Anaconda Copper Mining Company, John R. Toole, William W. Dixon, William Scallon, Daniel J. Hennessy, thereby commanding them, and each of them, at a certain time, and under a certain penalty to be fixed, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer to make to all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall be meet and agreeable to equity, and your orator will ever pray."

Mr. Marsden C. Burch, and *Mr. Fred A. Maynard,* Special Assistants to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

The fundamental source of equity jurisdiction lies in the fraud which raises the constructive trust, but out of the situation naturally grows other remedial elements of jurisdiction of a court of equity, as discovery, accounting, settlement of an estate, prevention of multiplicity of suits, and the inadequacy of remedies at law.

The remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, practicable, and efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce's Executors* v. *Grundy,* 3 Peters, 215; *Kilbourn* v. *Sunderland,* 130 U. S. 514; *Walla Walla Water Case,* 172 U. S. 112.

The application of this principle depends on the circumstances of each case. If the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. *Watson* v. *Sutherland,* 5 Wall. 74; *Payne* v. *Hook,* 7 Wall. 425; *Davis* v. *Wakelee,* 156 U. S. 680, 688; *Bank of Kentucky* v. *Stone,* 88 Fed. Rep. 391.

The mere fact that a legal remedy does exist is not a sufficient objection to resorting to the more convenient remedy in equity. 1 Cyc. of Law and Procedure, 421, and cases cited; *Russell* v. *Clark's Executors,* 7 Cr. 69, 89; *Wylie* v. *Coxe,* 15 How. 415, 420; *Jones* v. *Bolles,* 9 Wall. 364, 369; *Oelrichs* v. *Spain,* 15 Wall. 228.

As to the doctrine of constructive trust, by which one who has been defrauded of his property is treated in equity as a constructive *cestui que trust* and has the right to follow the property of which he has been defrauded into any form it may assume while in the hands of a party to the fraud, and to claim not only the trust *res* and its avails, but also any increase in value by reason of its transmutation of form, see *McMullen Lumber Company* v. *Strother,* 136 Fed. Rep. 295, 305; Perry on Trusts, 5th ed., § 166; *American Sugar Refining Co.* v.

Fancher, 145 N. Y. 552; *Newton* v. *Porter*, 5 Lansing, 416; *S. C.*, 69 N. Y. 133.

Equity only stops the pursuit when the means of ascertainment fails, or the rights of *bona fide* purchasers for value, without notice of the trust, have intervened. The relief can be adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. *Lane* v. *Dighton*, Ambler, 409; *Mansell* v. *Mansell*, 2 P. Wms. 679; *Lench* v. *Lench*, 10 Ves. 511; *Lewis* v. *Madocks*, 17 Ves. 49; Perry on Trusts, § 829; Story's Eq., § 1258.

The aid of equity is not to be denied where a case is otherwise made simply because the defendant may be solvent, and simply because at the time the bill is filed the complainant may not have exact information as to the particular property sought to be charged. *Angle* v. *Chicago, St. Paul &c. Railway*, 151 U. S. 1; *Clews* v. *Jamieson*, 182 U. S. 461; Pomeroy's Eq. Jur., § 158.

The aid of equity may be invoked by reason of the fraud, misrepresentations and concealments practiced by the defendants. Equity has always had jurisdiction of fraud, misrepresentation and concealment and it does not depend upon discovery. *Jones* v. *Bolles*, 9 Wall. 369.

When an account cannot be justly and fairly taken at law, equity has always had jurisdiction. *Weymouth* v. *Boyer*, 1 Ves. Jr. 424; *Fowle* v. *Lawrason's Executors*, 5 Pet. 495; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 515; 1 Story Eq. Jur. §§ 450–495; Pomeroy's Eq. Jur. § 1421; *Kirby* v. *Lake Shore Ry.*, 120 U. S. 130, 134. See also *Fenno* v. *Primrose*, 116 Fed. Rep. 49; *McMullen Lumber Co.* v. *Strother*, 136 Fed. Rep. 295.

The jurisdiction in equity should also be maintained to avoid a multiplicity of suits. *Bailey* v. *Tillinghast*, 99 Fed. Rep. 801; *DeForest* v. *Thompson*, 40 Fed. Rep. 375.

Where the bill is filed for the purpose of obtaining final relief, and where discovery is only incidental to that end, there can be no demurrer to the discovery only, for the reason that if

the discovery be material in support of the relief, and the complainants be entitled to the relief, the defendants must answer. *Ex parte Boyd*, 105 U. S. 647; *Brown* v. *McDonald*, 133 Fed. Rep. 897; *McMullen Lumber Co.* v. *Strother*, 136 Fed. Rep. 301; Bates Fed. Eq. Pro., pp. 128–130; *Gas Company* v. *Indianapolis*, 90 Fed. Rep. 197; *Rider* v. *Bateman*, 93 Fed. Rep. 31; Adams Eq. Jur., American ed., p. 444.

The examination of the officers of the defendant corporations as witnesses can in no event be the exact equivalent of a discovery by the corporations themselves under their corporate seals. *Bank* v. *Heilman*, 66 Fed. Rep. 184; Pom. Eq. Jur. § 199; *Evans* v. *Lancaster*, 64 Fed. Rep. 626; *McClaskey* v. *Barr*, 40 Fed. Rep. 559.

A court of equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him if the wrongful act has resulted in a benefit capable of being measured pecuniarily, if the demand is of such a nature as can be properly entertained by the court. *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; *Garth* v. *Cotton*, 1 Dickens, 183; *Marquis of Lansdowne* v. *Marchioness Dowager of Lansdowne*, 1 Madd. 116; *Phillipps* v. *Homfray*, 24 Ch. D. 439; *Lee* v. *Alston*, 1 Br. C. C. 194; *Monypenney* v. *Bristow*, 2 Russ. & M. 117; *Kennedy* v. *Creswell*, 101 U. S. 641, 645; Pomeroy Eq. Jur. § 156; *Beverly* v. *Rhodes*, 86 Virginia, 416.

A creditor not a citizen of the State of the decedent and his representative can proceed in the United States court against such representative to establish his claim therein by judgment or decree against the representative, but where the estate is being administered in a probate court, the Federal court, after adjudicating the claim, must remit the complainant to that court for distribution. *Byers* v. *McAuley*, 149 U. S. 608. See also *Martin* v. *Fort*, C. C. A. 83 Fed. Rep. 19, 22; *Wickham* v. *Hull*, 60 Fed. Rep. 329; *Hale* v. *Tyler*, 115 Fed. Rep. 838; *Walker* v. *Brown*, 165 U. S. 655.

Mr. L. O. Evans, with whom *Mr. A. J. Campbell*, *Mr. A. J.*

Shores, *Mr. C. F. Kelley* and *Mr. John F. Forbis* were on the brief, for appellees:

The complainant has a full, complete and adequate remedy at law in an action for damages. From the bill, and as claimed by appellant's counsel in the lower court, the inadequacy of the legal remedy consists only of the trouble and difficulty of unraveling before a jury the methods adopted by the appellees in creating corporations, transferring their property from one to the other, and in various other ways seeking to cover up their tracks; and that these devices could only be brought to light through an inspection of the books and records of the corporations, the contention of appellant being that it would not be so difficult to obtain and produce such complicated evidence in a suit in equity.

It is not a case where it is necessary to bring in a large number of defendants in order to adjust their rights among themselves as well as complainant's rights as to each of them. Under the allegations of this bill the defendants have no claims to be adjusted as between themselves. Under the bill they were wrongful trespassers, each and all of them, and each directly responsible for the injuries sustained.

These allegations do not lay the foundation for equitable relief. The remedy is at law. *Buzard* v. *Houston*, 119 U. S. 347; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Dowell* v. *Mitchell*, 105 U. S. 430; *Parkersburg* v. *Brown*, 106 U. S. 500; *Amber* v. *Choteau*, 107 U. S. 586; *Litchfield* v. *Ballou*, 114 U. S. 190; *Root* v. *Railway Co.*, 105 U. S. 189; *Thompson* v. *Allen County*, 115 U. S. 550; *Texas Pac. Ry. Co.* v. *Marshall*, 136 U. S. 393; *Hipp* v. *Babin*, 19 How. 278; *Dumont* v. *Fry*, 12 Fed. Rep. 21; *White* v. *Boyce*, 21 Fed. Rep. 228; *Alger* v. *Anderson*, 92 Fed. Rep. 696; Pomeroy on Equity Jurisprudence, 2d ed., vol. 1, § 178; Foster's Fed. Prac. § 12; Bates' Fed. Eq. Prac. § 188.

The complainant, presenting only an unliquidated claim for damages, has no standing in a court of equity. Before a party can come into a court of equity and seek relief he must reduce

his claim, whether it be for unliquidated damages or upon contract, to judgment. In other words, his right to a recovery at all, whether it be in damages, for tort or a recovery upon contract, is a legal right, and one triable by jury. And this right must be determined, and a judgment entered before he can seek the interposition of equity. *Swan Land and Cattle Co.* v. *Frank*, 148 U. S. 603; *Cates* v. *Allen*, 149 U. S. 451; *Scott* v. *Neeley*, 140 U. S. 106.

Equity will follow and declare a trust in the property for the benefit of the real owner, where money or other property has been misapplied, only in cases where the misapplication or misappropriation has been done by parties standing in some fiduciary relation to the wronged party. 1 Perry on Trusts, 5th ed., § 128, p. 170, and cases cited; *Hawthorn* v. *Brown*, 3 Sneed (Tenn.), 462.

A bill for discovery alone cannot be maintained, and where the case is for relief and discovery, if the facts stated are insufficient to entitle the complainant to relief, the discovery must fail also. *Preston* v. *Smith*, 26 Fed. Rep. 885; *Venner* v. *Atchison, T. & S. F. R. Co.*, 28 Fed. Rep. 581; *Everson* v. *Equitable Life Assur. Co.*, 68 Fed. Rep. 258, aff'd 71 Fed. Rep. 570; *Cecil Nat. Bank* v. *Thurber*, 59 Fed. Rep. 913; *McLanahan* v. *Davis*, 8 How. 170.

No equity jurisdiction arises by reason of the fact that Margaret P. Daly, appellee, is sued as executrix of the estate of Marcus Daly. Even a creditor of an estate is not such a *cestui que trust* of the executrix as will enable him to maintain a bill in equity against the administrator for the establishing and payment of his claim, merely on the ground of trust relation, in the absence of charges of fraud, maladministration or non-administration, on the part of the executrix. *Walker* v. *Brown*, 58 Fed. Rep. 23, aff'd 63 Fed. Rep. 204.

There is no relation between the complainant and the defendants, or any of them, which would support an action for accounting. The defendants are charged in the bill as joint tort feasors. Complainant's action upon the facts alleged is

for trespass and conversion or trover. To maintain an action for accounting there must be between the parties either a privity, by contract or consent, or a privity in law. Against a defeasor or mere wrongdoer no action for accounting will lie. The fact that the controversy embraces a series of torts, each of which would have to be proven by separate and distinct evidence, would not alter the nature of the case. *Whitwell* v. *Willard*, 1 Met. (Mass.) 216; *Stringham* v. *Winnebago County*, 24 Wisconsin, 594; *Conklin* v. *Busch*, 8 Pa. St. 514; *Brinsmaid* v. *Mayo*, 9 Vermont, 30.

Complainant is not entitled to discovery under the allegations of the bill of complaint.

Since the adoption of § 858 *et seq.*, Rev. Stat., the parties having full remedy in the law action, and there being no necessity for a recourse to equity, the courts of chancery, and particularly the Federal courts have clearly established the doctrine that a bill for discovery alone cannot be maintained. *Safford* v. *Ensign Mfg. Co.*, 120 Fed. Rep. 480; *Brown* v. *Swan*, 10 Pet. (U. S.) 497; *Rindskoff* v. *Platto*, 29 Fed. Rep. 130; *Preston* v. *Smith*, 26 Fed. Rep. 885; *United States* v. *McLaughlin*, 24 Fed. Rep. 823; *Ex parte Boyd*, 105 U. S. 647; *Paton* v. *Majors*, 46 Fed. Rep. 210; *Field* v. *Hastings & Bradley Co.*, 65 Fed. Rep. 279; *Home Ins. Co.* v. *Stanchfield*, 1 Dillon, 420; Fed. Case No. 6660.

The bill is so general, uncertain and indefinite that it presents no grounds for relief or discovery in equity. It must state clearly and precisely the facts essential to make out its cause. Story Eq. Pl. §§ 253, 257; *Tillinghast* v. *Chase*, 121 Fed. Rep. 435.

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

Although there is a liberal use in the bill in this case of averments in regard to fraud, conspiracy and violation of trust, of which the pleader avers the defendants have been guilty,

in various ways, yet upon a careful examination of the pleading itself, and the actual facts therein stated, we concur in the view of the courts below, that the action is really nothing but an action of trespass or trover to recover damages sustained by the complainant by reason of the wrongful cutting, carrying away and conversion of the property of the complainant, consisting of the timber on the land mentioned in the bill; and for the wrong thus done we think it clear that the complainant has a plain, adequate and complete remedy at law, and consequently the court has no jurisdiction of this bill in equity.

It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature, equity has no jurisdiction, provided the complainant has a full and adequate remedy at law for the wrongs complained of. *Buzard* v. *Houston*, 119 U. S. 347; *Scott* v. *Neely*, 140 U. S. 106, 110. A mere charge of fraud does not give equity jurisdiction. *Buzard* v. *Houston, supra; Ambler* v. *Choteau*, 107 U. S. 586; *Safford* v. *Ensign Manufacturing Co.*, 120 Fed. Rep. 480, and cases cited in opinion. *Tyler* v. *Savage* 143 U. S. 79, bears no resemblance to the case at bar. As the court there said, there were in the case discovery, account, fraud, misrepresentation and concealment. There was no demurrer for multifariousness, and no objection in the court below for want of equity, and the case was not one of a plain defect in equity jurisdiction. The suit was clearly one for equitable relief.

The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants. The bill shows that whatever was done in the way of cutting the timber and carrying it away was done by the defendants as tort feasors, and the various devices alleged to have been resorted to by the deceased, Daly, by way of organizing different corporations, in order to, as alleged, cover up his tracks and to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. It is simply a question of evidence to show

who did the wrong, and upon that point the fact could be ascertained as readily at law as in equity.

The complainant is entitled in an action at law to an inspection of the books and records of these various corporations, and it has the same power to obtain the facts therefrom in that action as it would have in this suit in equity.

The complainant contends that where property has been stolen, or obtained by fraud, equity recognizes the law to be that the property always belongs to the true owner, and therefore its proceeds must also belong to him and may be reclaimed in a suit in equity against the voluntary assignee or one holding in bad faith. The cases of *Newton* v. *Porter*, 69 N. Y. 133, and *American Sugar Refining Co.* v. *Fancher*, 145 N. Y. 552, are cited to sustain the contention. These cases, it will be seen upon examination, show that the plaintiff had no remedy at law, and he was able to fully identify the particular property into which the original property belonging to him had been converted, and which was in the hands of a voluntary assignee. It was a question of following the proceeds, and accurately and certainly identifying them, which the court held was necessary in order to permit of such following. The defendants were also insolvent. The case of *Angle* v. *Chicago, St. Paul &c. Railway Co.*, 151 U. S. 1, did not involve any question like the one herein. In that case the land had been granted to the Portage Company by the State for the purposes named, and it was conceded by the demurrer that the officials of the Portage Company had been bribed by the Omaha Company to betray their trust, and the legislature had been induced by false allegations to revoke the grant to the Portage Company and to bestow it upon the Omaha Company. The plaintiff had obtained a judgment against the Portage Company in an action at law, and the execution had been returned *nulla bona*, and the bill in equity was filed in the Circuit Court of the United States by the administratrix of the judgment creditor against the Omaha Company to reach the land formerly owned by the Portage Company and then in the hands of the Omaha

Company by reason of its own wrongdoing. Thus there was the illegal and wrongful act of the Omaha Company, by which the land once vesting in the Portage Company had been taken away and that same land regranted to the Omaha Company, and it was to reach that particular land which the Omaha Company had obtained by its wrongful act that the bill was filed. Mr. Justice Brewer, delivering the opinion of this court, said:

"And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property."

These lands were identified, and were found in the hands of the actual wrongdoer, who had acquired them by reason of such wrong.

Now, there is no pretense in this case that any specific piece of property was in fact either the same timber or the proceeds of the timber wrongfully cut and disposed of by the defendants, or any of them. Nor was it averred that any particular timber had been taken from the land described in the bill. On the contrary, it is alleged in the bill that the complainant was unable to show just when or by whom the cutting had been performed, or the logs manufactured into lumber had been sold, or just when and by whom the proceeds thereof were obtained and when the same were divided. There is a general allegation in the bill of complaint that the deceased, Daly, left an estate worth $12,000,000, located in the State of Montana and elsewhere, and that a large portion of that estate was the

result of the proceeds of Daly's illegal acts in his lifetime, in trespassing upon the lands of the complainant, and converting the proceeds of the sale of the timber growing thereon to his own use and benefit. It is also averred that he made his will, appointing Margaret P. Daly, defendant, executrix; and the will was duly admitted to probate, and letters of administration were duly issued to the defendant, Margaret P. Daly, on the fifteenth day of February, A. D. 1901, and she duly qualified and entered upon the discharge of her duties as such executrix; that Margaret P. Daly, under and by virtue of the terms of the will, and as the wife of Marcus Daly, is the owner of a large portion of his estate. It is plain that such allegations fall far short of even a pretense of identifying specific, definite property as the proceeds of certain other property wrongfully or fraudulently taken by defendants from the lands described in the bill. Such allegations are totally inadequate for that purpose.

Under the law providing for the examination of defendants, and under section 724 of the Revised Statutes, providing for the production of books and writings in actions at law, under the same circumstances that defendants might be compelled to produce them under the ordinary rules of proceeding in chancery, there is nothing in these allegations, which shows any necessity for a discovery in equity, such as would render the remedy more adequate therein than in an action at law.

Nor was there anything in the cases cited by complainant as showing a right to proceed in equity because one of the defendants is the executrix of a deceased person, who, it is alleged, was one of the parties guilty of the wrongdoing set forth in the bill. Upon the question of liability she is entitled to a trial at law and by jury, as well as the other defendants. In *Green's Administratrix* v. *Creighton*, 23 How. 90, it was said that a single creditor has been allowed to sue an administratrix for his demand in equity, and obtain decree for payment out of the personal estate, without taking a general account of the testator's debts. In that case the facts were complicated;

the original debtor and his surety were dead, and had died insolvent, and a portion of the assets of the estate of the latter could be traced to the possession of his administratrix, and the authority of a court of equity was required to call for a discovery of the nature and amount of the assets in hand. It was said that the debtor, Tunstall, had died insolvent, and Whiting, his surety, had also died insolvent. A portion of the assets belonging to the estate of the latter was in the hands of the surety of this administrator. A discovery of the nature and amount of the assets in hand was necessary if they were subject to the application, and it was held that the Circuit Court was authorized to entertain the suit, and the decree dismissing the bill was reversed. Certainly there is nothing in that case which in the least degree aids the proposition that because there is an administratrix named as a party, equity has jurisdiction, even though no discovery of assets is sought, and the bill shows that the estate represented by the administratrix is largely solvent, and the demand is for unliquidated damages against others besides the administratrix, and no debt is admitted, the alleged cause of action having arisen against the deceased, among others, for a tort.

In *Kennedy* v. *Creswell*, 101 U. S. 641, it was held that the creditor of a deceased person had a right to go into a court of equity for a discovery of assets and the payment of his debt, and that when there he would not be turned back to a court of law, to establish the validity of his claim. The basis of getting into a court of equity being a discovery of assets, the object of the bill was obtained, as the court held, by the admission of the executor, that he had sufficient assets, and that if so, the jurisdiction of the court remained to give a decree for the payment of the debt. Here is no such case. Daly is alleged to have been the principal wrongdoer, out of several defendants, in cutting and converting the timber on these lands owned by the Government. He died, leaving an estate of over $12,000,000, as averred in the bill of complaint, and the claim of the complainant is only for $2,000,000. Thus. by com-

plainant's own averment, the estate is largely solvent. There is no endeavor to discover assets and no ground for jurisdiction in equity, simply because one of the defendants is an executrix. The proposition of the complainant would confer jurisdiction in equity in every case of a legal cause of action for unliquidated damages for a tort, where one of the wrongdoers had died and an administratrix had been appointed, and the existence of assets was alleged by complainant, largely in excess of the complainant's demand, and the other defendants remained parties. This has never been so held in any case to which our attention has been called, and we are unable to find any principle of equity jurisdiction upon which to permit the maintenance of this suit on the special ground here asserted.

But it is averred there was a fiduciary relationship existing on account of the permits or licenses to cut timber, which, it is alleged, were given the defendant, Bitter Root Delevopment Company, and that in such permits there was set forth an obligation on the part of that company, and others acting for it, to make under oath monthly returns of the amounts and kinds of timber cut, with a description of the particular tract or tracts from which it was cut, how much was disposed of, and to whom, and that a failure to do so was a failure in a fiduciary capacity on the part of the defendant company, and therefore there is jurisdiction in equity. The Government contends that by reason of the duty of the Bitter Root Development Company to keep true and accurate accounts and to monthly submit statements to the officers of the Government, and by reason of its failure so to do, the proceeds of the lumber retained by it became in its hands a trust fund belonging to the complainant; that there was a breach of this trust; its extent is in the defendants' knowledge; and in such cases choice of remedy is with the party aggrieved, and he may proceed in equity for an accounting and pursue the fund. It is doubtful, to say the least, whether an obligation to report as to timber cut on the permitted lands constitutes any fiduciary relationship between the licensees and the Government,

with regard to an alleged wrongful cutting of timber on other and separate lands. It is not, in truth, alleged that the returns called for by the permit were not made. *Safford* v. *Ensign Manufacturing Co.*, 120 Fed. Rep. 480 (Circuit Court of Appeals). However that may be, there is no such obligation (to render monthly accounts) set forth in the bill as being part of the permit or license referred to therein. The bill simply avers that Daly did, at certain times, during the several years of said depredations, apply to and obtain from the lawful agents of the Government licenses to cut upon certain small portions of the tracts above described, and under cover of such permits the conspirators not only cut, carried away and manufactured timber growing on the said lands included in such licenses, but, well knowing that such permits gave them no right or authority to enter upon other lands, they willfully and fraudulently entered upon large tracts of land adjacent thereto and cut the timber therefrom. There is no mention of an obligation to render monthly accounts. The fact that the defendants had permission to cut timber on certain tracts of land described did not make their cutting of timber on other tracts the act of trustees *ex maleficio*. When they went outside of the tracts for which license was given, they committed a trespass for which they were liable at law. And, again, as the contents of the permits are not set forth, we cannot take judicial notice of such contents in any particular case. Different conditions may be contained in different permits, and they are the subject of the discretion of the department giving the permits.

It is also argued that a court of equity has jurisdiction in such a case as this on the ground of an accounting. We do not think that this is any such case as gives a court of equity jurisdiction because of an accounting being necessary. There are no accounts between the parties. The cause of action is one arising in tort and cannot be converted into one for an account. The case made is a plain trespass, for which the defendants are liable in damages. Or it might be termed an

action in trover, as stated. Whatever books, if any, defendants may have kept, showing the amount and location of the timber cut and its value, can be perfectly well obtained by an inspection of these books in an action at law. No discovery is alleged to be necessary in aid of any action at law, although the bill shows that several such actions have in fact been commenced. The facts averred do not show jurisdiction for the general purpose of discovery.

Nor do we see that there is any jurisdiction on the ground of prevention of a multiplicity of suits. Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other. It is not a case where a few defendants may be made parties as representatives of a class holding under or claiming the same title or right, and so that a judgment against the representative defendants may bind all others of the class. There is no class and there can be no representatives.

We fail to see any fact alleged in this bill which constitutes a proper foundation for the jurisdiction of a court of equity. The Government counsel, however, assert that since the filing of this bill new and material facts have been discovered by the Government, which in the judgment of counsel would furnish foundation for a bill in equity, even though this bill is defective. In order to permit of the filing of such a bill, if counsel should be so advised, and so as not to run against a plea of *res adjudicata*, the judgment of dismissal is

Affirmed, without prejudice, etc.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA took no part in the decision of this case.

LOONEY *v.* METROPOLITAN RAILROAD COMPANY.

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

No. 173. Argued December 14, 15, 1905.—Decided February 19, 1906.

In an action for damages for personal injuries while the defendant has the burden of proof of contributory negligence, the plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff. There is equally a presumption that the defendant performed his duty.

THE facts are stated in the opinion.

Mr. Maurice D. Rosenberg and *Mr. Alexander Wolf*, with whom *Mr. Simon Lyon* was on the brief, for plaintiff in error.

Mr. J. J. Darlington for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action brought by plaintiff as administratrix of the estate of James F. Looney, deceased, against the defendants, for damages for the death of her intestate, alleged to have been caused by defendants. Judgment went against plaintiff in the Supreme Court of the District of Columbia, which was affirmed by the Court of Appeals.

After the plaintiff had rested her case the court directed the jury to return a verdict for the defendants. The correctness of this ruling is the question in the case.

The declaration consists of four counts. The first three allege the employment of the deceased by each of defendant

companies respectively. In the fourth the allegation is that he was rightfully and lawfully in the discharge of his duties.

Looney was employed as a "pitman" by the Washington and Great Falls Railroad Company (now the Washington and Electric Company), and was on the day of his death, July 28, 1901, in one of the "plow pits" located on the lines of the company, near its terminus, at Thirty-sixth street and Prospect avenue northwest.

The Metropolitan Company's line connects at this point with that of the Great Falls line. The latter company uses the overhead system. By this system the power is conveyed to the car by means of a "trolley pole" attached to the top of the car and made to touch the trolley wire when used to propel the car. The Metropolitan Company uses the underground system by means of a "plow," so called, projecting through a slot in the tracks to an underground current. The two companies have a trackage arrangement, whereby the cars of the Metropolitan Company run over the line of the other company. The cars of the Metropolitan Company, therefore, are equipped not only with a "plow" and mechanism for the underground system, but with a trolley-pole and mechanism for an overhead system. To attach these mechanisms to their respective systems it is necessary to run a car over an excavation on the line of the Great Falls Company known as the "pit." The "pitman" is thus enabled to remove the "plow" from a car to be transferred from the Metropolitan line to the Great Falls line, and adjust or attach the wires or "leads" necessary for the operation of the car over the Great Falls line. While doing this Looney was killed, the plaintiff contends, through the negligence of the conductor of the car in permitting the trolley pole to come in contact with the trolley wire, whereby a current of electricity was transmitted to the motive machinery. And this is the ground of negligence charged in the declaration. In every count it is alleged "before said intestate entered said plow pit it became the duty of the defendants, and each of them, to keep, or cause to be kept, the electric current so cut

off from said pit as not to injure the said intestate; and the plaintiff says that said intestate having entered said pit in obedience to said direction to him as aforesaid, said defendants negligently failed to keep, or cause to be kept, cut off, as aforesaid, said electric current from said pit while said intestate was therein for the purpose aforesaid, whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died."

At the trial there was evidence given by the plaintiff of the arrangement between the defendant companies as to the exchange of cars and to the relation of their respective employés. On this evidence the parties base opposing contentions, the defendants contending that the conductor and Looney were fellow servants, the plaintiff contending that they were not. Both of the lower courts sustained the contention of the defendants. The Court of Appeals, besides intimated a belief that the testimony on behalf of plaintiff rather tended to show accident than negligence. If this be so, or if the evidence fails to establish whether the death was caused by accident or negligence the judgment should be affirmed, and it will be unnecessary to decide whether Looney and the conductor were fellow servants. We will assume for the purposes of the case that they were not fellow servants.

The accident was seen by two persons, Margaret Mawson and Helen Gertrude Coon. The former testified that she was sitting in her room on the second floor of her house, which is on Prospect avenue, seventy-five feet or more from the "pit." She saw the car turn the curve from Thirty-sixth street into Prospect avenue, and "that the trolley pole was up and the trolley wheel against the overhead wire, all the time after the car got into Prospect avenue until it stopped over the pit; that while the car was coming from Thirty-sixth street down to the pit she saw Looney, the deceased, enter the pit through the south trapdoor. That after the car stopped over the pit she saw him go up under the car and take the plow off. That

after he took the plow off she saw him go up under the car again and put the wires up in the car to connect with the overhead trolley, and that while he was in that position she heard him holler and drop down, and the motorman turned and said 'For God's sake, fix that trolley!' and the conductor then pulled the trolley down, but did not before that time. . . . That the accident did not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires. That she saw the movements of the deceased under the car through the trap-door. That she could see his hands taking off the plow; could see nothing but his hands then; that after he took off the plow and went up under the car, she could see a part of his body above the surface of the street. That the pit was deep enough for a man to stand up in; that she heard no bell ring, nor signal of any sort; her hearing was good enough to hear a bell if one had been rung. That he had to use his hands to remove the plow and also put the overhead current on, and she saw him twist his hands when he got the shock."

Helen Gertrude Coon testified that she was a daughter of the preceding witness and lived with her; that she saw the accident from the front porch of the house, which was about on the level with the sidewalk of Prospect avenue. She saw the car run around the curve from Thirty-sixth street, come down the avenue and stop over the pit. She was not certain whether the pole was touching the wire before the car stopped over the pit, but the pole was touching the wire or came in contact with it while deceased was taking off the plow. "That her attention was directed to the fact of the trolley being in contact with the wire from the fact that the deceased gave a groan, and the motorman said 'For God's sake, pull that trolley down!' That some one said 'Pull the car off the pit!' That she saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan. That she heard no bells or signals given.

That he had to use his hands to remove the plow and also put the overhead current on, and she saw him twist his hands when he got the shock. That she saw all this while looking under the car from where she was sitting on the porch. That they took the body up out of the pit over which the car had been standing."

A passenger on the car testified that he heard one bell ring, and immediately the conductor took the rope that holds the trolley rod in his hands, but he did not notice him do anything else. In about a minute and a half there "was a groan down in the hole and he jumped down and saw the man lying on his face." He heard some one say "For God's sake, hold the rod down; pull the pole down!"

Another witness testified that he lived on Prospect avenue, and was in front of his house lighting the fire in his automobile. He did not notice the car before it stopped. While it was standing over the pit he heard an exclamation and a groan, and some one said "Pull that trolley down!" After the exclamation he looked up and saw the trolley against the wire. He was about seventy-five feet from the car.

Another witness testified as to the manner of adjusting the plow and "leads," and the way a shock could be received by the pitman. It was to the effect that the wires used to connect the motive power with the overhead trolley are called "leads." Where the pitman takes hold of them to adjust them they are insulated by a covering of india rubber, but at the ends where they connect with other wires they are uninsulated and have to be so in order to take the current. If the pitman takes hold of them at the right place and there is no leak, he would not be shocked, even though they were connected with the trolley. "Wear and tear," a witness said who was experienced in removing and adjusting plows and wires, "will cause a leak in the insulation. A leak is when the electricity comes through a hole in the insulation, caused by the wear and tear or from the insulation being old or imperfect."

