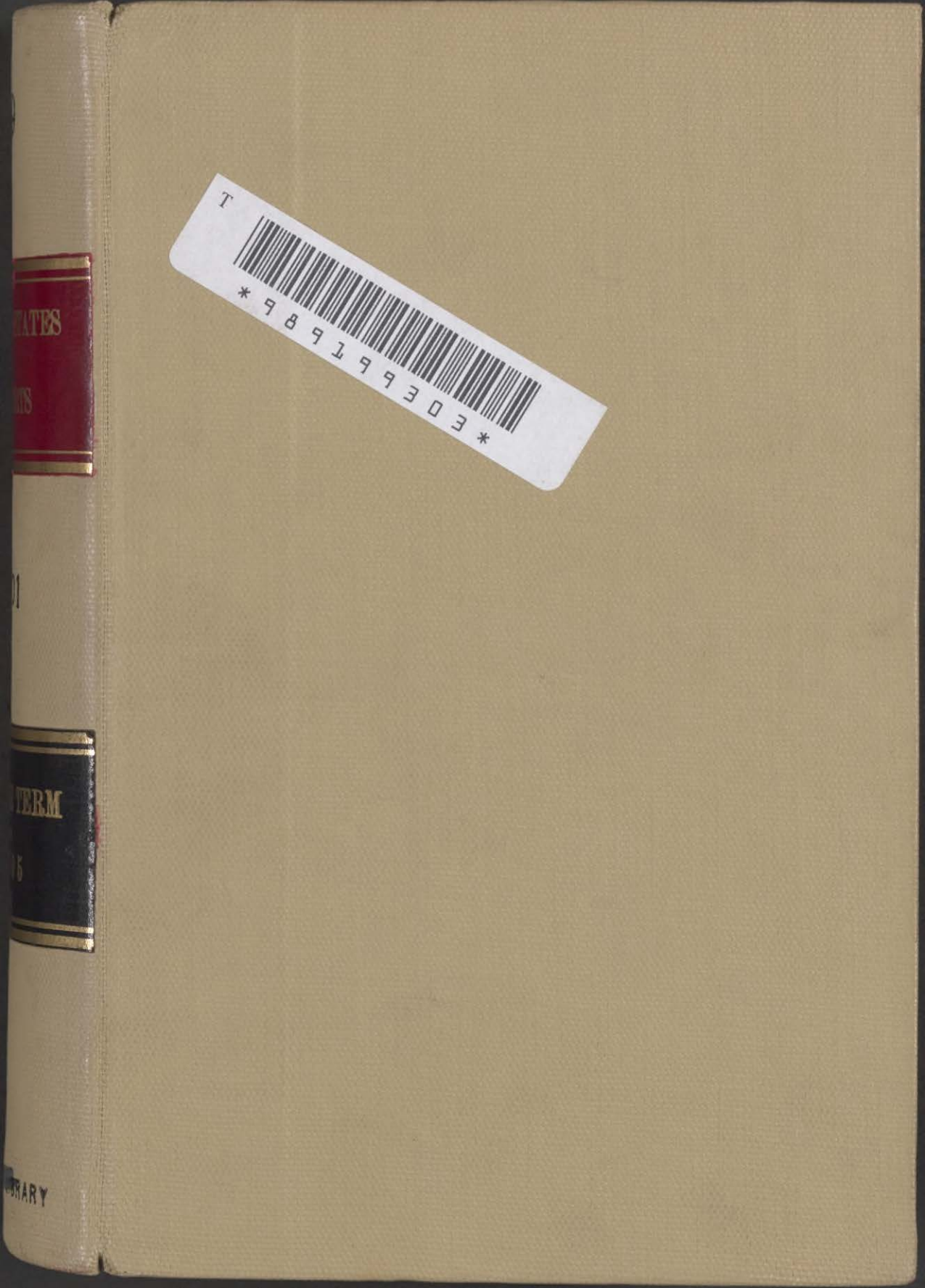

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UNITED STATES REPORTS

VOLUME 201

CASES ADJUDGED

IN

THE SUPREME COURT

AT

PROPERTY OF
UNITED STATES SENATE

OCTOBER TERM, 1905

CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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HENRY BILLINGS BROWN, Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
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JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.

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JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1905.

KENTUCKY *v.* POWERS.

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

Ex parte COMMONWEALTH OF KENTUCKY,

PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

No. 393, Submitted; No. 15, Original, Argued, January 22, 1906.—Decided March 12, 1906.

Subordinate judicial tribunals of the United States can exercise only such jurisdiction as may be authorized by acts of Congress and whatever the nature of a civil suit or criminal proceeding in a state court it cannot be removed to the Federal court unless warrant therefor be found in some act of Congress.

Under §§ 641, 642, Rev. Stat., there is no right of removal into the Circuit Court of the trial of a person indicted under the state law where the alleged discrimination against the accused in respect to his equal rights, is due merely to illegal or corrupt acts of administrative officers unauthorized by the constitution or laws of the State as interpreted by its highest court. The remedy for wrongs of that character is in the

state court, and ultimately in this court by writ of error to protect any right secured or granted to the accused by the Constitution or laws of the United States and which has been denied to him in the highest court of the State in which the decision in respect to that right can be had.

The fact that the courts of the State have on previous trials refused to recognize the validity of an alleged pardon given to the accused by the acting Governor of the State does not make a case under § 641, Rev. Stat., for the removal of the prosecution from the state court into the Circuit Court.

While the prior decisions of this court determining the scope of § 641, Rev. Stat., had reference to discrimination against negroes because of their race, the rules announced equally apply where it exists as to the white race; § 641 as well as the Fourteenth Amendment is for the benefit of all of either race whose cases are embraced by its provisions and not alone for the benefit of the African race.

Where the highest court of the State has declared that the action of the trial court in refusing to quash the indictment or the panel of petit jurors cannot under the laws of the State be reviewed by any appellate court, although the motion to quash was based on Federal grounds, then after the highest appellate court of the State has disposed of the matters of which it may take cognizance, a writ of error will run from this court to the highest court in the State in which the decision of the Federal question may be had; and upon such writ of error this court can review the judgment of the trial court, and will exercise such jurisdiction as may be necessary to vindicate any Federal right, privilege or immunity specially set up and denied.

Where this court holds that a case cannot be removed under § 641 from the state court into the Circuit Court it will not pass upon the merits of any Federal question which may arise in the case.

THESE cases arise out of a criminal prosecution begun in one of the courts of Kentucky and, after several trials, removed on the petition of the accused, Caleb Powers, into the Circuit Court of the United States for the Eastern District of Kentucky.

The principal question to be determined is whether the prosecution was removable from the state court.

After referring to the indictment and to the transfer of the prosecution into the Circuit Court of the United States, the petition for removal alleged that the accused was within the jurisdiction of the United States and of the Commonwealth of Kentucky; that he was and all of his life had been a citizen of the United States, and of that Commonwealth, and as such citizen was entitled to enforce in the judicial tribunals of Kentucky,

on the trial and final disposition of said prosecution, all equal civil rights and equal protection of laws secured to him by the provision of the Fourteenth Amendment that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." He also claimed the rights secured by section 1977 of the Revised Statutes of the United States, providing, "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other;" as well as those secured by the act of Congress of March 1, 1875, 18 Stat. 335, the preamble of which declares that: "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law."

The petition then refers to the arrest of the accused on the ninth of March, 1900, upon the charge of being an accessory before the fact to the willful murder of William Goebel, and alleges that on the tenth of March, 1900, and prior to the finding and reporting of the indictment against the accused, "William S. Taylor, who was then the duly and legally elected, qualified, actual and acting Governor of the State of Kentucky, and had in his actual possession and under his actual control the office and executive mansion prepared by said State for its Governor, and all the books, papers, records, and archives belonging thereto, in due form of law duly and legally granted and de-

livered to your petitioner, and your petitioner accepted from him, a full, complete, absolute and unconditional pardon, release, and acquittance of the identical charge against him in said indictment, and the charge now pending in said prosecution against your petitioner in said Scott Circuit Court and under which your petitioner is now in custody; that said Taylor at the time he granted said pardon had the right and authority, under the constitution and laws of Kentucky, to grant same; that your petitioner accepted said pardon, and from the time same was granted he had claimed, and he now claims, the full benefit and effect thereof and his liberty thereunder. That on the day said pardon was granted him it was, by said Taylor as Governor aforesaid, duly entered on the executive journal kept in his office, and a certificate thereof was duly and in due form of law and as required by law, issued and delivered to him, duly executed by said Governor and the Secretary of said State, and placed in your petitioner's possession, and same was by your petitioner accepted. Your petitioner further states that at the time the said pardon was granted to him by his Excellency, the said William S. Taylor and subsequent thereto, the said William S. Taylor was, and prior thereto he had been, recognized, regarded, and treated as the duly elected, actual and acting Governor of the State of Kentucky by the Executive power and Executive Departments of the United States Government, including the President, the Attorney General and the Postmaster General, and by the postmaster at Frankfort, Kentucky;" that "for said State to hold him in custody, or to try or to require him to be tried in any one of its courts for the offense alleged against him in and by said indictment, since the granting and acceptance of said pardon and the issuance and acceptance of the certificate thereof, is a denial to him of the equal protection of the laws and the equal civil rights to which he is entitled under and as provided for in and by the portions of said Amendment to the Constitution of the United States above copied, and by said section of said Revised Statutes, and by said act of Congress;" and, that "notwithstanding the granting and ac-

ceptance of said pardon, the issuance and acceptance of said certificate, the fact that the said William S. Taylor was the Governor of Kentucky when said pardon was granted and when said certificate was issued, and was then recognized as such Governor by said executive officers of the United States, that he cannot enforce in the said Scott Circuit Court in which said prosecution is pending, or in that part of the State in which said Scott County is located, or in any court, judicial tribunal or place of the said State, the equal civil rights and the equal protection of the laws secured to him by each and all of the three portions of said Amendment copied above, and by said section of the Revised Statutes of the United States and by said act of Congress for the reasons now set forth."

The accused here refers to the three trials to which he was subjected, and after stating that he was confined in the county jail, without bail, and awaiting trial, proceeds in his petition: "That at each of said trials your petitioner presented to said Scott Circuit Court said certificate of pardon, and pleaded and offered in evidence said pardon and said certificate as a bar and complete defense to said prosecution and the trial and conviction of your petitioner under said indictment, but at each of said trials the said trial court overruled said pleas and refused to admit said pardon and certificate as evidence, and held and adjudged that said pardon and certificate were null and void and of no effect whatever, and in each of said trials the said holding of the trial court in reference to said pardon and certificate was duly excepted to and made one of the grounds which was presented and on which a reversal was asked by said Court of Appeals on the trial of each one of said appeals heretofore mentioned, and on each one of said appeals your petitioner contended that said pardon and certificate entitled him to an acquittal of the charge contained in said indictment, but the said Court of Appeals on the trial and final disposition of each one of said appeals failed and refused to hold that said pardon and certificate authorized your petitioner's acquittance of said charge; instead, that court, as the said trial court had

done, held that said pardon and certificate were and are null and void and of no effect whatever. The holding of said Court of Appeals on the trial of each of said appeals was reduced to writing, and each holding as prepared and ordered by said Court of Appeals has been, by the official reporter of that court, under the court's direction, caused to be printed in, and is now a part of, the official printed reports of said court, and all of said holdings are now in full force and effect as, and they in fact are, the laws of said State in this case, and are binding upon and will have to control this honorable court. That the instances named are the only instances in which said Court of Appeals or any trial court of said State ever held any pardon and certificate thereof, granted, entered and issued by any Governor of Kentucky, to be void and of no effect. That in consequence of the action and holdings of said trial court and said Court of Appeals above stated, this honorable court cannot, and, should this case be retried in this honorable court, could not allow your petitioner to plead or introduce said pardon and certificate as evidence as a defense to the said charges contained in said indictment against him, and could not allow your petitioner his liberty and acquittal under and by virtue of said pardon and certificate, or allow said pardon and certificate to have any effect whatever in your petitioner's behalf, but instead is and will be bound in consequence of said laws to hold said pardon and certificate null and void and of no effect whatever."

In the second paragraph of his petition for removal the accused states that he is a citizen of the United States and of Kentucky, and as such is entitled to enforce in the judicial tribunals of the State the equal civil rights and the equal protection of the law secured to him by the above constitutional provisions and statutes.

His petition then alleges: "But your petitioner states that he is denied and cannot enforce in the judicial tribunals of this State and in the part of the State where this action is pending, the rights secured to him by said laws and each of said laws,

because the said State of Kentucky has enacted a law which has not been repealed nor abrogated, and which is now in full force and effect, to wit, section 281 of the Criminal Code of Practice of said State, which section reads as follows: 'The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception;' and because of the decisions of the Court of Appeals of Kentucky, the highest judicial tribunal in this State, rendered in this action . . . upholding the validity of said law, notwithstanding its plain contravention of the said provisions of the Constitution of the United States.

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"Your petitioner states that the death of said Goebel occurred during the existence of intense political excitement following the election of a Governor and other state officers in November, 1899; that said Goebel had been the Democratic candidate for the office of Governor, and was at the time of his death contesting the right of said William S. Taylor to the office of Governor, said Taylor who was a Republican candidate for that office, having been actually elected Governor and declared elected Governor by the duly and legally constituted authorities, and inducted into said office; that this petitioner was at said election the Republican candidate for the office of Secretary of State, and had been actually elected and declared elected to said office, and had been inducted into said office; and there was pending at the time of said Goebel's death a contest for the said office of Secretary of State, against this defendant, inaugurated by one C. B. Hill, who had been a Democratic candidate for said office; that the public mind was, by said election and said contest for the office of Governor, Lieutenant Governor, Secretary of State, and the other state offices greatly inflamed, and bitter and intense political animosities were excited and fostered by reason thereof, and that such feelings existed at all of the trials of this petitioner hereinafter referred to, and such feelings still exist against him on the part of said

adherents of said Goebel throughout the State of Kentucky, and particularly in Scott County.

"Your petitioner further states that he was first put on trial under said charge on the 9th day of July, 1900, at a special term of the Scott Circuit Court, begun and holden on said date; that said trial resulted in a verdict of conviction, and he was sentenced to confinement in the state penitentiary during his natural life; that the jury in said trial was selected from a large number of the citizens of said county, and that with three or four exceptions all of the veniremen were purposely summoned because of their known party affiliations, which were different from the known party affiliations of your petitioner; that by the laws of Kentucky in such cases made and provided the prosecution has a right to five, and the defense to fifteen, peremptory challenges, and that with the exception of three or four Republicans and Independent Democrats all of those summoned were known to be partisan Goebel Democrats while your petitioner was and is a Republican and was known to belong to the Republican Party; that from veniremen so summoned a trial jury was selected that was composed almost if not entirely, of Goebel Democrats, and no Republicans, although there were then residing in said county many hundreds of citizens qualified for jury service who were Republicans and Independent Democrats and not supporters of said Goebel in his candidacy or contest for the office of Governor of Kentucky, nor in sympathy with him; but your petitioner avers and charges that all of such citizens, with the exceptions named, were intentionally passed by in summoning said veniremen, in order that your petitioner should not have a fair trial by a jury of his peers impartially selected, but to the end that such jury might be selected to convict him.

"Your petitioner further respectfully represents that the sheriff of Scott County to whom is assigned the duty of selecting all jurors whose names are not drawn from the jury wheel is a Goebel Democrat, as are also the deputy sheriffs of said county.

"Your petitioner further states that at said first trial hereinbefore mentioned the judge of the Scott Circuit Court, when the original list of names drawn from the jury wheel for jury service had been exhausted, although requested by counsel for this petitioner, and while there remained in said jury wheel about one hundred names, to draw the names remaining in said jury wheel therefrom, refused to do so, but directed the sheriff to summon one hundred men for jury service and explicitly directed him to summon no men for jury service from the city of Georgetown, but to go out into county for that purpose. Your petitioner states that the said one hundred names that remained at said time in said jury wheel had been placed there by impartial and unbiased jury commissioners prior to the election in November, 1899, and prior to the killing of said Goebel. Your petitioner states that on the morning following the order of the court to the sheriff to summon the one hundred men for jury service from the county and when said one hundred men so summoned had appeared in court they were seated on one side of the court room separate and apart from the spectators and other persons; that the judge of said court, without notice to your petitioner or any of his counsel, and without making any request of any of his counsel or of this petitioner to accompany him, left the bench and went to the side of the court room wherein said parties summoned for jury service were assembled, and without swearing said parties, so far as this petitioner saw, heard or has information, as to their excuses for not serving as jurors if any they had, called them up to him one at a time, not in the hearing of this petitioner, or his counsel, and excused such of them from jury service as he saw fit, without any knowledge on the part of this petitioner or his counsel as to why such parties were thus excused, and on the following day the same proceeding was had as to forty additional men that had been summoned for jury service in this case.