The same witness also testified "that the company furnishes

gloves in the pit with which to handle live plows and wires. But it is not customary or required to use the gloves except upon rainy days. On bright days, the car, when over the pit, is supposed to be 'dead,' and you don't take off the plows with gloves; you can't do half your work with them. That danger from electricity is increased from perspiration, rain or other moisture. That the day of the accident was a bright, sunshiny day. The accident occurred between two and four o'clock P. M."

If the trolley was on before the plow was disconnected and removed, the plow would be charged with the full voltage on the line.

A witness who had experience with the construction of electric railway systems, and was familiar with the action of electricity generally, and had experience in superintending the work of disconnecting a plow from an electric car and adjusting the wires to move an overhead system, testified that in his opinion as an expert that it would be the duty of a conductor to keep the trolley off the wire until he received some signal from the man beneath the car.

(1) It will be observed that the deceased did not meet his death while removing the plow. Of this the testimony leaves no doubt. (2) He received the electric shock while adjusting the leads. It follows from the first proposition that the trolley pole was not in contact with the trolley wire when the plow was removed. The argument of plaintiff assumes the contrary, and, indeed, is based entirely on the assumption that the deceased received his death stroke when removing the plow.

Two questions arise on the second proposition. The leads are insulated except at the ends that go into the connection; they are necessarily uninsulated there in order to take the current. But it was not necessary for the deceased to touch the uninsulated parts in making the connection, and, unless touched, no shock would have been received, even though they had been connected with the current by reason of the trolley being in contact with the wire, *unless there was a leak in the*

insulation arising from defective construction or wear and tear in use. Granting, therefore, that the conductor was negligent, one of two things was necessary to cause the accident: a leak in the insulation, or the act of the deceased in touching the uninsulated ends of the leads. Either one or the other was a necessary condition. If the first existed, the defendants may be charged with liability. If the second, they are exonerated. The burden of proof becomes a factor. The plaintiff in the first instance is not required to prove that the deceased was free from contributory negligence; in other words, the burden of proof of contributory negligence is on the defendant. But on the other hand, plaintiff must establish grounds of liability against the defendant. To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown.

In *Texas & Pacific Railway Company* v. *Barrett*, 166 U. S. 617, the plaintiff (defendant in error in this court) was a foreman in charge of a switch engine, and was injured by the explosion of a boiler of another engine. There was evidence tending to prove that the boiler was and had been in a weak and unsafe state by reason of the condition of the stay bolts, and that if a well-known test had been applied the condition of the bolts would have been discovered. The Circuit Court instructed the jury that the mere fact of the injury received from the explosion would not entitle plaintiff to recover; that, besides the fact of explosion, he must show that the explosion resulted from the failure of the railroad company to exercise ordinary care either in selecting the engine or in keeping it in reasonable safe repair. The court also instructed the jury that the burden of proof was on the plaintiff throughout the case to show that the boilers and engines that exploded were improper appliances to be used on its railroad by the defendant; that by reason of the particular defects pointed out and in-

sisted on by the plaintiff the boiler exploded and injured him, and the plaintiff was ignorant of the defects, and did not by his negligence contribute to his injury. Passing on these instructions, this court said, that they laid down the applicable rule with sufficient accuracy and in substantial conformity with the views of this court expressed in prior cases which were cited.

Plaintiff in the case at bar introduced no evidence whatever of a defect in the leads or that leaks were likely to occur, or the amount or degree of inspection necessary to discover them, or that there was an omission of inspection. The case was probably brought and tried on a different theory. It was argued in this court on a different theory. It was argued on the assumption that the deceased was killed when removing the plow. The assumption is directly in the teeth of the testimony. "The accident did not happen until after the car stopped and the deceased had removed the plow and had gone up under the car again and was putting up the wires." (Testimony of Margaret Mawson.) And to like effect is the testimony of Miss Coon. "She saw deceased take the plow off and then go up under the car to throw the overhead current on. That after he took the plow off and was putting the overhead current on, she heard him groan." And she saw him "twist his hands when he got the shock."

The declaration does not charge a defect in the leads. It charges the negligence to have been in the failure "to keep, or cause to be kept, cut off" the electric current while the deceased was in the pit, "whereby and by reason of said negligence the said intestate was so severely shocked and injured by said electric current that he almost immediately died." In other words, the cause of death was the negligent act of permitting the trolley pole to come in contact with the trolley wire.

But, granting plaintiff is not limited by her declaration, nevertheless she has not satisfied the requirements of law in her proof. A plaintiff in the first instance must show negli-

gence on the part of the defendant. Having done this, he need not go farther in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. In other words, if there is no evidence which speaks one way or the other with reference to contributory negligence of the person killed, then it is presumed that there was no such negligence. Thompson on the Law of Negligence, sec. 401; *Baltimore & Potomac R. R. Company* v. *Landrigan*, 191 U. S. 461; *Texas & Pacific Railway Company* v. *Gentry*, 163 U. S. 353. But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another. *Douglas* v. *Mitchell*, 35 Pa. St. 440; *Philadelphia &c. Railway Company* v. *Henrice*, 92 Pa. St. 431; *Yarnell* v. *Kansas City &c. Railroad Company*, 113 Missouri, 570.

Judgment affirmed.

UNITED STATES *v.* NEW YORK AND CUBA MAIL STEAMSHIP COMPANY.

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

No. 116. Argued January 22, 23, 1906.—Decided February 19, 1906.

Payment of an illegal demand with full knowledge of the facts rendering it illegal, without an immediate and urgent necessity therefor, or unless to release or prevent immediate seizure of person or property, is a voluntary payment and not one under duress.

Affixing stamps required by the war revenue act of 1898 to the manifest of a vessel in order to obtain the clearance required by § 4197, Rev. Stat., without presenting any claim or protest to the collector of internal revenue from whom the stamps are purchased or to the collector of the port from

whom the clearance is obtained, is not a payment under duress, but a voluntary payment, and the amount paid for the stamps cannot be recovered either on the ground of the unconstitutionality of the provisions of the war revenue act requiring the stamps to be affixed, or under the act of May 12, 1900, providing for the redemption of stamps used by mistake. *Chesebrough* v. *United States*, 192 U. S. 253, followed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Robb for the United States:

This action must fail, as the stamps were purchased voluntarily and without protest, and affixed and canceled voluntarily and without protest. *Chesebrough* v. *United States*, 192 U. S. 253.

There was no notice or protest at the time of the purchase or affixing of these stamps. They were purchased from a dealer in internal revenue stamps who was not in any sense an agent of the Government and the purchase was purely voluntary.

Mr. John G. Carlisle, with whom *Mr. William Edmond Curtis* was on the brief, for defendant in error:

These stamps were purchased, affixed and canceled by the petitioner under compulsion and through fear of criminal prosecution, and in order to obtain clearance papers which could not have been procured without delivering to the collector of the Port of New York the outward foreign manifests of cargo stamped as aforesaid, and without which clearance papers the vessels would have been prevented from sailing or would have become liable for the penalty imposed by § 4197, Rev. Stat.

The provision of the act of June 13, 1898, purporting to impose a stamp duty upon export manifests, is unconstitutional, as undertaking to lay a tax or duty on exports in violation of Article I, section 9, clause 5 of the Constitution of the United States, and the duties represented by the internal revenue stamps, which petitioner was compelled to affix to export man-

ifests, were, therefore, wrongfully collected, and the money paid by petitioner for said stamps unlawfully exacted.

The unconstitutionality of this stamp duty on export manifests was settled by *Fairbank* v. *United States*, 181 U. S. 283, holding that the stamp duty of ten cents on every export bill of lading was unconstitutional, as a tax on exports, and this decision controls the case at bar.

In *Chesebrough* v. *United States*, 192 U. S. 253, this court held that a purchase of internal revenue stamps for the purpose of affixing them to a conveyance of real estate pursuant to a contract of sale was voluntary.

The distinction between the *Chesebrough case* and the case at bar is obvious. In the case at bar, § 4197, Rev. Stat., prevented the petitioner's vessels from obtaining clearance and sailing for a foreign port, unless the internal revenue stamps in question were purchased and affixed, and this constituted coercion or duress, not as between the petitioner and some third party, but as between the petitioner and the very authorities which demanded and compelled the payment of the tax.

This action being based upon the act of May 12, 1900, and not on the provisions of the Revised Statutes discussed in the *Chesebrough case*, neither protest nor duress in connection with the payment of the duties is necessary to sustain the action.

This act says nothing about protest or compulsion. In most of the instances enumerated in it there could be no question of duress or protest.

Mr. Justice McKenna delivered the opinion of the court.

The defendant in error filed a petition in the District Court to recover the amount paid by it for documentary stamps used on manifests of cargoes on certain vessels bound to foreign ports, as required by an act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes."

The United States demurred to the petition on the ground

that it did not state facts sufficient to constitute a claim against it. The demurrer was overruled and judgment entered for the sum of $240, the amount of claim. 125 Fed. Rep. 320.

It appears from the opinion of the District Court that the constitutionality of the tax was alone submitted for decision, and the court, upon the authority of *Fairbank* v. *United States*, 181 U. S. 283, held that the tax was unconstitutional.

In the *Fairbank case* it was held that a stamp tax on bills of lading imposed by the act of June 13 was a tax on exports, and therefore void. In the case at bar the District Court observed "that the essential character of the stamp tax on manifests was that of a tax on exports, in the same sense in which a stamp on a bill of lading was a tax on exports." The United States now concedes the correctness of this ruling, but urges nevertheless that the judgment for defendant in error was erroneous because, as is contended, the stamps were purchased and affixed voluntarily and without protest. For this, *Chesebrough* v. *United States*, 192 U. S. 253, is adduced as controlling. In that case recovery was sought for the price of stamps affixed to a deed in compliance with Schedule A of the act of June 13, 1898. The unconstitutionality of the act was asserted by Chesebrough but was not discussed by the court. The decision was based on the ground that the payment of the taxes was voluntary. Chesebrough contended that section 7 of the act, which made it a misdemeanor to omit to fix stamps to the instruments enumerated, constituted such coercion as made the payment involuntary, and besides that, his vendee was unwilling to accept the deed without the stamps required by the act, and that he "under compulsion of said law," in order to receive the consideration for his conveyance, to enable his deed to be recorded and received in evidence and to give a title free from doubt, purchased stamps from the United States collector of internal revenue and placed them upon the deed.

What is the duress alleged in the case at bar? The averment of the petition is:

"That said act being in force, under compulsion and through

fear of criminal prosecution, and in order to obtain clearance papers which could not have been procured without the delivery to the collector of the port of New York, of outward foreign manifests of cargo stamped as aforesaid, and without which clearance papers the vessels hereinafter named would have been prevented from sailing, or would have become liable for the penalty imposed by section 4197 of the Revised Statutes of the United States, said James E. Ward & Company, for and on behalf of your petitioner and as such general agents as aforesaid, purchased and affixed to the said outward foreign manifests of cargo and canceled internal revenue documentary stamps of the United States of the face value of two hundred and forty dollars ($240), as appears more fully by the exhibit hereto annexed and made a part of this petition, and marked 'Exhibit A,' which contains the name of the vessel, the date of delivery to said collector of the outward foreign manifests of cargo, the alleged tax on which is sought to be recovered, and the face value of the documentary internal revenue stamp affixed thereto."

It is alleged that the stamps were purchased from Walter H. Stiner, a dealer in internal revenue stamps, on various days subsequent to January 1, 1900, and that Stiner purchased them from the collector of internal revenue, and the proceeds thereof were duly paid over to the United States.

In this case, as in the *Chesebrough case*, the collector was not informed at the time of the purchase of the particular purpose for which the stamps were to be used, and no intimation was given him, written or oral, that defendant in error claimed that the law regarding such stamps was unconstitutional, and that it was making the purchase under duress. And, expressing the principle to be applied, the court said, in the *Chesebrough case*, "even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property

of the party making the payment, from which the latter has no other means of immediate relief than such payment."

Applying that principle to the allegation that Chesebrough's vendee was unwilling to accept an unstamped conveyance, it was said "if that constituted duress as between Chesebrough and his building company, it was a matter with which the collector had nothing to do. On the face of the petition the purchase was purely voluntary and made under mutual mistake of law if the law were unconstitutional."

It is, however, insisted that these observations are not apposite to the case at bar. The coercion, it is contended, that Chesebrough alleged was between him and some third party. In the case at bar the coercion was exerted "between the petitioner [defendant in error] and the very authorities who demanded and compelled the payment of the tax," through section 4197 of the Revised Statutes of the United States. This section requires the master or person in charge of any vessel bound for a foreign port to deliver to the collector of the district a manifest, and upon its delivery the collector shall grant a clearance for such vessel and her cargo. It is provided:

"If any vessel bound to a foreign port departs on her voyage to such foreign port without delivering such manifest and obtaining a clearance, as hereby required, the master or other person having the charge or command of such vessel shall be liable to a penalty of five hundred dollars for every such offense." Section 4197, Revised Statutes of the United States.

We do not think this section makes a difference in the cases. The destination of the stamps cannot affect the payment of the tax which they represent. It may be more or less of an inducement to submit to the tax, but who can determine the degree? The loss of a purchaser, as in the *Chesebrough case*, may be of much more concern than the payment of the penalty for violating the provisions of section 4197. Besides, whatever element of coercion there was came from the United States, and it was not as immediate in the case of the manifests as in the case of the deed. The applicable principle is expressed in

the extract from the *Chesebrough case*, which we have given above. It is stated in *Railroad Company* v. *Commissioners*, 98 U. S. 541, and quoted from that case in *Little* v. *Bowers*, 134 U. S. 547, at page 554, as follows: "Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back."

There was no such imminence in the duress charged by defendant in error. It purchased the stamps of a dealer at various times. No information was given to the collector of internal revenue of the particular purpose nor claim that the law was unconstitutional. There was no claim of the collector of the port from whom the clearances were asked that defendant in error was acting under the restraint of the law and yielding only to enable his ships to depart to their destinations. All determining conditions, therefore, are the same as in the *Chesebrough case*.

2. It is, however, contended that even though the stamps were purchased without any duress or coercion, that under the act of Congress of May 12, 1900, entitled "An act authorizing the Commissioner of Internal Revenue to redeem or make allowance for internal revenue stamps," the Commissioner must make allowance for the stamps used by the petitioner, and the Commissioner having declined to do so the defendant in error has a right of action under the Tucker Act. The provision of the act of May 12, relied on, is as follows:

"That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps, issued under authority of law, to denote the payment of any internal revenue tax, as may have been spoiled, destroyed or rendered useless or unfit for the purpose intended, or for which the owner may have no

use, or which through some mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected."

The argument is that by this provision "the question of duress or compulsion is taken entirely out of the case," because in most of the instances enumerated "it is inconceivable that there should be any protest or duress." And it is further alleged that the act of 1900 was not considered in the *Chesebrough case.* It certainly does not follow that, because in some instances, protest or duress cannot exist, that they cannot exist in other cases, nor that the statute intended to destroy the difference between voluntary and involuntary payment of taxes. In the *Chesebrough case* section 3220 of the Revised Statutes of the United States was considered. It authorized the Commissioner of Internal Revenue "to remit, refund and pay back all taxes . . . that appear to be unjustly assessed or exclusive in amount, *or in any manner wrongfully collected.*" The words in italics are identical with those in the act of May 12, which are relied on by defendant in error. Commenting on section 3220, the court said, in the *Chesebrough case:* "It is argued that the provisions of section 3220, for the repayment of judgments against the collector, rendered protest or notice unnecessary for his protection, but it was clearly demanded for the protection of the Government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no right of recovery, expressly or by necessary implication, conferred by statute, in such circumstances."

We, therefore, think that this case is governed by the *Chesebrough case,* and on its authority judgment is reversed and case remanded with directions to sustain the demurrer.

MISSOURI *v.* ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO.

No. 4, Original. Argued January 2, 3, 4, 1906.—Decided February 19, 1906.

Missouri filed its bill in this court to enjoin Illinois and the Sanitary District of Chicago from discharging sewage through an artificial channel connecting Lake Michigan with the Desplaines River, a tributary of the Illinois, the latter of which empties into the Mississippi River above St. Louis, claiming that such sewage so polluted the water of the Mississippi as to render it unfit to drink and productive of typhoid fever and other diseases. Illinois denied the jurisdiction of this court, and the allegations of the bill, and alleged that if the conditions complained of at St. Louis existed they resulted from discharge of sewage into the Mississippi by cities of Missouri and from other causes for which Illinois was not responsible. A demurrer was overruled, with leave to answer, 180 U. S. 208; after answer and taking of proof including much expert testimony as to effect of sewage on water and health, *held*, that:

This court has jurisdiction and authority to deal with a question of this nature between two States, which, if it arose between two independent sovereignties, might lead to war.

In such a case, while this court cannot take the place of a legislature it must determine whether there is any principle of law, and if any what, on which the plaintiff State can recover.

Every matter which would be cognizable in equity if between private citizens in the same jurisdiction would not warrant this court in interfering if such matter arose between States; this court should only intervene to enjoin the action of one State at the instance of another when the case is of serious magnitude, clearly and fully proved; and in such a case only such principles should be applied as this court is prepared deliberately to maintain.

While a State may have relief in this court against another State to prevent it from discharging sewage through an artificial channel into, and thereby polluting the waters of, a river flowing through both States and on which the complainant State relies for water supply, if the alleged facts as to such pollution are not fully proved, and it also appears that such pollution might result from the discharge of sewage by cities of the complainant State into the same river the bill should be dismissed,—but in this case without prejudice.

The reasons on which prescription for a public nuisance is denied or granted to individuals against the sovereign power to which he is subject have no application to an independent state; but it would be contradicting a fundamental principle of human nature not to allow effect to the lapse of time. The fixing of a definite time, however, is usually for the legislature and not for the courts.

The mere fact that the drainage canal, constructed by authority of Illinois and also under authority of an act of Congress, brought water from the Lake Michigan watershed into the watershed of the Mississippi does not, in the absence of proof of the deleterious effects of such water, render the canal an unlawful structure, the use whereof should be enjoined at the instance of another State in the Mississippi watershed.

THE facts, which involved the right of the defendants to discharge the sewage of Chicago through an artificial channel into the Desplaines River which empties into a tributary of the Mississippi River, are stated in the opinion of the court.

Mr. Herbert S. Hadley, Attorney General of the State of Missouri, *Mr. Sam B. Jeffries* and *Mr. Charles W. Bates,* with whom *Mr. W. F. Woerner* was on the brief, for the complainant:

The substantial purpose of the complaint is to subject the construction and operation of the drainage channel from the Chicago River at Chicago, southwestwardly to the Desplaines River at Lockport, a point immediately above Joliet, to the court's supervision, upon the charge that the method of construction and operation creates and constitutes a continuing nuisance, dangerous to the health of the people of Missouri; and which if not restrained, results in the daily transportation, by artificial means, and through an unnatural channel, of large quantities of undefecated sewage, and of accumulated deposits in the harbor of Chicago, and in the bed of the Illinois River, which poison the water supply of the inhabitants of Missouri and injuriously affect that portion of the Mississippi River which lies within complainant's jurisdiction.

No attack is made upon the canal or artificial channel as an unlawful structure, nor is any attempt made to prevent its use as a waterway. Complainant seeks relief against the pouring of undefecated and unpurified sewage and filth through it by the artificial arrangements into the Mississippi River to the detriment of complainant and its inhabitants.

For the original bill see 180 U. S. 208, where defendants' demurrer was overruled.

The population of Chicago is about 2,000,000 and by its addition to the Mississippi watershed the urban population sewering into that river has been increased by seventy-five per cent. Lake Michigan is the natural basin for the sewage of Chicago. The expert evidence in this case shows that more polluting and infectious material is now contained in the water than prior to the opening of the canal.

According to the science of bacteriology, it is practically impossible to discover in a contaminated water the disease producing organisms, so small are the organisms and so delicate the test to be made. It has, however, been observed, that where large quantities of *bacilli coli communis* have been found, it is a conclusive indication that the water is sewage polluted and, therefore, infected with disease producing organisms. The number of bacteria is important if the source of the polluting matter is known. However, bacteriologists when applying the science to the sanitary observations of water, disregard largely the number of bacteria and depend mostly upon the character of the pathogenic organisms found.

Typhoid bacilli, the most dangerous perhaps of any of the water-borne diseases, has never been discovered in the waters of a running stream, save as to two or three reported instances, and from the present conditions of the science, their discovery is not a practical proposition. So it may be said that from the standpoint of bacteriology and chemistry as applied to sanitary observations, there is no direct means of proving the absolute presence of pathogenic bacteria in water. A water supply may be chemically without fault and yet contain many living disease producing organisms.

The effect of the sewage of Chicago upon the waters of the Mississippi River at the mouth of the Illinois has been such as if a large and populous city had been established on January 17, 1900, upon the banks of the Mississippi River discharging its sewage into the waters of that river. The chemical analysis discloses that the water in the Illinois River at Grafton contains more infectious material, and material liable to

contain infection, than it did prior to the opening of the drainage canal. It also discloses that the waters of the Mississippi River above Grafton and the Missouri River are freer from contaminating and infectious matter than the waters of the Illinois. This, of course, is but a natural condition. The sewage of two millions of people could not have the effect of improving conditions at any point on the Illinois River.

As soon as the canal was opened the death rate from typhoid in St. Louis started upward and has continued on the increase ever since. Typhoid mortality per 100,000 population in St. Louis for the years 1900, 1901, 1902 and 1903 increased 77.7 per cent over the typhoid mortality per 100,000 population in 1896, 1897, 1898 and 1899. This enormous increase occurred with no change in the manner of treating the water. The increase has been gradual, both in winter and summer seasons, with no relaxation in the least except that the percentage of increase has been greater in the winter seasons than during the summer months. All parts of the city where the public water supply has been used have alike suffered. No local epidemic has occurred; in fact, nothing has been observed, after a very searching investigation, that can in any way be charged with the cause of the increase save the discharge of the sewage of Chicago into the canal in question and hastening its flow to St. Louis by means of the Illinois River.

The evidence discloses the germs of tetanus (lock jaw) and anthrax to have been discovered in the waters of the Illinois River since the opening of the canal at Chicago.

The enormous increase in deaths and cases of typhoid in St. Louis caused by the discharge of sewage from the city of Chicago into the Mississippi has been a source of financial loss to complainant. It has been truthfully said that "The average city of 100,000 population wastes perhaps half a million dollars, per year on the luxury of having it." Not only is it a long, tedious and grave illness, often leaving life-long disabilities in its wake, but it is also one of the most expensive of ailments.

Counting each death in the city of St. Louis caused by the

sewage from Chicago as having a value of $5,000, the loss to complainant is no small matter. While if we take into consideration the cost and expense of treating and nursing those cases wherein a recovery is had, together with the loss of labor while ill, the loss to the community reaches a total of many hundred thousand dollars per annum. This is the financial loss. The sorrows of death, pains of sickness and mental distress cannot, from the standpoint of humanity, be measured in dollars and cents.

The population residing upon the natural watershed of the Illinois River brands it as more heavily infected than that of either the Mississippi or the Missouri. Physical and atmospherical conditions also must not be overlooked.

The population upon the watershed of the Mississippi River has already burdened it with an immense sewage disposal which burden will become greater as population increases. Much trouble will soon arise in this connection, making it impossible to secure suitable water without very expensive treatment and improvement plants. The discharge of the sewage from Chicago into the drainage basin of the Mississippi has not only hastened that condition, but if not restrained, will compel St. Louis to spend many million dollars in the construction of a filter plant in order to force its typhoid mortality back to conditions similar to 1896, 1897, 1898 and 1899. The danger and damage to complainant, the menace to its welfare, the loss of its reputation as a city of comparatively low typhoid mortality and the impediment to its financial and industrial growth caused by the injury sustained and the constantly increasing embarrassing conditions manifestly convict defendants of the injuries complained of, and unquestionably warrant the decree prayed for in this case.

Much might be said of what may be expected in the future, as shown by the evidence in the case, if present conditions are permitted to become permanent. Ere long we may depend on Chicago having a population of more than 5,000,000. That city will then, so to speak, be brought nearer to St. Louis,

in so far as its contaminating effect upon the water supply is concerned. The volume of the water passing through the canal will be necessarily increased, thus hastening the flow down the river. It is not necessary, however, to look to future developments for grounds of relief, the existing conditions are amply sufficient.

The expert testimony of eminent scientists, chemists and bacteriologists shows that the principal water-borne diseases may be designated as cholera, typhoid, dysentery, anthrax and tetanus, and the result produced by *bacilli coli communis* when injected under the skin of a human being, or when lodged in the appendix producing appendicitis. Typhoid fever or *bacilli typhosis* is a common water-borne disease in this country. It is caused by crude sewage being discharged into the water supply. This fact is demonstrated by the effect of the establishment of filtration plants for the purpose of treating the water supplied for the cities of Hamburg, Germany; London, England, and Berlin, Germany, and a number of large cities in this country.

That typhoid, cholera, dysentery, anthrax and tetanus are water-borne diseases was conceded by all witnesses. In fact sanitary science has come to realize with absolute assurance that the diseases above mentioned as a general thing are caused by inferior water, or water which has been subjected to sewage pollution.

While it is practically impossible to discover or detect the physical presence of bacilli in running water, save or except as to *bacilli coli communis*, which are found in abundance in all streams in which sewage is emptied, all persons having knowledge of sanitary science, have settled beyond question that the diseases above mentioned are as a general proposition more readily communicated by means of inferior water supplied than in any other way.

In the examinations of the water of the Illinois River bacillus of tetanus and of anthrax was discovered in the water of that river. This in connection with *bacilli coli communis*,

which is very prevalent in the water of the Illinois, as shown by all the testimony in the case, constitutes practically the total results of the discoveries of the pathogenic bacillus in the waters of the rivers in question during this entire investigation.

A riparian population has the right to the use of a stream for drinking and other domestic uses in its natural state.

Where discharges of sewage render the water of a stream impure or infectious, the injured have a right to ask and obtain relief through the power of the courts.

Although those residing upon the stream have the right to cast their waste into the stream so long as it does not substantially interfere with the convenience, health and comfort or the business interests of those residing on the river below, yet, such right does not extend to those residing upon another watershed so as to permit such discharges or deposits by artificial means into the stream draining a different watershed.

When discharges have such effect as to render the conditions dangerous and unsanitary, the right to maintain such nuisance cannot become permanent by prescription.

The fact that others contribute to the injury constitutes no excuse or justification for the one charged to continue in the same.

The fact that riparian owners are allowed to discharge their waste and refuse into a stream so long as it does not create a substantial injury to those lower down, is merely a privilege even to the law of convenience and public policy. It is not a substantial vested right incapable of defeat.

While the privilege of depositing waste into a river by riparian owners so long as no damage or substantial injury is experienced by those living lower down may be recognized on grounds of public policy and the general law of convenience and necessity of the people, it does not necessarily license others than riparian owners to discharge waste into the stream and that, too, regardless of whether it be a substantial interference with those below the point of discharge or not.

Complainant has been materially and irreparably injured on account of the conduct of defendant in the operation of the artificial channel from Lake Michigan to the Desplaines River, and the discharge of the raw sewage into the channel and thence into the Mississippi River, defendants having no right in law to convey the sewage and infectious material of more than two millions of people from one watershed to people living upon another watershed.

Germs of infectious diseases are shown to pass from Chicago to St. Louis and greatly injure the water of the Mississippi at St. Louis, and at all points on the Missouri shore below the mouth of the Illinois River.

The waters of the Mississippi are shown to be more heavily burdened with disease organisms and injectious material since the opening of the canal, January 17, 1900, than prior to that time, such increased infection being due to the discharge of the sewage at Chicago into the canal.

The typhoid mortality at St. Louis, on account of defendants' action, has increased annually 77.7 per cent for the period of four years since the establishment of the nuisance as compared with the four years immediately prior thereto, such increase of typhoid mortality being due to said nuisance.

Valuing each life to the extent of the annual increase of at least 80 deaths per annum for the four years at $5,000, and the loss of labor, cost of treating and nursing the additional or increased cases amounting to 1,200 (deaths multiplied by 15), occurring annually, calculated on the basis of $10 per day for loss of labor, medical treatment and nursing, it will be observed that the damage of complainant is of no trivial amount.

From the standpoint of humanity and taking into consideration mental and physical suffering, permanent disabilities and all of the disagreeable elements entering into conditions and circumstances which produce death, and taking also into consideration the fact that no one community should attempt to relieve itself from sufferings of sickness and death at the expense of a neighboring community, the right and justice of this

litigation instituted, on behalf of complainant against defendant, is apparent.

The injury inflicted upon complainant is actual, substantial, continuous, immediate and irreparable.

In the presentation of the case upon the demurrer to the court, a full line of authorities was submitted upon complainant's right to institute this proceeding, entitling it to judgment if the facts set forth in the petition be established, and showing complainant's right to join both parties defendant in the action. The position assumed by complainant was upheld, both as to the jurisdictional question and its right to the relief sought. 180 U. S. 208.

The undisputed evidence shows that disease-producing organisms or pathogenic bacteria are discharged from the sewers of a city into the drainage basin and when carried away by the running stream remain in the stream throughout the life of the germ or organism, unless they be sooner introduced into some human system. In this way certain diseases are communicated from one individual to another. As the population of a city upon a watershed increases, the relative number of pathogenic bacteria discharged into the river upon which the city is situated increases, and thus the water of that river is being continually increased in contamination.

The inhabitants of a large and populous city have the right to use the water of the stream upon which the city is situated in its natural condition, free from infectious material deposited into it at points above. If the discharge of infectious sewage and filth in the stream renders the water dangerous and harmful to the people living below, such municipality or person creating the nuisance and causing the danger or damage may be enjoined from continuing the infectious discharges. 30 Am. & Eng. Ency. of Law, 2d ed., 378; *Indianapolis Waterworks Co.* v. *Strawboard Co.*, 57 Fed. Rep. 1000; *Trevett* v. *Prison Association*, 98 Virginia, 352; *Attorney General* v. *Birmingham*, 4 Kay & J. 528.

The right of a city to pour into a river surface drainage

does not include the right to mix with that drainage filthy and noxious substances in such quantities that the river cannot dilute them nor safely carry them off without injury to the property of others. The latter act is, in effect, an appropriation of the bed of the river as an open sewer to carry such substances to the property of the lower proprietor and is an invasion of his property rights. *Platt* v. *Waterbury*, 77 Am. St. Rep. 335; Wood on Nuisances, 3d ed., §§ 427, 579.

Where there are several contributing causes to the pollution and infection of a water course, one cannot escape liability for those living below and using the waters for domestic purposes, because of such pollution by themselves. Eliminating from the case the fact that Chicago is situated upon the natural watershed of Lake Michigan while complainant is situated upon the natural watershed of the Mississippi, and even though it be assumed that the same rights with reference to the disposal of its sewerage belong to Chicago as to any other city upon the natural watershed of the Illinois River, it cannot be claimed by the defendants that they have the right to pollute the waters of the Mississippi because there are other cities situated upon its watershed which contribute to the pollution after or before the water reaches the Mississippi at Grafton. *Crossley* v. *Lightowler*, L. R. 2 Ch. 478; *Tennessee Coal and Iron Co.* v. *Hamilton*, 100 Alabama, 252; *Watson* v. *New Milford* 77 Am. St. Rep. 345; 30 Am. and Eng. Ency. of Law, 383; *Hill* v. *Smith*, 32 California, 177; *Little Schuylkill Navigation Co.* v. *Richard*, 98 Am. Dec. 211; *Ferguson* v. *Firmenich Manufacturing Co.*, 77 Iowa, 579.