"Your petitioner further states that an appeal was taken from the judgment of said court to the Kentucky Court of Appeals, and that at the January term, 1901, of said court the

judgment of the trial court was reversed; that your petitioner was again tried in the Scott Circuit Court at its October, 1901, term, and a verdict of guilty returned again, fixing the punishment of your petitioner at confinement in the state penitentiary for life; that in summoning the veniremen from whom the jury was selected at the second trial the same unjust and unlawful discrimination was practised, and that of one hundred and twenty-five veniremen summoned in Scott County, all were partisan Goebel Democrats except three, and of one hundred and sixty-eight veniremen summoned in the adjoining county of Bourbon, all were partisan Democrats except three, so that of the aggregate of two hundred and ninety summoned, two hundred and eighty-four were Goebel Democrats and six were Republicans, notwithstanding the fact that there were many hundreds of citizens in each of said counties qualified for jury service who were Republicans or Independent Democrats, and not Goebel partisans.

"Your petitioner states that at said second trial he objected to the formation of a jury from the veniremen summoned as hereinabove stated, and moved to discharge the entire venire on the ground that he could not obtain a fair trial before a jury selected therefrom and filed in support of said objection an affidavit."

The affidavit referred to is given in full in the margin.[1]

[1] The affiant states that he ought not to be required to go to trial before a jury drawn as a panel for service at the present term of this court or already summoned from the county of Bourbon for the following reasons, namely: that the political canvass in this State in 1899, in which the late William Goebel was candidate for the office of Governor, was a heated and angry one, and tended to create great antagonism in the minds of his political adherents against those who opposed; that this canvass was followed by a contest before the state legislature for said office, in which the deepest and fiercest passions were stirred in the minds of his followers in this county, as well as in other counties of the State, including the county of Bourbon; that during that contest the said Goebel was killed, which killing tended still further to deepen and intensify the political passions of his friends and admirers in this county and in the county of Bourbon and throughout the State, against this affiant, who was a candidate for a state office on the Republican ticket in the said year of 1900. The passions thus created have

The petition then proceeds: "Your petitioner states that although the statements in said affidavit were true and known to be true by the court he was forced to submit to trial before a jury composed entirely of Goebel Democrats, your petitioner

since that time been stimulated and fed by the political contests which have since followed, and are still in existence, in this county and Bourbon County. Affiant says that, at a special term of this court in July, 1900, he was put on trial in this county, charged with being an accessory before the fact to the killing of said William Goebel, and was by the jury found guilty. From the judgment of the court at that term, the affiant appealed to the Appellate Court, the appeal being taken in the early part of September in said year; that at the subsequent October term of said court, jury commissioners for this county were selected whose duty it was to select a large number of names and place them in the jury wheel for service during the year 1901.

The three commissioners appointed were John Bradford, Ben Mallory and H. H. Haggard, all three of whom were partisan supporters and allies, in the contest referred to, of the said William Goebel, deceased. The said jury commissioners discharged the work assigned to them by placing in said jury wheel the names of two hundred citizens of Scott County for purposes of said jury service; that at the February term, 1901, of the Circuit Court of this county and at the May term of the said year, seventy-five or more names were drawn from the jury wheel for said service; that at the present term there were drawn from the said jury wheel for the purpose of securing a jury in this case about one hundred and twenty-five names, that being the entire number of names placed in the wheel. Affiant further states that at the regular state election of 1900, in the county of Scott, there were cast for the Democratic candidate, in round numbers, 2,500 votes, and for the Republican candidate 2,100 votes; that of these 2,100 votes not less than 1,300 were white voters of equal character, standing and intelligence with the white voters who cast their votes for the Democratic party at said election.

Affiant says that, despite these conditions, which were shown to exist in this county, that of the 200 names placed in the jury wheel by the aforesaid commissioners and drawn out as herein described, only five were supporters of the Republican party, and the other 195 being active partisan friends and supporters of the party with which William Goebel was identified as its leader and whose minds and passions had been inflamed against this affiant by continued political agitation.

The affiant further says that of the five Republicans whose names were placed in the jury wheel for jury service by said commissioners, as before stated, one man was drawn for service at the February term of this court, 1901, and another at the May term; of the remaining three, two of them at the present term disqualified themselves herein by previously formed opinions, and the fifth and last, after qualification and acceptance on the *voir dire*, was peremptorily challenged by the Commonwealth. The affiant says that

always having been a Republican in politics as hereinabove stated; and as hereinabove stated your petitioner was at said trial found guilty and sentenced to imprisonment for life by the judgment of said Scott Circuit Court; that your petitioner took an appeal from the judgment so rendered, which judgment was

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it will be impossible under these circumstances for him to avoid being tried at this term of this court except by a jury composed entirely of his political opponents and exclusively made up of those who were the adherents and admirers of said Goebel, and it will be impossible for him to obtain a fair and impartial trial before any jury so constituted and formed.

The affiant further states that the officers of this county who went to Bourbon County to summon the men for jury service sent directly to the sheriff of Bourbon County, who, together with his deputies, were earnest and ardent adherents, supporters and friends of the said William Goebel and opposed politically to this affiant; that the officers of this county consulted and advised with the said officers of Bourbon County as to the selection of the men summoned, and that Wallace Mitchell, deputy sheriff of said county; James Burke, another deputy sheriff of said county; Joseph Williams, a constable of Bourbon County, and James A. Gibson, a guard for county prisoners in Bourbon County, all of whom are the political adherents of said Goebel and politically opposed to this affiant, acted with them in making the selection and summoning said men.

He says that the political complexion of Bourbon is almost equally Democratic and Republican, there being a slight majority in favor of the Democratic party; that of the Republicans, about three-fifths are colored, but there are many conscientious, fair-minded and respectable citizens of Bourbon County, qualified for jury service, of the same political faith of this affiant, a great many of whom could have been as readily and conveniently summoned and who would give to both sides herein a fair and impartial trial; but that none of such persons were summoned with the exception of two men, and with these exceptions 91 of the 93 names appearing upon the list furnished this affiant as a correct list of the men summoned from Bourbon County are the names of the supporters and adherents of said Goebel, and opposed politically to this affiant, and were summoned for jury service herein by reason of such fact, as this affiant believes.

Affiant further states that said Wallace Mitchell, the deputy sheriff of Bourbon County is now a candidate for sheriff of said county, seeking an election at the hands of the supporters and adherents of said William Goebel, and is their nominee for said office. Said Mitchell, in the fall of 1900, acted in summoning for jury service in this court in the case of the *Commonwealth* v. *Youtsey*, indicted for the same offense of this affiant, and in making the selection of men to serve as jurors therein, made the statement that he would not summons a single Brown Democrat or Republican for such service, and he did not summons any such.

reversed by the Court of Appeals of Kentucky at the September, 1902, term; that your petitioner was again and for the third time tried at a special term of the Scott Circuit Court under the charge hereinabove mentioned, which trial was begun and holden on the third day of August, 1903, and that of the number of one hundred and seventy-six veniremen summoned from Bourbon County, from which the jury was selected, three only, or possibly four, were Republicans, and the remaining one hundred and seventy-three (two) were Goebel Democrats and were summoned for that reason, and because they differed politically from your petitioner, whereas there were many hundreds of Republicans and Independent Democrats in said county qualified for jury service, but your petitioner states they were purposely avoided and passed by in summoning said veniremen, and that said trial jury was not selected impartially as required by law; that in the year 1896 there were over twenty-six hundred votes in said county for William McKinley, Republican candidate for President of the United States, and about twenty-two hundred votes cast for William J. Bryan, his Democratic opponent; that in the year 1899 William S. Taylor, Republican candidate for Governor of Kentucky, received twenty-seven more votes in said county than were cast for said William Goebel, his Democratic opponent, and that a jury impartially selected could not have been and would not have been, as it was, composed entirely of Goebel Democrats—on his said third trial one juror, a Goebel supporter, but of doubtful politics, excepted.

"Your petitioner further represents that at the third and last trial of this petitioner in said Scott Circuit Court, the judge thereof entered an order directing the sheriff of said Scott County to summon two hundred men from Bourbon County for jury service; that this petitioner's attorneys asked the court to admonish the sheriff to summon an equal number of men of each political party; that this request was refused and thereupon counsel for this petitioner asked the court to instruct the sheriff to summon the talesmen as he came to them,

regardless of political affiliation. This the court also refused to do.

"Your petitioner further states that said trial resulted in a verdict of guilty, affixing the death sentence, and a judgment was thereupon entered, from which judgment an appeal was taken to the Court of Appeals of Kentucky, and on December 6, 1904, the judgment of conviction was for the third time reversed by said court, and that it is the purpose and intention of the Commonwealth of Kentucky to subject this petitioner to a fourth trial under said charge, within a short time, in said Scott Circuit Court.

"Your petitioner further respectfully states that at each of said three trials the facts in relation to the jurors given or hereinbefore recited were embraced in affidavits filed in support of challenges to the panel and the venire and objections to the formation of the jury from the men summoned as hereinabove mentioned, and were also embraced in the motions and grounds for new trial prepared and filed on behalf of this petitioner at each of said trials, but that they were disregarded by the court and your petitioner's challenge to the panels, to the venire and the motions for new trials in each instance overruled; that by reason of section 281 of the Criminal Code of the State hereinbefore quoted, this petitioner was and is denied the right of any exception on said grounds, and the Court of Appeals of Kentucky on each of the three appeals hereinbefore set forth have decided that no irregularity in the summoning or impanelling of the jury is a reversible error, and they are powerless to reverse any judgment of said court by reason of such facts and have held said law to be valid and such law is now the law of this case, and said Court of Appeals of Kentucky are powerless upon any future appeal to reverse any judgment of said court by reason of a repetition of the acts hereinbefore set forth, or for any other irregularity or improper conduct in the formation of the jury, no matter how prejudicial to the substantial rights of your petitioner they may be, and must be followed and cannot be disregarded by this honorable court.

"Your petitioner therefore prays this honorable court that the said indictment and the prosecution pending thereunder in this honorable court against your petitioner be removed into the Circuit Court of the United States for the Eastern District for trial at the next ensuing term of said Circuit Court, and your petitioner will ever pray."

Mr. Napoleon B. Hays, Attorney General of the Commonwealth of Kentucky, and *Mr. Lawrence Maxwell, Jr.*, with whom *Mr. Robert B. Franklin* and *Mr. C. J. Bronston* were on the brief, for petitioner in No. 15, original, and for appellant in No. 393:

The decision of the Court of Appeals of Kentucky that Taylor was not Governor of the State on March 10, 1900, presents no Federal question, and, if erroneous, denies no right secured to him by the Constitution or laws of the United States. It would not justify a writ of error from this court, much less a removal of the criminal prosecution, in advance of trial, into the Circuit Court of the United States. *Taylor* v. *Beckham*, 178 U. S. 548.

The office of Governor of Kentucky is created by the constitution and laws of the State, and not by those of the United States. It is the laws of the State which provide for the contest of elections and declare the effect of the decision of the legislature. *In re Converse*, 137 U. S. 624, 631; *Lambert* v. *Barrett*, 157 U. S. 697, 699.

Under the decision of the Court of Appeals of Kentucky in *Powers* v. *Commonwealth*, 110 Kentucky, 386, and by the judgment of this court in *Taylor* v. *Beckham*, 178 U. S. 548, the decision of the legislature of Kentucky, in the contest between Beckham and Taylor for Governor, was final, and not subject to review by any court, state or Federal.

The statutes of Kentucky for the selection of jurors, and the trial of criminal prosecutions, are not repugnant, in any respect, to the Constitution of the United States. Section 2241 Kentucky Statutes; Crim. Code, §§ 191–194, 199, 203, 207–209, 271, 340.

The possibility that officers of the state court will disregard state statutes and unlawfully discriminate in summoning jurors at the next trial, is not ground for removal, under § 641, Rev. Stat.

Unless officers of the state court, charged with the duty of selecting jurors, are guilty of unlawful conduct, there will be no occasion for the parties to challenge the panel on that account, or for the court to pass upon any question in that connection.

If the contingency arises, and rights of the defendant under the Constitution of the United States are denied, his remedy is by writ of error from this court, if need be, as in *Carter* v. *Texas*, 177 U. S. 442, and *Rogers* v. *Alabama*, 192 U. S. 226, or by writ of *habeas corpus* from a Federal court under § 753, Rev. Stat.; *Ex parte Wells*, 3 Woods, 128; *Virginia* v. *Rives*, 100 U. S. 313; *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370; *Gibson* v. *Mississippi*, 162 U. S. 565; *Murray* v. *Louisiana*, 163 U. S. 101; *In re Wood*, 140 U. S. 278; *Andrews* v. *Swartz*, 156 U. S. 272.

The petition for removal does not allege that the officers of the state court will practice unlawful discrimination in selecting jurors at the next trial.

The possibility that the judge who presides at the next trial in the state court will commit error of law in overruling challenges to the panel is not ground for removing the prosecution into a Federal court.

See *Carter* v. *Texas*, 177 U. S. 442, and *Rogers* v. *Alabama*, 192 U. S. 226, as to state court's refusal to consider evidence in support of objections to the panel; unlawful discrimination in summoning jurors may be ground for a writ of error but is not ground for removal. It is not uncommon for inferior state courts to err in construing the Constitution and laws of the United States, but a method is provided for the decent and orderly revision of their judgments. They do not forfeit their jurisdiction, because they have committed error of law.

While the guaranty of equal protection of the laws under the Fourteenth Amendment applies to action of a State through its

courts, as well as through its legislature, the claim, on account of action by a state court, cannot be made, in advance of the trial, on the allegation that the circumstances requiring protection arise during the trial, and that when they arise the court will deny the protection.

Protection against action by a State, through its courts, has never been accorded except on writ of error after the state court has acted.

If there is no writ of error from this court to the Court of Appeals of Kentucky, or to the Circuit Court of Scott County, to review the rulings of that court in connection with the impaneling of the jury, that might furnish a ground for writ of *habeas corpus* after conviction, but it does not justify the removal of the prosecution into the Federal court in advance of trial.

The statute will not be enlarged by construction. *Virginia* v. *Paul*, 148 U. S. 107, 114; *Tennessee* v. *Davis*, 100 U. S. 257; *Virginia* v. *Rives*, 100 U. S. 313; *Davis* v. *South Carolina*, 107 U. S. 597; *In re Neagle*, 135 U. S. 1; *Huntington* v. *Attrill*, 146 U. S. 657.

The right to trial by an impartial jury in a state court is not guaranteed by the Constitution or laws of the United States. *Brooks* v. *Missouri*, 124 U. S. 394; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Morrow* v. *Brinkley*, 129 U. S. 178; *Howard* v. *Fleming*, 191 U. S. 126; *In re Converse*, 137 U. S. 624.

Section 281 of the Criminal Code of Kentucky, providing that decisions upon challenges shall not be subject to exception, is not repugnant to the Constitution of the United States and does not authorize a removal, in advance of trial.

The right of appeal in a criminal case is left entirely to the discretion of the State, and is not guaranteed by the Federal Constitution. *Kohl* v. *Lehlback*, 160 U. S. 293; *Mallett* v. *North Carolina*, 181 U. S. 589; *Missouri* v. *Lewis*, 101 U. S. 22; *Andrews* v. *Swartz*, 156 U. S. 272.

If any right of a defendant in a criminal case, under the Constitution or laws of the United States, in connection with a

challenge to a panel, or upon motion to set aside an indictment, or upon motion for a new trial, is denied by a state court, the remedy is by writ of error from this court, as in *Carter* v. *Texas*, 177 U. S. 442, and *Rogers* v. *Alabama*, 192 U. S. 226, or by writ of *habeas corpus* from a Federal court, after conviction, under section 753 of the Revised Statutes.

Due process of law and equal protection of the laws do not require that there shall be right of appeal from a criminal prosecution in the state court. *Andrews* v. *Swartz*, 156 U. S. 272.

The State of Kentucky, without violating the Federal Constitution, might provide that there should be no appeal in any criminal case. For nearly a century there was no appeal in criminal cases in the Federal courts.

Mr. Frank S. Black and *Mr. E. L. Worthington*, with whom *Mr. Richard Yates*, *Mr. H. Clay Howard*, *Mr. James C. Sims* and *Mr. R. C. Kinkead* were on the brief, for defendant in No. 15 and for appellee in No. 393:

The uncontroverted allegations of the first paragraph of the petition for removal are that an absolute, unconditional, valid pardon was issued, delivered to, and accepted by, appellee for the identical offense herein charged; that said pardon has been thrice denied by the highest court in Kentucky; that, therefore, he is denied or cannot enforce, in the judicial tribunals of said State, the equal civil rights secured to him, as a citizen of the United States, by the laws thereof.