The fact that Peoria, Pekin, Havana, LaSalle, Beardstown and Joliet sewer into the Illinois River, does not constitute the right of defendants to likewise discharge the sewerage from the city of Chicago into the Illinois River. *Noland* v. *New Britain*, 69 Connecticut, 668; *Wheeler* v. *Fisher Oil Co.*, 9 Ohio Dec. 294; *Jackman* v. *Arlington Mills*, 137 Massachusetts, 277; *Morgan* v. *Danbury*, 67 Connecticut, 484; *Fahnestock* v. *Feldner*, 56 Atl. Rep. 785.

The right to continue a public nuisance cannot be acquired by prescription. The fact that the Illinois and Michigan Canal was constructed many years ago for the purpose of aiding navigation, and since 1871 has been used for the purpose of partially carrying off the discharges from the stock yards in the southern part of the city of Chicago, and the fact that this canal enters the Illinois River at Peru, does not constitute a right by prescription upon the part of defendants to construct the main drainage canal in question, and operate it in the manner as charged in the bill.

The construction of the artificial channel and the discharge of Lake Michigan through it has changed conditions entirely in comparison with those which existed prior thereto. So that the fact that a certain portion of the sewerage of Chicago was discharged through the Illinois and Michigan canal prior to January, 1900, does not bestow upon defendants the right either to continue therein or to construct a larger channel capable of producing, and which does produce, irreparable injury to complainant.

There can be no prescription for a public nuisance, and no length of enjoyment can legalize the continuance of a nuisance destructive to the health of the surrounding community. *Wright & Rice* v. *Moore*, 38 Alabama, 598; *Goldsmid* v. *Commissioners*, 1 Law. Rep. 167; *Mills* v. *Hall*, 9 Wend. 416; *Attorney General* v. *Copper Co.*, 152 Massachusetts, 452.

No length of time will legalize a nuisance. The reason of the rule to which these cases refer is, that criminality can gain no toleration in the law. The creation and maintenance of a public nuisance is punishable criminally; hence the element of criminality, which characterizes the act of creating it, should prevent the acquisition of a right to maintain it. *Commonwealth* v. *Upton*, 6 Gray, 473; *Morton* v. *Moore*, 15 Gray, 573; *New Salem* v. *Eagle Mill*, 138 Massachusetts, 8; *State* v. *Rankin*, 3 S. Car. 448; 1 Chitty on Criminal Law, 160; *Stoughton* v. *Baker*, 4 Massachusetts, 522.

Although water may be permitted to run along its natural

course and the flow in its natural course may be to some extent hastened, there is, however, no right in law to hasten the flow or impose an additional volume by entering upon the servient estate using artificial channel for drainage purposes, thereby increasing the drainage area and thereby burdening the drainage facilities. 2 Farnham on Water and Water Rights, 1052; *Ward* v. *Peck*, 49 N. J. L. 42.

Such an act is a trespass which may be resisted by the injured party, and for that purpose, all the machinery of law is at his service. Farnham, 487.

Riparian owners are entitled to the usual and natural flow of water in the stream without material interference.

No one has the right to increase the volume or hasten the flow of a stream against the will and wish of lower riparian owners especially when damages or injury are likely to result. Farnham on Water, 487, 1052; *Ward* v. *Peck*, 49 N. J. L. 42; *Water Co.* v. *Bigelow*, 60 N. J. L. 201; Wood on Nuisances, 499; *Merritt* v. *Parker*, 1 Coxe, 460; *Tillotson* v. *Smith*, 32 N. H. 490; *Gerrish* v. *Manufacturing Co.*, 30 N. H. 478; *Plattsworth Co.* v. *Smith*, 57 Nebraska, 579.

For this precise case of turning a stream from its natural channel and forcing it to run in the channel of another stream, see *Merritt* v. *Parker*, 1 Coxe, 460, cited in Angell on Watercourses, 335; the French law is fully discussed in Pardessus and Servitudes, §§ 82, 85, 88. If a man's land is materially damaged by water thrown upon it by reason of the acts of another, it can make no difference what the source of the water may be; whether it be backwater, or the flowage of the same, or the water of another stream. The wrong consists in turning any water upon the land which does not naturally flow in that place; and it can make no difference if the water wrongfully turned upon a man's land against his will flows in the channel of an ancient stream, or in a course where no water flowed before, if similar damage results. *Howell* v. *McCoy*, 3 Rawle, 256; *Bealey* v. *Shaw*, 6 East. Rep. 213, Ellenborough, C. J.; *Mason* v. *Hill*, 3 Barn. & Adol. 304, Tenterden,

C. J.; *King* v. *Tiffany*, 9 Connecticut, 162; 3 Kent's Com. 439.

It is a long established principle of the common law that wherever any act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right without proof of any specific injury. *Mellor* v. *Spateman*, 1 Wms. Saund. 346, note 2; *Woodman* v. *Tufts*, 9 N. H. 91; *Snow* v. *Cowles*, 22 N. H. 302; *Cowles* v. *Kidder*, 24 N. H. 379; *Bassett* v. *Salisbury Mfg. Co.*, 28 N. H. 455. See also *Evans* v. *Merriweather*, 38 Am. Dec. 106; *Ten Eyck* v. *Delaware Canal Co.*, 32 Am. Dec. 232; *Miller* v. *Miller*, 39 Am. Dec. 544; *Norton* v. *Valentine*, 39 Am. Dec. 220; *Elliott* v. *Fitzbury*, 57 Am. Dec. 85; *Newhall* v. *Iresom*, 54 Am. Dec. 794.

Complainant has the right to the use of the Mississippi River in its natural and accustomed flow. Defendants have no right to change or alter the velocity of the stream or the volume of water passing down it. By the increased volume of water discharged into the Illinois River not only is the height of the water increased, but also the velocity likewise becomes much greater, the particular damage resulting to complainant in this respect being that inasmuch as the velocity of the current and the volume of water is increased, the longevity of disease-producing organisms is greatly advanced and the rapidity with which they pass from Chicago to St. Louis is largely accelerated. As shown by all of the evidence in the case, this constitutes a material and substantial, in fact, a great damage and injury to complainant. There is no contrariety of opinion that by the increase in the volume of water the life of the disease-producing organisms is greatly increased, and likewise, by the increase of the current, the distance traveled by pathegenic bacteria within their lifetime is largely extended.

The evidence shows that all the typhoid epidemics of consequence have been produced by infectious water. That at Washington in 1898, by a typhoid epidemic at Cumberland, Maryland, 175 miles up the stream; at Detroit, by typhoid

germs in the St. Clair River at the mouth of Black River, 67 miles from Detroit; at Lawrence and Newport, where the water was inducted into large reservoirs and so remained for a period of from two to three weeks, and yet preserved sufficient of the typhoid bacteria, alive and virulent, to produce the disease; at Pittsburg, by typhoidal conditions at Oil City, 113 miles above.

Cincinnati, Ohio, receives its water supply from the Ohio, and is known to be infected from the sewers of Pittsburg, more than 200 miles away; Buffalo, which obtains its water supply, practically, from the mouth of Lake Erie, suffers with a high typhoid mortality caused by the sewage discharge into the lake at Cleveland and other points. Covington, Kentucky, and New Albany, Indiana, suffer severely from the disease. At these points the water is pumped into large reservoirs, where it is confined for more than 30 days, during which time it retains sufficient germs of the disease that when distributed to the consumers, typhoid conditions result. Chicago, one of the greatest typhoid-ridden cities in the United States, takes its water supply from Lake Michigan, heretofore looked upon as an acceptable source for pure water. The experience of the city, however, has demonstrated that the sewage from Chicago itself has so contaminated and infected the water of the lake at such distance from the shore so as to render it questionable whether the intakes could be extended a sufficient distance into the lake to be free from infectious material.

In view of all the unquestionable facts and circumstances presented by complainant, together with the fact that defendant discharged disease germs into the canal, coupled with the fact that there has been an increase of 77.7 per cent of the typhoid mortality in the city of St. Louis, it is apparent that pathogenic bacteria do pass from Chicago to the Mississippi River at Grafton and seriously affect the sanitary condition of complainant's water supply.

One of the most remarkable disclosures in this investigation is found by the discovery of the bacilli of anthrax and

tetanus in the waters of the Illinois River. This discovery was made by Professor Zeit in his bacteriological observations of the water since the opening of the drainage canal.

Not only has the act of defendants been damaging to the people of the city of St. Louis, which constitutes one-third of the population of complainant, but also renders unsuitable the water supply of the people residing upon the Mississippi River from a point opposite Grafton to the southern boundary line of the State.

No objection is made to the construction of the canal or of the transmission of water of Lake Michigan through it, but defendant should be restrained from discharging sewage into it or disinfect it before discharging it therein.

Nor does the fact that certain municipalities of Missouri discharge sewage into the Mississippi justify the city of Chicago for doing so through the artificial canal and thus burden the Mississippi River with an inconvenience not contemplated by nature.

Mr. James Todd for the Sanitary District of Chicago. *Mr. Howland J. Hamlin,* with whom *Mr. John G. Drennan* and *Mr. W. H. Stead* were on the brief, for the State of Illinois:

The following facts are established by the proof:

The water of the Illinois River at Grafton since the opening of the drainage canal, as disclosed by chemical and bacterial surveys covering a long period of time, is, if anything, in a better sanitary condition since the opening of the drainage canal than it was prior thereto.

The Illinois River at its mouth, from a sanitary standpoint, based upon chemical and bacterial analyses, is less polluted and less dangerous to health than is either the Missouri River or the Mississippi River, and the Illinois River, emptying into the Mississippi and Missouri Rivers, is contaminated and polluted by these two rivers, instead of contaminating and polluting the combined waters of the Mississippi and Missouri Rivers.

Since the opening of the drainage canal the water of the

Illinois River has been improved for agricultural, piscatorial and manufacturing purposes by virtue of its dilution with the pure waters of Lake Michigan.

Typhoid conditions existing in the city of St. Louis, as evidenced by its public health statistics, cannot be charged, in whole or in part, to the sanitary district of Chicago.

That the water supply of St. Louis is polluted and infected defendants do not deny; but they assert that the infected material bringing about this condition is derived, not from Chicago, but from towns, villages and rural communities much nearer, in point of time, to the St. Louis intake at the Chain of Rocks.

The evidence in this case establishes affirmatively, beyond all question, that the number of deaths under the heading "Typhoid Fever" in the published reports of the Board of Health of the city of St. Louis, and as employed and used by the complainant in this controversy to establish their case that typhoid fever has increased in the city of St. Louis since January, 1900, do not correctly show the typhoid conditions existing in the city of St. Louis since 1900, or the typhoid conditions that obtained in St. Louis prior to 1900, for the reason that in the published reports of the Board of Health of the city of St. Louis there appears a column of nondescript fevers characterized under the names of intermittent, remittent, typho-malaria, congestive and simple continued fevers, and under this heading there appears a definite number of deaths attributed to these various fevers; and the evidence in this case establishes, beyond any question, that these nondescript fevers are, in reality, mainly typhoid fever, and should have been classified under the heading "Typhoid Fever," and not classified separately as distinct types of fever, and that only by uniting the deaths reported under the head of typho-malaria, etc., with those reported under typhoid fever can an approximate judgment of the true typhoid fever mortality in St. Louis be obtained; that when properly compiled and analyzed the typhoid fever statistics of the city of St. Louis, as shown in its published

Board of Health reports, do not disclose any real increase of typhoid fever, or, at most, a doubtful or a halting one, such as might be expected in a World's Fair city, with a considerable influx of population that admits of continuous sources of infection. No explosive outbursts of typhoid fever, such as characterizes water-borne epidemics, followed the opening of the drainage canal.

The evidence in this case establishes affirmatively, by a preponderance of the testimony, the following propositions:

(*a*) The typhoid germ entering the sewers of Chicago will not survive the journey to the intake tower of the city of St. Louis in a virulent condition and be able to cause typhoid fever among the inhabitants of the city of St. Louis.

(*b*) Typhoid germs from Chicago will not make the journey to the Mississippi River and become a danger and a menace to the inhabitants of the State of Missouri taking their water supply from the waters of the Mississippi River.

(*c*) That the opening of the drainage canal is not a danger and a menace, present or impending, to the inhabitants of the State of Missouri taking their water supply from the Mississippi River.

(*d*) That a typhoid germ leaving the sewers of Chicago, by way of the drainage canal, will have perished long before Grafton is reached on the Illinois River.

The necessity of purifying by filtration or other means the water supply of the city of St. Louis, as the same is derived from the Mississippi River, existed as far back as 1866, and was so recognized by the authorities in St. Louis, and has continued to be so recognized up to the present time.

The opening of the drainage canal has in no manner increased the necessity which has heretofore existed for purifying by filtration the water supply of St. Louis, and in the installation, operation and maintenance of a filtering plant sufficient to meet the requirements of St. Louis, the opening of the drainage canal has created no added cost.

The evidence in this case establishes the fact conclusively

that the sewage discharged into the Missouri and the Mississippi Rivers by the cities situated within the jurisdiction of complainant is sufficient of itself to contaminate and infect the water supply of those cities in Missouri obtaining their water supply from the Missouri and Mississippi Rivers, exclusive of all other sources of contamination or pollution entering said stream.

There is no testimony offered in evidence in this case showing that any damage has been sustained by complainant, the State of Missouri, by virtue of the opening of the drainage canal, much less any that can be measured in dollars and cents.

In the prosecution of the work of the Chicago drainage canal by the defendant, the sanitary district of Chicago, at an expenditure of over $42,500,000, the complainant had knowledge of this great public improvement and has stood by in silence and acquiesced impliedly in its construction. 2 Wood on Nuisances, §§ 804–806; Gould on Waters, §§ 530, 533.

It is the well established doctrine of the Supreme Court of the United States that laches on the part of the complainant is a bar to the granting of equitable relief. This is especially so where the lack of diligence on the part of the complainant has led the defendant to place himself in a position from which he cannot escape or recede without great loss and inconvenience.

The question of laches does not depend as does the statute of limitations upon the fact, that a certain definite time has elapsed since the cause of action accrued, but whether under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. *McKnight* v. *Taylor*, 1 How. 168; *Badger* v. *Badger*, 2 Wall. 87; *Twin Lake Oil Co.* v. *Marbury*, 91 U. S. 587; *Hayward* v. *Elliot National Bank*, 96 U. S. 611; *Harwood* v. *Cincinnati & C. Air Line Co.*, 17 Wall. 79; *Apeidel* v. *Henrici*, 120 U. S. 377; *Galiher* v. *Cadwell*, 145 U. S. 368; *Hammond* v. *Hopkins*, 143 U. S. 224; *Willard* v. *Wood*, 164 U. S. 502; *Sullivan* v. *Portland & K. R. Co.*, 94 U. S. 806; *Lans-*

dale v. *Smith*, 106 U. S. 391; *Lane & B. Co.* v. *Locke*, 150 U. S. 193; *Mackall* v. *Casilear*, 137 U. S. 556; *Whitney* v. *Fox*, 166 U. S. 637; *Gildersleeve* v. *New Mexico Min. Co.*, 161 U. S. 573; *Ware* v. *Galveston City Co.*, 146 U. S. 102; *Foster* v. *Mansfield C. & L. M. R. Co.*, 146 U. S. 88; *Hoyt* v. *Latham*, 143 U. S. 553; *Hanner* v. *Moulton*, 138 U. S. 486; *Richards* v. *Mackall*, 124 U. S. 183; *Roberts* v. *Northern P. R. Co.*, 158 U. S. 1. See also *Wilson* v. *Anthony*, 19 Barb. (Ark.) 16; *Taylor* v. *Adams*, 14 Barb. (Ark.) 62; *Johnson* v. *Johnson*, 5 Alabama, 90; *Fuson* v. *Sanger*, 2 Ware, 256; *Fisher* v. *Boody*, 1 Curtis, 219; *Cholmondy* v. *Clinton*, 2 Jac. & Walk. 141; *Smith* v. *Clay*, Ambler, 645; *Johnston* v. *Standard Mining Co.*, 148 U. S. 360.

Equity will not interfere to aid a plaintiff who has stood by in silence and has acquiesced impliedly in the expenditure of large sums of money by the defendant in the belief that his work was rightful and would never be interfered with. High on Injunctions, §§ 618, 643, 884; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 343; *Dougrey* v. *Topping & Holme*, 4 Paige Ch. 93; *Town* v. *Needham & Harvey*, 3 Paige Ch. 546; *Blanchard* v. *Doering*, 23 Wisconsin, 200; *Sprague* v. *Steere*, 1 R. I. 247; *Patterson* v. *Hewitt*, 55 L. R. A. 658, 662, 670; *Swain* v. *Seamens*, 9 Wall. 254, 273, 274; 2 Pomeroy Eq. Jur., §§ 816–821; *Niven* v. *Belknap*, 2 Johns. N. Y. 572, 588, 589; *Rochdale Canal Co.* v. *King*, 2 Simons N. S., 78; *Wood* v. *Sutcliffe*, 2 Simons (N. S.), 163; *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; *Ripon* v. *Hobart*, 3 Mylne & K. 169; *Barrett* v. *Blagrave*, 6 Ves. 104; *Binney's Case*, 2 Bland. Ch. 99; *Jacox* v. *Clark*, Walk. Ch. 249; *Gray* v. *Ohio & Penn. R. R.*, 1 Grant's Cases, 412; *Dunn* v. *Sprevier*, 7 Ves. 235; *Bassett* v. *Company*, 47 N. H. 426; *Bliss* v. *Pritchard*, 67 Missouri, 181, 190; *Landrum* v. *Union Bank*, 63 Missouri, 48. See also *Eston* v. *N. Y. & L. B. R. R.*, 24 N. J. Eq. 49.

The court of equity will refuse to grant an injunction when it appears that greater injury and inconvenience will be caused to the defendant by granting the injunction than will be caused to the complainant by refusing it.

The courts will require a very strong case for the granting of an injunction which will cause more injury than it will remedy, and it may be said, as a general rule, that an injunction will not be granted where it will be productive of greater injury than will result from a refusal of it. This rule is especially applicable when the party applying for an injunction has by his own laches made it impossible to grant the injunction without inflicting serious injury on the party so to be enjoined. 16 Am. & Eng. Ency. of Law, 2d ed., 363, 364; Spelling on Extraordinary Relief, §§ 23, 372; *Edwards* v. *Allonez Mining Co.*, 38 Michigan, 46; *Clifton* v. *Dye*, 87 Alabama, 468; *Richard's Appeal*, 57 Pa. St. 114; *Hall* v. *Rood*, 39 Michigan, 46; *Campbell* v. *Seaman*, 63 N. Y. 568.

A court of equity will not grant an injunction to restrain a party from committing a nuisance when the evidence shows that the party complaining is guilty of contributing to the nuisance of which he complains. If the granting of an injunction will not relieve him from the consequences of his own acts the injunction will not issue. If the complainant contributes to the conditions which it claims in its bill of complaint will injure it as a State, it cannot obtain equitable relief.

It is the fundamental principle of equity that "He who seeks equity must do equity," and out of this grows the maxim that " He who comes into equity must come with clean hands." In other words, courts of equity will not enjoin one from doing a lawful act upon the application of one who, while claiming said act will cause him great and irreparable injury, is himself contributing to the injurious condition complained of. In such case the parties are *in pari delicto*. 11 Paige Ch. 349.

If the plaintiff himself has contributed to the pollution he cannot recover against an upper proprietor. Gould on Waters, § 219; *Water Supply Co.* v. *Potwin*, 43 Kansas, 408; *Ferguson* v. *Firmenich Mfg. Co.*, 77 Iowa, 576. See also *Cassady* v. *Cavenor*, 37 Iowa, 300; *Richards* v. *Waupun*, 59 Wisconsin, 45; *Mowday* v. *Moore*, 133 Pa. St. 598; *Comstock* v. *Johnson*, 46

N. Y. 615; *Palmer* v. *Harris*, 60 Pa. St. 156; *Jacksonville* v. *Doane*, 145 Illinois, 23.

The cities, towns and villages in the State of Missouri, situated upon the shore of the Missouri River, which are contributing to the nuisance complained of in this suit, are all agencies of the State; their acts in so contributing will be imputed to the State, and it should not be given relief from a condition to which its agencies are so materially contributing.

An injunction to restrain a nuisance will issue only in a case where the fact of nuisance is made out upon determinate and satisfactory evidence. If the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding the injunction, and where interposition by injunction is sought to restrain that which is apprehended will create a nuisance of which its complainant may complain, the proof must show such a state of facts as will manifest the danger to be real and immediate.

A careful consideration of all the testimony fails to establish as a fact that the opening of the drainage canal is a nuisance, causing complainant great and irreparable injury. The contention made by complainant has not been made out upon determinate and satisfactory evidence. The evidence is conflicting and the injury doubtful, and consequently complainant is not entitled to the relief prayed for. The evidence establishes affirmatively that Missouri, as a State, is not injured or damaged by virtue of the opening of the Chicago drainage canal, but on the contrary, if there has been an injury established in the evidence in this case as suffered by the inhabitants of the State of Missouri from the use of the waters of the Mississippi River, that injury has been caused by the inhabitants of the cities, towns and villages within the jurisdiction of complainant who have emptied their sewage into the Missouri and Mississippi Rivers at points above the places where the alleged injury is supposed to have existed. The evidence upon which damage is predicated is speculative and theoretical, and insufficient to show that the opening of the

Chicago drainage canal is responsible for the injury complained of.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the State of Missouri to restrain the discharge of the sewage of Chicago through an artificial channel into the Desplaines River, in the State of Illinois. That river empties into the Illinois River, and the latter empties into the Mississippi at a point about forty-three miles above the city of St. Louis. It was alleged in the bill that the result of the threatened discharge would be to send fifteen hundred tons of poisonous filth daily into the Mississippi, to deposit great quantities of the same upon the part of the bed of the last-named river belonging to the plaintiff, and so to poison the water of that river, upon which various of the plaintiff's cities, towns and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing, purposes. It was alleged that the defendant Sanitary District was acting in pursuance of a statute of the State of Illinois and as an agency of that State. The case is stated at length in 180 U. S. 208, where a demurrrer to the bill was overruled. A supplemental bill alleges that since the filing of the original bill the drainage canal has been opened and put into operation and has produced and is producing all the evils which were apprehended when the injunction first was asked. The answers deny the plaintiff's case, allege that the new plan sends the water of the Illinois River into the Mississippi much purer than it was before, that many towns and cities of the plaintiff along the Missouri and Mississippi discharge their sewage into those rivers, and that if there is any trouble the plaintiff must look nearer home for the cause.

The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future

with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful and that the danger must be shown to be real and immediate. The nuisance set forth in the bill was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt. But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence is to be approached.

The first question to be answered was put in the well known case of the Wheeling bridge. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518. In that case, also, there was a bill brought by a State to restrain a public nuisance, the erection of a bridge alleged to obstruct navigation, and a supplemental bill to abate it after it was erected. The question was put most explicitly by the dissenting judges but it was accepted by all as fundamental. The Chief Justice observed that if the bridge was a nuisance it was an offence against the sovereignty whose laws had been violated, and he asked what sovereignty that was. 13 How. 581; Daniel, J., 13 How. 599. See also *Kansas* v. *Colorado*, 185 U. S. 125. It could not be Virginia, because that State had purported to authorize it by statute. The Chief Justice found no prohibition by the United States. 13 How. 580. No third source of law was suggested by any one. The majority accepted the Chief Justice's postulate, and found an answer in what Congress had done.

It hardly was disputed that Congress could deal with the

matter under its power to regulate commerce. The majority observed that although Congress had not declared in terms that a State should not obstruct the navigation of the Ohio, by bridges, yet it had regulated navigation upon that river in various ways and had sanctioned the compact between Virginia and Kentucky when Kentucky was let into the Union. By that compact the use and navigation of the Ohio, so far as the territory of either State lay thereon, was to be free and common to the citizens of the United States. The compact, by the sanction of Congress, had become a law of the Union. A state law which violated it was unconstitutional. Obstructing the navigation of the river was said to violate it, and it was added that more was not necessary to give a civil remedy for an injury done by the obstruction. 13 How. 565, 566. At a later stage of the case, after Congress had authorized the bridge, it was stated again in so many words that the ground of the former decision was that "the act of the Legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law." 18 How. 421, 430.

In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that State's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly

or implicitly recognized. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 737. It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new. Take the question of prescription in a case like the present. The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent state. See 1 Oppenheim, International Law, 293, §§ 242, 243. It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long, *Davis* v. *Mills*, 194 U. S. 451, 457, yet the fixing of a definite time usually belongs to the legislature rather than the courts. The courts did fix a time in the rule against perpetuities, but the usual course, as in the instances of statutes of limitation, the duration of patents, the age of majority, etc., is to depend upon the lawmaking power.

It is decided that a case such as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would

amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between States.

The nearest analogy would be found in those cases in which an easement has been declared in favor of land in one State over land in another. But there the right is recognized on the assumption of a concurrence between the two States, the one, so to speak, offering the right, the other permitting it to be accepted. *Manville Co.* v. *Worcester,* 138 Massachusetts, 89. But when the State itself is concerned and by its legislation expressly repudiates the right set up, an entirely different question is presented.

Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. See *Kansas* v. *Colorado,* 185 U. S. 125.

As to the principle to be laid down the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into the river is

general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals some consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights. *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642. See *Boston Ferrule Co.* v. *Hills*, 159 Massachusetts, 147, 150. Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame.

We have studied the plaintiff's statement of the facts in detail and have perused the evidence, but it is unnecessary for the purposes of decision to do more than give the general result in a very simple way. At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretence that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois River in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said, without evil results. The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change and that other expla-

nations have been disproved, and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.

We assume the now prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward, and the cases which are produced are controverted. The plaintiff obviously must be cautious upon this point, for if this suit should succeed many others would follow, and it not improbably would find itself a defendant to a bill by one or more of the States lower down upon the Mississippi. The distance which the sewage has to travel (357 miles) is not open to debate, but the time of transit to be inferred from experiments with floats is estimated at varying from eight to eighteen and a half days, with forty-eight hours more from intake to distribution, and when corrected by observations of bacteria is greatly prolonged by the defendants. The experiments of the defendants' experts lead them to the opinion that a typhoid bacillus could not survive the journey, while those on the other side maintain that it might live and keep its power for twenty-five days or more, and arrive at St. Louis. Upon the question at issue, whether the new discharge from Chicago hurts St. Louis, there is a categorical contradiction between the experts on the two sides.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places. We give them mainly from the plaintiff's brief: 1890, 140; 1891, 165; 1892, 441; 1893, 215; 1894, 171; 1895, 106; 1896, 106; 1897, 125; 1898, 95; 1899, 131; 1900, 154; 1901, 181; 1902, 216; 1903, 281. It is argued for the defendant that the num-

bers for the later years have been enlarged by carrying over cases which in earlier years would have been put into a miscellaneous column (intermittent, remittent, typho-malaria, etc., etc.), but we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause.

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected. But the plaintiff relies upon proof that such bacilli are discharged into the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the *bacillus coli communis*, which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference. To prove that the typhoid bacillus could make the journey an experiment was tried with the *bacillus prodigiosus*, which seems to have been unknown, or nearly unknown, in these waters. After preliminary trials, in which these bacilli emptied into the Mississippi near the mouth of the Illinois were found near the St. Louis intake and in St. Louis in times varying from three days to a month, one hundred and seven barrels of the same, said to contain one thousand million bacilli to the cubic centimeter, were put into the drainage canal near the starting point on November 6, and on December 4 an example was found at the St. Louis intake tower. Four others were found on the three following days, two at the tower and two at the mouth of the Illinois. As this bacillus is asserted to have about the same length of life in sunlight in living waters as the *bacillus typhosus*, although it is a little more hardy, the experiment is thought to prove one element of the plaintiff's case, although

the very small number found in many samples of water is thought by the other side to indicate that practically no typhoid germs would get through. It seems to be conceded that the purification of the Illinois by the large dilution from Lake Michigan (nine parts or more in ten) would increase the danger, as it now generally is believed that the bacteria of decay, the saprophytes, which flourish in stagnant pools, destroy the pathogenic germs. Of course the addition of so much water to the Illinois also increases its speed.

On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through they would be scattered and enfeebled and would do no harm. The defendant also sets against the experiment with the *bacillus prodigiosus* a no less striking experiment with typhoid germs suspended in the Illinois River in permeable sacs. According to this the duration of the life of these germs has been much exaggerated, and in that water would not be more than three or four days. It is suggested, by way of criticism, that the germs may not have been of normal strength, that the conditions were less favorable than if they had floated down in a comparatively unchanging body of water, and that the germs may have escaped, but the experiment raises at least a serious doubt. Further, it hardly is denied that there is no parallelism in detail between the increase and decrease of typhoid fever in Chicago and St. Louis. The defendants' experts maintain that the water of the Missouri is worse than that of the Illinois, while it contributes a much larger proportion to the intake. The evidence is very strong that it is necessary for St. Louis to take preventive measures, by filtration or otherwise, against the dangers of the

plaintiff's own creation or from other sources than Illinois. What will protect against one will protect against another. The presence of causes of infection from the plaintiff's action makes the case weaker in principle as well as harder to prove than one in which all came from a single source.

Some stress was laid on the proposition that Chicago is not on the natural watershed of the Mississippi, because of a rise of a few feet between the Desplaines and the Chicago Rivers. We perceive no reason for a distinction on this ground. The natural features relied upon are of the smallest. And if under any circumstances they could affect the case, it is enough to say that Illinois brought Chicago into the Mississippi watershed in pursuance not only of its own statutes, but also of the acts of Congress of March 30, 1822, c. 14, 3 Stat. 659, and March 2, 1827, c. 51, 4 Stat. 234, the validity of which is not disputed. *Wisconsin* v. *Duluth*, 96 U. S. 379. Of course these acts do not grant the right to discharge sewage, but the case stands no differently in point of law from a suit because of the discharge from Peoria into the Illinois, or from any other or all the other cities on the banks of that stream.

We might go more into detail, but we believe that we have said enough to explain our point of view and our opinion of the evidence as it stands. What the future may develop of course we cannot tell. But our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause.

Bill dismissed without prejudice.

STRICKLEY v. HIGHLAND BOY GOLD MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 172. Argued January 25, 1906.—Decided February 19, 1906.

If a state statute as construed by the highest court of the State is constitutional this court will follow that construction.

There is nothing in the Fourteenth Amendment which prevents a State in carrying out its declared public policy from requiring individuals to make to each other, on due compensation, such concessions as the public welfare demands; and the statute of Utah providing that eminent domain may be exercised for railways and other means to facilitate the working of mines is not unconstitutional. *Clark* v. *Nash*, 198 U. S. 361, followed.

THE facts are stated in the opinion.

Mr. Arthur Brown and *Mr. Frank Hoffman* for plaintiffs in error:

The construction of this tramway was not a matter of public necessity, but it was constructed solely for the purpose of reducing to a minimum the cost of transporting the defendant in error's ores from its mines to the depot. The only use to which this tramway is put is for the transportation of the ores of the defendant in error. The public is in no manner interested in it, nor does the public derive any benefit from the same. In the very nature of its construction and in the manner of its operation, no passengers can be carried over the tramway, nor does it receive, transport or deliver any freight of any kind or description. The defendant has not even the excuse that it is necessary or a matter of necessity that this tramway was built for the operation of its mines. Its only claim is that it is a matter of convenience and the sole object and purpose of its construction was to save a few cents a ton in the cost of transporting its ores.

The taking in this case was for a private use, and contrary

to the provisions of the Fourteenth Amendment. *Consolidated Channel Company* v. *Central Pacific Railroad Co.*, 51 California, 269; *People* v. *Pittsburgh &c. Railroad Co.*, 53 California, 694; *Sholl* v. *German Coal Co.*, 118 Illinois, 429; *Nesbit* v. *Trumbo*, 29 Illinois, 110; *Bankhead* v. *Brown*, 25 Iowa, 540; *Edgewood Railroad Co.'s Appeal*, 79 Pa. St. 257; *Coster* v. *Tidewater Company*, 18 N. J. Eq. 54; Kent's Commentaries, vol. 2, p. 339; Lewis on Eminent Domain, § 165; Mills on Eminent Domain, §§ 23, 26, 27.

Under all of the authorities cited, no legislature or court has the authority to take property from A and give it to B, when it is as apparent as it is in this case that the only object that can be accomplished by such transfer is to enable B to more successfully conduct the same business that A is conducting, and to condemn A's property to the use of B for the same purposes for which A has already appropriated it, and especially is this so where the only benefit to be derived is that B may more successfully, economically and conveniently conduct mining enterprises.

Mr. George Sutherland, with whom *Mr. Waldemar Van Cott* and *Mr. E. M. Allison, Jr.*, were on the brief, for defendants in error:

This court has no jurisdiction. The constitutional question was not specially set up or claimed. Rule 21; § 709, Rev. Stat.; *Morrison* v. *Watson*, 154 U. S. 115; *Bolln* v. *Nebraska*, 176 U. S. 90.

In order to determine whether a particular use is a public one, it is first necessary to ascertain whether such use furthers the general public policy of the State and contributes to the public welfare.

Utah is crossed by great mountain ranges. Long, narrow valleys lie between these ranges and it is impossible for mines in these mountains to be furnished with railway facilities, but it is practicable to construct aerial tramways.

One of the great public uses of Utah, namely, irrigation, has

been judicially declared to be a public use. *Clark* v. *Nash*, 198 U. S. 361. No less important to the public policy and general welfare of the State of Utah is the development of its mineral resources. The legislature of Utah has declared the great public necessity of developing the mineral wealth of the State. The legislature has declared that it is a public use to construct aerial tramways for the development of its mineral resources. The District Court and the Supreme Court of Utah have declared in this case that under the statute so providing the construction of aerial tramways for the development of mineral resources is a public use. See also *Fall Brook Irrigation Dist.* v. *Bradley*, 164 U. S. 112.

The legislative declaration of a public use will be respected by the courts, unless such declaration is clearly without reasonable foundation. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668; *Backus* v. *Fort Street Ry. Co.*, 169 U. S. 568.

A public use is not determined simply by the question whether a physical use is made by the public; but the question is deeper and depends upon whether the use subserves the public good or tends to that end. *Olcott* v. *Supervisors*, 16 Wall. 694; *Gibson* v. *Mason*, 5 Nevada, 308; *Munn* v. *Illinois*, 94 U. S. 113.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding begun by the defendant in error, a mining corporation, to condemn a right of way for an aerial bucket line across a placer mining claim of the plaintiffs in error. The mining corporation owns mines high up in Bingham Canyon, in West Mountain Mining District, Salt Lake County, Utah, and is using the line or way to carry ores, etc., for itself and others from the mines, in suspended buckets, down to the railway station, two miles distant and twelve hundred feet below. Before building the way it made diligent inquiry but could not discover the owner of the placer claim

in question, Strickley standing by without objecting or making known his rights while the company put up its structure. The trial court found the facts and made an order of condemnation. This order recites that the mining company has paid into court the value of the right of way, as found, and costs, describes the right of way by metes and bounds and specifies that the same is to be used for the erection of certain towers to support the cables of the line, with a right to drive along the way when necessary for repairs, the mining company to move the towers as often as reasonably required by the owners of the claim for using and working the said claim. The foregoing final order was affirmed by the Supreme Court of the State. 78 Pac. Rep. 296. The case then was brought here.

The plaintiffs in error set up in their answer to the condemnation proceedings that the right of way demanded is solely for private use, and that the taking of their land for that purpose is contrary to the Fourteenth Amendment of the Constitution of the United States. The mining company on the other hand relies upon the statutes of Utah, which provide that "the right of eminent domain may be exercised in behalf of the following public uses: . . . (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines." In view of the decision of the state court we assume that the condemnation was authorized by the state laws, subject only to the question whether those laws as construed are consistent with the Fourteenth Amendment. Some objections to this view were mentioned, but they are not open. If the statutes are constitutional as construed, we follow the construction of the state court. On the other hand, there is no ground for the suggestion that the claim by the plaintiffs in error of their rights under the Fourteenth Amendment does not appear sufficiently on the record. The suggestion was not pressed.

The single question, then, is the constitutionality of the

Utah statute, and the particular facts of the case are material only as showing the length to which the statute is held to go. There is nothing to add with regard to them, unless it be the finding that the taking of the strip across the placer claim is necessary for the aerial line and is consistent with the use of all of the claim by the plaintiffs in error for mining, except to the extent of the temporary interference over a limited space by four towers, each about seven and a half feet square and removable as stated above.

The question thus narrowed is pretty nearly answered by the recent decision in *Clark* v. *Nash*, 198 U. S. 361. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the State. In discussing what constitutes a public use it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a State from requiring such concessions. If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong. If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff

is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears.

Judgment affirmed.

WHITNEY *v.* DRESSER.

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

No. 180. Argued January 26, 1906.—Decided February 19, 1906.

Bankruptcy proceedings are more summary than ordinary suits, and a sworn proof of claim against the bankrupt is *prima facie* evidence of its allegations in case it is objected to.

THE facts are stated in the opinion.

Mr. George H. Gilman for appellant:

The burden of proof as to claims against a bankrupt estate is upon the claimant, and he is not relieved of it by the *ex parte* statements in his proof of claim.

It is of course a general principle, applicable to every form of legal or equitable procedure in courts administering the Anglo-Saxon system of jurisprudence, that a mere *ex parte* affidavit is not to be treated as legal evidence in support of the claim embodied therein, if objection is made to the claim and the issues thereby raised are brought to trial. Loveland on Bankruptcy, 2d ed., 341.

The question has come up under state insolvency laws, and proofs of claim under those laws are always treated, if an issue is raised by objections filed thereto, as in the nature of pleadings, which must be supported by legal evidence. This has

been the practice in the New York state courts. *Matter of Jeselson*, 10 Daly, 104. See also *Crandall* v. *Carey-Lombard Lumber Co.*, 164 Illinois, 474; *Bank* v. *Lanahan*, 66 Maryland, 461.

Mr. Adrian H. Joline, with whom *Mr. Adrian H. Larkin* and *Mr. George E. Hargrave* were on the brief, for appellee:

The verified amended proof of claim is *prima facie* evidence of indebtedness requiring the trustee to produce evidence of sufficient force to rebut the presumption thus raised. *In re Sumner*, 101 Fed. Rep. 224; *In re Shaw*, 109 Fed. Rep. 780; *In re Doty*, 5 Am. B. Rep. 58; *In re Cannon*, 133 Fed. Rep. 837; *In re Carter*, 138 Fed. Rep. 846. The cases cited by appellant arising under state insolvency laws have no bearing on this question.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from the allowance of a claim of Emma B. Dresser against the firm of Dresser & Company, bankrupts, the members of the firm being Daniel Le Roy Dresser and Charles E. Reiss. The allegations of the amended proof, so far as necessary to be stated, are that the bankrupts are justly and truly indebted to the deponent in the sum of $88,145, upon the following consideration. Before May, 1896, the deponent lent certain specified shares of stock to the firm of Dresser and Goodrich for the purpose of the firm's borrowing money upon the same, etc., and the firm did so. In May, 1896, the firm was dissolved, Daniel Le Roy Dresser took over its assets and assumed its liabilities, including that to the deponent with her consent, "and the proceeds of the loans for which said securities had been deposited by said firm as collateral were turned over to said Daniel Le Roy Dresser and used by him in his business." In May, 1897, the present bankrupts formed their partnership, taking over the assets and assuming the liabilities of said Dresser. At the request of said Dresser and Reiss with deponent's knowledge and consent the liability of Dresser

to the deponent was assumed by the firm, "and used by said firm in its business." Evidently some words were omitted at this point, by mistake, and we agree with the court below that the most reasonable view is that it was intended to repeat the phrase quoted above in speaking of the transfer from Dresser & Goodrich to Dresser.

The trustee objected to the allowance of the claim against the assets of the partnership and put in evidence before the referee, the main fact proved being that Dresser personally signed the notes on which were made the advances for which the stocks were pledged. This was relied on, in connection with the form of the proof of claim before it was amended, to show that the stocks really were lent to Daniel Le Roy Dresser alone. On the other hand it appeared that some, at least, of the checks for the money lent went to the firm, and all the evidence was reconcilable with the averments of the amended claim. The referee ruled that the verified amended proof of claim was *prima facie* proof of the indebtedness of Dresser & Co. to the claimants, held the evidence introduced insufficient to rebut it, and dismissed the objection. The District Judge sustained the action of the referee and his order was affirmed by the Circuit Court of Appeals. *In re Dresser*, 135 Fed. Rep. 495; 68 C. C. A. 207.

It is urged that the claim is bad on its face because it showed at most a promise to answer for the debt of another, required to be in writing by the New York Statute of Frauds, and no such writing was filed with the proof in accordance with the requirement of the Bankruptcy Law. Section 57*b*. It is unnecessary to consider whether the objection is open or otherwise sound, because, if it is, which we are far from intimating, the claim clearly imports a novation, that is to say, the giving and accepting of the responsibility of the present firm in place of that of Daniel Le Roy Dresser alone. The only question warranting the appeal is whether the sworn proof of claim is *prima facie* evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense—a

burden which does not change whatever the state of the evidence—but simply whether the sworn proof is evidence at all.

The Circuit Court of Appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that on general principles it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

Notwithstanding these forcible considerations we agree with the Circuit Court of Appeals. The prevailing opinion, not only in the Second Circuit but elsewhere, seems to have been that way. *In re Sumner*, 101 Fed. Rep. 224; *In re Shaw*, 109 Fed. Rep. 780; *In re Cannon*, 133 Fed. Rep. 837; *In re Carter*, 138 Fed. Rep. 846; *In re Doty*, 5 Am. B. Rep. 58. See also *In re Saunders*, 2 Low. 444, 446; *In re Felter*, 7 Fed. Rep. 904, 906. The alternative would be that the mere interposition of an objection by any party in interest, § 57*d*, would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have that effect. If it does not, then the formal proof is some evidence even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: "Objections to claims shall be heard and determined as soon," etc. Section 57*f*. It is the objection, not the claim, which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word "proof" as used in the act. Convenience undoubtedly is on the side of this view. Bankruptcy proceedings are more summary than ordi-

nary suits. Judges of practical experience have pointed out the expense, embarrassments and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act and convenient and just administration all are on the side of treating a sworn proof of claim as some evidence even when it is denied.

Order affirmed.

SOUTHERN PACIFIC COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

SOUTHERN CALIFORNIA RAILWAY COMPANY *v.* SAME.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *v.* SAME.

SANTA FE PACIFIC RAILROAD COMPANY *v.* SAME.

SOUTHERN PACIFIC COMPANY *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Nos. 158, 159, 160, 161, 162. Argued January 23, 24, 1906.—Decided February 26, 1906.

The Southern Pacific and other railroads published a guaranteed through rate on citrus fruits from California to the Atlantic seaboard. The shippers availing of this rate routed the goods themselves from the terminals of the initial carriers and illegally obtained rebates for the routing from the connecting carriers. To prevent this—and the action was successful—the initial carriers republished the rate reserving the right to route the goods beyond their own terminals. On complaint of shippers the Interstate Commerce Commission ordered the initial carriers to desist from enforcing the new rule, holding it violated § 3 of the Interstate Commerce Act by subjecting the shippers to undue disadvantage. The Circuit Court sustained the Commission but on the ground that the routing by the carrier amounted, although no other agreement was proved in re-

gard thereto, to a pooling of freights and violated § 5 of the act. *Held*, error and that:

As the general purpose of the act was to facilitate commerce and prevent discrimination it will not be construed so as to make illegal a salutary rule to prevent the violation of the act in regard to obtaining rebates.

The question of joint through rates is, under the act, one of agreement between the companies and under their control, and nothing in the act prevents an initial carrier guaranteeing a through rate to reserve in its published notice thereof the right to route the goods beyond its own terminal.

A carrier need not contract to carry goods beyond its own line, or make a through rate; if it does agree so to do, it may do so by such lines as it chooses, and upon such reasonable terms, not violative of the law, as it may agree upon; and this right does not depend upon whether it agrees to be liable for default of the connecting carrier.

The fact that the initial carrier, in order to break up the practice of rebating by the connecting carriers, promises them fair treatment and carries out the promise by giving them certain percentages of its guaranteed through rate business, does not amount to a pooling of freights within the meaning of § 5 of the Interstate Commerce Act.

A reservation applicable to a single business by the initial carrier, guaranteeing a through rate, of the right to route goods beyond its own terminal does not amount to an unlawful discrimination within the prohibition of the act if the business is of a special nature, like the fruit business, having nothing in common with other freight.

In a suit by the Interstate Commerce Commission to enforce an order made by it, the court is not confined in passing on the validity of the order to the reasons stated by the Commission.

THESE are appeals from orders or decrees of the Circuit Court of the United States for the Southern District of California, in proceedings wherein that court affirmed, and ordered to be enforced, the determination of the Interstate Commerce Commission, relating to the above-named railroad companies, directing them to desist from maintaining or enforcing a rule adopted by them and pertaining to shippers of oranges and other citrus fruits in Southern California, whereby those shippers were denied their alleged right of designating the routes for the transportation of their property from California to the eastern markets, under a tariff of through rates, as mentioned in the orders or decrees.

The proceeding in each case was commenced before the Commission under sections 13, 14 and 15 of the Interstate

Commerce Act, U. S. Comp. Stat. pp. 3154–3164; 24 Stat. 379, by the filing of a petition with the Commission, on the part of certain corporations of the State of California, called the Consolidated Forwarding Company, and the Southern California Fruit Exchange, engaged in the business of shipping oranges and other citrus fruit from Southern California to the eastern markets. The proceeding was continued in the Circuit Court under section 16 of the act. The petition charged the railroads with various violations of the Interstate Commerce Act, including specially the agreement for "routing," hereinafter set forth, and asked the Commission to enjoin such companies from any further violation of the act. The companies put in answers to the petition, denying its material averments. Testimony was then taken before the Commission, and the following, among other facts, were shown:

The through tariff of rates from California to the East, with the right of routing, which had been agreed upon between the companies complained of (hereinafter called the initial carriers) and their eastern connections regarding the oranges and other citrus fruit transportation was in force January 1, 1900, and these proceedings were commenced February 26, 1900. Before the adoption of the rule for routing there had been among the eastern connections of the initial carriers under the through joint tariff rates then existing, the greatest rivalry to obtain the California fruit freight business, and this rivalry led, on the part of the connecting carriers, to a system of rebates from the through tariff rates, which was a clear violation of the Commerce Act, and was demoralizing in every way to honest business. Indeed, the president of one of complainants before the Commission admitted that his company (the Southern California Fruit Exchange) had in four years received rebates to an amount of over $174,000. The practice had become so general that the shippers came to regard a rebate as part of the legitimate returns from the orange business. Among those who participated in this system of rebates were what is termed the car line companies, which were incorporated companies

owning cars in which the fruit was packed, described as ventilator or refrigerator cars, which were peculiarly adapted to the carriage of the fruit, and were hired by the initial carriers because they did not want to own equipment cars which they could keep in service only part of the year, while the car companies could use the cars for other purposes in other parts of the United States when the orange transportation was over. These car companies made arrangements with the connections of the initial carriers east of Chicago and New Orleans, by which a certain bonus, varying from $10 to $40 per car, was given the car line companies, in consideration of the car being routed over the line paying the bonus, a part of the bonus, varying from a quarter to a half, being usually turned over to the shipper by the car company, for the privilege allowed the latter of routing the shipment.

The initial carriers form two systems, one called the Southern Pacific System and the other the Santa Fe System. There are numerous points of junction on these lines of the defendants, where connection is made with other carriers, and at their termini in Chicago, Ogden and New Orleans such connection is made, and through lines are formed over which the cirtus fruit is transported to practically all the markets of the United States. The two systems are the only ones which reach the section of country where the orange industry in Southern California exists, and they about equally divide the transportation of the oranges therefrom. The Commission said the evidence was unsatisfactory as a basis for a conclusion whether the initial carriers pooled their citrus fruit traffic or divided the earnings therefrom, and it therefore retained such question for further hearing and investigation.

Prior to January, 1900, the rebates by the eastern companies, already referred to, had become so great and demoralizing that the initial carriers at length determined to try and crush the whole thing. The connecting carriers were themselves dissatisfied with this state of things, but each felt it necessary in order to compete with the others. It had been

assumed that the car line companies were not common carriers, and were not within the Commerce Act, and therefore they were more ready to indulge in the practice of getting rebates whenever they could, and paying part of the amount to the shippers for giving them the right to route the shipment. Prior to the adoption of the through rate tariff with this rule under discussion, the shippers had been permitted by the initial carriers to control the routing of the freight, and also to divert it, en route, from the destination point named in the bill. In order to stop the rebating on these joint through rates it was proposed to agree upon a through rate tariff, to be assented to and accepted by the railroads interested in the fruit transportation, or by as many of them as possible, with the rule in question to form part of the agreement. Such a tariff agreement was made between some of the roads (and subsequently assented to and joined in by most of the roads), and filed with the Commission, for the transportation of oranges and other citrus fruit from Southern California at $1.25 per hundred pounds, to practically all points east of the Missouri River. The tariff agreed upon by the companies contains the rule complained of, which is part of such agreement, and by it the initial carriers agreed to guarantee the through rates to the shipper, but only on the following conditions:

"In guaranteeing the through rate named herein, the absolute and unqualified right of routing beyond its own terminal is reserved to initial carrier giving the guarantee. In accordance with this rule, agents will not accept shipping orders or other documents, if routing instructions are shown thereon. Neither will agents accept verbal routing instructions."

Another rule reads:

"Initial carrier will route each car from point of origin to point of destination, and diversions in transit will not be permitted except by consent of initial carrier, who will thereupon designate new routing when diversion necessitates change therein."

Notwithstanding the rule thus published in regard to rout-

ing, the initial carriers generally thereafter permitted the shippers to route the cars containing their fruit as they desired. The right to divert freight from the destination point or route named in the bill of lading and before the freight reached the billed destination, had been exercised generally by shippers, and had been allowed by the carriers throughout the country, and the practice was regarded of value to the shippers, as it enabled them sometimes to realize higher prices than they otherwise might if the freight were continued to the original destination. This diversion by the shippers also continued to be generally allowed.

The reason for the rule, reserving to the initial carrier this right to route the traffic, is stated to have been because it enabled the initial carriers to secure the discontinuance of the practice of paying rebates. Since the adoption of that rule the rebates which had been paid to shippers and to owners of car lines were discontinued, and the Commission says there is no evidence that the practice has been resumed. They were discontinued for the obvious reason that the shippers could not control the route, and hence it would be useless for the eastern railroad company to pay the shippers or the car line companies rebates on freight the eastern company might not receive and which the initial carrier alone had the routing of. As soon as the routing was agreed upon and the through tariff rates fixed, the eastern connections had to do business with the initial carriers instead of the car company or the shipper. The shippers prepay or guarantee freight charges to destination. The initial carrier does not assume liability from damage resulting from negligence of any connecting line.

The Commission (the chairman, Mr. Commissioner Knapp, dissenting) ordered the defendants to cease from exacting from the shippers the right to themselves make the route which the freight should take. The ground taken by the Commission was that such routing by the initial carriers subjected the shippers to undue, unjust and unreasonable prejudice and disadvantage, and gave to the carrier an undue and unrea-

sonable preference and advantage, and was a violation of the third section of the act.

The initial carriers, believing the Commission had erred in its decision, refused to obey the order which it made, and thereupon the Commission, pursuant to the sixteenth section of the act, filed its bill in the Circuit Court for the purpose of enforcing its order.

The bill thus filed by the Commission was demurred to by the defendants, and the demurrer was overruled. 132 Fed. Rep. 829. The railroad companies then answered, and the case, after the taking of further evidence, came up for final hearing, when the order of the Commission was affirmed and directed to be enforced (132 Fed. Rep. 829), although the Circuit Court put the affirmance on the ground that the agreement as to routing showed that there was a violation of § 5 of the Commerce Act, in that such agreement amounted to a contract or combination for the pooling of freights. The court passed upon no other question raised in the case. A very full statement of facts is contained in the report in 132 Fed. Rep. *supra*.

A motion was made for a supersedeas pending the hearing of this appeal, which, for the reasons stated in the opinion of the Circuit Court, was denied. 137 Fed. Rep. 606.

Mr. Robert Dunlap, with whom *Mr. Thomas J. Norton* and *Mr. Gardiner Lathrop* were on the brief, for appellants, Southern California Railway Company, Atchison, Topeka & Santa Fe Railway Company, and Santa Fe Pacific Railroad Company. *Mr. Maxwell Evarts*, with whom *Mr. Robert S. Lovett* was on the brief, for appellant, Southern Pacific Company:

This is a special proceeding in which the jurisdiction of the Circuit Court is confined to determining the lawfulness of the order of the Commission, and if found to be lawful to enjoin obedience thereto, otherwise to dismiss the bill. Sec. 16, pp. 3165, 3166, 3 U. S. Comp. Stat. If the Commission have misconstrued or misapplied the provisions of this law their order is invalid. *Int. Com. Com.* v. *L. V. R. R. Co.*, 74 Fed. Rep. 784;

D. G. H. & M. R. R. Co. v. *Int. Com. Com.*, 74 Fed. Rep. 803; *Int. Com. Com.* v. *D., L. & W. R. R. Co.*, 64 Fed. Rep. 723; *East Tenn. &c. R. R.* v. *Int. Com. Com.*, 181 U. S. 1.

The facts found by the Commission were insufficient to warrant its conclusions and orders and it is therefore evident that the Commission erred in applying the law to the case before them. *L. & N. R. R.* v. *Behlmer*, 175 U. S. 674–676.

The evidence in the lower court showed that the conclusion of the Commission concerning the adoption of the routing provision in the joint tariff was erroneous and its order based upon such conclusion is therefore invalid. The report of the Commission shows that it misconstrued and misapplied sec. 6 in holding that carriers could not impose as a condition for the making of joint tariffs the right of the initial carrier in any event to route shipments under such joint rates.

The supposed right of the shippers to route is neither recognized nor protected by the Interstate Commerce Law and therefore the assertion of such right to route in the initial carrier contrary to the wishes of shippers is not "something done or omitted to be done in violation of the provisions" of that law or any other law cognizable by the Commission. *Wannan* v. *Scottish Central R. Co.*, 1 Nev. & MacN. 237; *Bennett* v. *Manchester, &c. Ry. Co.*, 6 C. B. (N. S.) 707.

The shipper is at liberty to ship under the joint tariffs and the rates therein prescribed, or not, as he may please,—it is always optional with him to do so. It is simply insisted that where he does make a through shipment under a joint rate, which is lower than the sum of the locals, he ship and accept such lower rate upon the condition on which it is made by the agreement of the carriers and thus offered him.

If he does not like this condition he is not obliged to accept the same, but may ship at the sum of the locals, and the routes or lines are just as continuous for shipment or carriage in the one case as in the other.

The joint rate is the through rate where the initial carrier routes, and the sum of the locals is also a through rate where

the shipper routes. A through rate may be the one thing or the other—a joint rate fixed by agreement of connecting carriers, or the sum of the locals. Opinion of Lord Esher, in *Didcot &c. Ry. Co.* v. *Great Western &c. Ry. Co.*, 10 Ry. & Canal Traffic Cas. 5.

The power of the Commission in respect to such joint tariffs is very clearly defined in the statute. It has no power to prescribe what shall or shall not be contained in the joint agreements, nor what the provisions thereof shall be. *Interstate Com. Com.* v. *Railway Company*, 167 U. S. 504, 505.

There is a marked difference between this law which intentionally omitted giving the Commission power to make provisions concerning joint tariff rates, and the Minnesota statute which invested the Railroad Commission of that State with specific power over such tariffs, and which was considered by this court in *Minneapolis &c. Ry.* v. *Minnesota*, 186 U. S. 257.

With the exception of requiring joint agreements to be filed and published, the law leaves the carriers as free as they were at common law to determine the terms and conditions of such joint contracts. This view was taken by Mr. Justice Jackson in *Kentucky Bridge Co.* v. *L. & N. Ry. Co.*, 37 Fed. Rep. 629.

There ought to be a clear authority found in the statute for depriving the carrier of this important right before the authority is exercised, for when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated. *Little Rock &c. R. R. Co.* v. *St. Louis &c. Ry. Co.*, 63 Fed. Rep. 780; *Interstate Com. Com.* v. *B. & O. R. R. Co.*, 43 Fed. Rep. 37 (Mr. Justice Jackson), approved in *Cincinnati &c. Ry. Co.* v. *Interstate Com. Com.*, 162 U. S. 197. See also *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 74 Fed. Rep. 723; *Int. Com. Com.* v. *Western & A. R. Co.*, 93 Fed. Rep. 91; *Int. Com. Com.* v. *Western & A. R. Co.*, 88 Fed. Rep. 196; *Nicholson* v. *Great Western Ry. Co.*, 7 C. B. (N. S.) 755.

At common law the appellants could route through freight

beyond their own terminals and they have not been deprived of such right by the Interstate Commerce Act.

The principle is that a carrier when it agrees to transport freight beyond its own lines does so not as a common carrier, but under an independent contract governed by the same rules that any contract is controlled by. Under the common law, therefore, it is clearly open to a carrier, which has contracted to carry beyond its own lines, to select the agency through which to perform the contract made by it with the shipper. *Atchison, Topeka & Santa Fe R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667; *Louisville &c. R. R. Co.* v. *West Coast Stores Co.*, 198 U. S. 483; *Snow* v. *I. B. & W. R. Co.*, 109 Indiana, 422, 425; *C. I. & L. R. Co.* v. *Woodward*, 72 N. E. Rep. 558 (Supreme Court of Indiana, 1904); *White* v. *Ashton*, 51 N. Y. 280, 284; *Hinckley* v. *N. Y. C. & H. R. Co.*, 56 N. Y. 429; *Indiana R. R.* v. *Remy*, 13 Indiana, 518; *Patten* v. *U. P. R. R.*, 29 Fed. Rep. 591; *Post* v. *Southern Ry. Co.*, 103 Tennessee, 220; *Lowe* v. *Seaboard Air Line Ry. Co.* (S. C.), 41 S. E. Rep. 297.

Neither the Commission nor the court could make a different agreement or contract for these carriers than the one made by such carriers and the attempt of the Commission to keep in force the joint rate and strike out the condition or consideration therefor would be equivalent to making a new agreement for the parties which they did not desire to make. *Little Rock &c. R. R.* v. *St. Louis &c. R. R.*, 63 Fed. Rep. 779, 780; *Southern Pacific Co.* v. *C. F. & I. Co.*, 101 Fed. Rep. 779, 786; *Little Rock &c. R. R.* v. *St. Louis &c. R. R.*, 41 Fed. Rep. 559; *Pullman Car Co.* v. *Mo. Pac. Ry.*, 115 U. S. 587; *A., T. & S. F. Ry.* v. *D. & N. O. R. R.*, 110 U. S. 682, 683; *Express Cases*, 117 U. S. 1, 29.

Any interference with the supposed right of a shipper to divert his shipment while in transit would not be in violation of the Interstate Commerce Law. Diversion of this traffic, as practiced by the shippers is merely a privilege or concession granted by the carriers, but to which the shipper is not en-

titled as a matter of right. *Ellis* v. *Willard*, 9 N. Y. 529; *Violett* v. *Stettinius*, 5 Cranch. (C. C.) 559; *S. C.*, 28 Fed. Cas. No. 16,953; *Braithwaite* v. *Power*, 48 N. W. Rep. 354; Hutchinson on Carriers, 2d ed., § 444*a*.

Section 5 of the Interstate Commerce Act does not prohibit a mere division of traffic between connecting lines, even if competitive. It only concerns agreements for a division of receipts or earnings which are to be combined or pooled and afterwards distributed upon an agreed proportion or ratio. Sec. 5 Interstate Commerce Law; *United States* v. *Trans-Missouri Freight Association*, 58 Fed. Rep. 65.

To justify a finding of undue preference either as between shippers or traffic it must be shown that they come in competition with each other so that injury results to the one by reason of the preference given the other. *Int. Com. Com.* v. *B. & O. R. R.*, 43 Fed. Rep. 37; *United States* v. *C. & N. W. Ry.*, 127 Fed. Rep. 785; *Hozier* v. *Caledonian Ry.*, 1 Nev. & MacN. 27; *Int. Com. Com.* v. *B. & O. R. R.*, 145 U. S. 282, 283, 284; *Nicholson* v. *Great Western Ry.*, 1 Nev. & MacN. 150; *Lees et al.* v. *Lancashire &c. R. R.*, 1 Nev. & MacN. 352, 366; *Nicholson et al.* v. *Great Western Ry.*, 1 Nev. & MacN. 121; 1 Railway and Canal Traffic, Boyle & Waghorn, 158, 159; *Phipps et al.* v. *London & N. W. R. R.*, Law. Rep., Q. B. Div., 1893, vol. 2, p. 236.

The order of the Commission is too broad to be supported upon the ground that an undue preference might be made by the carrier or upon the ground that the routing provision was adopted to effectuate a division of traffic between connecting carriers. The order is not responsive to or confined to any findings in the case upon the points stated in the report of the Commission and is therefore unlawful. *D. G. H. & M. R. R.* v. *Int. Com. Com.*, 74 Fed. Rep. 803, 840, 841; *East Tenn. R. R.* v. *Int. Com. Com.*, 181 U. S. 1, 23, 26. It is unlawful because legislative in its nature. It is not confined in favor of the complainants nor to the case before the Commission but it is intended generally to control the conduct

of the carriers in all future cases and controversies and is such an order as the Commission has no authority to make. *Int. Com. Com.* v. *C., N. O. &c. R. R.*, 76 Fed. Rep. 184; *Farmers' L. & T. Co.* v. *Nor. Pac. R. R.*, 83 Fed. Rep. 268; *Int. Com. Com.* v. *Railway Co.*, 167 U. S. 501; *Int. Com. Com.* v. *Alabama &c. R. R.*, 168 U. S. 161, 162; *Texas & Pac. R. R.* v. *Int. Com. Com.*, 162 U. S. 216.