Unless there is a record contradiction, the sworn allegations of a petition for removal, which are not traversed, must be taken as true. *Dishon* v. *C., N. O. & T. P. Ry. Co.*, 133 Fed. Rep. 471; *Toledo Traction Co.* v. *Cameron*, 137 Fed. Rep. 48; 18 Ency. Pl. and Pr. 372. Section 641 is constitutional. *Ex parte Virginia*, 100 U. S. 339; *Strauder* v. *West Virginia*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101;

Williams v. *Mississippi*, 170 U. S. 213; *Virginia* v. *Rives*, 100 U. S. 313; *Tennessee* v. *Davis*, 100 U. S. 257.

The view was taken for some years after the Fourteenth Amendment was promulgated, that its restrictions applied exclusively to prevent discrimination by the States against the negro on account of his race or color, and the *Slaughter House Cases*, 16 Wall. 36; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339, were erroneously construed by many of the state courts, as actually holding that the Amendment was so restricted.

And indeed, Congress, too, for many years, must have believed that the application of the Amendment would be limited as stated in the opinion in the *Slaughter House Cases*. See sec. 16, act of May 31, 1870, 16 Stat. 144; act of March 1, 1875, 18 Stat. 335, and last clause of act of June, 1879, 21 Stat. 43, and sec. 17 of the act of May 31, 1870 now sec. 5510, Rev. Stat.

This court has long since discarded that view, and has held, without qualification, that its provisions apply to every form of state action, legislative, political or judicial, regardless of race or color, and to the official acts of every state officer, as well, and to the benefit of all persons within the jurisdiction of any State.

For definition of equal civil rights and equal protection of the laws as guaranteed by the Amendment, see *Kentucky Railroad Tax Cases*, 155 U. S. 321; *Holden* v. *Hardy*, 169 U. S. 366.

A State, by its judicial tribunals, cannot deny to a citizen of the United States "a right secured to him by any law providing for the equal civil rights of citizens of the United States." *Bowman* v. *Lewis*, 101 U. S. 22; *Pace* v. *Alabama*, 106 U. S. 583; *Moore* v. *Missouri*, 159 U. S. 673; Guthrie, Fourteenth Amendment, pp. 107, 108.

The petition for removal under § 641, Rev. Stat., may be filed at any time before final hearing, though there have been previous trials and reversals. *Bush* v. *Kentucky*, 107 U. S. 110;

Parker v. *Vanderbilt*, 136 Fed. Rep. 246; *Detroit* v. *Detroit City Ry.*, 54 Fed. Rep. 10.

The cases of *Strauder* v. *West Virginia*, *Virginia* v. *Rives*, *Ex parte Virginia*, *Neal* v. *Delaware* and *Gibson* v. *Mississippi*, hold that the Amendment is much broader than § 641; that many rights are protected by the Amendment, a denial of which by the State during the trial cannot constitute grounds for removal. These cases seem to hold that, as the cause for removal must under the act exist before the trial or final hearing of the cause, that that cause must necessarily be a denial of equal civil rights by either a law or a constitutional provision of the State. The first paragraph of the petition for removal fully meets, as we believe, all the requirements of these decisions, even though they do require a law or constitutional amendment to justify the removal. It alleges that certain laws of Kentucky stand between appellee and the courts of the State, and force the latter to deny the former the equal protection of the laws secured by this Amendment.

The several decisions of the highest court of Kentucky have become the law of the case and have become binding upon all the courts of the Commonwealth. *Rowland* v. *Craig*, Sneed, 330; *Morgan* v. *Dickerson*, 1 T. B. Monroe, 20; *Sims* v. *Reed*, 12 B. Mon. 51; *Gray* v. *Dickerson*, 11 Ky. Law Rep. 890; *L. & N. R. R. Co.* v. *Survant*, 19 Ky. Law Rep. 1576; *Commonwealth* v. *L. & N. R. R. Co.*, 20 Ky. Law Rep. 351; *L. & N. R. R. Co.* v. *Ricketts*, 21 Ky. Law Rep. 662; *Breashears* v. *Letcher County*, 21 Ky. Law Rep. 1250; *Wilson's Assignees* v. *Louisville Nat. Bk.*, 25 Ky. Law Rep. 1065; *Booth & Co.* v. *Bethel*, 25 Ky. Law Rep. 747; *Brown* v. *Crow*, Hardin, 451; *Bryan* v. *Bekley*, Litt. Sel. Cas. 91; *Lewis* v. *Lewis*, 11 Ky. Law Rep. 413.

Equal civil rights are denied by state decisions no less than by state statutes. *Neal* v. *Delaware*, *Bush* v. *Kentucky*, *supra*.

When the common law of England was adopted as a part of our jurisprudence, the pardoning power, as exercised by the British Crown and Parliament, was well understood. Before the Revolution it was exercised in those parts of this country

which were British colonies. The same power in its essential elements, has been conferred upon the Executive of our States and Nation. *United States* v. *Klein*, 13 Wall. 128.

When the validity and effect of a pardon are to be determined the established principles of the common law will control in state and Federal courts, in the absence of enactment to the contrary. *United States* v. *Wilson*, 7 Pet. 150.

When a citizen of the United States is arrested and tried for a state offense notwithstanding he holds a valid pardon which is denied recognition in the highest state court, in legal contemplation, an innocent man is thrown in prison, and the Federal courts can restore his liberty, either by *habeas corpus* or removal proceedings. In the latter, a trial can be had upon the merits of the charge, and the pardon, heard upon its merits, can be offered in arrest of judgment, if need be, from any cause. *Ex parte Wells*, 18 How. 310. See also *Ex parte Slauson*, 73 Fed. Rep. 666; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Iasigi* v. *Van de Carr*, 166 U. S. 391.

Taylor having lawfully been inducted into office, and holding actual possession thereof, claiming title by virtue of a certificate of election, his authorized official acts until legally and actually ousted are binding upon the State and third persons regardless of the alleged determination of a contest. His powers continue, as originally invested, pending any litigation that may properly ensue, and it is his duty to hold said office until title thereto is finally adjusted. *United States* v. *Mitchell*, 136 Fed. Rep. 896; *Brady* v. *Levitt*, 17 Kansas, 471; *Kansas* v. *Durkee*, 12 Kansas, 308; *Ex parte Powers*, 129 Fed. Rep. 985; *Taylor* v. *Beckham*, 178 U. S. 548.

Title to an office cannot be determined by an ordinary civil suit between private individuals. It must be by *quo warranto*. *People* v. *Olds*, 58 Am. Dec. 398; *Marke* v. *Wright*, 13 Indiana, 548; *Cochran* v. *McCleary*, 22 Iowa, 75; *Updegraff* v. *Crane*, 47 Pa. St. 103. The decision of the Court of Appeals of Kentucky that Taylor was not Governor is therefore of no effect.

If appellee was pardoned, no court had jurisdiction to arrest

or try him. No questions involve more general principles of law than those of pardon and jurisdiction, questions and principles common to all courts, local and peculiar to none. See *United States* v. *Wilson*, 7 Pel. 150 cited *supra*. Because the highest state court has passed upon and denied a pardon, it is not therefore a local question, peculiar to that State, and this court is not bound to follow that decision. The established principles of the common law control in determining the validity of a pardon. *Olcott* v. *Supervisors*, 16 Wall. 678; *Mohr* v. *Manierre*, 7 Biss. 419.

Federal courts do not follow state decisions upon the construction or enforcement of state laws, if they violate the Federal Constitution, or the rights it guarantees. *Rowan* v. *Runnels*, 5 How. 134; *Bank of Ohio* v. *Knoop*, 16 How. 369; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436.

The decisions rejecting Powers' pardon cannot be here followed, not only because general principles of law, common to all courts, are involved, but because they deny to Powers the equal protection of the law in such a discrimination.

The Federal Government recognized Taylor as Governor of Kentucky and such recognition binds all courts. Black's Constitutional Law, pp. 83, 241–244; *Luther* v. *Borden*, 7 How. 1; *Jones* v. *United States*, 137 U. S. 202; *Hamilton* v. *McClaughry*, 136 Fed. Rep. 445; *Sutton* v. *Tiller*, 98 Am. Dec. 471; *The Hornet*, Fed. Cas. No. 6,705.

Mr. Justice Harlan, delivered the opinion of the court.

Powers, the accused, was indicted in the Circuit Court of Franklin County, Kentucky, for the crime of having been an accessory before the fact to the murder of William Goebel, who was assassinated in that county on the thirtieth day of January, 1900. The prosecution was removed by change of venue to the Circuit Court of Scott County. In the latter court the accused was found guilty and his punishment fixed by the jury at confinement in the state penitentiary for life. Upon appeal

to the Court of Appeals of Kentucky the judgment was reversed and a new trial ordered. *Powers* v. *Commonwealth,* 110 Kentucky, 386. At the second trial the verdict was guilty, and the punishment was again fixed at confinement in the penitentiary for life. Upon appeal, that judgment was reversed and a new trial ordered. *Powers* v. *Commonwealth,* 114 Kentucky, 239. A third trial occurred, which resulted in a verdict of guilty, with the punishment fixed at death. This judgment was also reversed and the case sent back for a new trial. *Powers* v. *Commonwealth,* 83 S. W. Rep. 146.

When the case came on for trial the fourth time the accused tendered and offered to file in the state court his petition praying, upon grounds therein stated (and which appear in the above statement) that the prosecution be removed for trial into the Circuit Court of the United States for the Eastern District of Kentucky. But the state court would not allow the petition to be filed. Subsequently, a partial transcript of the record was filed in the Federal court, and the case was docketed in that court. The Commonwealth objected to the filing of the transcript from the state court and to the docketing of the case in the Federal court, and moved to vacate the order of filing and docketing. That motion was overruled.

Thereupon the accused, by his counsel, presented to the Federal court an application for a writ of *habeas corpus,* in order that he might be discharged from the custody of the state authorities. For the reasons set forth in the opinion of that court the application was granted and a writ ordered to issue commanding the jailer of Scott County, who held the accused in custody for the State, to deliver him into the custody of the marshal of the Federal court, which was done, that officer being directed to keep the accused confined in the county jail of Campbell County, Kentucky, until the further order of the Federal court. *Commonwealth* v. *Powers,* 139 Fed. Rep. 452. From that order the Commonwealth of Kentucky has prosecuted the above appeal (No. 393), the sole ground of such appeal being that the Federal court was without jurisdiction to make the

order allowing the writ of *habeas corpus* and taking the accused from the custody of the state authorities. The accused has moved to dismiss the appeal because the remedy of the Commonwealth was by a writ of mandamus.

The Commonwealth also asked leave to file a petition for mandamus to compel the Federal court to remand the case to the state court and to restore the custody of the accused to the state authorities. Leave to file was granted and the Federal judge, having made his return, submitted the rule upon the record of the case, including the opinion filed by the court below when the writ of *habeas corpus* was awarded to take the accused from the custody of the state authorities. This is case No. 15, Original.

The fundamental question to be determined is whether the removal of this criminal prosecution from the state court into the Federal court was authorized by any statute of the United States. We say, by any statute, because the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by acts of Congress. Chief Justice Marshall, speaking for this court, has said that "courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman &c.*, 4 Cr. 75, 93; *United States* v. *Hudson*, 7 Cr. 32, 33; *Cary* v. *Curtis*, 3 How. 236, 245; *McIntire* v. *Wood*, 7 Cr. 504, 506; *United States* v. *Eckford*, 6 Wall. 484, 488; *Sheldon* v. *Sill*, 8 How. 441, 449; *Jones* v. *United States*, 137 U. S. 202, 211; *The Sewing Machine Companies*, 18 Wall. 553, 571; *Holmes* v. *Goldsmith*, 147 U S. 150, 158.

The adjudged cases make it clear that whatever the nature of a civil suit or criminal proceeding in a state court, it cannot be *removed* into a Federal court unless warrant therefor be found in some act of Congress.

We are now to inquire whether the case was removable from the state court, in virtue of any act of Congress.

The removal of this prosecution into the Federal court was rested on §§ 641, 642 Revised Statutes, which are as follows:

"SEC. 641. When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person *who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States,* . . . such suit or prosecution may upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. . . .

"SEC. 642. When all the acts necessary for the removal of any suit of prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said Circuit Court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said Circuit Court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said state court a duplicate copy of said writ."

The contention of the Commonwealth is that the decisions of this court wholly preclude the suggestion that section 641 authorized the removal of this case into the Federal court. In view of this contention we must see what has been heretofore decided.

Among the cases to which our attention has been called, the first one, in point of time, involving the construction of section 641, is *Ex parte Wells*, 3 Woods, 128, 132, determined in the Circuit Court of the United States for the District of Louisiana, Mr. Justice Bradley presiding. The accused there sought to remove the prosecution from the state court, upon the ground, among others, that such vindictive prejudice existed against them on the part of the law-making and law-administering authorities of the State that they would be denied their rights as citizens in the state court, as well as before any jury that might be impanelled therein under the then existing jury law of the State; consequently, they would not be able to enforce their rights in said court. It was also alleged that the state court and its officers had so manipulated the local law as to deprive the accused of an impartial jury, and that they would be deprived of the full and equal benefit of the laws and proceedings for the security of their persons. The court, having found that there was nothing in the constitution or laws of the State that was hostile to the equal rights of the accused, in any particular, said: "The allegations with regard to the manipulation of the law in such manner as to secure a jury inimical to the petitioners, and with regard to the existence of a general prejudice against them in the minds of the court, the jurors, the officials and the people, are not within the purview of the statute authorizing a removal. The Fourteenth Amendment to the Constitution, which guarantees the equal benefit of the laws on which the present application is based, only prohibits state legislation violative of said right; it is not directed against individual infringements thereof. The civil rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression; but, still, only when committed under color of some 'law, statute, ordinance, regulation or custom.' And when that provision in this law, which is transferred to section 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court against a person who is denied or cannot enforce any

of the rights secured by the act, it had reference to a denial of those rights or impediments to their enforcement, arising from some state law, statute, regulation or custom. It is only when some such *hostile state legislation* can be shown to exist, interfering with the party's right of defense, that he can have his cause removed to the Federal court."

In *Strauder* v. *West Virginia*, 100 U. S. 303, 309, 312, which was an indictment in a court of West Virginia against a person of the African race for the crime of murder, the accused, before the trial commenced, presented his petition for the removal of the case into the United States court upon the ground that the laws of the State, in relation to both grand and petit juries, discriminated against colored citizens, because of their race, in violation of the Constitution and laws of the United States. The petition for removal was denied, and the accused was forced to a trial in the state court, found guilty, and sentenced. That judgment was affirmed by the Supreme Court of Appeals of the State, and the case was brought here upon writ of error. This court held the state statute to be unconstitutional, as making an illegal discrimination against negroes, because of their race. After referring to what was said in *United States* v. *Reese*, 92 U. S. 214, to the effect that rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress, and that the form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide, the court said: "There is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate Congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a state court, in which the right is denied *by the state law*, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Section 641 is

such a provision." Adverting to the act from which sections 1977 and 1978 of the Revised Statutes were taken the court further said: "This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Section 641 was an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment." Observe that this was the case of a state statute held to prevent the enforcement in the judicial tribunals of the State of rights secured to the accused by the Constitution of the United States. Upon that point this court said: "That the petition of the plaintiff in error, filed by him in the state court before the trial of his case, made a case for removal into the Federal Circuit Court, under section 641, is very plain, if, by the constitutional amendment and section 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and *a denial by the statute law of the State.* There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel."

In *Virginia* v. *Rives,* 100 U. S. 313, 321, which was an indictment in a court of Virginia against colored persons charged with the crime of murder, the accused moved that the venire, which was composed entirely of white men, should be modified so as to allow one-third of the jury to be composed of colored men. That motion was overruled. Thereupon the defendants, before the trial, sought by petition to have the prosecution removed into the Federal court, upon the ground that the right secured to them by the act of Congress providing for the equal civil rights of all citizens of the United States was denied to them in *the judicial tribunals of the county in which the prosecution was pending;* also, upon the ground that the grand jury finding the indictment had been organized in discrimination against the

colored race because of their race. The application to remove the case was denied, and the defendants were tried in the state court and convicted. The case at that stage of the trial was docketed, at the motion of the accused, in the Federal court, and upon writ of *habeas corpus* sued out from that court they were taken from the custody of the State and placed in the custody of the United States marshal. The Commonwealth of Virginia obtained from this court a rule against the judge of the Federal court to show cause why the accused should not be redelivered to the authorities of the State to be dealt with according to the laws of that Commonwealth. The judge made his return to the rule, averring that the indictments were removed into the Federal court by virtue of section 641 of the Revised Statutes. It is important to notice that there was no claim in that case that either the Constitution or laws of Virginia denied the civil rights of colored people or stood in the way of their enforcing the equal protection of the laws. The law, this court said, made no discrimination against them because of their color, nor any discrimination at all. And further, referring to the officer charged with the duty of selecting jurors, this court said: "He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional amendment. But, *inasmuch as it was a criminal misuse of the state law*, it cannot be said to have been such a 'denial or disability to enforce in the judicial tribunals of the State' the rights of colored men, *as is contemplated by the removal act.* Section 641. It is to be observed that act gives the right of removal only to a person 'who is denied, or cannot enforce, in the judicial tribunals of the State his equal civil rights.' And this is to appear before trial. *When a statute of the State* denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. *Such a case* is clearly within the provisions of section 641. But

when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer, whose duty it is to select jurors, fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a *venire* is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason—it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. *We cannot think such cases are within the provisions of section* 641. *Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court.*"

The question as to the scope of section 641 of the Revised Statutes again arose in the subsequent cases of *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 116; *Gibson* v. *Mississippi*, 162 U. S. 565, 581, 584, and *Charley Smith* v. *Mississippi*, 162 U. S. 592, 600. In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in section 641—"who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States"—did not give the right of *removal*, unless

the constitution or the laws of the State in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such State of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had.

In *Gibson* v. *Mississippi*, 162 U. S. 565, 581, 584, the words of this court as to the scope of section 641 were very emphatic. In that case there was a conviction in a state court of a negro for the crime of murder, and in which one of the questions, upon writ of error to the highest court of that State, was as to the action of the trial court in denying a petition for the removal of the prosecution to the Federal court. This court said: "When the constitution and laws of a State, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the state court may not respect and enforce the right to the equal protection of the laws, constitutes no ground, under the statute, for *removing* the prosecution into the Circuit Court of the United States in advance of a trial. We may repeat here what was said in *Neal* v. *Delaware*, namely, that in thus construing the statute 'we do not withhold from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the State, his constitutional equality of civil rights, all opportunity of appealing to the courts of the United States for the re-

dress of his wrongs. For if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied, in the subsequent proceedings of the state court, or in the execution of its judgment, any right, privilege or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review.' We therefore held in *Neal* v. *Delaware* that Congress had not authorized a removal of the prosecution from the state court, where jury commissioners or other subordinate officers had, *without authority derived from the constitution and laws of the State*, excluded colored citizens from juries because of their race." Again: "The application was to remove the prosecution from the state court, and a removal, as we have seen, could not be ordered upon the ground simply that citizens of African descent had been improperly excluded, because of their race, and without the sanction of the constitution and laws of the State, from service on previous grand juries, or from service on the particular grand jury that returned the indictment against the accused. We do not overlook in this connection the fact that the petition for the removal of the cause into the Federal court alleged that the accused, by reason of the great prejudice against him on account of his color, could not secure a fair and impartial trial in the county, and that he prayed an opportunity to subpœna witnesses to prove that fact. Such evidence, if it had been introduced, and however cogent, could not, as already shown, have entitled the accused to the *removal* sought; for the alleged existence of race prejudice interfering with a fair trial was not to be attributed to the constitution and laws of the State. It was incumbent upon the state court to see to it that the accused had a fair and impartial trial, and to set aside any verdict of guilty based on prejudice of race."

The cases to which we have adverted had reference, it is true, to alleged discriminations against negroes because of their race. But the rules announced in them equally apply where the accused is of the white race. Section 641, as well as the Fourteenth Amendment of the Constitution, is for the benefit of all

of every race whose cases are embraced by its provisions and not alone for the benefit of the African race.

We have not overlooked the suggestion, earnestly pressed upon our attention, that it is impossible for the accused to obtain a fair trial in the locality where the prosecution is pending. Indeed, the suggestion is, in effect, that there was a deliberate purpose on the part of those charged with the administration of justice in that locality to take his life, under the forms of law, even if the facts did not establish his guilt of the crime charged. It is true that looking alone at the petition for removal, the trials of the accused disclose such misconduct on the part of administrative officers connected with those trials as may well shock all who love justice and recognize the right of every human being, accused of crime, to be tried according to law. The case as made by the record, it must be conceded, tends to show, if it does not justify the belief, that administrative officers, having connection with the trial of the accused, had it in mind, at each trial, to exclude from the jury, so far as it was possible to do so, every person, however competent, who belonged to the same political party as the accused. In his separate opinion in *Powers* v. *Commonwealth*, 83 S. W. Rep. 146, 149, Judge Barker, of the Court of Appeals of Kentucky, referring to the third trial of the accused, said: "It is clear that the trial judge was of opinion that it was not an offense against the Fourteenth Amendment or a denial of the equal protection of the laws to the defendant to exclude Republicans [the accused being a Republican in politics] from the jury, solely because they were Republicans, provided the selected Democrats [the deceased Goebel being a Democrat in politics] were possessed of the statutory qualifications required for jury service."

It is appropriate here to recall that the Circuit Court, referring to the petition for removal, said: "The Commonwealth of Kentucky has not filed a reply to said petition for removal, or in any way taken issue with the defendant as to any of the allegations thereof. Said allegations must, therefore, be accepted as true, save in so far as they may be contradicted by the tran-

script on file herein. In the case of *Dishon* v. *C., N. O. & T. P. Ry. Co.*, 133 Fed. Rep. 471, 66 C. C. A. 345, Judge Richards, in discussing the affirmative allegations of a petition for removal in a civil suit under the jurisdictional acts of 1887–88, said: 'If these averments were not true, the plaintiff should have denied them, and an issue would then have been made for the court below to try and determine. No answer was filed; no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, and which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out.' In the case of *Whitten* v. *Tomlinson*, 160 U. S. 231, Justice Gray, in referring to a petition for a writ of *habeas corpus* under sections 751–755, Rev. Stat. U. S., said: 'In a petition for a writ of *habeas corpus*, verified by oath of the petitioner, as required by Rev. Stat. U. S. § 754, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.' The allegations of the petition for removal are not borne out by the transcript in all their detail. They are, however, borne out to a substantial degree, and are not contradicted in any substantial particular. It establishes the discrimination complained of in the selection of the jurors by the subordinate officers having to do therewith on the second and third trials, and that on both trials the Scott Circuit Court held that such discrimination was not illegal and the defendant had no right to complain thereof, it not being claimed that the jurors selected did not possess the statutory qualifications. As to the first trial, all that the transcript shows is that it was one of the grounds of defendant's motion for new trial that the Circuit judge, after the regular panel was exhausted, had refused to draw from the wheel the names of jurors placed there in the fall of 1899, before any motive for discrimination had arisen, concerning which Judge Du Relle had this to say in the opinion delivered by him on behalf of the majority of the Court of Ap-

peals on the first appeal: 'In the grounds relied on in the motion for new trial it is stated that the court overruled the motion of appellant, after the regular panel was exhausted, to draw the remaining names necessary to complete the jury from the jury wheel. It is to be regretted that, in a case concerning which so much feeling existed, the simple and easy mode was not adopted, which would have put beyond cavil the question of the accused having a trial by jury impartially selected. This will doubtless be done upon the succeeding trial.' "

Taking then the facts to be as represented in the petition for removal, still the remedy of the accused was not to have the prosecution removed into the Federal court—that court not being authorized to take cognizance of the case upon removal from the state court. It is not contended, as it could not be, that the constitution and laws of Kentucky deny to the accused any rights secured to him by the Constitution of the United States or by any act of Congress. Such being the case, it is impossible, in view of prior adjudications, to hold that this prosecution was removable into the Circuit Court of the United States by virtue of section 641 of the Revised Statutes. Such a case as the one before us has not been provided for by any act of Congress; that is, a Circuit Court of the United States has not been authorized to take cognizance of a criminal prosecution commenced in a state court for an alleged crime against the State, where the constitution and laws of such State do not permit discrimination against the accused in respect of such rights as are specified in the first clause of section 641. This court, while sustaining the subordinate courts of the United States in the exercise of such jurisdiction as has been lawfully conferred upon them, must see to it that they do not usurp authority not affirmatively given to them by acts of Congress. In *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382, we said that "the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires of this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of

all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." This principle has been again and again reaffirmed. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453, and authorities there cited.

Now, it affirmatively appears of record that the Circuit Court has taken jurisdiction of this case on removal from the state court, when, as we hold, no act of Congress authorized it to do so. We cannot, in fidelity to the law, as declared in former cases, overlook this defect of jurisdiction in the court below or fail to express our inability to concur in the views of the learned court below upon this point.

The Circuit Court said: "I, therefore, conclude that the prior action of the Scott Circuit Court denying the defendant the equal protection of the laws is a real hindrance and obstacle to his asserting his right thereto in a future trial therein—just as real as an unconstitutional statute would be—and that the defendant is denied the equal protection of the laws in said court, within the meaning of said section, and entitled to a removal on account thereof. He is denied in said court the equal protection of the laws because he has been denied, and such denial has never been set aside, but remains in full force and effect. . . . By an 'inability to enforce in the judicial tribunals of the State' is meant, as I construe the statute, any judicial tribunal of the State that may have jurisdiction of the prosecution." This view is met by what has been said in former cases, namely, that the words in section 641—"who is denied or cannot enforce in the judicial tribunals of the State"—have no application to any case where the rights secured to an accused "by any law providing for the equal civil rights of citizens of the United States,

or of all persons within the jurisdiction of the United States," are recognized or are not denied by the constitution or laws of the State in which the prosecution is pending.

Under this holding, the accused is not deprived of opportunity to have his rights, of whatever nature, which are secured or guaranteed to him by the Constitution or laws of the United States, fully protected by a Federal court. But it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, although the motion to quash was based on Federal grounds, cannot, under the laws of Kentucky, be reviewed by the Court of Appeals, the highest court of that Commonwealth. If such be the law of Kentucky, as declared by the statutes and by the Court of Appeals of that Commonwealth, then, after the case is disposed of in that court by final judgment, in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can exercise such jurisdiction in the case as may be necessary to vindicate any right, privilege or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may reëxamine the final judgment of the trial court so far as it involved and denied the Federal right, privilege or immunity asserted. This must be so, else it will be in the power of a State to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed. What we have said is clear from section 709 of the Revised Statutes, which declares that "A final judgment or decree in any suit in the highest court of a State, in which a decision *in* the suit could be had, . . . where any title, right, privilege or immunity is claimed under the Constitution, . . . and the decision is *against* the title, right, privilege or immunity

specially set up or claimed, by either party, under such Constitution, . . . may be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error." Looking at the object of that section it must be held that this court has jurisdiction, upon writ of error to reëxamine the final judgment of a subordinate state court denying a Federal right, specially set up or claimed, if, under the local law, that court is the highest court of the State entitled to pass upon such claim of Federal right. The great case of *Cohens* v. *Virginia*, 6 Wheat. 264, which was a criminal prosecution for a misdemeanor, was brought to this court, upon writ of error, from the Quarterly Session Court for the Borough of Norfolk, Virginia, and our jurisdiction was sustained upon the ground that such court was the highest court of the State in which, under the laws of Virginia, that case was cognizable. In *Downham* v. *Alexandria*, 9 Wall. 659, which was a suit for taxes against a dealer in liquors, the court said: "The legislature, then, having thought fit to make the judgment of the District Court in this case final and without appeal, that court is, for this case, the highest court in which the decision could be made; and the writ of error is, therefore, warranted by the act of Congress, and regular." In *Gregory* v. *McVeigh*, 23 Wall. 294, 306, which was a writ of error to the Corporation Court of Alexandria, Virginia, and in which there was a motion to dismiss for want of jurisdiction, this court said: "The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may reëxamine the judgment of the highest court which, under laws of the State, could decide it. . . . We think, therefore, that the judgment of the Corporation Court of the city of Alexandria is the judgment of the highest court of the State in which a decision of the suit could be had, and that we may reëxamine it upon error." In *Bergemann* v. *Backer*, 157 U. S. 655, 659, a criminal prosecution for murder

in a subordinate court of New Jersey, this court said: "If the proceedings in the Court of Oyer and Terminer could not, under the laws of New Jersey, be reviewed in a higher court of that State, except upon the allowance of a writ of error by such court or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the acts of Congress, the judgment of the highest court of the State in which a determination of the case could be had, and such judgment could have been, upon writ of error, reëxamined here, if it had denied any right, privilege, or immunity specially set up and claimed under the Constitution of the United States." So, in *Missouri, Kansas &c. Ry. Co.* v. *Elliott*, 184 U. S. 530, 539, in which the defendant made a claim of immunity in virtue of an authority exercised under the United States, it was held that our writ of error ran, not to the Supreme Court of Missouri, but to the Kansas City Court of Appeals, the highest court in which, under the law of that State, the question as to that immunity could be decided.

It is necessary to notice one other point made in behalf of the accused. At each of the trials he pleaded in bar of the prosecution a pardon granted to him on the tenth day of March, 1900, by William S. Taylor, who was alleged to have been, at the time, the duly elected, qualified, actual and acting Governor of Kentucky, having in his possession and under his control all the books, papers, records and archives, as well as the Executive Mansion, belonging to the office of Governor. That pardon, it is alleged, was accepted by the accused. It is further alleged that at the time said pardon was issued Taylor had been recognized, regarded and treated as the lawful Governor of Kentucky by the Executive power and Executive Department of the Government of the United States, including the President, the Attorney General, and the Postmaster General, and by the postmaster at Frankfort, the capital of Kentucky. The petition for removal alleged that the court in which the accused was tried, as well as the Court of Appeals of Kentucky, had refused to recognize said pardon as having any legal effect, and had

thereby denied to him the equal civil rights and the equal protection of the laws secured to him by the above provisions of the Constitution and laws of the United States; consequently, it was contended, he was denied and could not enforce in any judicial tribunal of Kentucky the rights which said pardon gave him.

Manifestly, in view of what has already been said, this question as to the pardon of the accused, does not make a case of removal on the ground of the denial or inability to enforce in the judicial tribunals of Kentucky of a right secured to the accused "by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States." Whether the non-recognition by the courts of the State of the validity of the alleged pardon involved a denial of any right secured to the accused by any other law or by the Constitution of the United States, we need not now consider. As the Circuit Court could not, in virtue of section 641, take cognizance of this prosecution or removal, we cannot properly pass upon the merits of any question of Federal right which might arise in the case. It is sufficient to say that if the accused, by reason of the Taylor pardon, acquired any right under the Constitution or laws of the United States, and if at the next trial of his case that right, having been specially set up and claimed, should be denied by the highest court of the State in which a decision of that question could be had, such action of that court, in respect of that pardon, can be reviewed here upon writ of error. We do not perceive that any question arising out of the pardon could make a case under section 641 for the removal of the prosecution from the state court.

We are all of opinion that the order awarding the writ of *habeas corpus cum causa* must be reversed, with directions to set aside that order as well as the order docketing the case in the Circuit Court of the United States; also, that the rule in relation to mandamus must be made absolute, the prosecution remanded to the state court, and the custody of the accused surrendered to the state authorities.

It is so ordered.

TERRITORY OF NEW MEXICO *v.* ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

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

No. 182. Argued January 26, 1906.—Decided March 12, 1906.

Plaintiff sued in the District Court of a Territory for several items and recovered judgment for less than amount sued for but over $5,000 with interest at six per cent. Defendant alone sued out writ of error from the Supreme Court of the Territory which disallowed $4,880 of the judgment including interest at six per cent. Plaintiff then appealed to this court and prayed for reinstatement of the District Court judgment and, when the case was reached for hearing here, assigned as additional error that the District Court had not allowed twenty-five per cent instead of six per cent interest which would have made the amount disallowed exceed $5,000. *Held*, that as plaintiff had not complained of the District Court judgment the only matter in dispute was that part of the District Court judgment which was disallowed by the territorial Supreme Court and as that was less than $5,000 the appeal to this court could not under the act of March 3, 1885, 23 Stat. 443, be maintained.

THE facts are stated in the opinion.

Mr. Frank W. Clancy, with whom *Mr. A. H. Harlee* was on the brief, for appellant.

Mr. Robert Dunlap, with whom *Mr. H. L. Waldo*, *Mr. R. E. Twitchell* and *Mr. Gardiner Lathrop* were on the brief, for appellees.