The order was invalid because the connecting carriers were not made parties to the proceedings before the Commission and the Commission had no power to adjudicate the provision in the joint tariff agreement to be invalid without having before it the connecting carriers who were parties to that agreement and giving them an opportunity to be heard thereon. A court of equity could not entertain jurisdiction in such a contingency, neither could the Commission make an adjudication or order declaring invalid the joint tariff agreement and thus affecting rights of parties who were not before the Commission. *California* v. *So. Pac. Co.*, 157 U. S. 229, 249, 251; *United States* v. *Nor. Pac. R. R. Co.*, 134 Fed. Rep. 715 (C. C. A., 8th Circuit); *Minnesota* v. *Nor. Sec. Co.*, 184 U. S. 199; *Cons. Water Co.* v. *City of San Diego*, 93 Fed. Rep. 849, 852; *Western N. Y. R. R.* v. *Penn. Refg. Co.*, 137 Fed. Rep. 358.

Mr. Joseph H. Call, Special Assistant to the Attorney General, and *Mr. Llewellyn A. Shaver*, Solicitor for the Interstate Commerce Commission, for the Commission:

This case is not within the rule of the common law.

The defendants base their alleged right to make this rule upon the right of routing as they claim it exists at common law, and contend that at common law the right was absolutely in the carrier to select his own route, his own instrument, his own agent, in shipping beyond his own line.

This is not true absolutely. It is only true where the initial carrier assumes the common law liability of a common carrier beyond its own line and on the lines of its connections. At

common law a common carrier is in the nature of an insurer against damage or loss of goods during the carriage on its own line from any cause except the act of God or the public enemy. 2 Redfield, Law of Railways, 6; Chitty on Contracts, 6th Am. ed., 181. And the common law rule giving the initial carrier the right to route the traffic beyond its own line only applies where the initial carrier practically extends its own line and becomes a common carrier with common law liability over the entire route. The cases cited by counsel for defendants are of that character. See *Atchison &c. R. R. Co.* v. *Denver & N. O. R. R. Co.*, 110 U. S. 667, 680.

A further distinction between the case at bar and the cases cited in behalf of the defendants is the fact that the case at bar is controlled by the provisions of the act to regulate commerce.

In the opinion in *Atchison, Topeka & Santa Fe R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667, this court recognizes that even where a carrier has contracted to carry beyond his own line, and therefore has the right at common law to select the route, this right only exists in the "absence of statutory regulations to the contrary"—the language of this court being that "if he (the carrier) contracts to go beyond his own line, he may in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ."

The routing rule of defendants is inconsistent with and contrary to the spirit, if not the letter, of section 6 of the Commerce Act.

The routing rule gives an undue preference and subjects to an undue prejudice in violation of section 3 of the act to regulate commerce.

Preferences or prejudices may be in respect to rates or routing or facilities or any other matter as to which a preference can be given or a prejudice inflicted, and therefore the statute, in order to cover every form of preference or prejudice, uses the all-embracing words "in any respect whatsoever."

The connections of the defendants and the lines established by them beyond their own lines differ as to desirability. Some of these connections are better built, better managed and operated, and more reliable financially than others, and some of the lines are shorter and freer from risk than others and more desirable in other particulars. Hence, while the rate by all is the same, there is a choice between them, and the shippers of all traffic except citrus fruit are allowed to avail themselves of this choice. The citrus fruit traffic is the only kind of freight as to which the defendants deny to shippers the right of choice of route. This clearly gives to other traffic and the shippers thereof an undue preference, and subjects citrus fruit to an undue prejudice.

The defendants concede to shippers of citrus fruit the right to ship over the route of their choice, but if it happens not to be the route of the defendants' choice they require the shippers to pay for the right; in other words, to pay a rate which is the sum of the locals of the several carriers composing the through line, this sum of the locals being much higher than the regularly established and published rate filed with the Interstate Commerce Commission.

Under this regulation the shipper of citrus fruit who chooses a route other than that selected by the initial carrier pays a higher rate than the shipper of the same kind and quantity of citrus fruit between the same termini for whom the carrier has selected the route in question. In both cases the carrier's risk and service are precisely the same and the traffic of both shippers may be on the same train, but a higher rate is exacted from the one than from the other.

This results in violation of §§ 1, 2, 5 and 6 of the Interstate Commerce Act and also §§ 1 and 7 of the anti-trust act. *Wight* v. *United States*, 167 U. S. 512; *King* v. *Railroad Company*, 4 I. C. C. R. 262; *Augusta Southern R. R. Co.* v. *Wrightsville & Tennville R. R. Co.*, 74 Fed. Rep. 527; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 262; *Chicago &c. R. R. Co.* v. *Tompkins*, 176 U. S. 167; *United States* v. *Trans-*

Missouri Freight Assn., 166 U. S. 290; *Swift & Co.* v. *United States*, 196 U. S. 375.

The routing rule is essential to and adopted and used for the purpose of carrying out a pooling or division of traffic arrangement between the defendants; it is therefore unlawful under section 5 of the act to regulate commerce.

It is no excuse for one violation of law that it incidentally puts a stop to another.

Without the power of routing the traffic could not be pooled. If shippers route the traffic it will necessarily render pooling by the carriers impracticable. *Port* v. *Southern Railroad Co.*, 103 Tennessee, 220, distinguished.

Objection to want of other parties was waived by failure to plead their names and show necessity of joining. *Carey* v. *Brown*, 92 U. S. 171, 173; *Florence Machine Co.* v. *Singer*, 8 Blatch. 113; *S. C.*, Fed. Cases No. 4,881; *Sheffield* v. *Newman*, 77 Fed. Rep. 787, 791 (C. C. A.); Equity Rules, 52, 53.

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

Although there are separate proceedings in these various cases, the question arising in all is identical and the cases will hereafter be spoken of as if there were but one proceeding before the court. The single question presented is, has the carrier that takes the fruit from the shipper in California the right, under the facts herein, to insist upon the rule permitting such carrier to route the freight at the time it is received from the shipper?

The Commission has decided that the carrier has not the right, and that the rule denies to shippers the use of their transportation facilities, which such shippers are entitled to, and that in its application, by the initial carriers to the fruit traffic, the shippers are subjected to undue, unjust and unreasonable prejudice and disadvantage, and the carriers are given an undue and unreasonable preference and advantage.

If this be the necessary effect of the rule, it may be assumed to be a violation of section 3 of the Interstate Commerce Act, and the Commission, therefore, rightly ordered the carriers to desist from observing it.

By section 16 of the act, the Circuit Court is given authority to enforce "any lawful order or requirement of the Commission." If the order be not a lawful one, the court is without power to enforce it. Whether or not such order was lawful is the matter to be determined.

The Commission does not find that any contract existed between the initial carrier and its eastern connections to bill the fruit according to certain proportions among the connecting railroads. The Commission said:

"The situation warrants the inference, however, that these two initial carriers or systems, connecting with other carriers at various points, and they in turn connecting with numerous other carriers, as shown by the tariff, are able by acting in concert, and routing as they see fit, to only send traffic over the roads of such carriers as fulfilled an agreement to refrain from making any rate concession to the shippers, and some influence of like character could doubtless be exerted by them upon the car lines which are also hereinafter referred to."

Such statement simply shows that if any eastern railroad, with which an agreement for joint through rates existed, should give rebates on the joint through rate tariff, thus carrying freight below the rates agreed upon as the through rate tariff, that road would not get the freight.

We see nothing in the initial carrier endeavoring to maintain the rates agreed upon as a through rate tariff, and thereby preventing the payment of rebates, which in itself is a violation of the act. The act especially prohibits, in the sixth section, any alteration of the rates agreed upon, in favor of any person or persons. There is no finding that there has in fact, as a result of the rule, been any discrimination or unjust action as between the initial carriers and the shippers themselves, and there is no evidence that any was ever practiced.

In the examination of the rule it is well to bear in mind the situation of the companies and the business at the time of its adoption. It is fully set forth in the foregoing statement of facts. The payment of the rebates was a shame and was in truth unsatisfactory to all the railroads, besides being plainly a violation of the Commerce Act.

We think there is nothing in the act which clearly prohibits the roads from adopting the rule in question. The decision turns upon the construction of a statute which at least does not in terms prohibit.

In cases such as this a court is bound to consider the bearing of the result of either construction upon the general purposes of the act. In enacting the Commerce Act this court has stated that the object of Congress was to facilitate and promote commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197.

The importance of the rule in this case, so far as the shipper is concerned, is not so great as is its importance to the railroads in preventing rebates. If the right of routing be looked at alone, without any connection with the claimed right of diverting the freight, the rule itself would be generally of little importance to the shipper. In all probability the freight gets to its destination when routed by the carrier as early as if routed by the shipper, and in that event the particular route taken is not very important to the latter. The evidence before the Circuit Court shows that the routing, when done by the carrier, was fairly apportioned among the eastern connections, having an eye to good service and expedition, and the roads that the routing was done over were the best roads in the country; the roads that have been eliminated were the roundabout roads; there were no roads that were insolvent, so far as known by the witnesses. Now, as the fact appears that the actual routing is generally conceded the shipper, and also his request for a diversion allowed, there is nothing in the mere

right of routing by the companies, separate from other facts, of which the shipper can properly complain. The Commission says it does not distinctly appear in testimony that a delivery by a particular terminal road has been denied in any particular case, yet the manifest evil results of an arbitrary application of the rule must be considered in determining its legality. If there is no such arbitrary application, we do not agree that the rule itself is to be held illegal, because a violation of the act may be committed, while the evidence is that none in fact was committed. It does appear that the mere existence of the right to route on the part of the company has ended the practice of rebating. But the opportunity to obtain rebates on the part of the shipper is surely not a ground for action by the Commission or by the court. Of course, if in attempting to cut off rebates there is a violation of the act, the act must be followed, and that means of prohibiting them must be abandoned. Courts may well look with some degree of care before so construing a statute, which confessedly does not in terms so provide, as to prohibit such a rule on the ground that it would be a violation of the statute. We are of opinion that the rule is not a violation thereof.

It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The Commerce Act recognizes such right and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads.

It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier and thus end its responsibility,

and charge its local rate for the transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses. *Atchison &c. R. R. Co.* v. *Denver &c. R. R. Co.*, 110 U. S. 667; *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores &c. Co.*, 198 U. S. 483. This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon, at least so long as they are reasonable and do not otherwise violate the law. In this case the initial carrier guarantees the through rate, but only on condition that it has the routing. It was stated by the late Mr. Justice Jackson of this court, when Circuit Judge, in the case of *Texas &c. R. R. Co.* v. *Interstate Commerce Commission*, 43 Fed. Rep. 37, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

This statement was approved by this court in *Cincinnati &c. R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 197.

Having this right to agree on a joint through tariff on terms mutually satisfactory, we cannot find anything in the Commerce Act which forbids the agreement with such a condition therein as to routing. It is said that the sixth section, properly construed, prohibits such condition. We confess our inability to find anything in that section which does so.

The fact that the rate, when agreed upon, must be filed with the Commission and made public by the common carriers when directed by the Commission, does not prevent the adoption of an agreement for a through rate tariff with the condition as stated. Nor does the provision granting power to the Commission to prescribe forms of schedules of rates, as provided for in the sixth section, have any such effect. Where there is an agreed through rate tariff, and as part of such agreement, which is joined in by several railroads, the right to route cars is reserved to the initial carrier, we do not think that the shipper, by virtue of the sixth section, has the right to ignore the condition which is part of the agreement under which the through rate is made and is guaranteed.

We cannot see that the rule violates the third section of the act. All the facts referred to by the Commission are nothing but statements as to how, under such a rule, there might occur a violation of that section, but we find nothing in the facts stated by the Commission, showing that such violation had occurred. In truth, the companies did not always even enforce the rule, still less did they discriminate against shippers or in favor of carriers. On the contrary, the Commission stated that "while the initial carriers do not always route as requested by the shippers, they generally comply with their request." The mere failure to do so does not, however, prove a violation of the section.

The right to route is also complained of because the rule confined it to the fruit business, and therefore it was, as contended, a discrimination against those engaged in it or against the traffic itself. The transportation of this fruit is a special business, large interests are involved in it, and particular pains are taken to transport it as speedily as possible. With regard to all other freight it has substantially nothing in common. The cases are wholly unlike, and there has been no proof or complaint as to rebates being given in connection with other freight, and the witnesses for the railroad state if there were any evidence or complaint of such rebates, the same rule as to

routing would be immediately adopted. As has been said, there is no pretense of discrimination under this rule between the shippers of freight themselves. There seems to be unanimous agreement that all shippers are treated alike and are granted the same privileges, and the routing is generally accorded them. It is the power to route, which rests with the initial carrier, that really takes away the motive for a rebate in the manner indicated, and, therefore, the granting of the request of the shipper as to a particular route may be, and is, generally conceded without danger that the rebate business may be again practiced.

The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract the carrier may make such terms as it pleases, at least so long as they are reasonable and do not otherwise violate the law. We think the routing rule is not unreasonable under the facts herein and that it does not violate the third section of the act.

Because opportunities for the violation of the act may occur, by reason of the rule, is no ground for holding as a matter of law that violations must occur, and that the rule itself is therefore illegal. We are, consequently, unable to concur in the view taken by the Commission that the rule violates the third section of the act.

Upon the proceeding before the Circuit Court, that court did not pass upon the question decided by the Commission, but held that the routing rule agreed to between the initial carrier and the various eastern companies, and forming a part of the subsequent joint through tariffs which were filed with the Commission, was in itself a contract or combination for the pooling of freights.

The defendants object that the Circuit Court had no authority to decree the enforcement of the order upon any other ground than that taken by the Commission itself. We think that the court was not confined to those grounds, and if it

found the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held that the rule to be a violation of one section, the order to desist might be valid, if, instead of the section named by the Commission, the court should find that the rule was a violation of another section of the act. All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the Circuit Court.

That court found that the rule was adopted to uphold their published rates, or in other words to maintain the rates on the joint through tariff. Although, under the previous through rate tariff, these rates had been secretly cut by the eastern connections of the initial carriers, yet when the routing rule was agreed to as part of the through rate tariff these rebates ceased. Hence, as the court said, the purpose of the rule was undoubtedly to maintain the through rate tariff, and that it was effectual. But the court held, as a result, that this routing provision, being part of the through rate tariff, agreed to by the various eastern roads, made a contract among those roads for the pooling of freights on competing railroads within the meaning of section 5 of the Commerce Act. It held that it was not necessary in order to form a pool, in violation of that section, that the contract or agreement should fix the percentages of freight the several railroads were to receive, or that the railroads should know in advance what the percentages should be; that it was sufficient to constitute a pool if the contract or agreement provided for special means or agencies for apportioning freights, which would destroy the rivalry which would otherwise exist between the competing railroads; and an agreement by which the apportionment was left to the will of the initial carrier accomplished that purpose as effectually as though definite percentages were fixed in the contract; that defendants' plan to maintain through rates

through the operation of the routing rule necessarily destroyed competition, and the adoption of the routing rule put the shippers in a position where their patronage could not possibly be competed for by the defendants' eastern connections.

Thus the mere fact that the initial carrier was granted by this through tariff agreement the right to route the freight was held to result in the formation of a pool, in violation of the fifth section of the act. There was no other agreement proved in the case. It is stated by the Commission that the shipments are forwarded by the initial carrier so as to give certain percentages of the traffic to connecting lines. At the same time the Commission finds that initial carriers generally comply with the requests of the shippers to route the freight as desired. The substance of the report of the Commission is, therefore, that there is a certain percentage of the traffic given the connecting carriers when there is no request for routing given by the shippers. It amounts to the giving of fair treatment to the connecting carriers. It is true the Commission calls this a tonnage pool between the connecting carriers, to which the initial carriers give effect by their routing arrangement, and that its object was not so much to prevent rebates, which was but an incident, as to effect the tonnage division. We are of opinion, however, that the evidence is substantially one way, and that is that the arrangement for routing was to break up rebating, and that it has been accomplished. The evidence before the Circuit Court was to the effect that there was no agreement whatever with the eastern connections that any of them should have any particular proportion of the freight, but the eastern roads entered into the routing agreement because they were satisfied that it would be better than the then present practice of rebating, and they thought that they would get a fair share of the business, or, in other words, would be fairly treated by the initial carriers, who gave them to understand that they would be so treated. The tonnage pool was, as the witnesses said, a myth, and it was testified to that there was not one of the eastern

companies that knew what percentage of the whole business that company secured. They simply knew that the through rates were maintained under the operation of the routing agreement and that rebating ceased, and they were satisfied with the manner of their treatment by the initial carrier.

The Circuit Court, in order to arrive at its result, necessarily treated the connecting carriers as rival and competing transportation lines for this freight, and assumed that between these lines there would exist, but for the routing agreement, a competition for the fruit transportation which could not be extinguished by any agreement as to routing, as a condition for making through tariff rates; that as competition was destroyed by this rule, it was idle to say that such result was not intended by the defendant, and so it was held that the carrying out of the routing agreement violated the act.

We think these various roads were really not competing roads within the meaning of the fifth section of the Commerce Act, when the facts are carefully examined. That act recognizes the right of the carriers to agree upon and provides for the publication of joint through tariff rates between continuous roads, on such terms as the roads may choose to make, provided, of course, the rates are reasonable and no discrimination, or other violation of the act is practiced. The initial carrier did not, on its line, reach the eastern markets, but it reached various connecting railroads which did reach those markets. The initial carrier had the right to enter into an agreement for joint through rates, with all or any one of these connecting companies, though such companies were competing ones among themselves. And the agreements could be made upon such terms as the various companies might think expedient, provided they were not in violation of any other provision of the act.

Prior to the adoption of the routing rule these connecting railroads were already acting under a through rate tariff which continued up to the time when the agreement for the routing was adopted. When so acting it was no longer possible to

compete with each other as to rates (and it is upon the rebates as to rates that this whole controversy is founded), provided the companies fulfilled their joint rate tariff agreements. The only way the rate competition could exist under the through rate tariff was by violating the law. This, unfortunately, was habitually done, and during that time the competition consisted in a rivalry between these roads, as to which would be the greatest violator of the law by giving the greatest rebates.

In truth, the only way in which these connecting lines could legally become competing railroads for this California fruit trade would be in the absence of all joint tariff rate agreements. The moment they made such agreements, and carried them out, rate competition would cease.

All that would be needed for the total suppression of rate competition among the connecting railroads would be the honest fulfillment of their agreement as to joint through rates. And just here is where they failed and where they violated their agreement and the law by granting rebates, or, in other words, by competing, as to rates, for the freight in violation of the joint rates. In such case we do not see any violation of the pooling section of the act, by putting in the agreement for joint through rates the provision for routing by the initial carrier. It achieved its purpose and stopped rebating, although it thereby also stopped rate competition which, in the presence of the through rate tariff, was already illegal. The railroads are no longer rate competing roads after the adoption of a through rate tariff by them, and they have no right to privately reduce their rates.

Now, while the most important, if not the only, effect of the routing agreement is to take away this rebating practice, and to hold all parties to that agreement as part of the joint through rate tariff, we think no case is made out of a violation of the pooling provision in the fifth section of the act, even where the initial carrier promises fair treatment to the connecting roads, and carries out such promises.

We must remember the general purpose of the act which is,

as has been said, to obtain fair treatment for the public from the roads, and reasonable charges for the transportation of freight and the honest performance of duty, with no improper or unjust preference or discrimination. Under such circumstances, the court ought not to adopt such a strict and unnecessary construction of the act as thereby to prevent an honest and otherwise perfectly legal attempt to maintain joint through rates, by destroying one of the worst abuses known in the transportation business. The effort to maintain the published through joint tariff rates is entirely commendable.

We think that the agreement in question, upon its face, does not violate any provision of the Commerce Act, and there is no evidence in the case which shows that in fact there has been any such violation.

The decree of the Circuit Court is reversed and the case remanded with instructions to dismiss the bill.

Reversed, etc.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY *v.* PEOPLE OF THE STATE OF ILLINOIS *ex rel.* DRAINAGE COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 157. Argued December 14, 1905.—Decided March 5, 1906.

The failure of the state court to pass on the Federal right or immunity specially set up of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.

Under the laws of Illinois the draining of bodies of land so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the State may by appropriate agencies exert the general

powers it possesses for the common good, and § 40½ of the Farm Drainage Act of that State was a proper exercise of the police power of the State. The rights of a railroad company to a bridge over a natural watercourse crossing its right of way, acquired under its general corporate power are not superior and paramount to the right of the public to use that watercourse for the purpose of draining lands in its vicinity in accordance with plans adopted by a drainage commission lawfully constituted under the Farm Drainage Act.

Although the opening under a bridge constructed by a railroad company may be sufficient at the time to pass all water flowing through the watercourse, there is an implied duty on the part of the company to maintain an opening adequate and effectual for such an increase in the volume of water as may result from lawful and reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the watercourse.

Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not taking property without due compensation, and the constitutional prohibition against the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.

In this case the proper drainage of the land in the district being impossible without the removal of a railway bridge over the natural watercourse into which the lands drained and the construction of a bridge with a larger opening for the increased volume of water, *held*, that:

It is the duty of the railway company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with regulations established by the Drainage Commissioners, under the authority of the State; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws.

THIS is a contest between certain Drainage Commissioners in Illinois and the Chicago, Burlington and Quincy Railway Company, as to the validity of a demand made by the former that the latter should remove the bridge and culvert now maintained by it over Rob Roy Creek, in Kendall County, Illinois, and, if it continues to maintain a bridge and culvert at the same point, that one be substituted that will meet the requirements of a certain plan of drainage adopted by

those Commissioners. Let us see in what way the dispute arises.

This suit or proceeding is based in part on what is known as the Farm Drainage Act of Illinois, in force July 1, 1885, entitled "An act to provide for drainage for agricultural and sanitary purposes, etc." Hurd's Ill. Stat. 1901, p. 712. By that act the Commissioners of Highways in each town, in the several counties under township organization, are constituted Drainage Commissioners for all drainage districts in their respective towns, with power as a body politic to sue and be sued, contract and be contracted with. Section 1. Owners of lands are authorized to "drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural watercourse, or into any natural depression, whereby the water will be carried into some natural watercourse, or into some drain on the public highway with the consent of the Commissioners thereto; and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation." Section 4.

The act also provided: "When the case involves a system of combined drainage in one town, and it is proposed that the cost shall be borne proportionately by the several parties benefited, a petition addressed to the Drainage Commissioners shall be presented to the town clerk, signed by a majority in number of the adult owners of land lying in a proposed district, and they shall be the owners in the aggregate of more than one-third of the lands lying in the proposed district, or by the owners of the major part of the land and who constitute one-third or more of the owners of the land in the proposed district setting forth the boundaries, or a description of the several tracts of land thereof or fractions as usually designated: . . . Said petition shall state that the lands lying within the boundaries of said proposed district require a combined system of drainage or protection from wash or overflow; that the petitioners desire that a drainage district may be

organized, embracing the lands therein mentioned, for the purpose of constructing, repairing or maintaining a drain or drains, ditch or ditches, embankment or embankments, grade or grades, or all or either, within said district, for agricultural and sanitary purposes, by special assessments upon the property benefited thereby." Section 11. Again: "Upon the organization of a drainage district, the Commissioners shall go upon the land and determine upon a system of drainage, which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies, as well as the present. . . . The maps and papers showing the final determination, as to the system of drainage, shall be filed in the clerk's office and be recorded in the drainage record." Section 17. Hurd's Rev. Stat. Ill. 1901, 713, 714, 717.

Section 40½ has, however, a more special application to the present case. It is in these words: "The Commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, *or by the railroad company,* as the case may be: *Provided, however,* notice shall first be given to the road or railroad authorities to build or construct such bridge or culvert, and they shall have thirty days in which to build or construct the same, such bridges or culverts shall, in all cases, be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the Commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace or any court having jurisdiction, and reasonable attorney's fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual land owners." Section 40½. Hurd's Rev. Stat. Ill. 1901, 723.

It is contended by the appellees that section 56 of what is known as the Levee Act has a bearing on the case. That section need not, however, be set out, as the Supreme Court of the State adjudged in this case that a District organized under the Farm Drainage Act was subject only to the provisions of that act, and that the Drainage Commissioners could not claim any authority under the other act. *Chicago, B. & Q. Ry. Co.* v. *People of Illinois ex rel &c.*, 212 Illinois, 103. See also *Gauen* v. *Drainage District*, 131 Illinois, 446; *Drainage Commissioners* v. *Volke*, 163 Illinois, 243; *McCaleb* v. *Coon Run Drainage District*, 190 Illinois, 549.

The present proceeding was instituted in the Circuit Court of Kendall County, Illinois, by the appellees as Drainage Commissioners for the Bristol Drainage District in that county, against the Chicago, Burlington and Quincy Railway Company. It is a petition for mandamus.

Besides a general demurrer, the railway company demurred specially upon the ground that a judgment in favor of the Commissioners would take its property for public use without compensation, and therefore without due process of law, as well as deny to it the equal protection of the laws, in violation of the Constitution of the United States. The demurrer was overruled. The defendant having elected to stand by its demurrer, judgment was rendered ordering a writ of mandamus as prayed for in the petition. That judgment was affirmed by the Supreme Court of Illinois, 212 Illinois, 103, and hence the present writ of error.

As the case was determined upon the demurrer, the facts are to be taken as alleged in the petition. The case, thus presented, is as follows:

The Drainage District in question was organized under the Farm Drainage Act above referred to, and contains about 2,000 acres of land on both sides of Rob Roy Creek, across which are the road and right of way of the railway company. For more than fifty years before the District was established, that creek had been, as it now is, a natural watercourse. Prior

to June 24, 1903, the Commissioners located a ditch or drain on the line of the creek for the purpose of enlarging its channel or watercourse, and thereby enabling the lands in the Drainage District to be better drained and made more tillable.

The railway company operated and maintained its road across Rob Roy Creek, not under any specific grant of authority, but under its general corporate power to construct, operate and maintain a railroad. It placed a bridge or culvert twelve by thirty feet at the point where the road crosses the creek. In constructing a foundation for the bridge or culvert the company sank or placed in the creek at the point of crossing huge wooden timbers and stones, thereby preventing the deepening and enlarging of the creek by the Commissioners, unless they removed such timbers and stones; and if that be done the result will be the destruction of the bridge or culvert. The present channel or waterway of the creek, under the bridge or culvert, is three feet in depth and twelve feet in width. It is insufficient to allow the natural flow of water in the ditch or drain proposed to be constructed by the Commissioners. The estimated cost of this ditch or open drain is twenty thousand dollars. The present bridge across the creek does not exceed eight thousand dollars in value, and a new bridge conforming to the plan of the Commissioners, will cost not exceeding thirteen thousand dollars.

On the twenty-fourth of June, 1903, the Drainage Commissioners notified the railway company in writing that a bridge was necessary at the point where the company's right of way would be crossed or intersected by the proposed ditch; that it was necessary to enlarge the opening under the present bridge; that the proposed improvement was to be the waterway of a combined system of drainage established in the vicinity under the charge and direction of the Drainage Commissioners of the District; that the main ditch of the drainage where it will intersect the company's right of way must be of the width of twenty-three feet and of the depth of nine and one-half feet, the bridge constructed to be of the width of twenty-three feet

in the clear at the surface or level of land, and to permit at least sixteen feet in the clear at the bottom of the ditch. The notice stated that the company was required, in pursuance of the statute in such case made and provided, to build and construct such bridge within thirty days from the date of the notice, in default whereof the Commissioners would construct the same at the cost and expense of the company.

The company disregarded the notice and failed to build and construct the required bridge or culvert at the point of intersection with the creek, in accordance with the dimensions specified in the notice, and so as to permit such enlargement of the channel under the bridge as would be sufficient for the natural flow of water in the proposed ditch or drain.

The petition averred that a majority of the lands of the Drainage District were swamp or slough lands, and in their present condition were not subject to cultivation, but by means of the proposed deepening and enlarging of Rob Roy Creek, and as a result of the removal of the timbers and stones in the creek and the enlargement and deepening of the creek, all the lands in the Drainage District would be "greatly improved, and made good, tillable land, subject to cultivation;" that the proposed location of the ditch or drain along the creek was the best route or means for drainage of the District, constituting the only natural watercourse of the Drainage District and affording the only natural outlet or way of drainage of the lands to make them tillable; that if said improvement and enlargement of the ditch was made and the timbers and stones removed from the creek, at the point of crossing, all of the lands of the district would be made good, tillable lands for general farming purposes; and that the proposed construction of a ditch or drain along Rob Roy Creek, when completed in accordance with said plans, would "not divert or carry waters which by nature of force of gravity would flow or drain into any other natural watercourse in said Drainage District or the vicinity thereof."

The Commissioners allege in their petition that the neglect,

failure and refusal of the railway company to remove the timbers and stones it had placed in the creek, and to construct and enlarge the opening under its bridge or culvert, had prevented them from completing the construction of the ditch or drain in accordance with the plans adopted by them; that it was necessary for the use and protection of the proposed drainage work that the opening underneath the bridge or culvert be constructed and enlarged in the manner indicated in order that the lands in the District might be drained in accordance with said plans; which plans "are reasonable for the suitable and proper drainage of said District."

The relief asked was a writ of mandamus commanding the railway company to forthwith enlarge, deepen and widen the waterway over and across the company's right of way across Rob Roy Creek.

Mr. Albert J. Hopkins, with whom *Mr. Robert Bruce Scott* and *Mr. Chester M. Davis* were on the brief, for plaintiff in error:

Federal questions were raised in the trial court and in the Supreme Court of Illinois which were decided adversely to plaintiff in error, and this court therefore has jurisdiction of the case, and the motion to dismiss the writ of error should be overruled.

A writ of error lies to this court where the state court orders a writ of mandamus and a Federal question is involved. *Hartman* v. *Greenhow,* 102 U. S. 672; *McPherson* v. *Blacker,* 146 U. S. 1; *M. & St. L. R. R. Co.* v. *Minnesota,* 193 U. S. 53.

Even though the state court did not, in its opinion, expressly refer to the Federal Constitution, if the judgment of affirmance necessarily denied Federal rights specially set up by defendant, a writ of error will lie to this court. *Roby* v. *Colehour,* 146 U. S. 153; *Green B. & M. Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58.

This court has jurisdiction in error over a judgment of the

Supreme Court of a State when it necessarily involves the decision of the question raised in that appellate court for the first time, and not noticed in its opinion, whether a statute of the State conflicts with the Constitution of the United States. *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579; *McCullough* v. *Virginia*, 172 U. S. 102, 116; *Chapman* v. *Goodnow's Admr.*, 123 U. S. 540, 548; *Green B. & M. C. Co.* v. *Patten Paper Co.*, 172 U. S. 58, 68.

Even where this court is left in doubt by the briefs whether the statute, as construed by the state Supreme Court, was objected to or only its application under the facts of the case, still if the statute was directly attacked in the answer a motion to dismiss the writ of error for want of jurisdiction will be denied, and the court will consider whether the grounds of objection to the statute are substantial and sufficient. *M. & St. L. R. R. Co.* v. *Minnesota*, 193 U. S. 53, 61; *Detroit &c. Ry.* v. *Osborn*, 189 U. S. 383.