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

The Territory of New Mexico commenced three separate actions against appellees, respectively, in the District Court of Grant County, New Mexico, to recover taxes alleged to be due on a levy to pay certain judgments against the county, including

a particular item of $276.21, arising from the increase of the valuation of the property of the railroad companies. The aggregate amount claimed was $8,646.49 with interest at the rate of twenty-five per cent per annum. The cases were consolidated and submitted to the District Court on an agreed statement of facts with exhibits attached, a jury being waived, and resulted in a judgment, October 9, 1902, for $5,156.71, with interest at six per cent per annum. This included the $276.21 with interest. Appellees sued out writs of error from the Supreme Court of the Territory. No cross writ of error was brought and no cross errors were assigned. In the Supreme Court the item of $276.21 with interest was not contested. February 26, 1903, the Supreme Court announced its conclusion that the judgment be reversed, but as the item of $276.21 was not contested, rendered judgment for that amount, thereby rejecting the sum of $4,880.50 of the judgment below, that sum with interest at six per cent amounting to less than five thousand dollars on that date. 72 Pac. Rep. 14. From the judgment so rendered the Territory prosecuted an appeal to this court, under the act of Congress in that behalf, January 17, 1905, and prayed in its assignment of errors that the judgment of the Supreme Court be reversed and set aside, and the cause be "remanded to said Supreme Court, with directions to affirm the judgment of the District Court of Grant County." The appeal was heard in this court on January 26, 1906, and on that day appellant filed an additional assignment of errors to the effect that the Supreme Court of New Mexico erred in failing to hold that appellant was entitled to interest at the rate of twenty-five per cent per annum from October 9, 1902. But the judgment of the District Court gave interest at six per cent, and, as before stated, the Territory did not complain of that judgment as rendered.

By the act of March 3, 1885, 23 Stat. 443, c. 355, no appeal or writ of error could be allowed from any judgment or decree of the Territorial Supreme Courts, with certain exceptions not material here, "unless the matter in dispute, exclusive of costs,

shall exceed the sum of five thousand dollars." The matter in dispute here was that part of the judgment of the District Court which was disallowed by the Supreme Court and that was less than five thousand dollars.

Appeal dismissed.

HALE v. HENKEL.

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

No. 340. Argued January 4, 5, 1906.—Decided March 12, 1906.

Under the practice in this country the examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment, but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and if so they may indict upon such evidence. In summoning witnesses it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify without indicating the nature of the charge against them, or laying a basis by a formal indictment.

The examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso to the general appropriation act of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the Anti-trust Law. The word should receive as wide a construction as is necessary to protect the witness in his disclosures.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away. A witness is not excused from testifying before a grand jury under a statute which provides for immunity, because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea. The law takes no account of the practical difficulty which a party may have in procuring his testimony.

A witness cannot refuse to testify before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, because the immunity does not extend to prosecutions in a state court. In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty.

The benefits of the Fifth Amendment are exclusively for a witness compelled to testify against himself in a criminal case, and he cannot set them up on behalf of any other person or individual, or of a corporation of which he is an officer or employé.

A witness who cannot avail himself of the Fifth Amendment as to oral testimony, because of a statute granting him immunity from prosecution, cannot set it up as against the production of books and papers, as the same statute would equally grant him immunity in respect to matters proved thereby.

The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production upon a trial of documentary evidence through a *subpœna duces tecum.*

While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.

There is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State; and an officer of a corporation which is charged with criminal violation of a statute cannot plead the criminality of the corporation as a refusal to produce its books.

Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress to regulate such commerce; and while Congress may not have general visitatorial power over state corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress.

A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate constitutional immunities, and although it cannot refuse to produce its books and papers it is entitled to immunity under the Fourth Amendment against *unreasonable* searches and seizures, and where an examination of its books is not authorized by an act of Congress a *subpœna duces tecum* requiring the production of practically all of its books and papers is as indefensible as a search warrant would be if couched in similar terms.

Although the *subpœna duces tecum* may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this objection would not go to the validity of the order committing him for contempt.

THIS was an appeal from a final order of the Circuit Court made June 18, 1905, dismissing a writ of *habeas corpus* and remanding the petitioner Hale to the custody of the marshal.

The proceeding originated in a *subpœna duces tecum,* issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to "testify and give evidence

in a certain action now pending . . . in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company on the part of the United States, and that you bring with you and produce at the time and place aforesaid":

1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company.

2. All correspondence by letter or telegram between MacAndrews & Forbes Company and six other firms and corporations.

3. All reports made or accounts rendered by these six companies or corporations to the principal company.

4. Any agreements or contracts or arrangements, however evidenced, between MacAndrews & Forbes Company and the Amsterdam Supply Company or the American Tobacco Company or the Continental Company or the Consolidated Tobacco Company.

5. All letters received by the MacAndrews & Forbes Company since the date of its organization from thirteen other companies named, located in different parts of the United States and also copies of all correspondence with such companies.

Petitioner appeared before the grand jury in obedience to the subpœna, and before being sworn asked to be advised of the nature of the investigation in which he had been summoned; whether under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the grand jury had any lawful right to make the inquiry, and also that he be furnished with a copy of the complaint, information or proposed indictment upon which they were acting; that he had been informed that there was no action pending in the Circuit Court as stated in the subpœna, and that the grand jury was investigating no specific charge against

any one, and he therefore declined to answer: First, because there was no legal warrant for his examination, and, second, because his answers might tend to incriminate him.

After stating his name, residence and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its officers, the location of its office, or its agreement or arrangements with other companies. He was thereupon advised by the Assistant District Attorney that this was a proceeding under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies; that under the act of 1903, amendatory thereof, no person could be prosecuted or subjected to any penalty or forfeiture on account of any matter or thing concerning which he might testify or produce documentary evidence in any prosecution under said act, and that he thereby offered and assured appellant immunity from punishment. The witness still persisted in his refusal to answer all questions. He also declined to produce the papers and documents called for in the subpœna:

First. Because it would have been a physical impossibility to have gotten them together within the time allowed.

Second. Because he was advised by counsel that he was under no legal obligations to produce anything called for by the subpœna.

Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the court, and made a presentment that Hale was in contempt, and that the proper proceedings should be taken. Thereupon all the parties appeared before the Circuit judge, who directed the witness to answer the questions and produce the papers. Appellant still persisting in his refusal, the Circuit judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of *habeas corpus* was thereupon sued out, and a hearing had before another judge of the same court, who discharged the writ and remanded the petitioner.

Mr. De Lancey Nicoll, with whom *Mr. Junius Parker* and *Mr. John D. Lindsay* were on the brief, for appellant in this case and in No. 341 argued simultaneously herewith.[1]

There were no facts authorizing the Circuit Court to entertain any charge against appellant. Unless the grand jury in prosecuting the investigation acted within its jurisdiction, the court had no authority to punish the witness for his supposed contumacy in refusing to answer questions. *People* v. *Cassels*, 5 Hill, 164; *Ex parte Fisk*, 113 U. S. 713; *Scott* v. *McNeal*, 154 U. S. 34; Cooley, Const. Lim. 7th ed. p. 575; *United States* v. *Terry*, 39 Fed. Rep. 355.

No judicial matter was pending in the Circuit Court when appellant was required to attend before the grand jury, or when the orders of May 5 and May 8 were made, in or upon which he could lawfully be required to testify or produce evidence.

Notwithstanding the *subpœna* said "in a certain action," no action was pending; there can be no action, prosecution or criminal proceeding, until after someone has been formally accused of acts constituting a criminal offense by indictment or by information. *Post* v. *United States*, 161 U. S. 583, 587.

Nor was there any particular charge against the corporations named in the *subpœna duces tecum*, or under investigation. The grand jury was merely engaged in an effort to find out whether they had or had not transgressed the Sherman Act.

An *ex parte* investigation, based upon mere suspicion, without any complaint or charge, and that may be without result, is not a "case" or "controversy" within the meaning of the Constitution. *Pacific Railway Commission* v. *Stanford*, 32 Fed. Rep. 241; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation; consequently its requirement, and the orders of the court, based upon it and the witness's refusal, were *coram non judice* and void.

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[1] McAlister *v.* Henkel, *post*, p. 90.

At common law the powers of grand juries were restricted to indictments returned after the examination of witnesses, and presentments made upon their own knowledge or observation.

The former was a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by the grand jury. Blackstone, Bk. IV, c. 23.

The grand jury was continued as a part of our Federal institutions by the Fifth Amendment; but its powers and duties, not being defined by the Constitution or any Federal statute, are only such as grand juries possessed at common law, namely, of considering and acting upon indictments previously framed and laid before them by a known prosecutor, and of presenting facts within their own knowledge. *United States* v. *Mundell*, Iredell, J., 1795, 8 Virginia (6 Call), 245, 247.

No Federal statute authorizes a grand jury to inquire into matters called to their attention by the court or prosecuting attorney, where there is no specific charge against one or more individuals. Such a statute would be unconstitutional, and the idea that a grand jury has practically unlimited inquisitorial power rests, upon various loose and ill-considered utterances in reported cases. 17 Am. & Eng. Ency. 2d ed. 1279.

No case in this country holds that there can be a legitimate inquiry without a previous charge; and except in Tennessee, where there is legislative authority in respect to certain offenses, the idea of general inquisitorial power is repudiated. *Re Lester*, 77 Georgia, 143; *Lewis* v. *Commissioners*, 74 N. Car. 194; *Ward* v. *State*, 2 Missouri, 120. See also *Frisbie* v. *United States*, 157 U. S. 160; *People* v. *Kelly*, 24 N. Y. 74; *O'Hair* v. *People*, 32 Ill. App. 277; *Webster's Case*, 5 Greenleaf, 432; *Post* v. *United States*, 161 U. S. 585; *Beavers* v. *Henkel*, 194. U. S. 73, 84.

Although a grand jury may send for witnesses before indictment actually framed, some specific charge must be pending before them directed against a particular person or persons. *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Kilpatrick*, 16 Fed. Rep. 765; *Lloyd* v. *Carpenter*, 3 Pa. L. J. 188.

A grand jury does not possess, and cannot, under the constitution of this State exercise, purely inquisitorial power, because such power is no sense a judicial one.

The greatest evil incident to the Star Chamber was its inquisitorial procedure. Upon suggestion or suspicion citizens were subpœnaed and subjected to examination under the *ex officio* oath. See preamble of act for the abolition of that court (July 5, 1641; 16 Charles I, c. 10; 5 S. R., 110) reciting the violation of the statute of 25 Edw. III.

To exercise judicial power there must be parties to the proceeding, a matter in controversy, an assertion and a denial; in short, a distinct issue to be determined. Cooley, Const. Lim. 132; *Matter of Pacific Railway Commission* v. *Stanford*, 32 Fed. Rep. 241; *Interstate Com. Com.* v. *Brimson*, 154 U. S. 447.

The theory of our criminal proceeding, like that of Great Britain, is accusatory and not inquisitorial. *United States* v. *James*, 60 Fed. Rep. 257. See opinion of Chief Justice Marshall in *United States* v. *Hill*, 1 Brock. C. C. 159.

Section 1 of the act of February 25, 1903, does not give the petitioner immunity from prosecution, on account of the transactions concerning which he was directed to testify and produce evidence before the grand jury, the investigation before that body not being a "proceeding, suit or prosecution" under either of the acts referred to in the act of February 25, 1903; consequently the petitioner was within the legitimate exercise of his right under the Fifth Amendment of the Constitution, when he refused to testify or produce evidence before the grand jury on the ground that by so doing he might have criminated himself.

The legislative guaranty must have a broad construction in favor of the right which it is intended to secure. *Counselman* v. *Hitchcock*, *supra*.

See also as to similar language in the act of February 11, 1893, *Brown* v. *Walker*, 161 U. S. 591; but the immunity is worthless here unless the language subsequently used, "proceeding, suit or prosecution," embraces a grand jury investigation. If it does not, the witness is deprived of his constitu-

tional rights; any reasonable doubt on this head should be resolved in his favor.

A witness hereafter pleading the immunity afforded by this act as a bar to criminal prosecution will be held to strict proof, especially if he seeks to plead this Federal statute as a bar to a state prosecution. See *Jack* v. *Kansas*, 199 U. S. 372.

An inquiry before a grand jury is not a "suit" nor a "prosecution." *Post* v. *United States, supra; Paul* v. *Virginia*, 148 U. S. 107; *State* v. *Wolcott*, 21 Connecticut, 279; Constitution, Fifth Amendment.

The act of February 25, 1903, is unconstitutional in that it undertakes to deprive the various States of their right and power to prosecute persons concerned in transactions, which violate their own laws, thus infringing upon the provision of the Tenth Amendment. *Brown* v. *Walker, supra*, is against this proposition, but see *Jack* v. *Kansas*, 199 U. S. 372, where it is in effect limited by the improbability only of state prosecution rather than the right of the State to proceed.

The order of May 5 requiring appellant to produce the papers called for in the *subpœna duces tecum* was void under the Fourth Amendment. Its enforcement would amount to the ancient seizure and search which continued by usage in England until the decision of Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029. See also *Boyd* v. *United States*, 116 U. S. 616, 626; *Hartranft's Appeal*, 85 Pa. St. 433; *Ex parte Brown*, 72 Missouri, 83; *In re Lester*, 77 Georgia, 143; *In re Morer*, 101 N. W. Rep. 588.

The writ must also particularly describe the papers desired. *Ex parte Brown, supra; Sandford* v. *Nichols*, 13 Massachusetts, 286.

A corporation is entitled to the same immunities as an individual. It cannot be compelled to incriminate itself. Wigmore on Evidence, § 2259; *Logan* v. *Penna. R. R. Co.*, 132 Pa. St. 403; *Santa Clara County* v. *Railroad Company*, 118 U. S. 394; *King of Sicilies* v. *Willcox*, 7 St. Tr. (N. S.) 1049.

By the express provisions of the Sherman Act corporations

are deemed to be persons. Section 8. A corporation can only be examined through its officers, directors or agents. In the present case the Government undertook deliberately by that method to compel the corporation to submit to examination, not as a witness, but by forcing one of its officers and directors to produce its books and papers for the sole purpose of ascertaining whether or not the corporation had committed a crime under the Sherman Act.

The rule that the protection of the Fourth and Fifth Amendments is the personal privilege of the witness and cannot be claimed for the benefit of another has no possible application to the case of an officer, director or agent of a corporation who seeks to secure to the corporation its constitutional rights and immunities; for these rights can only be asserted through its officers, directors and agents.

In this view the witness is not seeking to invoke the privilege of another, but the corporation itself invokes its own privilege in the only manner and by the only means it can employ for that purpose.

If, under these circumstances, it could be said that the corporation was a witness, and, therefore, entitled to the immunity afforded by the statute, this might, perhaps, meet our present contention. But the position of the Government is that the corporation is not protected by the statute. Its avowed purpose is to use the papers as the basis of an indictment against the corporation. See *Davies* v. *Lincoln National Bank*, 4 N. Y. Suppl. 373; *Rex* v. *Purnell*, Wilson, 239; *In re Morse*, 101 N. W. Rep. 588.

Mr. Henry W. Taft, Special Assistant to The Attorney General, with whom *The Attorney General* and *Mr. Felix H. Levy*, Special Assistant to The Attorney General, were on the brief, for the United States in this case and in No. 341:

The procedure of a grand jury in this country at the time of the enactment of the Fifth Amendment was, and, with unimportant exceptions, has remained quite different from that of

the similar body in England. Under this procedure the grand jury proceeds, before a bill of indictment is framed, to investigate, at the instance of the court or of their own body or of the district attorney, a suspected or alleged crime and to determine whether it has been committed, and, if so, who committed it. In so doing they exercise broad inquisitorial powers. The administration of the criminal law in this country necessitates this procedure, and this was clearly within the common law powers of a grand jury in 1791 when the Fifth Amendment was adopted however different the usual practice in England may have been at that time.

The power of a grand jury extends to the broadest kind of an inquisitorial proceeding. Counsel for appellant have mistaken a radical change of mere procedure for an attempted enlargement of power. Or if it is a question of power, long before 1791 the American idea prevailed that the State and not the individual is the agency which should start a criminal prosecution; that this was vitally different from the English idea and necessarily involved radical changes in the grand jury system and the extension of its powers; and that it was with reference to such a system and such powers that the Fifth Amendment was adopted.

During the first hundred years of our independence precedents are not numerous and authority for grand jury procedure rests not so much upon adjudications of the courts, as upon practice sanctioned by long usage and general recognition.

As to power of grand jury to find indictments on its own investigations, see lectures delivered by Judge Wilson in 1791 and 1792, Works James Wilson, ed. 1896, p. 213, and charge of Judge Addison, 1791, Common Pleas Court, Fifth Circuit, Addison's Pa. Rep. Appx. 38; but see *Lloyd* v. *Carpenter*, 1845, 5 Penn. L. Jour. 55 and *State* v. *Smith*, 1838, Meigs, 99.

United States v. *Mundel* (1795), 8 Virginia (6 Call.), 245, does not support appellant's contention. Its tendency is the other way. See also *Ward* v. *State* (1829), 2 Missouri, 120; *State* v. *Freeman* (1842), 13 N. H. 488,

It thus appears that at the date of the adoption of the Fifth Amendment and for fifty years thereafter under the procedure sanctioned by usage and precedent, an American grand jury (1) could proceed in cases other than those in which a private prosecutor presented a duly engrossed indictment, and (2) on its own motion or at the instance of the court or the prosecuting attorney, could (and necessarily by an inquisitorial method) investigate an alleged or suspected crime and after the investigation direct an indictment to be drawn.

The legality of the grand jury, without the agency of the district attorney, calling witnesses, whom they interrogated as to their knowledge concerning a Cuban expedition, was sustained, and the broad inquisitorial powers of grand juries was recognized. See report in note to § 337, Wharton's Crim. Pl. & Pr. 8th ed., and see also the charge delivered by Justice Field to a grand jury in California. 30 Fed. Cas. 994; 2 Sawyer, 667.

The limitations placed by Mr. Justice Field upon the inquisitorial powers of the grand jury do not relate to matters brought to their attention either by the court or by the district attorney, and that they permit a general investigation of a crime upon the "personal knowledge" of a juror, where such knowledge goes no further than to include "facts which tend to show" that a crime has been committed, which, of course, implies the power to call witnesses other than the grand juror having such knowledge. See also *United States* v. *Kimball*, 117 Fed. Rep. 156; *Frisbie* v. *United States*, 157 U. S. 160; *United States* v. *Reed*, 27 Fed. Cas. 737; *United States* v. *Terry*, 39 Fed. Rep. 355; *United States* v. *McAvoy*, 18 How. Pr. 380.

In the state courts see *State* v. *Terry*, 30 Missouri, 368; *Ex parte Brown*, 72 Missouri, 83; *Commonwealth* v. *Smyth*, 11 Cush. 473; *State* v. *Wolcott*, 21 Connecticut, 272; *State* v. *Magrath*, 44 N. J. L. 227; *Blaney* v. *State*, 74 Maryland, 153; *People* v. *Northey*, 77 California, 618; *McCullough* v. *Commonwealth*, 67 Pa. St. 30; *Rowland* v. *Commonwealth*, 82 Pa. St. 405; Thompson and Merriam on Juries, §§ 612, 615; Wharton's Crim. Pl. & Pr. 8th ed. § 338. *O'Hair* v. *People*, 32 Ill. App. 277; *State*

v. *Smith*, Meigs, 99; *Lewis* v. *Board of Commissioners*, 74 N. Car. 194, and *United States* v. *Kilpatrick*, 16 Fed. Rep. 765, distinguished.

A specific charge against a particular person is not necessary to give the grand jury jurisdiction. The English practice of private prosecutors has never prevailed. The grand jury acts on information of the district attorney or from its own knowledge or information otherwise obtained. Thompson and Merriam on Juries, § 609; 1 Bishop's Crim. Pr. § 278; charge of Mr. Justice Field, 30 Fed. Cas. 994; *The King* v. *John Lukens*, 1 Dallas, 7.

In its beginnings the grand jury seems to have been devised as a convenient method to assist itinerant justices in England in detecting crime and punishing it. They seem clearly to have been expected to investigate, and originally they indicted frequently, on mere rumor. See Pollock & Maitland's History of the English Law, vol. 2, pp. 622, 639, for description of the grand jury before the time of Edward I, founded on Bracton and Britton; Bracton, "De Corona," Twiss' ed. vol. 2, c. 22, fol. 143, p. 451; Reeves' History English Law, vol. 1, p. 457; Stephens' History Crim. Law. vol. 1, p. 253; Stubbs' Constitutional History of England, vol. 1, p. 661 *et seq.*; *Earl of Macclesfield* v. *Starkey* (1684), 10 Howell's State Trials, 1330.

A specific charge involves definiteness. Date and circumstances and the technical accuracy characteristic of an indictment are not necessary to the exercise of jurisdiction by the grand jury.

A witness could object to answering a question because the proceeding was not properly inaugurated, demand a ruling by the court as to whether under the charge presented the question was admissible; and thus an investigation begun before the grand jury would soon assume the aspect of a trial in court, subverting the whole purpose of the grand jury system and seriously affecting the administration of justice.

If appellant's claim be conceded that a charge be necessary, it must follow that he can object to the admissibility of evidence

on the ground that it is not competent under the charge. But the granting of such a right would necessarily result in a violation of the secrecy of the proceedings of the grand jury and of the rule that a witness has no right to question the regularity of the proceedings of a grand jury. *United States* v. *Brown*, 1 Sawy. 533, Fed. Cas. 14,671; *McGregor* v. *United States*, 134 Fed. Rep. 187; *United States* v. *Cobban*, 127 Fed. Rep. 713; *United States* v. *Farrington*, 5 Fed. Rep. 343; *United States* v. *Ambrose*, 3 Fed. Rep. 283.

The court will assume that the district attorney and the grand jury proceeded in accordance with their sworn duties and in accordance with law. *United States* v. *Terry*, 39 Fed. Rep. 355; *United States* v. *Hunter*, 15 Fed. Rep. 712; *United States* v. *Reed*, 2 Blatchf. 435.

A witness before a grand jury has no right to raise objections as to the constitution of that body, unless his constitutional rights are clearly in danger. *Ex parte Haymond*, 91 California, 545.

No inconvenient or unjust results can attend the adoption of the rule the Government contends for, and sound public policy demands that it be held that the action was properly set in motion in this case.

It was contended below that to concede inquisitorial powers to a grand jury without in every case requiring a specific charge against a particular person would open up under the guise of the administration of justice possibilities of wrong and oppression "beyond conception."

In the many jurisdictions where broader inquisitorial powers exist and have been exercised by grand juries, they have not been used as an engine of oppression. The system is surrounded with such safeguards that the danger of abuses is very remote.

The scope of the powers of a grand jury is limited by the jurisdiction of the court of which it is an appendage. *United States* v. *Hill*, 1 Brock. 156. It is also subject to the direction of the court and cannot effectually exercise some of its most

important functions without the interposition of the court. It must resort to the court to enforce by *subpœna* the attendance of witnesses, and it is only through the order of the court that witnesses may be punished for contumacy. *Commonwealth* v. *Bannon*, 97 Massachusetts, 214; *Heard* v. *Pierce*, 8 Cush. 338. The court may inquire whether the grand jury has exceeded its powers, *People* v. *Naughton*, 7 Abb. U. S. 421, 426; *Denning* v. *The State*, 22 Arkansas, 131, 132, and may punish the entire jury or any of its members. *Turk* v. *State*, 7 Ohio Pt. II, 240, 243; *State* v. *Cowan*, 1 Head, 280; *Re Ellis*, Hemp. 10. Thus, while the grand jury is an independent body, its independence is confined within well-defined limits.

Whether a cause or action under the title mentioned in the subpœna was pending is unimportant. The proceeding might have proceeded without a title. Titles of proceedings before a grand jury are invariably fictitious. *United States* v. *Reed*, 27 Fed. Cas. 737; *Appeal of Hartranft*, 85 Pa. St. 433.

The Fourth Amendment does not relate to the compulsory production of papers for use as evidence. *Summers* v. *Moseley*, 2 Cr. & M. 477; *Wertheim* v. *Continental R. & T. Co.*, 15 Fed. Rep. 718; *Adams* v. *United States*, 192 U. S. 585; *Interstate Com. Com.* v. *Baird*, 194 U. S. 25; *In re Moser*, 101 N. W. Rep. 591; 1 Greenleaf, Evidence, 16th ed. § 469*a*; *Boyd* v. *United States*, 116 U. S. 616.

Unreasonableness under the Fourth Amendment cannot be predicated upon either the indefiniteness of the description of the books and papers called for in the subpœna or upon the volume of evidence and the inconvenience in producing it. *United States* v. *Babcock*, 3 Dillon, 567; *In re Storror*, 63 Fed. Rep. 564; *United States* v. *Tilden*, 10 Ben. 566; *In re Mitchell*, 12 Abb. Pr. 249.

It was not for the witness to determine whether the description of the papers was sufficiently definite or the papers themselves material to the inquiry, or whether the production of such a volume of papers was oppressive. He must comply, so far as it was possible, with the terms of the writ and produce the

papers submitting, as he might be advised, any objection to their use in evidence. See note by John D. Lawson, 15 Fed. Rep. 723; see also *Doe* v. *Kelly*, 4 Dowl. 273; *Key* v. *Russell*, 7 Dowl. 693; *Amey* v. *Long*, 9 East, 483; *Holtz* v. *Schmidt*, 2 Jones & Sp. 28; *Bull* v. *Loveland*, 10 Pick. 9; *Chaplain* v. *Briscoe*, 5 Sm. & M. 198; *Corsen* v. *Dubois*, 1 Holt, 239; *Field* v. *Beaumont*, 1 Swanst. 209; *Mitchell's Case*, 12 Abb. Pr. 249; *Doe* v. *Clifford*, 2 C. & K. 448; *In re O'Toole*, 1 Tuck. 39. See also Wigmore on Evidence, § 2200, at page 2979.

Every person subject to the jurisdiction of a competent tribunal is bound to give testimony. This is a "solemn and important duty that every citizen owes to his country." *Ward* v. *State, supra.* He is privileged to decline only in case his answers may tend to criminate him. Our system of jurisprudence does not permit a witness to refuse to answer because he prefers not to or even because his answer will tend to degrade him, except, only, where degrading testimony is interposed solely to affect his credibility. 1 Greenl. on Ev. §§ 454, 455. See cases cited. Where the reason of the privilege ceases the privilege also ceases. Broom's Legal Maxims, 654; *Brown* v. *Walker*, 161 U. S. 597, 599.

The protection of the Fourth and Fifth Amendments is based alone upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer, and if the privilege cannot be asserted in behalf of a corporation under the Fifth Amendment it is plain that it may not be so availed of under the Fourth Amendment.

Where the question of criminality is not involved, an officer of a corporation having the books of the company in his custody is bound to produce them in obedience to a *subpœna duces tecum*. *Wertheim* v. *Continental R'y & Trust Co.*, 15 Fed. Rep. 718. The same rule applies, even though the production of the evidence may tend to incriminate the corporation; one of its officers may not assert in its behalf the privilege secured to persons by the Fifth Amendment of the Constitution. See

United States v. *Amedy*, 11 Wheat. 412; *Beaston* v. *The Farmers' Bank of Delaware*, 12 Pet. 134. That word in the Fifth Amendment does not include corporations, as the mischief intended to be reached did not apply to corporations.

The privilege embodied in the Amendment is upheld on grounds which vary to some extent; but the privilege is personal and is based upon the consideration of the law for the individual in his capacity as a witness. *Brown* v. *Walker*, 161 U. S. 596; Best on Evidence, 9th ed. p. 113; 3 Taylor on Evidence, § 1453; 1 Greenleaf on Evidence, 16th ed. § 469*d*, and cases cited in notes; *Commonwealth* v. *Shaw*, 4 Cush. 594; Phillipps on Evidence, 4th Am. ed. p. 935; Starkie on Evidence, 10th Am. ed. 4; Wigmore on Evidence, § 2263; *State* v. *Wentworth*, 65 Maine, 234, 241; *Reynolds* v. *Reynolds*, 15 Cox Cr. Cases, 108, 115; *Bartlett* v. *Lewis*, 12 C. B. (N. S.) 249, 265.

While sporadic cases look in a different direction, there have been many decisions, both in this country and in England, in which the courts have refused to permit the privilege to be asserted by an officer or employé in behalf of a corporation of which he is the representative. *New York Life Ins. Co.* v. *People*, 195 Illinois, 430; *In re Moser*, 101 N. W. Rep. 591; *In re Peasley*, 44 Fed. Rep. 271; *Gibbons* v. *Waterloo Bridge*, 5 Price, 491; *Rex* v. *Purnell*, Wilson, 239.

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

Two issues are presented by the record in this case, which are so far distinct as to require separate consideration. They depend upon the applicability of different provisions of the Constitution, and, in determining the question of affirmance or reversal, should not be confounded. The first of these involves the immunity of the witness from oral examination; the second, the legality of his action in refusing to produce the documents called for by the *subpœna duces tecum*.

1. The appellant justifies his action in refusing to answer the

questions propounded to him, 1st, upon the ground that there was no specific "charge" pending before the grand jury against any particular person; 2d, that the answers would tend to criminate him.

The first objection requires a definition of the word "charge" as used in this connection, which it is not easy to furnish. An accused person is usually charged with crime by a complaint made before a committing magistrate, which has fully performed its office when the party is committed or held to bail, and it is quite unnecessary to the finding of an indictment by a grand jury; or by an information of the district attorney, which is of no legal value in prosecutions for felony; or by a presentment usually made, as in this case, for an offense committed in the presence of the jury; or by an indictment which, as often as not, is drawn after the grand jury has acted upon the testimony. If another kind of charge be contemplated, when and by whom must it be preferred? Must it be in writing, and if so, in what form? Or may it be oral? The suggestion of the witness that he should be furnished with a copy of such charge, if applicable to him is applicable to other witnesses summoned before the grand jury. Indeed, it is a novelty in criminal procedure with which we are wholly unacquainted, and one which might involve a betrayal of the secrets of the grand jury room.

Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.

We are pointed to no case, however, holding that a grand jury

cannot proceed without the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in *Rex* v. *Shaftsbury*, 8 Howell's State Trials, 759, indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given to you in charge, *as of all other matters, and things as shall come to your own knowledge* touching this present service," etc. This oath has remained substantially unchanged to the present day. There was a difference, too, in the nomenclature of the two cases of accusations by private persons and upon their own knowledge. In the former case their action was embodied in an indictment formally laid before them for their consideration; in the latter case, in the form of a presentment. Says Blackstone in his Commentaries, Book IV, page 301:

"A presentment, properly speaking, is a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it."

Substantially the same language is used in 1 Chitty Crim. Law, 162.

In *United States* v. *Hill*, 1 Brock. 156, it was indicated by Chief Justice Marshall that a presentment and indictment are to be considered as one act, the second to be considered only as an amendment to the first, and that the usage of this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings.

In a case arising in Tennessee the grand jury, without the agency of the district attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition. Mr. Justice Catron sustained the legality of the proceeding and compelled the wit-

nesses to answer. His opinion is reported in Wharton's Criminal Pleading and Practice, 8th ed. § 337. He says: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime." His charge contains a thorough discussion of the whole subject.

While presentments have largely fallen into disuse in this country, the practice of grand juries acting upon notice, either of their own knowledge or upon information obtained by them, and incorporating their findings in an indictment, still largely obtains. Whatever doubts there may be with regard to the early English procedure, the practice in this country, under the system of public prosecutions carried on by officers of the State appointed for that purpose, has been entirely settled since the adoption of the Constitution. In a lecture delivered by Mr. Justice Wilson of this court, who may be assumed to have known the current practice, before the students of the University of Pennsylvania, he says (Wilson's Works, vol. II, page 213):

"It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and

by accusers, marshalled in legal array, should, on full investigation, be secure in that protection, which the law engages that she shall enjoy inviolate.

"The oath of a grand juryman—and his oath is the commission under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?"

Similar language was used by Judge Addison, President of the Court of Common Pleas, in charging the grand jury at the session of the Common Pleas Court in 1791 (Addison's Pa. Rep. Appx. p. 38):

"If the grand jury, *of their own knowledge*, or the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty, either to inform the officer, who prosecutes for the State, of the nature of the offense, and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The practice then prevailing, with regard to the duty of grand juries, shows that a presentment may be based not only upon their own personal knowledge, but from the examination of witnesses.

While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge previously laid before them. An analysis of cases approving of this method of procedure would unduly burden this opinion, but the following are the leading ones upon the subject: *Ward* v. *State*, 2 Missouri, 120; *State* v. *Terry*, 30 Missouri, 368; *Ex*

parte Brown, 72 Missouri, 83; *Commonwealth* v. *Smyth*, 11 Cushing, 473; *State* v. *Wolcott*, 21 Connecticut, 272, 280; *State* v. *Magrath*, 44 N. J. L. 227; Thompson & Merriam on Juries, §§ 615-617. In *Blaney* v. *Maryland*, 74 Maryland, 153, the court said:

"However restricted the functions of the grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders though no preliminary proceedings have been had before a magistrate, and though neither the court not the state's attorney has laid the matter before them."

The rulings of the inferior Federal courts are to the same effect. Mr. Justice Field, in charging a grand jury in California (2 Sawy. 667), said to the grand jury acting upon their own knowledge:

"Not by rumors or reports, but by knowledge acquired from the evidence before you, and from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury."

Similar language was used in *United States* v. *Kimball*, 117 Fed. Rep. 156, 161; *United States* v. *Reed*, 2 Blatch. 435, 449; *United States* v. *Terry*, 39 Fed. Rep. 355. And in *Frisbie* v. *United States*, 157 U. S. 160, it is said by Mr. Justice Brewer:

"But in this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the suspected party on trial, to direct the preparation of the formal charge or indictment."