A Federal question is involved if the effect of the state decision is to construe an act alleged to violate the Federal Constitution, although the state court does not mention the statute. *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66.

Defendants in error base their motion to dismiss upon the ground that the Supreme Court of Illinois decided the case upon a non-Federal question. It seems to be conceded, as it must be, that plaintiff in error, both in the trial court and in the state Supreme Court, specially presented a Federal question, but the argument is that the state Supreme Court did not decide this question, but disposed of the case upon an independent ground.

The drainage district in question is a statutory corporation. It possesses no powers not conferred upon it expressly or by fair implication by the law of its creation or other statutes applicable to it, since such bodies act wholly under a delegated authority and can exercise only such powers as are expressly conferred by their organic laws. *C. & N. W. Ry. Co.* v. *Chi-*

cago, 148 Illinois, 141, 161; *Seeger* v. *Mueller*, 133 Illinois, 86, 94.

The railway company met the issue thus presented by the petition by filing in the trial court a general and special demurrer specifically setting up the unconstitutionality of the statute, as repugnant to the Fourteenth Amendment, in depriving defendant of property without due process of law, and in denying it the equal protection of the laws, and as impairing the obligation of its charter rights.

There can be no doubt that the record fairly presented a Federal question for review, and under the authority of *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, this court has jurisdiction. See also *McCullough* v. *Virginia* and other authorities, *supra*.

Section 40½ of the Farm Drainage Act of Illinois, Hurd's Rev. Stat. Ill., 1901, 723, is unconstitutional because it is repugnant to the due process clause of the Fourteenth Amendment. *Holden* v. *Hardy*, 169 U. S. 366, 390; *Scott* v. *Toledo*, 36 Fed. Rep. 385 (Jackson, J.).

Corporations existing for drainage purposes are public corporations, and where property is sought to be taken for the purpose of a ditch it is for a public use, and compensation must be made before property of an individual can be taken for public use. *Payson* v. *People*, 175 Illinois, 276. The Farm Drainage Act of 1885 contemplates payment of full damage done, and if it did not it would be unconstitutional as a taking of private property for the public use without compensation. *Chronic* v. *Pugh*, 136 Illinois, 539, 548. The same rules for ascertaining damages which govern proceedings for the condemning of private property for public use apply to cases arising under the drainage statute. *Ginn* v. *Moultrie Drainage District*, 188 Illinois, 305.

Quasi-public corporations are entitled to claim the protection of the Constitution for their property rights. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Western Union Tel. Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 540. See also *Illinois Central R. R.* v. *Bloomington*, 76 Illinois, 447; *Erie* v.

Erie Canal Co., 59 Pa. St. 174; *C. & N. W. Ry. Co.* v. *Cicero*, 154 Illinois, 656; *O. C. & F. R. R. Co.* v. *Plymouth County*, 14 Gray, 155; *M. C. R. R.* v. *Boston &c. R. R.*, 121 Massachusetts, 124; *Commissioners* v. *Michigan Central Railroad*, 90 Michigan, 385.

The location and construction of a drainage ditch across the right of way of a railroad company is an appropriation of the company's property which entitles it to compensation for the value of the interest so taken, and when in the construction of such a ditch it becomes necessary to make an excavation under the tracks of the railroad and for the company to incur expense in supporting the tracks or otherwise while the ditch is being constructed, such expense should be taken into account in estimating the damages of the company. *L. E. & W. R. Co.* v. *Commissioners of Hancock County*, 63 Ohio St. 23. See also *Matter of Tuthill*, 163 N. Y. 133, where the drainage law of New York was held unconstitutional.

Mandamus will not lie to compel the owner of a bridge across a watercourse to remove the same so that the stream may be enlarged for drainage purposes. *State* v. *Board of Commissioners*, 157 Indiana, 96.

Section 40½ of the Farm and Drainage Act of Illinois is unconstitutional because repugnant to the equal protection clause of the Fourteenth Amendment. *Smyth* v. *Ames*, 169 U. S. 466, 524.

It denies defendant equal protection because it seeks out railroad corporations and requires them alone of all individuals or private corporations to build bridges over drainage ditches at their own expense. The Farm Drainage Act makes full provision for assessment and payment of damage in all other cases of individuals or private corporations, and see also section 74 of the act.

The statute in question was passed after the railroad was constructed and its rights had become vested, and to enforce such statute would be to impair the obligation of a contract

and thereby to violate the Federal Constitution. Art. I, sec. 10, par. 1; Cooley, Const. Lim., 721; *Bailey* v. *Philadelphia &c. R. R. Co.*, 4 Harr. 389; *Washington Bridge Co.* v. *State*, 18 Connecticut, 53.

The doctrine of dominant and servient estates does not apply. Petitioners do not seek to use the watercourse in its natural state, but seek to compel the railway company at its own expense to widen, deepen, and enlarge the channel of the same, and by so doing to take and damage the bridge lawfully erected over said watercourse, and also the land adjacent thereto.

The servient estate is burdened only by the natural flow of water through the natural channels. *Dayton* v. *Drainage Commissioners*, 128 Illinois, 271; *Groff* v. *Aukenbrandt*, 124 Illinois, 51. The dominant owner has no right by artificial means to precipitate unnatural quantities of water upon the lower estate. *Hicks* v. *Silliman*, 93 Illinois, 255. See also *Union Drainage District* v. *O'Reilly*, 132 Illinois, 631, 634; *Noonan* v. *Albany*, 79 N. Y. 470; *McCormick* v. *Horan*, 81 N. Y. 86.

Defendants in error argue that the relief sought in this case is justified under the police power, but it has never been held that a railroad company can be compelled under the police power to remove a bridge lawfully erected over a stream, and to enlarge, widen, and deepen a natural watercourse across its right of way, without compensation, merely for the benefit of a drainage district. Drainage work of the sort undertaken by the district in question has never been justified as a police regulation.

The constitutional provision is plain that the cost of the drainage work shall be paid for by special assessment upon the property benefited thereby.

If drainage work could be done under the police power, no assessment of benefits would be necessary. Proceedings by eminent domain and proceedings under the police power are entirely distinct and separate in character, the one always

implying compensation, the other never involving it. 22 Am. & Eng. Ency. of Law, 2d ed., 916.

No provision for compensation would have been made in the constitution if it had been intended that drainage work should be justified under the police power.

Drainage for the purpose of private advantage, such as improving the quality of the land or rendering it more productive or fit for cultivation, cannot be justified under the police power. *Kinnie* v. *Bare*, 68 Michigan, 625, 628. Lands cannot be permanently appropriated for drains for the benefit of other lands under the police power of the State or otherwise without compensation. *Matter of Cheesebrough*, 78 N. Y. 232.

The drainage district, being a statutory corporation, has no common law powers. If there was a common law duty of the railroad company to restore the stream to its former state or to such state as not unnecessarily to impair its usefulness, there is no allegation that it has violated any such duty. To compel it to do the work directed in the writ of mandamus is to deprive it of its rights under the Federal Constitution, whether such writ is sought to be justified under a statute or under the common law.

Mr. John K. Newhall and *Mr. John M. Raymond* for defendants in error:

No Federal question was raised in the trial court or in the Supreme Court of Illinois, which was decided against the title, right, privilege or immunity set up or claimed by the plaintiff in error.

To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.

It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question not Federal has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment. *Eustice* v. *Bolles*, 150 U. S. 361; *Hale* v. *Akers*, 132 U. S. 554; *Hopkins* v. *McLure*, 133 U. S. 380; *Fowler* v. *Lamson*, 164 U. S. 252.

Where the state court based its judgment not on a law raising a Federal question, but on an independent ground this court will not take jurisdiction of the case, even though it might think the decision of the state court an unsound one. *Desaussure* v. *Gaillard*, 127 U. S. 216. This court has no jurisdiction of a judgment in a state court, in which a Federal question was not decided and in which in the view which the court below took of the case, such a decision was not necessary. *McManus* v. *O'Sullivan*, 91 U. S. 578. It is not enough to give this court jurisdiction over the judgment of a state court for a record to show that a Federal question was argued or presented to that court for decision.

It must appear that the decision of a Federal question was necessary to the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Brown* v. *Atwell*, 92 U. S. 327.

In the State of Illinois it is the common law duty of a railroad, when it constructs its railway across any stream of water, to restore such stream or watercourse to its former state, or to such a state as not unnecessarily to have impaired its usefulness, and keep such crossing in repair. *Ligare* v. *City of Chicago*, 139 Illinois, 46; *O. & M. Ry. Co.* v. *Thillman*, 143 Illinois, 127.

This duty of restoration and provision for keeping such crossing in repair, and constructing the necessary culverts or

sluices for the necessary drainage, is a continuing duty; and if by the increase of population, establishment of lawful drainage districts, or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is then the duty of the railroad to make such alterations as will meet the present necessities of the public. *C. & N. W. Ry. Co.* v. *City of Chicago*, 140 Illinois, 309; *Ohio & Miss. R. R. Co.* v. *McClellan*, 25 Illinois, 140; *C., R. I. & P. R. R. Co.* v. *Moffit*, 75 Illinois, 524; *People* v. *C. & A. R. R. Co.*, 67 Illinois, 118; *Ill. Cent. Ry. Co.* v. *Wollenberg*, 117 Illinois, 203; *Cleveland* v. *City Council of Augusta*, 43 L. R. A. 638 (Ga.); *State* v. *St. Paul, M. & N. Ry. Co.*, 35 Minnesota, 131; *A., T. & S. F. R. R. Co.* v. *Henry*, 45 Pac. Rep. 576 (Kansas); *Cook* v. *Boston & Lowell R. R. Co.*, 133 Massachusetts, 185; *L. E. & W. R. R. Co.* v. *Smith*, 61 Fed. Rep. 885; *State of Indiana* v. *L. E. & W. R. R. Co.*, 83 Fed. Rep. 284.

An obligation to keep up a crossing imposed as a condition of a right to cross a highway must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road as long as the right is exercised. It is a continuing condition inseparable from the enjoyment of the franchise. *People* v. *C. & A. R. R. Co.*, 67 Illinois, 118.

Where authority is conferred upon a railroad company to cross any stream of water in the line of its road, coupled with the duty to restore the stream so crossed to its former state, or such state as not to unnecessarily impair its usefulness, it was held to apply to streams not navigable as well as to those that were navigable, as legislative authority was as necessary to cross the one as the other. *C., R. I. & P. R. R. Co.* v. *Moffit*, 75 Illinois, 524.

When a franchise is granted to construct ways or streets across a waterway, there is no implied right to destroy the waterway, but it must be so bridged that its use will not be unnecessarily impaired. *Ligare* v. *City of Chicago*, 139 Illinois, 46.

The legislature of the State of Illinois have enacted a statute

declaratory of the common law duty of railroads in crossing waterways, which duty is coupled with its authority to construct bridges or culverts over waterways. Rev. Stat. Ill., cl. 5, sec. 19, ch. 114.

Sec. 40½ of the Farm Drainage Act of Illinois is declaratory of the common law, is conclusively a reasonable police regulation, and is valid and constitutional as applied to the case at bar.

Federal courts follow state decisions as to the rights and liabilities respecting surface water as a matter of local law. *Walker* v. *N., M. & S. P. R. R. Co.*, 165 U. S. 593.

In Illinois it is the common law duty of plaintiff in error in constructing a bridge or culvert across a natural watercourse to anticipate that upper riparian proprietors may, by artificial drainage, increase the flow in such natural watercourse. *K. & S. R. R. Co.* v. *Horan*, 131 Illinois, 288.

A railroad constructing its road over a watercourse must make suitable bridges, culverts or other provisions for carrying off the water effectually. Angell on Watercourses, 7th ed., § 465*b*. The duty imposed by statute upon such company to restore the stream crossed to its former state, or to restore it so as not to impair its usefulness, exists also in the absence of statutory requirements. Pierce on Railroads, 203; *O. & M. R. R. Co.* v. *Thillman*, 143 Illinois, 127.

The petition alleged that the proposed construction of the drain by defendants in error when completed in accordance with the plans, would not carry waters, which by force of gravity would flow into any other natural watercourse in such drainage district.

The petition alleged that the opening underneath the present bridge or culvert was of insufficient capacity to allow of the natural flow of water in the drain which is proposed to be dug.

Clause 5, section 19, of chap. 114, the Railroad Act, and section 40½ of chap. 42, Farm Drainage Act, Revised Statutes of Illinois, are valid constitutional enactments, being simply reasonable police regulations, and apply with equal force to cor-

porations whose roads are already built, as well as to those thereafter constructed. *I. C. Ry. Co.* v. *Wollenberg*, 117 Illinois, 203; *C. & N. W. Ry. Co.* v. *Chicago*, 140 Illinois, 309; *People* v. *C. & A. R. R. Co.*, 67 Illinois, 118.

Railroad corporations being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligation to transport all persons and merchandise upon like conditions and at reasonable rates, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulations.

Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the railroad corporations, and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to them the equal protection of the laws nor making any unjust discrimination against them, all railroad corporations in the State being treated alike in this respect. *Charlotte, Columbia & Augusta R. R. Co.* v. *Gibbes*, 142 U. S. 386. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision and the police power of the State. *C. & N. W. R. R. Co.* v. *Chicago, supra.*

The inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals.

There is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligations of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest.

The adjudication of the highest court of a State that a law

enacted in the exercise of the police power of the State, to protect the public from danger is valid, will not be reversed by this court, on the ground of an infraction of the Constitution of the United States. *N. Y. & N. E. R. R. Co.* v. *Town of Bristol*, 151 U. S 556.

It may be assumed that it is a power coextensive with self-protection, and is not inaptly termed "the law of overruling necessity." *C. & N. W. R. R. Co.* v. *City of Chicago, supra; Lake View* v. *Rose Hill Cemetery Co.*, 70 Illinois, 191.

It is well settled that neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation, destined to secure the common welfare. *C. & A. R. R. Co.* v. *J. L. & R. R. Co.*, 105 Illinois, 388.

In granting a charter to a private corporation the State does not part with its powers to enact proper police regulations operating upon such corporations, the same as upon natural persons; and these bodies accept their charters upon the implied condition that they are to exercise their rights subject to the power of the State to regulate their action as it may individuals. *Ohio & Miss. R. R. Co.* v. *McClellan*, 25 Illinois, 140.

It is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts and of levees to prevent inundations. *Hagar* v. *Reclamation District*, 111 U. S. 701.

Since the amendment to the Illinois constitution adopted in 1878, the Illinois court has held that corporations formed for drainage purposes are public corporations. *Heffner* v. *Cass & Morgan Counties*, 193 Illinois, 439.

The right of drainage through a natural watercourse is the natural easement appurtenant to the land of every individual through whose lands such natural watercourse runs, and every owner of land along such watercourse is obliged to take notice

of the natural easement possessed by other owners along the same watercourse. *C., B. & Q. Ry. Co.* v. *The People ex rel. &c.*, 212 Illinois, 103.

A natural watercourse is not required to be used only in its natural state, but may be improved either by being deepened or widened by artificial means or by the construction along its course of a channel or drain for the purpose of more effectually carrying off the surface water from the land. The construction of such improvement does not create a substantively new watercourse, nor amount to an abandonment of the natural watercourse. *Lambert* v. *Allcorn*, 144 Illinois, 313.

The right to drain upon and over lower or servient lands without making compensation for such privilege is the same whether the dominant land is the farm of an individual owner or is a public highway.

The public represented by defendants in error, have the right to have the surface water, falling or coming naturally upon the district in question, to pass off the same through the natural channel, and over the right of way of plaintiff in error, and have the right to construct ditches or drains for the purpose of carrying such surface water into the natural channel, even though the water thus carried across the right of way is thereby increased. *Graham* v. *Keene*, 143 Illinois, 425; *K. & S. R. R. Co.* v. *Horan*, 131 Illinois, 288. This is one of the inevitable results experienced in the drainage and improvement of land, which the development of the country cannot always permit to remain in a state of nature. *Ribordy* v. *Murray*, 177 Illinois, 134.

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

1. The first question is one of the authority of this court to review the judgment below. As we have seen, the railway company insisted in the court of original jurisdiction that the statute under which the Drainage Commissioners proceeded

could not be applied in this case without taking its property for public use without compensation, and therefore depriving it of property without due process of law, or without denying to it the equal protection of the laws guaranteed by the Constitution of the United States. The judgment of the trial court was adverse to that view. In the Supreme Court of the State the railway company, by its assignments of error, preserved its objection based on constitutional grounds. That court did not, in words, refer to the Constitution of the United States, and its opinion concluded: "Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of section 40½ of the Farm Drainage Act."

The contention is that as the state court based its judgment on the common law duty of the railway company, and not expressly on any Federal ground, it cannot be said that there was any *denial* of the Federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to reëxamine the final judgment. Rev. Stat. § 709.

Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the pro-

posed action of the Drainage Commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the Federal question and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for, the supreme law of the land must always control. Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have reëxamined the judgment. But the decision was otherwise and was, in law, a denial of the claim of a Federal right.

For these reasons we are of opinion that this court has jurisdiction to reëxamine the final judgment of the state court so far as it involved the Federal right or immunity specially set up by the railway company.

2. The concrete case arising upon the petition and the demurrer is this: A public corporation, charged by law with the duty of causing a large body of lands, principally swamp and slough lands, to be drained and made capable of cultivation,

has, under direct legislative authority, adopted a reasonable and suitable plan to accomplish that object. That plan requires the enlarging and deepening of the channel of a natural watercourse running through the District, which is the only natural outlet or way of drainage of the lands of the District—the best and only practicable mode by which the lands can be made tillable. But that plan cannot be carried out unless the timbers and stones in the creek—placed there by the railway company when it constructed the foundation for its present bridge—are removed. The timber and stones referred to cannot, however, be removed without destroying the foundations of the present bridge and rendering it necessary (if the railway company continues to operate its road, which we assume it intends to do) to construct another bridge with an opening underneath wide enough to permit a channel sufficient to carry off the water of the creek as increased in volume under the drainage system adopted by the Commissioners.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate and maintain a railroad, in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows—the foundation of the bridge cannot be removed and its use of the bridge disturbed, unless compensation be first made or secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the Commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

The importance of these questions will justify a reference to some of the adjudged cases; referring first to those recog-

nizing the distinction between an incidental injury to rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the *taking*, within the meaning of the Constitution, of private property for public use.

In *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642, which involved a claim for damages directly resulting from the construction by the city of Chicago of a tunnel under Chicago River, whereby for a very long time the plaintiff was prevented from using its dock and other property for purposes of its business; in *Mugler* v. *Kansas*, 123 U. S. 623, 669, which related in part, to the lawful prohibition by the State of the use of private property in a particular way, whereby its value was materially diminished, if not practically destroyed; in *N. Y. & N. E. Railroad Co.* v. *Bristol*, 151 U. S. 556, 567, 571, which involved the question whether a railroad company could be required, at its sole expense, to remove a grade crossing which it had lawfully established and used and to establish another crossing at a different place; in *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 252, in which one of the questions was whether it was a condition of the exercise by the State of its authority to regulate the use of property, owned by individuals or corporations, that the owner should be indemnified for the damage or injury resulting from the exercise of such authority for legitimate public purposes; in *Gibson* v. *United States*, 166 U. S. 269, 271, 276, in which the owner of a farm on an island in the Ohio River, at which there was a landing, sought to recover compensation for the injury done to the farm by reason of the construction by the United States of a dike for the purpose of concentrating the water-flow in the main channel of the river; and in *Scranton* v. *Wheeler*, 179 U. S. 141, 164, which involved the question whether the United States was required to compensate an owner of land fronting on a public navigable river, when his access from the shore to the navigable part of such river was permanently obstructed by a pier erected in the river under

the authority of Congress for the purpose of improving navigation;—in each of those cases, this court recognized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this class belongs the recent, and as we think, decisive case of *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453, to be hereafter adverted to in another connection. In this class may also be placed *Mills* v. *United States*, 46 Fed. Rep. 738. That was the case of an improvement by the United States of the navigation of Savannah River, which resulted in so raising the water in that river as to make it impossible to prevent the flooding of adjacent rice fields that were ordinarily and naturally drained into the river, and rendering it necessary that expense be incurred in order to provide new drainage from those fields into a back river, where the water levels were suitable. In commenting upon that case, this court said, in *United States* v. *Lynah*, 188 U. S. 445: "Obviously there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense, as alleged, of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained." See also *Bedford* v. *United States*, 192 U. S. 217, and *Manigault* v. *Springs*, 199 U. S. 473.

We refer also, as having direct application here, to some of the cases, familiar to the profession, that recognize the possession by each State of the power, never surrendered to the Government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the constitution of the State or the Constitution of the United States. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Railroad Co.* v. *Husen*, 95 U. S. 465, 472; *Patterson* v. *Kentucky*, 97 U. S.

501, 503; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Henington* v. *Georgia*, 163 U. S. 299, 308, 309; *N. Y., N. H. & H. Railroad Co.* v. *New York*, 165 U. S. 628, 631.

We assume that the drainage statute in question is entirely consistent with the constitution of Illinois. It is so regarded by the Supreme Court of the State, and that is all-sufficient in this case. We assume, also, without discussion—as from the decisions of the state court we may properly assume—that the drainage of this large body of lands so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the State may by appropriate agencies exert the general powers it possesses for the common good. By the removal of water from large bodies of land, the state court has said, and by "the subjection of such lands to cultivation they are made to bear their proper proportionate burden to the support of the inhabitants and commerce of the State. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased." *C., B. & Q. Ry. Co.* v. *The People*, 212 Illinois, 103, 119. It is conceded that this public purpose cannot be certainly and effectively attained except through the plan adopted by the Drainage Commissioners. Further, the regulations against which the railway company invokes the Constitution have a real, direct, and obvious relation to the public objects sought to be accomplished by them; in no sense are they arbitrary or unreasonable. Indeed, it is admitted that the plan of the Commissioners is appropriate and the best that can be devised for draining the lands in question. But the railway company, in effect, if not in words, insists that the rights which it asserts in this case are superior and paramount to any that the public has to use the watercourse in question for the purpose of draining the lands in its vicinity, although such watercourse was in existence, for the benefit of the public, long before the railway company constructed its bridge. This contention cannot, however, be sustained, except upon the theory that the acquisition by the railway company of a right of way through the lands in

question, and the construction on that right of way of a bridge across Rob Roy Creek at the point in question, carried with it a surrender by the State of its power, by appropriate agencies, to provide for such use of that natural watercourse as might subsequently become necessary or proper for the public interests. If the State could part with such a power, held in trust for the public—which is by no means admitted—it has not done so in any statute either by express words or by necessary implication. When the railway company laid the foundations of its bridge in Rob Roy Creek it did so subject to the rights of the public in the use of that watercourse, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the State, reasonably require a material change in the methods used in crossing the creek with cars. It may be—and we take it to be true—that the opening under the bridge as originally constructed was sufficient to pass all the water then or now flowing through the creek. But the duty of the company, implied in law, was to maintain an opening under the bridge that would be adequate and effectual for such an increase in the volume of water as might result from lawful, reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the creek. Angell on Watercourses, 6th ed. 640, § 465*b*.

The Supreme Court of Illinois said in this case: "The right of drainage through a natural watercourse or a natural waterway is a natural easement appurtenant to the land of every individual through whose land such natural watercourse runs, and every owner of land along such watercourse is obliged to take notice of the natural easement possessed by other owners along the same watercourse." Again, in the same case: "Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained, and in the absence of any constitutional provision in relation to such laws they have been sustained, upon high authority, as the exercise of the

police power." Further: "A natural watercourse being a natural easement, is placed upon the same ground, in many respects as to the public right, as is a public highway. At the common law, if a railroad or another highway crosses a natural watercourse or a public highway, such highway or railroad must be so constructed across the existing highway or waterway, and so maintained, that said highway or waterway, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time. . . . The great weight of authority is, that where there is a natural waterway, or where a highway already exists and is crossed by a railroad company under its general license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or waterway, the railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand." The court said that the implied authority of the company to build its present bridge was coupled with its common law duty "to build its bridge over the natural watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further implied provision that there remained in the State, whenever the public welfare required it, the right to regulate its use." Still further: "The subject [the draining of lands] was deemed of such importance that the people, by section 31 of Article IV of the Constitution of 1870, conferred upon the General Assembly plenary powers in making provision for drainage for agricultural and sanitary purposes, and pursuant to that power the General Assembly passed the act under which the appellees are proceeding, declaring that the organization should be for agricultural and sanitary purposes. The Drainage Districts organized, as are the appellees, under that law are invested with the right of eminent domain and the power of taxation, upon the theory that they are public utilities and are held to be *quasi* public corporations. In their organic character

they do not represent merely the individual property owners or themselves, but they represent the State in carrying out its policy, as found in the common law and declared by its constitution and statutes. It has been so often said that it need only be adverted to here, that corporations such as appellant do not hold their property and exercise their franchises strictly in a private right, but that from the nature of their business and their relation to society they are public corporations in a sense and are subject to public control and regulation, though with their grant of power to traverse the State with their lines of railroad it cannot be said that their right of private property attaches to every highway and watercourse over which their roads may be constructed. To so hold would render such enterprises, which are designed for the benefit of the State, obstacles to its progress and a menace to its general welfare. . . . Of course, in the exercise of the right of the public interest, as against such corporations, the demand must be reasonable and must clearly appear to be for the public welfare. In this case it is not questioned that the improvement of Rob Roy Creek, as proposed, is necessary for the proper drainage of the lands comprising the Drainage District. The petition alleges that such enlargement is necessary and that the same cannot be carried on with the obstructions placed in the bed of said creek by appellant. This the appellant does not deny." *C. B. & Q. Ry. Co.* v. *The People*, 212 Illinois, 109, 110, 111, 114, 118.

In *Ohio & Miss. R. R. Co.* v. *McClelland*, 25 Illinois, 140, 144, it was said—indeed, all the cases hold—that "the power to enact police regulations operates upon all alike;" that that "power is incident to and part of government itself, and need not be expressly reserved, when it grants rights or property to individuals or corporate bodies, as they take subservient to that right."

A case quite in point is that of *Kankakee & Seneca R. R. Co.* v. *Horan*, 131 Illinois, 288. That was an action against a railroad company to recover for damage from the backing of water upon plaintiff's land by reason of an insufficient culvert con-

structed by it for the passage of water from a certain natural watercourse. The contention of the company was that the culvert when constructed was sufficient for the flow of water at the time, and that it was not bound to make such provision as was necessary for an increase of water in the slough subsequently arising from the drainage into it of the lands along its course. Upon this point the Supreme Court of Illinois said: "We do not subscribe to this doctrine. The Parker slough was a watercourse, and it was the legal right of any one along its line for miles above the railroad, where the water naturally shed toward the slough, to drain into it, and no one below, owning land along the slough, would have any legal remedy against such person so draining the water into the slough above him, for any damage done to his inheritance by means of an increased flow of water caused thereby. In other words, the slough was a legal watercourse for the drainage of all the land the natural tendency of which was to cast its surplus water, caused by the falling of rain and snow into it; and this, whether the flow was increased by artificial means or not. It would seem legitimately to follow that the railroad company, in providing a passageway for the slough, was bound to anticipate and provide for any such legal increase of the waterflow. If it did not, it was doing a wrong and legal injury to any one situated like the appellee, who received injury in consequence of a failure on its part to do its duty." See also the following Illinois cases: *People* v. *Chicago & Alton R. R.*, 67 Illinois, 118; *Chicago, Rock Island & Pacific R. R. Co.* v. *Moffit*, 75 Illinois, 524; *Chicago & Northwestern Ry. Co.* v. *City of Chicago*, 140 Illinois, 309; *Ohio & Miss. Ry. Co.* v. *Thillman*, 143 Illinois, 127; *Frazer* v. *City of Chicago*, 186 Illinois, 480, 486.

Many cases in other courts are to the same general effect. They negative the suggestion of the railway company that the adequacy of its bridge and the opening under it for passing the water of the creek at the time the bridge was constructed determines its obligations to the public at all subsequent periods. In *Cooke* v. *Boston & Lowell R. R.*, 133 Massachusetts, 185, 188,

it appeared that a railroad company had statutory authority to cross a certain highway with its road. The statute provided that if the railroad crossed any highway it should be so constructed as not to impede or obstruct the safe and convenient use of the highway. And one of the contentions of the company was that the statute limited its duty and obligation to provide for the wants of travelers at the time it exercised the privilege granted to it. The court said: "The Legislature intended to provide against any obstruction of the safe and convenient use of the highway, for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway." In *Lake Erie & Western R. R. Co.* v. *Cluggish*, 143 Indiana, 347, the court said (quoting from *Lake Erie & Western R. R. Co.* v. *Smith*, 61 Fed. Rep. 885): "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public." So, in *State of Indiana* v. *Lake Erie & Western R. R. Co.*, 83 Fed. Rep. 284, 287, which was the case of an overhead crossing lawfully constructed on one of the streets of a city, the court said: "If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway."

The cases to which we have referred are in accord with the declarations of this court in the recent case of *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453. That case would seem to be decisive of the question before us. It there appeared that a gas company had acquired an exclusive right

to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets. In the exercise of that right it had laid its pipes in the streets. Subsequently a Drainage Commission, proceeding under statutory authority, devised a system of drainage for the city, and in the execution of its plans it became necessary to change the location in some places of the mains and pipes laid by the gas company. The contention of that company was that it could not be required, at its own cost, to shift its pipes and mains so as to accommodate the drainage system; that to require it to do so would be a taking of its property for public use without compensation, in violation of the Constitution of the United States. This court said: "The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require, for a necessary public use, that changes in location be made. . . . There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such further regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. *National Water Works Co.* v. *City of Kansas*, 28 Fed. Rep. 921, in which the opinion was delivered by Mr. Justice Brewer, then Circuit Judge; *Gas Light & Coke Co.* v. *Columbus*, 50 Ohio St. 65; *Jamaica Pond Aqueduct Co.* v. *Brookline*, 121 Massachusetts, 5; *In re Deering*, 93 N. Y. 361; *Chicago, Burlington & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 254. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen

by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria.*"

The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the Drainage District, but only avers that the system of drainage adopted by the Commissioners will reclaim the lands of the District and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. *Lake Shore & Mich. South. Ry.* v. *Ohio,* 173 U. S. 285, 292; *Gilman* v. *Philadelphia,* 3 Wall. 713, 729; *Pound* v. *Turck,* 95 U. S. 459, 464; *Railroad Co.* v. *Husen,* 95 U. S. 470. And the validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Private property cannot be taken without compensation for public use under a police regulation relating

strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in *Village of Carthage* v. *Frederick*, 122 N. Y. 268, has always been exercised by municipal corporations, "by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that which promotes the general welfare." The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the Government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, 659; *Sweet* v. *Rechel*, 159 U. S. 380, 399, 402; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445. If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber*, 136 U. S. 313, 320. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a "taking" of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is

no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation "is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given." Sedgwick's Stat. & Const. Law, 434.

It remains to deal with a particular aspect of the case. The opening under the present bridge, we assume from the record, was sufficient, when the bridge was constructed, to pass all the water naturally flowing in the creek from lands in that locality. It is sufficient if the channel of the river be left as it is now. The Commissioners demand, however, as they may rightfully do in the public interest, a larger, deeper and wider channel in order to accommodate the increased volume of water in the creek that will come from the proposed plan of the Commissioners. But that is a matter which concerns the public, not the railway company. The duty of the company will end when it removes the obstructions which it has placed in the way of enlarging, deepening and widening of the channel. It follows, upon principles of justice, that while the expense attendant upon the removal of the present bridge and culvert and the timbers and stones placed by the company in the creek, as well as the expense of the erection of any new bridge which the company may elect to construct in order to conform to the plan of the Commissioners, should be borne by the railway company, the expense attendant merely upon the removal of soil in order to enlarge, deepen and widen the channel must be borne by the District. The expense to be borne by the District and the rail-

way company, respectively, can be ascertained by the state court in some appropriate way, and such orders made as will be necessary to facilitate the execution of the plan of the Commissioners.

Without further discussion we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the Drainage Commissioners, under the authority of the State; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws.

Leaving it to the state court to give effect to these views by appropriate orders and subject to the above qualifications, the decree of the state court is

Affirmed.

MR. JUSTICE HOLMES, with whom agreed MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, concurring.

I concur in the main with the judgment of the court. I agree that the public authority has a right to widen or deepen a channel if it sees fit, and that any cost that the railroad is put to in rebuilding a bridge the railroad must bear. But the public must pay for the widening or deepening, and I think that it does not matter whether what it has to remove is the original earth or some other substance lawfully put in the place of the original earth. Very likely in this case the distinction is of little importance, but it may be hereafter. I suppose it to be plain, as my brother Brewer says, that, if an expense is thrown upon the railroad unlawfully, its property is taken for public use without due compensation. *Woodward* v. *Central Vermont Railway Co.*, 180 Massachusetts, 599.

I am authorized to say that my brothers WHITE and MCKENNA agree with my view.

MR. JUSTICE BREWER, dissenting.

The question in this case is a narrow one, yet of profound importance, and, involving, as in my judgment it does, a grievous wrong to owners of private property, I am constrained to dissent. Conceding the regularity of the proceedings and the power of the State to drain the lands in the Drainage District, and if necessary therefor to compel the building of a new and enlarged bridge over Rob Roy Creek, I dissent from the conclusion that the State may cast the entire cost of such rebuilding upon the railroad company.

It appears from the petition which was demurred to, and whose allegations of fact must therefore be taken as true, that the Drainage District consists of about 2,000 acres on both sides of Rob Roy Creek; that a majority of the lands of said Drainage District are swamp or slough lands, and under natural conditions not subject to cultivation, but by drainage will all be greatly improved and made good tillable lands. The railroad company has for forty years maintained a bridge or culvert over Rob Roy Creek which has answered and does answer all its purposes and necessities. The cost of the ditches and drains in the Drainage District in accordance with the plans adopted by the Commissioners is estimated at $20,000. The railroad bridge or culvert across the creek does not exceed in value $8,000, and a new bridge or culvert can be constructed at a cost of not exceeding $13,000. The drainage act provides for an appraisement of the damages done to any tract by the construction of the proposed work, and a judgment in favor of the owner against the Commissioners of the District for that amount. It also provides for an assessment of the benefits to the different tracts, upon the basis of which assessments taxes are to be levied to pay for the construction and maintenance of the drainage system. In other words, any damage done to

any particular tract by the construction of the drainage system is to be paid to the owner of that tract, if a private individual, and the tracts which are benefited are to be charged with the cost in proportion to the amount of benefit received. Section 40½ of the drainage act then provides:

"The Commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, *or by the railroad company*, as the case may be: *Provided, however*, notice shall first be given to the road or railroad authorities to build or construct such bridge or culvert, and they shall have thirty days in which to build or construct the same; such bridges or culverts shall, in all cases, be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the Commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace or any court having jurisdiction, and reasonable attorney's fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual land owners."

According to this, if any bridge or culvert on any public highway is needed in order to perfect the drainage system, the cost of it is to be paid out of the public funds; but if a bridge or culvert is required on a railroad, the cost of it must be paid by the railroad company. And this is arbitrary, without any appraisement of benefits or damages.

Now, the property of a railroad company is private property. It cannot be taken for public uses without just compensation. True, it is used by the owners in performing the *quasi* public work of transportation, but it is not given up to public uses generally. It is not devoted to education or the improvement of farm lands, or, indeed, any other use than that of transpor-

tation. If taken therefrom and devoted to other public uses it is the taking of private property for public uses. That this can be done may be conceded, but only upon just compensation.

When private property is taken for public uses compensation must be paid. That is the mandate of the Federal Constitution and of that of nearly every State in the Union. Independently of such mandate, compensation would be required. In 2 Kent, p. 339 (12th. ed.), it is said:

"A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law." See also cases cited in the note; especially *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162, 166.

In *Sinnickson* v. *Johnsons*, 17 N. J. L. (2 Harr.) 129, 145, referred to approvingly by this court in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 178, and *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 324, it was said:

"This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle."

If this be true when the taking is for that which is solely a public use, how much more true is it when the taking is largely for the benefit of private individuals, and at best only incidentally for the benefit of the public? Now the sole purpose of this proceeding, as admitted by the demurrer, was the transformation of these swamp and untillable lands into good tillable lands; in other words, to that extent, increasing the value of the farms in the hands of their private owners. While the stat-

ute under which these proceedings were had contemplates drainage for agricultural and sanitary purposes, there is nothing in this record to show that any sanitary result was contemplated, and the only object disclosed is the direct beneficial result to the owners of these swamp lands. There is not the slightest intimation that the health, morals, or safety of the community will be promoted, or is intended to be promoted, by the drainage. I quote the exact language of the petition:

"And the petitioners aver that the aforesaid location of the ditch or drain along the said Rob Roy Creek was for the purpose of enlarging the channel or watercourse of the aforesaid Rob Roy Creek, and thereby enabling the land in said drainage district to be better drained and render the soil in said district more tillable.

* * * * * * * *

"And your petitioners aver that a majority of the lands of said Drainage District are what is known as swamp or slough land, and under the present condition are not subject to cultivation, but by means of the proposed deepening and enlarging of said Rob Roy Creek, as herein described, and as a result of the removal of said timbers and stones in said Rob Roy Creek, at the place aforesaid, and of the enlargement of and deepening of said Rob Roy Creek, all of the lands in said Drainage District will be greatly improved, and made good, tillable land subject to cultivation."

If it be a principle of natural justice that private property shall not be taken for public purposes without just compensation, is it not equally a principle of natural justice that no man shall be compelled to pay out money for the benefit of the public without any reciprocal compensation? What difference in equity does it make whether a piece of land is taken for public uses or so many dollars for like purposes? *Cary Library* v. *Bliss*, 151 Massachusetts, 364, 378, 379; *Woodward* v. *Central Vermont Railway Company*, 180 Massachusetts, 599, 603.

But it is said that this is done under the police power of the State, and that that can be exercised without any provision for

compensation. It seems to me that the police power has become the refuge of every grievous wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation, it is referred to the police power. But no exercise of the police power can disregard the constitutional guarantees in respect to the taking of private property, due process and equal protection, nor should it override the demands of natural justice. The question in the case is not how far the State may go in compelling a railroad company to expend money in increasing its facilities for transportation, but how far it can go in charging upon the company the cost of improving farms along the line of its road.

Again, it will be perceived that by the section quoted, if, in consequence of the drainage, a bridge or culvert is required on any public highway its cost is paid out of the public funds, but whenever a bridge or culvert is required along or across a railroad the company is charged with the cost. In the one case the public pays and in the other a private owner. It is not pretended that the railway is in any way benefited by the drainage. Its property is not improved, its revenues are not increased. The reconstruction of the bridge or culvert is not needed by it in its work of transportation. It has used its present bridge for over forty years, meeting in that time all the demands of the public for transportation. So that, receiving no benefit, it is charged with the cost of reconstruction, about $13,000, in order to improve the value of the lands belonging to private owners in this Drainage District, when if a highway crossed at the same place and a new bridge or culvert was required the cost of it would be paid out of the public funds. I cannot conceive how this can be looked upon as "the equal protection of the laws."

Further, even under the conclusion reached by the court, the plaintiff in error should recover its costs and, in accord with the common practice in this court, the order should be that the judgment be reversed and the case remanded for further proceed-

ings not inconsistent with our opinion. *Stanley* v. *Schwalby*, 162 U. S. 255, 282. Why should it be compelled to pay two or three hundred dollars in costs when it has shown that the decision below placed an improper charge upon it, the amount of which is not disclosed and which may be a very substantial sum?

I am, therefore, constrained to dissent from both the opinion and judgment.

UNITED STATES *v.* CLARK.

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

No. 359. Argued January 9, 10, 1906.—Decided March 5, 1906.

The rule that this court will not disturb findings of fact where both the Circuit Court and the Circuit Court of Appeals have concurred should not be departed from except in a very clear case, especially when those findings are against a charge of fraud in an effort to overthrow a patent of the United States.

In order to overthrow a patent on charges of fraud on the part of the entryman, and knowledge thereof on the part of a purchaser, the proof must be clear and fraud or knowledge of fraud in the entry will not be inferred from a merely suspicious circumstance; the purchaser is not bound to hunt for grounds of doubt. *United States* v. *Detroit Timber & Lumber Co.*, ante, p. 321 followed.

THE facts are stated in the opinion.

Mr. Marsden C. Burch and *Mr. Fred A. Maynard*, Special Assistant United States Attorneys, with whom *The Solicitor General* was on the brief, for the United States:

In this case the fact is established that the sole purpose which induced each one of the entrymen and entrywomen named in

the bill of complaint to take up a timber claim was that they might sell it to Cobban and receive from him $100. The quality of the land and quantity of the timber thereon were immaterial. They were taken to the land, and told to enter it, and when they obtained the receiver's receipt they could sell it and get a hundred dollars.

When land is taken up under such circumstances, title thereto is acquired contrary to the oath prescribed in the timber and stone act. *Hawley* v. *Diller*, 178 U. S. 476. See also *S. C.*, 17 L. D. 468. See *Diller* v. *Hawley*, 48 U. S. App. 462.

In *United States* v. *Detroit Timber & Lumber Company*, 131 Fed. Rep. 668, the court finds that the speculative clause of the act was violated.

All the entrymen also violated the "prior-agreement" clause of the act, and thus the case falls within the rule in *United States* v. *Budd*, 144 U. S. 154.

A man cannot be a *bona fide* purchaser before patent. *Hawley* v. *Diller*, 178 U. S. 476. The courts below have thus far held that under some circumstances he can be.

It is agreed, before patent issues, the guilty entryman, and the innocent purchaser from him, forfeit all moneys paid for lands, and all right to both land and money, if officers of the Interior Department, on ascertaining the entryman's fraud, take proper steps to annul the receiver's receipt.

It is agreed, after patent, if the guilty entryman has not sold, he also forfeits money and land, if, ascertaining the fraud, the Government proceeds, in equity, to annul the patent and fraud is completely established.

Appellant contends that the innocent purchaser from a guilty entryman, before patent, stands in his shoes from beginning to end; he can buy no more than the entryman has to sell; with the guilty entryman he falls before patent or after, at any time within the statute of limitations, Comp. Stat. U. S. 1521, because the entryman has neither a valuable equitable title by the receiver's receipt nor title by the patent.

The courts below, holding against the Government, admit

that entryman and purchaser are as one before patent, but also hold that the moment patent issues they part company, and from that time, while the Government can file its bill to avoid the patent if still owned by the guilty entryman, it can not do so if prior to patent he has sold to an innocent purchaser, and in so doing have misconstrued *Hawley* v. *Diller*, *supra*.

The judicial department has the same authority, after patent has issued, within the period of limitations, until the land is purchased by a *bona fide* purchaser, and the guilty entryman and his assignee can be reached as well after as before patent. The Government still has power to protect itself from fraud and perjury, but the forum alone is changed. As to the law governing the receiver's receipt, as declared by this court, see *Myers* v. *Croft*, 13 Wall. 291; *Parsons* v. *Verzke*, 164 U. S. 89; *Orchard* v. *Alexander*, 157 U. S. 372; *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 454; *Thayer* v. *Spratt*, 189 U. S. 350; *United States* v. *Steenerson*, 50 Fed. Rep. 507.

The decree of the lower courts failed to recognize this continuing power of the Government, in deciding that simply because, by issue of patent, the officers of the Land Department lost jurisdiction, all power to undo the fraud was gone.

The true rule is, that the courts acquire jurisdiction the moment the Interior Department loses it. *Peyton* v. *Desmond* (C. C. A.), 129 Fed. Rep. 1, citing *Knight* v. *United States Land Association*, 142 U. S. 161.

There is no legal reason why Clark, who would have sustained a total loss in case the frauds had been discovered an hour before patents issued, holds an unassailable title *eo instanti* on the issuing of patents, and thereby has become a *bona fide* purchaser.

This court has repeatedly decided that in case the entryman defrauds the Government he can be proceeded against as well after patent has issued as before. *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673.

Absence of notice of fraud is an indispensable element of the defense of a *bona fide* purchase. It is impossible for a purchaser

of the receipt to make this defense because by law he is charged with notice. As patent has not issued, he knows that he cannot buy the legal title; that the voidable contract may be avoided and therefore *caveat emptor* applies. Knowledge of the law is conclusively presumed. In all cases of statutory forfeitures ensuing from acts done or omitted, an innocent purchaser without notice cannot claim precedence of the title of the United States. *United States* v. *Grundy*, 3 Cranch, 338; *United States* v. *1,960 Bags of Coffee*, 8 Cranch, 398; *Distilled Spirits*, 11 Wall. 356. See also *Wilson* v. *Wall*, 6 Wall. 83; Pomeroy Eq. Jur. §§ 753, 762.

Appellee, before purchasing these lands, knew all the provisions of the law and the consequences if there was any violation thereof by himself or the entrymen.

He took his chances, and cannot now escape the loss, the risk of which he deliberately assumed. Such a person has no equity the courts can recognize.

Mr. Walter M. Bickford and *Mr. George F. Shelton* for appellee:

The defense of *bona fide* purchaser for a valuable consideration without notice was available to the defendant. This defense was absolute and precluded a recovery by the Government for the reason that prior to the commencement of suit patents had issued from the Government for said lands, and the full legal title to the same had vested in the defendant. *United States* v. *Stinson*, 197 U. S. 200, 204. The case of *Hawley* v. *Diller* does not sustain the position of the Government. On the contrary, the principle is therein recognized that when patent has issued, and the legal title has vested in the grantee of the Government, or his successors, the Government must seek redress, the same as any other litigant, in a court of equity.

The fact that the defendant at the time of purchasing the lands in question, obtained only an equitable title, did not debar

him from availing himself of the plea of a *bona fide* purchaser, because the legal title at the time of the commencement of the suit vested in him, and he was the owner of the full legal title as well as of the equitable title at said time; and, as a consequence, the strict requirements of the law for the successful interposition of the plea of a *bona fide* purchaser had been fulfilled. Pomeroy Eq. Jur. §§ 417, 740; *Fitzsimmons* v. *Ogden*, 7 Cranch, 2; *Thorndike* v. *Hunt*, 3 De G. & J. 563; *Newton* v. *McLean*, 41 Barb. 287; *Boone* v. *Chiles*, 10 Pet. 209; *Hoult* v. *Donahue*, 21 W. Va. 300; *Basset* v. *Noswontry*, 2 Lead. Cas. Eq. 1; *Knobloch* v. *Mueler*, 123 Illinois, 554; *United States* v. *California Land Co.*, 148 U. S. 31.

The fraud charged in the bill of complaint as against the entrymen was not such a fraud as prevented the passing of the legal title by the patents, and the patents conveyed the legal title. *Colorado Coal Co.* v. *United States*, 123 U. S. 313; *United States* v. *Detroit Timber & Lumber Co.*, 131 Fed. Rep. 668.

Until issuance of the patent the Government may, through the Interior Department, hold the entry for cancelation, and take proceedings to that end upon notice to the parties interested; but when the patent issued, it took effect as of the date of the inception of proceedings to enter the land. The patent having issued to the respective entrymen, it became conclusive of their right, and inured to defendant's benefit and related back to the date of the inception of proceedings to enter the land. The patent is conclusive that the Land Department had jurisdiction and that all the steps requisite and necessary to that end had been taken, and the adjudication of the land office is conclusively presumed from the issuance of the patent. *Silver Bow M. & M. Co.* v. *Clark*, 5 Montana, 424; *Morgan* v. *Daniels*, 153 U. S. 124; *Widdicombe* v. *Childers*, 124 U. S. 405; *Shanklin* v. *McNamara*, 87 California, 378; *United States* v. *Land Company*, 148 U. S. 44; *Heath* v. *Wallace*, 138 U. S. 575; *Johnson* v. *Townsley*, 13 Wall. 72; *Smelting Company* v. *Kemp*, 104 U. S. 636; *Minter* v. *Crommelin*, 18 How. 87; *United States* v. *Amer-*

ican Bell Tel. Co., 167 U. S. 240; *United States* v. *Detroit Timber & Land Co., supra.*

The charges of fraud and illegality in the bill of complaint filed in this case against the entrymen named are wholly unsustained by the proof.

The defendant was an innocent purchaser of the lands, and took title to the same without any notice whatever of the alleged fraudulent and illegal acts of the entrymen named in the bill. He was not bound to make inquiries unless his suspicions were aroused. *United States* v. *Detroit Timber & Lumber Co., supra; Jones* v. *Simpson*, 116 U. S. 609; *Wilson* v. *Wall*, 6 Wall. 83; *Meehan* v. *Williams*, 48 Pa. St. 238.

To annul a patent and destroy the title claimed under it the facts must be clearly proved by evidence entirely satisfactory to the court. *Maxwell Land Grant Case*, 121 U. S. 378; *Colorado Coal Co.* v. *United States*, 123 U. S. 307; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Des Moines &c. Co.*, 142 U. S. 510.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill for the cancelation of eighty patents for timber lands in Montana, now owned by the defendant, on the ground that the patentees did not purchase the same in good faith for their own exclusive use and benefit, but for speculation and under agreement by which their title should enure to the benefit of another, and that the defendant knew the facts in a general way, if not in detail. Act of June 3, 1878, c. 151, § 2, 20 Stat. 89; extended to all public land States by act of August 4, 1892, c. 375, § 2, 27 Stat. 348. The defendant pleaded that he was a *bona fide* purchaser, excepted as such from the invalidation of the patents by the act, and denied the material allegations of the bill. Voluminous evidence was taken, and at the hearing the bill was dismissed by the Circuit Court. 125 Fed. Rep. 774. That court found that Clark had no actual knowledge of the alleged frauds or of facts sufficient to put him on inquiry, 125

Fed. Rep. 776, 777, and, considering the requirement of clear proof according to the statement of this court in the *Maxwell Land-Grant Case*, 121 U. S. 325, 381, further was of opinion that the original frauds alleged were not made out. The Circuit Court of Appeals, in view of the pendency of indictments, did not discuss the alleged original frauds, but, assuming for the purposes of decision that they had been committed, confirmed the findings of the Circuit Court with regard to Clark. One judge dissented on the ground that Clark knew enough to be put upon inquiry. 138 Fed. Rep. 294. The United States then appealed to this court.

The bill proceeds upon the footing that Clark has the legal title to the lands in question. The entrymen conveyed to one Cobban, the alleged partner in their frauds, and Cobban conveyed to Clark, all by warranty deeds. It is true that they conveyed before the patents issued, shortly after obtaining the receiver's receipt, but it is assumed that the legal title, when created, followed the deeds. We make the same assumption. *Landes* v. *Brant*, 10 How. 348; *Bush* v. *Cooper*, 18 How. 82; *Myers* v. *Croft*, 13 Wall. 291; *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 322. See, further, *Ayer* v. *Philadelphia & Boston Face Brick Co.*, 159 Massachusetts, 84. But the position is that Clark is privy to the original frauds, and that, even if he is not, inasmuch as he did not purchase on the faith of the patents, he has no better title than the entrymen would have had if the title had remained in them. No distinction is attempted on the ground that the deeds as well as the bargain preceded the patents.

We may assume for the purposes of decision, as did the Circuit Court of Appeals, that the original frauds are made out, although there is a great amount of testimony to good faith. But the point of law just stated has been disposed of by *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321. The United States is attempting to upset a legal title. In order to do that it must charge Clark with notice of the original frauds. The fact that Clark, while he had a merely equitable or per-

sonal claim against the Government, held it subject to any defect which it might have, whether he knew it or not, as generally is the case with regard to assigned contracts not negotiable, was not equivalent to actual notice of the defect. It is recognized in the act of March 3, 1891, c. 561, § 7, 26 Stat. 1095, 1098, that there may be a *bona fide* purchaser before a patent issues. The title when conveyed related back to the date of the orginal entries. Therefore actual notice must be proved.

But so far as actual knowledge or notice on the part of Clark is concerned, both of the courts below found in explicit terms that the proof failed. We perceive no sufficient reason for departing from the rule that, except in a very clear case, where both courts have concurred we do not disturb their findings of fact. *United States* v. *Stinson*, 197 U. S. 200, 207; *The Germanic*, 196 U. S. 589, 595. If ever this rule is to be applied, it should be when those findings are against a charge of fraud and when the effort is to overthrow a patent of the United States. The requirement that the proof should be clear in such a case has been repeated in a series of decisions from the *Maxwell Land-Grant Case*, 121 U. S. 325, to *United States* v. *Stinson*, 197 U. S. 200, 204. There is nothing suficient to show that Clark had actual knowledge of the arrangement by which Cobban got the lands. The allegation that Cobban was Clark's agent in the purchase wholly breaks down. Clark was at a distance. He dealt as a purchaser with Cobban, and paid him the market price, and a substantial profit even on the Government's calculation. So far as any inference was to be drawn from the nearness of the respective dates of the receiver's receipts, the deeds of the entrymen to Cobban and the deeds of Cobban to Clark, it was as open to the officers of the Government as to Clark, if indeed he knew anything about those dates, yet they seem to have suspected nothing, and he was advised by reputable counsel that the titles were good, and bought only on his advice. Clark, his agents and advisers, testify that they did not know or suspect anything wrong.

With regard to constructive notice in addition to the facts

just mentioned the Government relies on an argument that Cobban began negotiations with Clark before he had acquired title to the lands, not, however, identifying those lands. Assuming this to be true, it requires Clark to have kept that fact in mind when the conveyances were made to him, and noticing the date of the conveyances to Cobban, and of the receiver's receipts, to infer that the negotiations were begun upon a scheme to get the lands from the Government by fraud. It requires an actual and not necessary inference from knowledge, with which Clark may have been chargeable, but which he probably, or at least possibly, did not actually possess. It is argued further that Clark's inspector must have gone upon the land about the time of the entries in order to do the necessary work of estimating the timber. If, for the purposes of argument, we assume that knowledge of a timber inspector of facts affecting the title, with which he had nothing to do, was chargeable to Clark, still the knowledge is a mere guess. There was nothing present or required to be present on the face of the earth to indicate when the entry took place. We cannot infer fraud merely from more or less familiar relations between some of Clark's agents and Cobban. When suspicion is suggested it easily is entertained. But, bearing in mind, as was said in *United States* v. *Detroit Timber & Lumber Co., supra,* that Clark was not bound to hunt for grounds of doubt, and recurring to the canons of proof laid down by the decisions, and to the findings of the courts below, we are of opinion that the decree dismissing the bill must be affirmed.

Decree affirmed.

MR. JUSTICE MCKENNA concurs on the law on the authority of *United States* v. *Detroit Timber & Lumber Co.,* and concurs on the facts.

MR. JUSTICE HARLAN and MR. JUSTICE BROWN dissent.

OPINIONS PER CURIAM, ETC., FROM DECEMBER 12, 1905, TO FEBRUARY 26, 1906.

No. 107. BEHN, MEYER & CO., APPELLANTS, *v.* CAMPBELL & GO TAUCO. Appeal from the Supreme Court of the Philippine Islands. Argued December 8, 1905. Decided December 18, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. Act July 1, 1902, 32 Stat. 691, c. 1369, § 10; *Deland* v. *Platte County,* 155 U. S. 221; *Comstock* v. *Eagleton,* 196 U. S. 99; *Oklahoma City* v. *McMaster,* 196 U. S. 529; *Walker* v. *Dreville,* 12 Wall. 440. *Mr. C. C. Carlin, Mr. Henry E. Davis* and *Mr. Louis C. Barley* for appellants. *Mr. Aldis B. Browne* and *Mr. Alexander Britton* for appellees.

No. 111. IN THE MATTER OF THE PETITION OF J. W. ROBINSON AND MARIE CARRAU FOR A WRIT OF HABEAS CORPUS. On a certificate from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted December 11, 1905. Decided December 18, 1905. *Per Curiam.* Certificate dismissed. *United States* v. *Rider,* 163 U. S. 132; *Fire Insurance Association* v. *Wickham,* 128 U. S. 426; *Jewell* v. *Knight,* 123 U. S. 426; *United States* v. *Perrin,* 131 U. S. 55; *Cross* v. *Evans,* 167 U. S. 60. *Mr. Joseph W. Robinson* and *Mr. Milton W. Smith* for petitioners. *Mr. Samuel H. Piles, Mr. George Donworth, Mr. James B. Howe* and *Mr. F. D. McKenney* for respondent.

No. 339. AH SOU, APPELLANT, *v.* THE UNITED STATES. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Motions to dismiss or affirm submitted December 11, 1905. Decided December 18, 1905. *Per Curiam.* Dismissed for the want of jurisdiction. 132 Fed. Rep.

878; 138 Fed. Rep. 775; *Barry* v. *Mercein*, 5 How. 103, 120; *Kurtz* v. *Moffitt*, 115 U. S. 487; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 239; *Farrell* v. *O'Brien*, 199 U. S. 89; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730; *Chin Bak Kan* v. *United States*, 186 U. S. 193; *Tom Hong* v. *United States*, 193 U. S. 517; *Turner* v. *Williams*, 194 U. S. 279. *Mr. John M. Thurston* for appellant. *The Attorney General* and *The Solicitor General* for appellee.

No. 344. MUTUAL RESERVE LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* HENRY C. BIRCH. In error to the Supreme Court of the State of New York. Motions to dismiss or affirm submitted November 13, 1905. Decided December 18, 1905. *Per Curiam.* Judgment affirmed with ten per cent damages, in addition to interest and costs. *Mutual Reserve Fund Life Association* v. *Phelps*, 190 U. S. 147; *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602; *Egan* v. *Hart*, 165 U. S. 188; *Richardson* v. *L. & N. Railroad Company*, 169 U. S. 128; *Young* v. *Valentine*, 177 N. Y. 347; *Woodward* v. *Mutual Reserve Life Insurance Company*, 178 N. Y. 485; *Birch* v. *Mutual Reserve Life Insurance Company*, 181 N. Y. 583; *S. C.*, 91 App. Div. 384. *Mr. Gordon T. Hughes* for plaintiff in error. *Mr. Gilbert E. Roe* for defendant in error.

No. 117. J. L. CONGDON, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF MICHIGAN. In error to the Supreme Court of the State of Michigan. Argued December 11, 1905. Decided January 2, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173; *Haseltine* v. *Bank*, 183 U. S. 130. *Mr. Thomas J. Cavanaugh, Mr. H. T. Cook* and *Mr. Wm. G. Howard* for plaintiff in error. *Mr. David Anderson, Mr. John E. Bird, Mr. Rus-*

sell M. Chase, Mr. Charles A. Blair and *Mr. Henry E. Chase* for defendants in error.

No. —, Original. *Ex parte:* IN THE MATTER OF THE CHICAGO TITLE AND TRUST COMPANY, PETITIONER. January 2, 1906. Motion for leave to file petition for a writ of mandamus denied. *Mr. Joseph E. Paden* and *Mr. Newton Wyeth* for petitioner. *Mr. Henry S. Robbins, Mr. Wallace Heckman* and *Mr. James G. Elsdon* for respondents.

No. 175. EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, APPELLANT, *v.* BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Motion to dismiss submitted December 18, 1905. Decided January 8, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Colorado Central Mining Company* v. *Turck,* 150 U. S. 138; *Press Publishing Company* v. *Monroe,* 164 U. S. 105; *Blackburn* v. *Portland Gold Mining Company,* 175 U. S. 571; *Spencer* v. *Duplan Silk Company,* 191 U. S. 526; *Shoshone Mining Company* v. *Rutter,* 177 U. S. 505. *Mr. George Turner, Mr. W. B. Heyburn* and *Mr. F. T. Post* for appellant. *Mr. Curtis H. Lindley, Mr. Henry Eickhoff* and *Mr. M. A. Folsom* for appellee.

No. 114. JOHN S. MCCALLA, APPELLANT, *v.* ALMA MAZO ACKER, EXECUTRIX OF CALVIN S. ACKER, DECEASED. Appeal from the Supreme Court of the Territory of Oklahoma. Submitted December 7, 1905. Decided January 8, 1906. *Per Curiam.* Decree affirmed with costs. *Winebrenner* v. *Forney,* 189 U. S. 148. *Mr. S. H. Harris* and *Mr. Fred Beall* for appellant. *Mr. Chester Howe* for appellee.

No. 307. LOTTIE R. RUSSELL, APPELLANT, *v.* BENJAMIN RUSSELL ET AL. Appeal from the United States Circuit Court

of Appeals for the Third Circuit. Motions to dismiss or affirm submitted January 8, 1906. Decided January 15, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Colorado Central Mining Company* v. *Turck,* 150 U. S. 138; *Press Publishing Company* v. *Monroe,* 164 U. S. 105; *Ex parte Jones,* 164 U. S. 691; *Continental National Bank* v. *Buford,* 191 U. S. 119; *Spencer* v. *Duplan Silk Company,* 191 U. S. 526. *Mr. John H. Hazelton* and *Mr. John G. Carlisle* for appellant. *Mr. Walter H. Bacon* and *Mr. Robert H. McCarter* for appellees.

No. 405. GEORGE H. JONES, PLAINTIFF IN ERROR, *v.* WILLIAM VANE ET AL. In error to the Supreme Court of the State of Idaho. Motions to dismiss or affirm submitted January 15, 1906. Decided January 22, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *San Francisco* v. *Itsell,* 133 U. S. 65; *Hopkins* v. *McLure,* 133 U. S. 380; *California* v. *Holladay,* 159 U. S. 415; *Eustis* v. *Bolles,* 150 U. S. 361, 367; *Kipley* v. *Illinois,* 170 U. S. 182; *Lynde* v. *Lynde,* 181 U. S. 183; *Western Union Telegraph Company* v. *Ann Arbor Railway Company,* 178 U. S. 239. *Mr. William T. Birdsall* for plaintiff in error. *Mr. S. M. Stockslager* and *Mr. George C. Heard* for defendants in error.

No. —, Original. *Ex parte:* IN THE MATTER OF GEORGE W. WATT AND JAMES M. DOHAN, PETITIONERS. January 29, 1906. Motion for leave to file petition for a writ of mandamus denied. *Mr. James M. Dohan* and *Mr. W. G. Arnold* for petitioners.