There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view and in a spirit of meddlesome inquiry. In the most pertinent of these cases, *In re Lester*, 77 Georgia, 143, the Mayor of Savannah, who was also *ex*

officio the presiding judge of a court of record, was called upon to bring into the Superior Court the "Information Docket" of his court, to be used as evidence by the State in certain cases pending before the grand jury. It was held "that the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well defined limits. . . . The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense."

This case is readily distinguishable from the one under consideration, in the fact that the subpœna in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company; and that the Georgia Penal Code prescribed a form of oath for the grand jury, "that the evidence you shall give the grand jury on this bill of indictment (or presentment, as the case may be, here state the case), shall be the truth," etc. This seems to confine the witness to a charge already laid before the jury.

In *Lewis* v. *Board of Commissioners*, 74 N. Car. 194, the English practice, which requires a preliminary investigation where the accused can confront the accuser and witnesses with testimony, was adopted as more consonant to principles of justice and personal liberty. It was further said that none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them. The practice in this particular in the Federal courts has been quite the contrary.

Other cases lay down the principle that it must be made to appear to the grand jury that there is reason to believe that a crime has been committed, and that they have not the power to institute or prosecute an inquiry on the chance that some crime may be discovered. *In Matter of Morse*, 18 N. Y. Criminal Rep. 312; *State* v. *Adams*, 70 Tennessee, 647 (an unimportant case, turning upon a local statute). In Pennsylvania grand juries are somewhat more restricted in their powers than is usual in other States, *McCullough* v. *Commonwealth*, 67 Pa. St.

30; *Rowand* v. *Commonwealth*, 82 Pa. St. 405; *Commonwealth* v. *Green*, 126 Pa. St. 531, and in Tennessee inquisitorial powers are granted in certain cases and withheld in others. *State* v. *Adams, supra; State* v. *Smith*, Meigs, 99.

We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesss, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted. As criminal prosecutions are instituted by the State through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own obser-

vations or upon the evidence of witnesses given before them.

2. Appellant also invokes the protection of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself.

The answer to this is found in a proviso to the General Appropriation Act of February 25, 1903, 32 Stat. 854, 904, that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," of which the Anti Trust Law is one, providing, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word "proceeding" is not a technical one, and is aptly used by courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. *Yates* v. *The Queen*, 14 Q. B. D. 648; *Hogan* v. *State*, 30 Wisconsin, 428.

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may ex-

pose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply. The criminality provided against is a present, not a past criminality, which lingers only as a memory and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal, but it would never be asserted that he would thereby be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the Amendment ceases to apply. The extent of this immunity was fully considered by this court in *Counselman* v. *Hitchcock*, 142 U. S. 547, in which the immunity offered by Rev. Stat. section 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in *Brown* v. *Walker*, 161 U. S. 591, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in *Counselman* v. *Hitchcock*, p. 586, that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." If the constitutional Amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost

any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith.

We need not restate the reasons given in *Brown* v. *Walker*, both in the opinion of the court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the court, which fully covers the case under consideration.

The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas*, 199 U. S. 372, namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this court and by the Supreme Court of Kansas that

the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes*, 1 B. & S. 311; *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.), 1049, 1068; *State* v. *March*, 1 Jones (N. Car.), 526; *State* v. *Thomas*, 98 N. Car. 599.

The case of *United States* v. *Saline Bank*, 1 Pet. 100, is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the District Court of the Virginia District, who pleaded that the emission of certain unlawful bills took place, within the State of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject themselves to those penalties. It is sufficient to say that the prosecution was under a state law which imposed the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction.

But it is further insisted that while the immunity statute may protect individual witnesses it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even

though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employés. The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employés, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the non-production by the witness of the books and papers called for by the *subpœna duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that under the circumstances he was under no obligation to produce them; and, finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the second ground does not set forth with technical accuracy the real rea-

son for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpœna was an infringement upon the Fourth Amendment to the Constitution, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The construction of this amendment was exhaustively considered in the case of *Boyd* v. *United States*, 116 U. S. 616, which was an information *in rem* against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the district judge, under section 5 of the act of June 22, 1874, directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held (p. 622) "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that Amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal (p. 634), "is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the Fourth Amendment.

Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions. Thus in the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, the constitutionality of the Interstate Commerce Act, so far as it authorized the Circuit Courts to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection:

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The case of *Adams* v. *New York*, 192 U. S. 585, which was a writ of error to the Supreme Court of the State of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the Fourth and Fifth Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission, as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment, was not an infringement of the Fifth Amendment, and that by the introduction of such evidence defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that "If a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these Amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to

render invalid legislation or judicial procedure having such effect."

The *Boyd* case must also be read in connection with the still later case of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the Fifth Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the Circuit Court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court the *Boyd case* was again considered in connection with the Fourth and Fifth Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate."

Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that Amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in *Summers* v. *Moseley*, 2 Cr. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey* v. *Long*, 9 East, 473; *Bull* v. *Love-*

land, 10 Pick. 9; *U. S. Express Co.* v. *Henderson*, 69 Iowa, 40; Greenleaf on Evidence, 469*a*.

If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to

act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

4. Although, for the reasons above stated, we are of the

opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. *Gulf &c. Railroad Company* v. *Ellis*, 165 U. S. 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Com-

pany, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpœna. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpœna of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Missouri, 83; *Shaftsbury* v. *Arrowsmith*, 4 Ves. 66; *Lee* v. *Angas*, L. R. 2 Eq. 59.

Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

But this objection to the subpœna does not go to the validity of the order remanding the petitioner, which is, therefore,

Affirmed.

MR. JUSTICE HARLAN, concurring.

I concur entirely in what is said in the opinion of the court

in reference to the powers and functions of the grand jury and as to the scope of the Fifth Amendment to the Constitution. I concur also in the affirmance of the judgment, but must withhold my assent to some of the views expressed in the opinion. It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpœna duces tecum* was an infringement of the Fourth Amendment, which declares that "the right of the *People* to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized." It may be, I am inclined to think as a matter of procedure and practice, that the *subpœna duces tecum* was too broad and indefinite. But the action of the court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness—whose personal rights, let it be observed, were in no wise involved in the pending inquiry—to refuse compliance with the subpœna, upon the ground that it involved an unreasonable search and seizure of the books, papers and records of the corporation whose conduct, so far as it related to the Sherman Anti Trust Act, was the subject of examination. It was not his privilege to stand between the corporation and the Government in the investigation before the grand jury. In my opinion, a corporation—"an artificial being, invisible, intangible and existing only in contemplation of law"—cannot claim the immunity given by the Fourth Amendment; for, it is not a part of the "People," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment. If a contrary view obtains, the power of the Government by its representatives to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed. If a corporation, when its affairs are under examination by a grand jury

proceeding in its work under the orders of the court, can plead the immunity given by the Fourth Amendment against unreasonable searches and seizures, may it not equally rely upon that Amendment to protect it even against a statute authorizing or directing the examination by the agents of the Government creating it, of its papers, documents and records, unless they specify the particular papers, documents and records to be examined? If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books and records of the corporation, could it be deemed valid if made under the express authority of an act of Congress? Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment. In my judgment when a grand jury seeking, in the discharge of its public duties, to ascertain whether a corporation has violated the law in any particular, requires the production of the books, papers and records of such corporation, no officer of that corporation can rightfully refuse, when ordered to do so by the court, to produce such books, papers and records in his official custody, upon the ground simply that the order was, as to the corporation, an unreasonable search and seizure within the meaning of the Fourth Amendment.

MR. JUSTICE MCKENNA, also concurring.

I concur in the judgment but not in all the propositions declared by the court. I think the subpœna is sufficiently definite. The charge pending was a violation of the Anti Trust Act of 1890. The documents and papers sought were the understandings and agreements of the accused companies. That the documents commanded were many or evidenced transactions occurring through a period of time are not circumstances fatal to the validity of the subpœna. If there was a violation of the Anti Trust Act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced or its transactions alluded to in tele-

grams and letters sent during the time the combination operated. Each telegram, each letter, would contribute proof, and therefore material testimony. Why then should they not be produced? What answer is given? It is said the subpœna is tantamount to requiring all the books, papers and documents found in the office of the MacAndrews & Forbes Company, and an embarrassment is conjectured as a result to its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpœna. If such consequences could be granted they are not fatal to the subpœna. But they may be denied. There can be at most but a temporary use of the books, and this can be accommodated to the convenience of parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties or subject them to more inconvenience than the demands of justice may require.

I cannot think that the consequences mentioned are important or necessary to the argument. A more serious matter is the application of the Fourth Amendment of the Constitution of the United States.

It is said "a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner." Nothing can be more direct and plain; nothing more expressive to distinguish a subpœna from a search warrant. Can a subpœna lose this essential distinction from a search warrant by the generality or speciality of its terms? I think not. The distinction is based upon what is authorized or directed to be done—not upon the form of words by which the authority or command is given. "The quest of an officer" acts upon the things themselves—may be secret, intrusive, accompanied by force. The service of a subpœna is but the delivery of a paper to a party—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. This is a safeguard against abuse the same as it is of other processes of the

law, and it is all that can be allowed without serious embarrassment to the administration of justice. Of course, it constrains the will of parties, subjects their property to the uses of proof. But we are surely not prepared to say that such uses are unreasonable or are sacrifices which the law may not demand.

However, I may apprehend consequences that the opinion does not intend. It seems to be admitted that many, if not all, of the documents may ultimately be required, but it is said "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for their production." This intimates a different objection to the order of the court than the generality of the subpœna, and, if good at all, would be good even though few instead of many documents had been required or described ever so specifically. I am constrained to dissent from it. The materiality of his testimony is not open to a witness to determine, and the order of proof is for the court. Besides, if a grand jury may investigate without specific charge, may investigate upon the suggestion of one of its members, must it demonstrate the materiality of every piece of testimony it calls for before it can require the testimony? So limit the power of a grand jury and you may make it impotent in cases where it needs power most and in which its function can best be exercised.

But what does the record show? It shows that Hale refused to give the testimony that, this court says, should have preceded the order under review. He refused to answer what the business of the MacAndrew & Forbes Company was or where its office was, or whether there was an agreement with the company and the American Tobacco Company in regard to the products of their respective businesses or whether the company he represented sold its products throughout the United States. The ground of refusal was that there was no legal warrant or authority for his examination, not that the documents or tes-

timony was not material or not shown to be material. Besides, after objection made to the laying of a foundation, complaint cannot be made that no foundation was laid. And it seems to be an afterthought in the proceedings on *habeas corpus* that the ground objection to examination did not exclusively refer to the want of power in the grand jury.

By virtue of its dominion over interstate commerce Congress has power, the opinion of the court asserts, over corporations engaged in that commerce. And the power is the same as if the corporations had been created by Congress. And yet it is said to be a power subject to the limitation of the Fourth Amendment. To this I am not prepared to assent. I have already pointed out the essential distinction between a *subpœna duces tecum* and a search warrant, and, it may be, the case at bar demands from me no expression of opinion of the Fourth Amendment. And I am mindful, too, of the reservation in the opinion of the court of the power of Congress to require by direct legislation the fullest disclosures of their affairs from corporations engaged in interstate commerce. While recognizing this may be true, and, that until such power is exercised, there may be reasons for holding that corporations are entitled to the protection of the Fourth Amendment, there are reasons against the contention, and I wish to guard against any action which would preclude against their consideration in cases where the Fourth Amendment may be a more determining factor than it is in the case at bar. There are certainly strong reasons for the contention that if corporations cannot plead the immunity of the Fifth Amendment, they cannot plead the immunity of the Fourth Amendment. The protection of both Amendments, it can be contended, is against the compulsory production of evidence to be used in criminal trials. Such warrants are used in aid of public prosecutions (Cooley Constitutional Lim. 6th ed. 364), and in *Boyd* v. *United States*, 116 U. S. 616, a relation between the Fourth Amendment and the Fifth Amendment was declared. It was said the Amendments throw great light on each other, "for the 'unreasonable searches and seizures' con-

demned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd* v. *United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the Fourth Amendment receives illumination from the Fifth, or, to express the idea differently, if the Amendments are the complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable conclusion, that if corporations have not such immunity they can no more claim the protection of the Fourth Amendment than they can of the Fifth.

MR. JUSTICE BREWER, with whom the CHIEF JUSTICE concurred, dissenting.

With what is said in the opinion of the court of the necessity of a "charge," with the proposition that the immunity granted by the Federal statute is sufficient protection against both the Nation and the several States, with the holding that the protection accorded by the Fifth Amendment to the Constitution is personal to the individual and does not extend to an agent of an individual or justify such agent in refusing to give testimony incriminating his principal, and also that the *subpœna duces tecum* cannot be sustained, I fully agree.

Further, I desire to emphasize certain truths which in this and other cases decided to-day seem to be ignored or depreciated. The immunities and protection of articles 4, 5 and 14

of the Amendments to the Federal Constitution are available to a corporation so far as in the nature of things they are applicable. Its property may not be taken for public use without just compensation. It cannot be subjected to unreasonable searches and seizures. It cannot be deprived of life or property without due process of law.

It may be well to compare the words of description in articles 4 and 5 with those in article 14:

"Article 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Article 5. No person . . . shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Article 14. . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, 396, Mr. Chief Justice Waite said:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

See also *Pembina Mining Company* v. *Pennsylvania*, 125 U. S. 181; *Missouri Pacific Railway Company* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway Company* v. *Beckwith*, 129 U. S. 26; *Charlotte &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Monongahela Navigation Company* v. *United States*, 148 U. S. 312; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154,

and cases cited; *Chicago, Burlington & Quincy Railroad Company* v. *Chicago*, 166 U. S. 226.

These decisions were under the Fourteenth Amendment, but if the word "person" in that Amendment includes corporations, it also includes corporations when used in the Fourth and Fifth Amendments.

By the Fourth Amendment the "people" are guaranteed protection against unreasonable searches and seizures. "Citizens" is a descriptive word; no broader, to say the least, than "people."

As repeatedly held, a corporation is a citizen of a State for purposes of jurisdiction of Federal courts, and, as a citizen, it may locate mining claims under the laws of the United States, *McKinley* v. *Wheeler*, 130 U. S. 630, and is entitled to the benefit of the Indian Depredation Acts. *United States* v. *Northwestern Express Company*, 164 U. S. 686. Indeed, it is essentially but an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised. As said by Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet. 514, 562: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

United States v. *Amedy*, 11 Wheat. 392, was the case of an indictment under an act of Congress for destroying a vessel with intent to prejudice the underwriters. The act of Congress declared that "if any person shall . . . willfully and corruptly cast away . . . any ship or vessel . . . with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy," etc. The indictment charged an intent to defraud an incorporated insurance company, and the court held that a corporation is a person within the meaning of the act, saying (p. 412):

"The mischief intended to be reached by the statute is the

same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. c. 7, respecting the erection of cottages, where the word used is, 'no person shall,' etc., says, 'this extends as well to persons politic and incorporate, as to natural persons whatsoever.' "

Neither does the fact that a corporation is engaged in interstate commerce in any manner abridge the protection and applicable immunities accorded by the Amendments. The corporation of which the petitioner was an officer was chartered by a State, and over it the General Government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either Amendment.

It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

In Angell & Ames on Corporations, 9th ed. c. 19, §§ 684, 685, the authors say:

"To render the charters or constitutions, ordinances and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation; or, in other words, to the inspection and control of tribunals recognized by the laws of the land. Civil corporations are visited by the Government itself, through the medium of the courts of justice; but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor.

"In this country, where there is no individual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuse or neglects which at common law would cause a forfeiture of their charters."

The matter is discussed in Blackstone's Commentaries, in par. 3, chap. 18, Book I, and he says:

"I proceed, therefore, next to inquire how these corporations may be visited. For corporations, being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil or eleemosynary."

And in respect to civil corporations he adds, same paragraph and chapter (*782):

"The law having by immemorial usage appointed them to be visited and inspected by the King, their founder, in His Majesty's Court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority."

In 2 Kent, *300, the author says: "The visitation of civil corporations is by the Government itself, through the medium of the courts of justice."

In *Amherst Academy* v. *Cowls*, 6 Pick. 427, 433, it was held that:

"Without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters."

The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen States was subject to the visitation of each of those States, and

compelled to regulate its actions according to the judgments—perhaps the conflicting judgments—of the several legislatures. The fact that a state corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments. The National Government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the States. *Boyd* v. *United States*, 116 U. S. 616, arose under the Revenue Acts, and the applicability of the Fourth and Fifth Amendments was sustained. In that case is an elaborate opinion by Mr. Justice Bradley, speaking for the court, in which the origin of the Fourth and Fifth Amendments is discussed, their relationship to each other shown, and the necessity of a constant adherence to the underlying thought of protection expressed in them strenuously insisted upon. I quote his words (p. 635):

"It may be that it (the proceeding in question) is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Finally, as the *subpœna duces tecum* was the initiatory step in the proceedings before the grand jury against this petitioner,

as that is the major fact in those proceedings, and as it is agreed that it is not sustainable, it seems to me that the order adjudicating him in contempt should be set aside, and this notwithstanding that subsequently he improperly refused to answer certain questions.