No. —, Original. *Ex parte:* IN THE MATTER OF LEONARD IMBODEN AND JAMES A. HILL, PETITIONERS. January 29, 1906. Motion for leave to file petition for a writ of *habeas corpus* denied. *Mr. James S. Davis, Mr. James J. Banks* and *Mr. Henry J. Hersey* for petitioners.

No. 407. ANNA SIEGEL, PLAINTIFF IN ERROR, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY ET AL.; No. 453. HEDEWIG KRIETE, PLAINTIFF IN ERROR, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY ET AL.; No. 454. DAVID W. O'NEIL ET AL., PLAINTIFFS IN ERROR, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY ET AL; and No. 493. FRANZISKA SCHALZ, PLAINTIFF IN ERROR, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY ET AL. In error to the Supreme Court of the State of New York. Argued January 15 and 16, 1906. Decided January 19, 1906. *Per Curiam.* Judgments reversed with costs, and cases remanded for further proceedings not inconsistent with the opinions of this court in *Muhlker* v. *New York and Harlem Railroad Company*, 197 U. S. 544; *Birrell* v. *New York and Harlem Railroad Company*, 198 U. S. 390; *Kierns* v. *New York and Harlem Railroad Company*, 198 U. S. 390. *Mr. L. M. Berkeley* and *Mr. Charles A. Hess* for plaintiffs in error. *Mr. Edward Winslow Paige* and *Mr. Ira A. Place* for defendants in error.

No. 222. JOSHUA W. DARDEN, PLAINTIFF IN ERROR, *v.* THE STATE OF ARKANSAS. In Error to the Supreme Court of the State of Arkansas. Motions to dismiss or affirm submitted February 19, 1906. Decided February 26, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173; *Haseltine* v. *Bank*, 183 U. S. 130; *California National Bank* v. *Stateler*, 171 U. S. 447; Kirby's Digest Statutes of Arkansas, § 1790. *Mr. Joe T. Robinson* for plaintiff in error. *Mr. Thomas B. Martin* for defendant in error.

No. 242. THE COLUMBIAN CORRESPONDENCE COLLEGE, APPELLANT, *v.* GEORGE B. CORTELYOU, POSTMASTER-GENERAL, ET AL. Appeal from the Court of Appeals of the District of Columbia. Motions to dismiss or affirm submitted February 19, 1906. Decided February 26, 1906. *Per Curiam.*

Dismissed for the want of jurisdiction. *South Carolina* v. *Seymour*, 153 U. S. 353, 357; *United States* v. *Lynch*, 137 U. S. 280, 286; Code District of Columbia, § 233. *Mr. Arthur A. Birney* and *Mr. Charles A. Ray* for appellant. *The Attorney General* and *The Solicitor General* for appellees.

Decisions on Petitions for Writs of Certiorari from December 12, 1905 *to February* 26, 1906.

No. 512. The Iroquois Transportation Company, etc., Petitioner, *v.* A. Harvey's Sons Manufacturing Company. December 18, 1905. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles E. Kremer* for petitioner. *Mr. Henry B. Graves* for respondent.

No. 516. The United States, Petitioner, *v.* George Riggs & Co. January 2, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General McReynolds* for petitioner. *Mr. Charles Curie* and *Mr. W. Wickham Smith* for respondents.

No. 452. Nome Beach Lighterage and Transportation Company, Petitioner, *v.* The Standard Marine Insurance Company. January 2, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Aldis B. Browne* and *Mr. Francis J. Heney* for petitioner. *Mr. T. C. VanNess* and *Mr. William Denman* for respondent.

No. 504. Copper River Mining Company, Petitioner, *v.* R. F. McClellan et al. January 2, 1906. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles H. Aldrich* and *Mr. W. B. Heyburn* for petitioner. *Mr. Frank D. Arthur, Mr. John A. Carson* and *Mr. Frederick DeC. Faust* for respondents.

No. 260. THE LAST CHANCE MINING COMPANY ET AL., PETITIONERS, *v.* BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY. January 8, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George Turner* and *Mr. W. B. Heyburn* for petitioners. *Mr. Curtis H. Lindley, Mr. Henry Eickhoff* and *Mr. M. A. Folsom* for respondent.

No. 437. EMPIRE STATE-IDAHO MINING AND DEVELOPMENT COMPANY, PETITIONER, *v.* BUNKER HILL AND SULLIVAN MINING AND CONCENTRATING COMPANY. January 8, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George Turner* and *Mr. F. T. Post* for petitioner. *Mr. Curtis H. Lindley, Mr. Henry Eickhoff* and *Mr. M. A. Folsom* for respondent.

No. 523. JOACQUIN F. DE VIGNIER ET AL., PETITIONERS, *v.* THE CITY OF NEW ORLEANS. January 8, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. (MR. JUSTICE WHITE took no part in the disposition of this application.) *Mr. Richard DeGray, Mr. John D. Rouse* and *Mr. William Grant* for petitioners. No appearance for respondent.

No. 435. HARRY B. DAVIS ET AL., PETITIONERS, *v.* THOMAS R. JONES ET AL. January 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Hayward Fairbanks* for

petitioners. *Mr. Melville Church* and *Mr. Robert Watson* for respondents.

No. 528. JESSE THOMAS, PETITIONER, *v.* THE PROVIDENT LIFE AND TRUST COMPANY ET AL.; and No. 529. LUCY L. WICKHAM, PETITIONER, *v.* THE PROVIDENT LIFE AND TRUST COMPANY ET AL. January 15, 1906. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles S. Fogg* for petitioner in No. 528 and *Mr. David A. Gourick* for petitioner in No. 529. *Mr. John F. Shafroth* for respondents.

No. 531. CHARLES C. BROWNE, PETITIONER, *v.* THE UNITED STATES. January 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Judson G. Wells, Mr. William Lindsay* and *Mr. Louis Marshall* for petitioner. *The Attorney General, The Solicitor General* and *Mr. W. Wickham Smith* for respondent.

No. 538. C. R. CHIPMAN, ETC., ET AL., PETITIONERS, *v.* JAMES B. MCDONALD, ADMINISTRATOR, ETC. January 15, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. Moultrie Mordecai, Mr. P. H. Gadsden* and *Mr. Jno. E. Hartridge* for petitioners. *Mr. A. W. Cockrell* for respondent.

No. 424. THE COUNTY COMMISSIONERS OF WICOMICO COUNTY PETITIONERS, *v.* SAMUEL BANCROFT, JR. January 22, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. James E. Ellegood* for petitioners. *Mr. Nicholas P. Bond* for respondent.

No. 526. ALBERT M. RAYMOND, PETITIONER, *v.* THE UNITED STATES. January 22, 1906. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Levi H. David* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 544. EFFIE C. WILSON, PETITIONER, *v.* SAMUEL D. HOFFMAN. January 22, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. George J. Bergen* for petitioner. *Mr. C. L. Cole* for respondent.

No. 535. NORTH PACIFIC COAST RAILROAD COMPANY, PETITIONER, *v.* MRS. CATHERINE HALL ET AL.; No. 536. NORTH SHORE RAILROAD COMPANY, PETITIONER, *v.* J. S. MCCUE; and No. 537. NORTH PACIFIC COAST RAILROAD COMPANY, PETITIONER, *v.* MRS. CATHERINE HALL ET AL. January 29, 1906. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George W. Towle, Jr.*, for petitioners. *Mr. H. V. Morehouse* for respondents.

No. 550. R. PERCY WRIGHT, PETITIONER, *v.* EAST RIVERSIDE IRRIGATION DISTRICT. January 29, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William F. Humphrey* and *Mr. G. W. McEnerney* for petitioner. *Mr. Byron Waters* for respondent.

No. 552. I. H. MOORE ET AL., PETITIONERS, *v.* JOHN DALTON ET AL. February 19, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. M. Stockslager* for petitioners. *Mr. E. S. Pillsbury* for respondents.

No. 556. FREDERICK S. GOSHORN ET AL., PETITIONERS, *v.* ROYAL TRUST COMPANY ET AL. February 19, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry W. Leman* for petitioners. *Mr. Frank H. Scott* and *Mr. Edgar A. Bancroft* for respondents.

No. 561. CHARLES G. DUNN, RECEIVER, ETC., PETITIONER, *v.* MITCHELL L. ERLANGER, SHERIFF, ETC. February 19, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William Lesser* for petitioner. *Mr. Henry J. Goldsmith* for respondent.

No. 566. DELTA NATIONAL BANK ET AL., PETITIONERS, *v.* J. O. EASTERBROOK, TRUSTEE. February 19, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edwin C. Brandenburg* for petitioners. No appearance for respondent.

No. 567. GEORGE H. GILMAN ET AL., PETITIONERS, *v.* JAMES A. HINSON. February 19, 1906. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. L. S. Bacon* for petitioners. *Mr. C. Clarence Poole* and *Mr. Taylor E. Brown* for respondent.

No. 599. FERDINAND EIDMAN, COLLECTOR, ETC., PETITIONER, *v.* FREDERICK B. TILGHMAN ET AL., EXECUTORS, ETC. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Robb* for petitioner. *Mr. Edward B. Whitney* for respondents.

No. 505. THE GERMAN SAVINGS AND LOAN SOCIETY, PETITIONER, *v.* WILLIAM L. TULL ET AL. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Francis J. Heney* for petitioner. *Mr. Robert A. Howard, Mr. L. G. Nash* and *Mr. Samuel R. Stern* for respondents.

No. 545. KOKOMO STEEL AND WIRE COMPANY, PETITIONER, *v.* COLUMBIA WIRE COMPANY. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas A. Banning, Mr. Ephraim Banning* and *Mr. C. C. Shirley* for petitioner. *Mr. Thomas W. Bakewell* for respondent.

No. 559. THE GREENWICH INSURANCE COMPANY OF NEW YORK CITY, PETITIONER, *v.* N. & M. FRIEDMAN CO. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Mark Norris* for petitioner. *Mr. Loyal E. Knappen* for respondent.

No. 560. MISSOURI RIVER POWER COMPANY, PETITIONER, *v.* LOUIS STADLER ET AL. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. B. Browne, Mr. Alexander Britton, Mr. Thomas C. Bach* and *Mr. E. C. Day* for petitioner. *Mr. Thomas J. Walsh* for respondents.

No. 563. EDWARD L. HARPER, BANKRUPT, PETITIONER, *v.* GEORGE C. RANKIN, RECEIVER, ETC. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. A. Ayers* for petitioner. *Mr. John W. Herron* and *Mr. William C. Herron* for respondent.

No. 571. DUNCAN ELECTRIC MANUFACTURING COMPANY ET AL., PETITIONERS, *v.* SIEMENS-HALSKE ELECTRIC COMPANY OF AMERICA. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Robert H. Parkinson* for petitioners. *Mr. Drury W. Cooper* and *Mr. Thomas B. Kerr* for respondent.

No. 585. ROBERT B. ROOSEVELT, PETITIONER, *v.* ELBERT A. BRINCKERHOFF ET AL. February 26, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Yeaman* and *Mr. George C. Kobbe* for petitioner. *Mr. Frederick S. Duncan* for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM DECEMBER 12, 1905, TO FEBRUARY 26, 1906.

No. 134. GEORGE H. COPLAND ET AL., APPELLANTS, *v.* C. W. WALDRON ET AL. Appeal from the District Court of the United States for the District of Washington. December 12, 1905. Dismissed with costs, pursuant to the tenth rule, and cause remanded to the District Court of the United States for the Western District of Washington. *Mr. G. Meade Emory* for appellants. No appearance for appellees.

No. 166. WILLIAM D. MARTIN, PLAINTIFF IN ERROR, *v.* THE NEW TRINIDAD LAKE ASPHALT COMPANY, LIMITED. In error to the Circuit Court of the United States for the Southern District of New York. December 14, 1905. Dismissed, per stipulation. *Mr. Henry B. Johnson* for plaintiff in error. *Mr. Abram J. Rose* for defendant in error.

No. 171. LOUISIANA AND MISSOURI RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* PATRICK MARKEY. In error

to the Supreme Court of the State of Missouri. December 14, 1905. Dismissed with costs, per stipulation. *Mr. W. C. Scarritt* for plaintiff in error. *Mr. George Robertson* for defendant in error.

No. 190. WABASH RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* BERNARD LOEB. In error to the Kansas City Court of Appeals of the State of Missouri. December 18, 1905. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Wells H. Blodgett* for plaintiff in error. *Mr. John Cosgrove* for defendant in error.

No. 130. THOMAS S. ELLIS, APPELLANT, *v.* WILLIAM WILLIAMS, COMMISSIONER OF IMMIGRATION. Appeal from the Circuit Court of the United States for the Southern District of New York. January 2, 1906. Dismissed, per stipulation, on motion of *The Solicitor General* for the appellee. *Mr. F. K. Pendleton* for appellant. *The Attorney General* for appellee.

No. 122. MUTUAL RESERVE LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* GEORGE W. WOODWARD. In error to the Supreme Court of the State of New York. January 8, 1906. Dismissed, per stipulation. *Mr. Gordon T. Hughes* for plaintiff in error. *Mr. Rollin M. Morgan* for defendant in error.

No. 542. GIUSSEPPE MARMO, APPELLANT, *v.* FRANK H. SOMMER, SHERIFF, ETC. Appeal from the Circuit Court of the United States for the District of New Jersey. January 15, 1906. Dismissed with costs, on motion of counsel for the appellant. *Mr. Elvin W. Crane* for appellant. No appearance for appellee.

No. 181. JOSE S. ESQUIBEL, APPELLANT, *v.* FRANCISCO S. CHAVES. Appeal from the Supreme Court of the Territory of New Mexico. January 19, 1906. Dismissed with costs, pursuant to the tenth rule. *Mr. Frank S. Bright* for appellant. No appearance for appellee.

No. 401. THE DRAKE & STRATTON COMPANY, PLAINTIFF IN ERROR, *v.* ALDEN ANDERSON, A MINOR, ETC. In error to the Circuit Court of the United States for the District of Minnesota. January 26, 1906. Dismissed, per stipulation. *Mr. Thomas J. Davis* for plaintiff in error. *Mr. Samuel A. Anderson* for defendant in error.

No. 402. THE DRAKE & STRATTON COMPANY, PLAINTIFF IN ERROR, *v.* MICHAEL SENESE. In error to the Circuit Court of the United States for the District of Minnesota. January 26, 1906. Dismissed, per stipulation. *Mr. Thomas J. Davis* for plaintiff in error. *Mr. Samuel A. Anderson* for defendant in error.

No. 432. MINERS AND MERCHANTS BANK OF LONACONING, PLAINTIFF IN ERROR, *v.* WALTER SNYDER. In error to the Court of Appeals of the State of Maryland. January 29, 1906. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Edgar H. Gans* for plaintiff in error. *Mr. William S. Bryan, Jr.*, for defendant in error.

No. 417. EMILIO MONTILLA Y VALDESPINO, APPELLANT, *v.* PAUL VAN SYCKEL ET AL. Appeal from the Supreme Court of Porto Rico. February 19, 1906. Dismissed with costs, per stipulation, on motion of *Mr. Barry Mohun* for the appellant. *Mr. J. H. McGowan* and *Mr. Charles Hartzell* for appellant. *Mr. N. B. K. Pettingill* for appellees.

200 U. S. Cases Disposed of Without Consideration by the Court.

No. 597. DAVID KAWAMANAKOA ET AL., APPELLANTS, *v.* ELLEN ALBERTINO POLYBLANK, ETC., ET AL. Appeal from the Supreme Court of the Territory of Hawaii. February 19, 1906. Docketed and dismissed with costs, on motion of *Mr. A. B. Browne* for the appellees. No one opposing.

No. 263. THE LAKE ERIE PROVISION COMPANY, PLAINTIFF IN ERROR, *v.* C. H. WESSELLS ET AL. In error to the Circuit Court of the United States for the Northern District of Ohio. February 19, 1906. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Newton D. Baker* for plaintiff in error. No appearance for defendants in error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

ORDER.

It is ordered by the Court, That Paragraph 4 of Rule 9 be, and the same is hereby, amended so as to read as follows:

4. In all cases where the period of thirty days is mentioned in Rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, Idaho, Hawaii and Porto Rico, and to one hundred and twenty days from the Philippine Islands.

(Promulgated January 29, 1906.)

INDEX.

CONVEYANCES.

See REAL PROPERTY.

CORPORATIONS.

COURTS.

municipality provided that no contract or privilege would be granted to furnish water to any other person or corporation, the city was not, in the absence of a special stipulation to that effect, precluded from establishing its own independent system of waterworks. *Ib.*

See PUBLIC LANDS.

HABEAS CORPUS.

See COURTS;
JURISDICTION, C 2.

HAWAIIAN FISHERIES.

1. *Fishing rights of owner of an ahapuaa.*

Damon v. *Hawaii*, 194 U. S. 154, followed to effect that under the Hawaiian Act of 1846, "of Public and Private Rights of Piscary," the owner of an ahapuaa is entitled to the adjacent fishing ground within the reef, and that the statute created vested rights therein within the saving clause of the organic act of the Territory repealing all laws of the Republic of Hawaii conferring exclusive fishing rights. *Carter* v. *Hawaii*, 255.

2. *Effect of omission to establish right to a fishery before Land Commission.*

The Land Commission of Hawaii was established to determine title to lands against the Hawaiian Government, and, as that Commission rightly treated fisheries as not within its jurisdiction, the omission to establish the right to a fishery before that Commission does not prejudice the right of the owner thereto. *Ib.*

HEADNOTES.

See REPORTS.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 1;
PRACTICE AND PROCEDURE, 2.

INHERITANCE TAX.

See CONSTITUTIONAL LAW, 14.

INJUNCTION.

See CONSTITUTIONAL LAW, 16, 20; JURISDICTION, A 12;
INTERSTATE COMMERCE, 1; NUISANCE, 2;
TAXATION, 2.

INTERSTATE COMMERCE.

1. *Rates; application of prohibition of Interstate Commerce Act as to charge by carrier of less than published rates—Illegality of contract for sale and transportation of commodity—Immateriality of intent to violate prohibitions of act—Scope of injunction against violations of act—Binding force on courts of ruling of Interstate Commerce Commission.*

(*a*) A carrier, not expressly authorized so to do by charter obtained prior

to the Interstate Commerce Act, cannot contract to sell, and to transport in completion of the contract the commodity sold, when the stipulated price does not pay the cost of purchase, the cost of delivery, and the published freight rates.

(*b*) The Interstate Commerce Act was enacted to secure equality of rates and to destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as to reasonably accomplish them; its prohibitions against directly or indirectly charging less than published rates are all-embracing and applicable to every method by which the forbidden results could be brought about.

(*c*) Where a contract of a carrier for sale and transportation is illegal under the Interstate Commerce Act because the amount charged for transportation is less than the published rates, the contract is not made legal because the carrier is also released by the same shipper from a claim, admitted by the carrier and amounting to more than the difference between the published rate and the amount charged, for breach of a prior contract, where it appears that such prior contract was also illegal for the same reason.

(*d*) Whatever powers a carrier may possess as to its commerce not interstate, it is subject as to its interstate commerce to the Interstate Commerce Act, the application of whose prohibitions depends not upon whether the carrier intends to violate them but upon whether it actually does so.

(*e*) Congress has undoubted power to subject to regulations adopted by it every carrier engaged in interstate commerce, and although the Interstate Commerce Act may not contain an express prohibition against a carrier becoming a dealer in commodities transported by it the court will enforce the general provisions of the act although in so doing it may render it impossible for a carrier to deal in such commodities.

(*f*) While the construction of a statute by a body charged with its enforcement which has long obtained, and, which has been impliedly sanctioned by the reënactment of the statute without alteration, must be treated, when not plainly erroneous, as read into the statute, the binding force of such construction on the court is restricted to the precise conditions passed on; and a ruling by the Interstate Commerce Commission as to the right of a carrier, possessing charter rights granted prior to the passage of the act, to also be a vendor is not applicable to the case of a carrier which does not possess such rights.

(*g*) Where a carrier has violated the provisions of the Interstate Commerce Act in a particular manner in regard to a particular commodity the court may perpetually enjoin it from further violations of that act by the means employed and as to that commodity, but should not enjoin the carrier in general terms not to violate the act in any particular. *New Haven R. R.* v. *Interstate Com. Com.*, 361.

2. *Construction of Interstate Commerce Act—Rebates—Joint through rates—Pooling of freights—Unlawful discrimination by carriers.*

The Southern Pacific and other railroads published a guaranteed through rate on citrus fruits from California to the Atlantic seaboard. The

JUDICIAL NOTICE.

Of government permits to cut timber.

This court cannot take judicial notice of the contents of permits to cut timber which are issued in different forms and subject to the discretion of the Department giving them. *United States* v. *Bitter Root Co.*, 451.

JURISDICTION.

A. Of This Court.

1. *Appeal from territorial court—Determination of amount involved.*

In the proceedings in *quo warranto* in this case the alleged usurpation of the office is the matter in dispute, and the liability to fine on judgment of ouster or the effect of the judgment in a subsequent action to recover the emoluments of the office does not make that matter measurable by some sum or value in money, and an appeal to this court will not lie from the Supreme Court of a Territory under either section of the act of March 3, 1885, c. 355. *Albright* v. *Sandoval*, 9.

2. *Appeal from territorial court—Sufficiency of record.*

Where the record in an appeal from a judgment of the Supreme Court of a Territory does not present any exceptions to rulings on admission of evidence worthy of consideration, and the judgment was rendered in the trial court and affirmed by the Supreme Court on a general finding, the appeal will be dismissed. *Guss* v. *Nelson*, 298.

3. *Appeal from territorial court—Limitation of review.*

On appeal from the Supreme Court of a Territory the jurisdiction of this court, apart from reviewing exceptions to rulings on evidence, is limited to determining whether the findings support the judgment. *Herrick* v. *Boquillas Cattle Co.*, 96.

4. *Dismissal of writ of error where only abstract question remains and relief impossible.*

Where, in a suit to cancel the revocation of an annual permit to do business in a State, the permit has ceased, since the writ of error was filed, to have any effect, and the plaintiff in error could not do business even if successful without obtaining a new permit, an event has occurred which renders it impossible for this court to grant any relief, and, as only an abstract question remains to be decided, the writ of error will be dismissed. *Security Life Ins. Co.* v. *Prewitt*, 446; *Travelers Ins. Co.* v. *Prewitt*, 450.

5. *Effect of certificate of state court as to existence of Federal question.*

While a certificate of a court of last resort of a State may not import into a record a Federal question not otherwise existing, such certificate serves to elucidate whether such Federal question does exist. *Rector* v. *City Deposit Bank*, 405.

6. *Review of action of state court in directing verdict.*

While this court is bound by the facts found by a state court, where that court does not find the facts but instructs a verdict on the ground that

A suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill.

The bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if the assignment had not been made.

A suit may be maintained between the immediate parties to a promissory note as indorser or indorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract, and in such case the original contract may be considered to ascertain the amount of damages.

Although an action of fraud might be sustained upon the facts involved in an action where the requisite diversity of citizenship exists if the suit is in substance one to foreclose a mortgage, and it appears by the bill that the fraud is a mere incident, the suit is one within the meaning of § 1 of the act of August 13, 1888, and will not lie in a Federal court unless plaintiff's assignor might have maintained the bill had no transfer been made. *Kolze* v. *Hoadley*, 76.

See CONSTITUTIONAL LAW, 17, 19;
COURTS;
JURISDICTION, C 2.

C. OF FEDERAL COURTS GENERALLY.

1. *Power over state instrumentalities.*

When a Federal court acquires jurisdiction of a controversy by reason of the diverse citizenship, it may dispose of all the issues in the case, determining the rights of parties under the same rules or principles that control when the case is in the state court. But, as between citizens of the same State, the Federal court may not interfere to compel municipal corporations or other like state instrumentalities to keep within the limits of the power conferred upon them by the State, unless such interference is necessary for the protection of a Federal right. *Waterworks Company* v. *Owensboro*, 38.

2. *Habeas corpus; limitation of jurisdiction to issue writs of.*

As the jurisdiction of courts of the United States to issue writs of *habeas corpus* is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations, a Circuit Court cannot issue the writ to release a citizen from imprisonment by another citizen of the State merely because the imprisonment is illegal. *Carfer* v. *Caldwell*, 293.

See CONSTITUTIONAL LAW.

D. OF STATE COURTS.

See COURTS.

adequate proportionate protection as to the easement being provided for the mortgagee of the vacant plot, the plot with the building should be sold together with the easement on the ten feet adjoining as one parcel, and the vacant parcel subject to the easement, as another parcel, separately. *Ib.*

See JURISDICTION, B 5;
LOCAL LAW (N. C.).

MUNICIPAL CORPORATIONS.

1. *Streets; power to grade.*

The power to grade streets given by a statute is not necessarily exhausted by one exercise thereof. *Mead* v. *Portland*, 148.

2. *Maladministration affecting National Government.*

Maladministration of its local affairs by a city's constituted authorities cannot rightfully concern the National Government, unless it involves the infringement of some Federal right. *Waterworks Company* v. *Owensboro*, 38.

See CONSTITUTIONAL LAW, 1, 2, 7, 8, 15; CORPORATIONS, 4; GRANTS; JURISDICTION, B 1; C 1; PRACTICE AND PROCEDURE, 2.

NATIONAL BANKS.

1. *Powers of—Ultra vires acts; taking stock in corporation organized for speculative business.*

A Minnesota manufacturing corporation having failed, the creditors, a national bank among them, organized a new corporation under the laws of Minnesota for the purchase of the capital stock, evidences of indebtedness and assets of the corporation and for the manufacture of the same articles that it had manufactured. The bank and other creditors exchanged their claims against the old corporation for stock in the new corporation. After the incorporation, and prior to the failure of the new corporation the laws of Minnesota imposing double liability on stockholders of certain corporations were amended and a new method of procedure for enforcing them was provided. Stockholders of corporations organized exclusively for manufacturing purposes are not subject to double liability. Proceedings having been taken under the statute to enforce the double liability of the stockholders, a receiver was appointed, an assessment determined, and a judgment for the *pro rata* amount obtained against the national bank, which denied liability, claiming that the corporation was organized for manufacturing purposes only, and therefore the stockholders were exempt from double liability; that the provisions in the statute providing for enforcing double liability were unconstitutional under the impairment of obligation clause of the Federal Constitution; and that the original taking of the stock by it as a national bank was *ultra vires*. *Held*, that a national bank has no power to engage in or promote a purely speculative business or to take stock in a corporation organ-

PRACTICE AND PROCEDURE.

1. *Effect of renewal of motion to dismiss appeal considered and denied by lower court.*

The renewal in this court of a motion to dismiss the appeal which was considered and denied by the Supreme Court of the Territory amounts to no more than an assignment of error to the action of that court in this regard, to be passed or disposed of as such, if this court otherwise has jurisdiction. *Albright* v. *Sandoval*, 9.

2. *Following state court's construction of state statute.*

If a state statute as construed by the highest court of the State is constitutional this court will follow that construction. *Strickley* v. *Highland Boy Mining Co.*, 527.

3. *Following state court's interpretation of state law.*

Owners of property erected wharves on the line of an adjoining street on the river front in Portland under ordinances adopted by municipal authorities. They made an agreement with a private bridge as to keeping the street open. The city having bought the bridge proceeded under legislative authority to change the approaches and in so doing affected the access to the wharves. The owners sought to enjoin on the ground that it took their property without compensation and impaired the obligation of their contract with the bridge owners. The state court held the ordinances were merely permissive, and that the persons constructing the wharves had no interest or easement in the streets and the proposed change was merely a change of grade of street for which consequential damages were not allowed under the law of the State. *Held*, that while the interpretation of a local ordinance by the highest court of the State is not indisputable, and, even though it may conflict with other decisions of the courts of the State, if it does not conflict with any decision made prior to the inception of the rights involved this court will lean to an agreement with the state court. *Burgess* v. *Seligman*, 107 U. S. 20. The power to grade streets given by a statute is not necessarily exhausted by one exercise thereof; and, where no Federal question is involved, the court must accept the interpretation of the highest court of a State of a local statute as to the extent of the power under a statute authorizing a municipality to change the grade of streets. *Mead* v. *Portland*, 148.

4. *Effect of failure of state court to pass on Federal right or immunity specially set up.*

The failure of the state court to pass on the Federal right or immunity specially set up of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners*, 561.

5. *Disturbance of findings of fact concurred in by Circuit Court and Circuit Court of Appeals.*

The rule that this court will not disturb findings of fact where both the

chaser where there is nothing which casts imputation on its conduct, or tends to show that it was not a purchaser in good faith, because after the actual purchase and payment therefor, but prior to the final conveyance, an officer of the vendee company became an officer of the vendor company for the purpose of closing up its business. *Ib.*

8. *Effect on bona fide purchaser of constructive fraud in entries of land.*

In order to overthrow a patent on charges of fraud on the part of the entryman, and knowledge thereof on the part of a purchaser, the proof must be clear and fraud or knowledge of fraud in the entry will not be inferred from a merely suspicious circumstance; the purchaser is not bound to hunt for grounds of doubt. (*United States* v. *Detroit Timber & Lumber Co.*, *ante*, p. 321, followed.) *United States* v. *Clark*, 601.

9. *Doctrine of relation as applied to patents for public lands.*

Although the doctrine of relation is but a fiction of law it is resorted to whenever justice requires, and under it patents for lands when issued by the United States become operative as of the dates of the entries, —the inception of the equitable right upon which the patent is based— and the doctrine can be applied to uphold a *bona fide* purchaser of timber notwithstanding the wrongful character of the entries of which he is ignorant. But the doctrine of relation never carries a patent back to the date of any entry other than that on which it is issued. *United States* v. *Lumber Co.*, 321.

10. *Effect of final receipt by Government.*

A final receipt is an acknowledgment by the Government that it has received full pay for the land and holds the title in trust for the entryman and will in due course issue to him a patent, and thereupon he becomes the equitable owner of the land. *Ib.*

11. *Title prior to issuance of patent.*

Until the patent which passes the legal title is issued the legal title remains in the Government and is subject to investigation and determination by the Land Department, but this power will not be exercised arbitrarily or without notice, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has been issued to other parties. *Ib.*

12. *Liability of one for timber cut under contract with entryman whose entry subsequently cancelled.*

The principles of equity exist independently of, and anterior to, all Congressional legislation, and the statutes are either annunciations of those principles or their applications to particular cases, and a party dealing with an entryman the evidences of whose entry are in form good and sufficient is justly entitled to the consideration of a court of equity, and one who has in good faith cut and removed timber under contract with such an entryman whose entry is subsequently cancelled and purchase money retained by the Government, cannot be compelled to account to the Government for the timber cut and removed in reliance on such contract. *Ib.*

STATES.

Police power; reclamation of lands by draining.

Under the laws of Illinois the draining of bodies of land so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the State may by appropriate agencies exert the general powers it possesses for the common good, and § 40½ of the Farm Drainage Act of that State was a proper exercise of the police power of the State. *Chicago, B. & Q. Ry. Co.* v. *Drainage Commissioners*, 561.

STATUTES.

A. CONSTRUCTION OF.

B. OF THE UNITED STATES.

C. OF THE STATES AND TERRITORIES.