The case is not parallel to that of an indictment in two counts upon which a general judgment is entered, and one of which counts is held good and the other bad, for a writ of *habeas corpus* is not a writ of error, and the order to be entered thereon is for a discharge or a remand to custody. If a discharge is ordered no punishment can be inflicted under the judgment as rendered, and if a new prosecution is instituted containing the good count a plea of former conviction will be a full defense. But in the case at bar an order for a discharge will have no such result. The *habeas corpus* statute, Rev. Stat., § 761, provides that "the court, or justice, or judge shall proceed in a summary way . . . to dispose of the party as law and justice require." Justice requires that he should not be subjected to the costs of this *habeas corpus* proceeding, or be punished for contempt when he was fully justified in disregarding the principal demand made upon him.

The order of the Circuit Court should be reversed and the case remanded with instructions to discharge the petitioner, leaving to the grand jury the right to initiate new proceedings not subject to the objections to this.

I am authorized to say that the CHIEF JUSTICE concurs in these views.

McALISTER *v.* HENKEL.

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

No. 341. Argued January 4, 5, 1906.—Decided March 12, 1906.

Hale v. *Henkel*, *ante*, p. 43, followed, as to the inquisitorial powers of the Federal grand jury and the extent of privilege and immunity of a witness under the Fifth Amendment.

THE facts are stated in the opinion.

Mr. De Lancey Nicoll, with whom *Mr. Junius Parker* and *Mr. John D. Lindsay*, were on the brief, for appellant.[1]

Mr. Henry W. Taft, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Felix H. Levy*, Special Assistant to the Attorney General, were on the brief, for the United States.[1]

MR. JUSTICE BROWN delivered the opinion of the court.

This case involves many of the questions already passed upon in the opinion in *Hale* v. *Henkel*, differing from that case, however, in two important particulars: First, in the fact that there was a complaint and charge made on behalf of the United States against the American Tobacco Company and the Imperial Tobacco Company under the so-called Sherman Act, and, second, that the subpœna pointed out the particular writings sought for (three agreements), giving in each case the date, the names of

[1] See abstracts of argument in *Hale* v. *Henkel*, *ante*, p. 43, argued simultaneously herewith.

the parties, and, in one instance, a suggestion of the contents.

The witness McAlister, who was secretary and a director of the American Tobacco Company, refused to answer or produce the documents for practically the same reasons assigned by the appellant Hale, demanding to be advised what the suit or proceeding was, and to be furnished with a copy of the proposed indictment. A copy of one of the agreements with three English companies and certified by the Consul General of the United States is contained in the record.

For reasons already partly set forth, we think that the immunity provided by the Fifth Amendment against self-incrimination is personal to the witness himself, and that he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer—in other words, the privilege is that of the witness himself, and not that of the party on trial. The authorities are practically uniform on this point. *Commonwealth* v. *Shaw*, 4 Cush. 594; *State* v. *Wentworth*, 65 Maine, 234, 241; *Ex parte Reynolds*, 15 Cox Criminal Cases, 108, 115. In *New York Life Insurance Co.* v. *People*, 195 Illinois, 430, the privilege was claimed by a corporation, but the agent of an insurance company was permitted to testify, in a suit for the recovery of a statutory penalty, to facts showing the performance by the corporation of the act prohibited. Indeed, the authorities are numerous to the effect that an officer of a corporation cannot set up the privilege of a corporation as against his testimony or the production of their books.

The questions are the same as those involved in the *Hale* case, without the objectionable feature of the subpœna, and the order of the Circuit Court is, therefore,

Affirmed.

NELSON *v.* UNITED STATES.

BOSSARD *v.* SAME.

McNAIR *v.* SAME.

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

Nos. 490, 491, 492. Argued January 5, 8, 1906.—Decided March 12, 1906.

In a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-trust Law of July 2, 1890, a witness refused to answer questions or submit books to inspection before an examiner appointed by the court on the ground of immateriality, also pleading the Fifth Amendment; after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him. On appeal to this court *held*, that:

Questions under the Constitution of the United States were involved and this court has jurisdiction of an appeal direct from the Circuit Court.

In such an action the books of the various defendants both before and after the alleged combination, and the contracts between them, as well as other papers referred to in the opinion, are all matters of material proof, but whether material or not the testimony must be taken and exceptions can be noted by the examiner and the materiality of the evidence passed on by the court.

Witnesses cannot take objections to materiality of evidence in order to be relieved from testifying. The tendency or effect of the testimony on the issues between the parties is no concern of theirs.

Documentary evidence in the shape of books and papers of corporations are in the possession of the officers thereof, who cannot refuse to produce them on the ground that they are not in their possession or under their control.

Hale v. *Henkel*, *ante*, p. 43, followed to the effect that officers and employés of corporations cannot, under the Fourth and Fifth Amendments, refuse to testify or produce books of corporations in suits against the corporations for violations of the Anti-trust Law of July 2, 1890, in view of the immunity given by the act of February 25, 1903.

THESE writs of error submit for review a judgment in contempt entered in the case of *United States* v. *General Paper Company*, described in *Alexander* v. *United States*, *post*, p. 117. The judgment was based upon the disobedience by the plaintiffs in error to orders of the court requiring them to answer certain

questions and to produce certain books, documents and papers in their examination before the special examiner in pursuance to a *subpœna duces tecum* duly issued and served. The orders requiring the plaintiffs to answer were made upon petition of the United States, which exhibited the issues in the suit of *United States* v. *General Paper Company et al.*, stated the questions asked plaintiffs in error, and the books, documents and papers required of them.

Plaintiffs in error refused to obey the orders, and the examiner reported their disobedience to the court "for such action as the court might take for the further enforcement of its orders." In defense plaintiffs in error filed separate answers, which respectively alleged that Nelson was the president and manager of the Hennepin Paper Company; Brossard, manager and treasurer of the Itasca Company, and McNair, a director and general manager of the Northwest Paper Company. In other particulars the answers are identical except so far as the relations of plaintiffs in error to their respective corporations made a difference. Plaintiffs in error are also directors of the General Paper Company. We insert the answer of Nelson in the margin.[1]

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[1] Now comes Benjamin F. Nelson and answering the order to show cause made in the above-entitled matter on the 15th day of September, A. D. 1905, and the petition heretofore filed in said matter by said complainant upon which said order to show cause was made, alleges and shows unto the court as follows:

That this respondent is a director and the president of Hennepin Paper Company, one of the defendants in the above-entitled matter, and is also the owner and holder of stock in said company of the par value of forty-nine thousand ($49,000.00) dollars, and that the books and papers referred to in said order to show cause and in the petition and schedules thereto attached, upon which said order to show cause was made, are the books and papers of said Hennepin Paper Company and not of this respondent, and are subject to the control of said Hennepin Paper Company and not of this respondent; that this respondent is also a director of General Paper Company, another of the defendants in the above entitled matter, and the owner and holder of stock in said General Paper Company of the par value of two thousand two hundred and fifty dollars; that said Hennepin Paper Company and said General Paper Company have objected and do object, and

The court required the questions to be answered and the books and documents to be produced and, being of opinion that the order did not constitute a final decision, refused to allow an appeal on the part of either of the plaintiffs in error or either of

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this respondent has objected and does object, to the production of said books and papers for inspection by counsel for said complainant for the purpose of being offered in evidence in said cause. Said objections are based upon the following reasons:

1. That the materiality of said books and papers in the case mentioned in said order to show cause now pending in said court has not been established so as to authorize a court of equity to order their inspection, production and introduction in evidence, and that the same are not material, relevant or competent evidence in said cause; that said books and papers contain matters of importance relating to the business of said Hennepin Paper Company and said General Paper Company in no way bearing upon or touching the issues in said cause, which it would be highly injurious to the business interests of both of said companies to make public, and this respondent submits that he ought not to be required to disclose any portions of said books or papers except on a proper showing that the same are material to said cause to establish some issue therein, and a showing that the same are not privileged for the protection of the defendants above named.

2. That one of the purposes of said complainant in instituting said cause and in making the requests mentioned in said order to show cause for the inspection, production and introduction as evidence of said books and papers, is to establish and to compel said Hennepin Paper Company and said General Paper Company, and this respondent as such director or officer of each of said defendants, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and the acts amendatory thereof or supplemental thereto, and to subject said Hennepin Paper Company and said General Paper Company to the penalties for such violations imposed by said act, and that to compel the production by said Hennepin Paper Company or said General Paper Company, through their officers or otherwise, of said books and papers for inspection and introduction as evidence in said cause, would be contrary to the provisions of the Fifth Amendment to the Constitution of the United States, which provides that no person shall be compelled in any criminal case to be a witness against himself, and also contrary to the provisions of the Fourth Amendment to the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

3. That the alleged acts of said Hennepin Paper Company complained

the defendants in the suit or on the part of all of them jointly.

Plaintiffs in error refused to obey the order of the court, and upon the report of the examiner the judgment under review was

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of by said complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said Hennepin Paper Company, be violations of the laws of the State of Minnesota, and would subject said Hennepin Paper Company to forfeiture of its charter and other penalties under said laws; that to compel said Hennepin Paper Company, through this respondent as one of its officers or otherwise, to produce said books and papers for inspection and introduction as evidence in said cause would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore mentioned of the Fourth and Fifth Amendments to the Constitution of the United States.

4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause and in making the requests mentioned in said order to show cause is to obtain from said court a decree enjoining said General Paper Company from carrying on the business for which it was incorporated, and to enjoin the carrying out of and operation under certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said act of Congress; that said contracts and agreements are of great value, not only to said General Paper Company whose entire business practically rests upon them, but are also of great value to and constitute valuable property rights in each of the defendants respectively parties thereto, including the said Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements and their virtual annulment thereby occasioned would result in great injury, damage or loss, not only to said General Paper Company but also to said Hennepin Paper Company and to this respondent as a stockholder in each of said companies; and that to compel the production by said Hennepin Paper Company or said General Paper Company, or either of them, through this respondent as such director or officer or otherwise, of said books and papers for inspection and introduction as evidence in said cause for the purpose aforesaid, would be contrary not only to the provisions of said Fourth and Fifth Amendments to the Constitution of the United States, but also contrary to the well established rule of the common law, as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or eventually, to prosecution for a crime or to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty.

entered, fining plaintiffs in error severally $100 "for their said disobedience of the said order, said fines to be paid to the clerk of this court for the use of the United States, as punishment for such contempt," and sentencing them to be imprisoned until

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Further answering, this respondent alleges and shows unto this court that all the matters concerning which the questions referred to in said petition and schedules thereto annexed were asked, and which this respondent refused to answer, as stated in said petition, came to this respondent's knowledge exclusively as president and a director of said Hennepin Paper Company, or as a director of said General Paper Company, in the conduct of matters entrusted to him as such director or president, and which said companies, from the nature of the case, were compelled to entrust to this respondent as such director or officer, and that said Hennepin Paper Company and said General Paper Company have objected and do object, and this respondent has objected and does object, to said questions and to his being required to answer the same, for reasons similar to those already set forth in respect to the production, inspection and introduction in evidence of the books and papers above mentioned, that is to say:

1. That the materiality of said questions in the cause above mentioned has not been established so as to authorize a court of equity to order them to be answered, and that the same are not material, relevant or competent evidence in said cause.

2. That the purpose of said complainant in instituting said cause and in asking said questions is to establish and to compel said Hennepin Paper Company and said General Paper Company, through this respondent as such director or officer, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the acts of Congress above referred to, and to subject them to the penalties for such violations imposed by said acts, and that to compel said defendants hereinbefore named, or either of them, through this respondent, to answer said questions would be contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

3. That the alleged acts of said Hennepin Paper Company complained of by said complainants in its original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by it, be violations of the laws of the State of Minnesota, and would subject it to forfeiture of its charter and other penalties under said laws; that to compel it through this respondent to answer the questions aforesaid would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

the order of the court requiring them to testify should be complied with.

The questions on the merits in these cases are the same as those on the merits in *Alexander* v. *United States, post*, p. 117,

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4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause and in asking the questions mentioned in said order to show cause is to obtain a decree enjoining said General Paper Company from carrying on the business for which it was incorporated and to enjoin the carrying out of and operation under certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said acts of Congress; that said contracts and agreements are of great value not only to said General Paper Company, whose entire business practically rests upon him, but are also of great value to and constitute valuable property rights in each of the defendants respectively parties thereto, including the Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements and their virtual annulment thereby occasioned would result in great injury, damage and loss, not only to said Hennepin Paper Company or said General Paper Company, and that to compel said Hennepin Paper Company or said General Paper Company, through this respondent, to answer the questions aforesaid in aid of the purposes aforesaid would be contrary not only to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States, but also contrary to the well established rule of the common law as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or indirectly, to prosecution for a crime or to a forfeiture or penalty or anything in the nature of a forfeiture or penalty.

Further answering this respondent alleges that he ought not to be required to answer the questions or comply with the requests, or produce for inspection by counsel for the complainant or for the purpose of being offered in evidence the cause above referred to, the books and papers referred to in said order to show cause and in the petition and schedules thereto annexed, upon which said order to show cause was made, not only for the reasons hereinabove set forth, but also for the following reasons, that is to say:

1. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests and produce for inspection by counsel for the complainant, and for the purpose of being offered in evidence in said cause the books and papers aforesaid, is to establish and to compel this respondent to furnish to said complainant evidence tending to establish that he has been guilty of certain violations of the acts of Congress hereinbefore mentioned and referred to, and to subject him to the penalties for such violations im-

decided this day. In those cases, however, this court had no jurisdiction and the appeals were dismissed. In the present cases we have jurisdiction, *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, and directly from the Circuit Court, as questions under the Constitution of the United States are involved.

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posed by said acts, and that to compel him to answer said questions or comply with said requests or to produce for inspection or for the purpose of being offered in evidence in said cause the said books and papers would be contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

2. That the alleged acts of said Hennepin Paper Company and of said General Paper Company complained of by the complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said defendant companies, involve certain violations of the laws of the State of Minnesota by this respondent, and would subject him to penalties and forfeiture under said laws, and that to compel him to answer the questions or comply with the requirements aforesaid, or to produce for inspection, or for the purpose of being offered in evidence in said cause, the said books and papers, would be to compel him to furnish evidence tending to establish that he has been guilty of such violations of the laws of the State of Minnesota and to subject him to the penalties and forfeitures aforesaid, contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

3. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests, and produce for inspection by counsel for the complainant and for the purpose of being offered in evidence in said cause, the books and papers above referred to, is to establish and compel this respondent to furnish to said complainant evidence tending to establish the allegations of the original petition or bill of complaint in said cause, which, if established, will result in subjecting this respondent to loss or detriment in the nature of a penalty or forfeiture, in that the said Hennepin Paper Company, of which this respondent is a stockholder as aforesaid, will be subjected under the laws of the State of Minnesota to the forfeiture of its charter, resulting in the virtual forfeiture of the stock of this respondent in said defendant company, and to be the loss and forfeiture to a large extent of the value of the interest of this respondent in said corporation, and in that the contracts made through said General Paper Company as its sales agent by said Hennepin Paper Company under and pursuant to the agency contracts herein referred to between said Hennepin Paper Company and said General Paper Company will be virtually annulled and the property rights of said Hennepin Paper Company in said contracts destroyed; that there are a large number of such contracts outstanding under which

In the pleadings in the original suit brought in the Circuit Court of the United States for the District of Minnesota it is respectively alleged and denied that the defendant corporations, of which plaintiffs in error are officers, had entered into an agreement, combination and conspiracy to control, regulate and monopolize not only the manufacture of newsprint and other papers, but the distribution and shipment thereof through the Middle, Southern and Western States, in violation of the Anti Trust Act of July 2, 1890. The United States sought to establish by plaintiffs in error the truth of the charge, and the subpœna served upon them was explicit as to what was required of them.

The subpœnas required plaintiffs in error to produce the account books, including the journals, ledgers and other books kept by or under the control of the companies respectively, of which plaintiffs in error were respectively officers, (*a*) showing the amounts, kinds and grades of paper manufactured by the respective companies and sold by or through the General Paper Company, and were shipped since the fifth of July, 1900; (*b*) the prices, amounts or credits received for such paper from the paper company between the fifth of July and the present time, including entries, showing the manner in which the prices and amounts received by the respective companies for any and all

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large sums of money are due to said Hennepin Paper Company, all of which, as this respondent is advised and believes, will be or may be forfeited and lost to said defendant and to this respondent as a stockholder therein in case the illegal combination alleged in said original petition or bill of complaint is established by the decree or judgment in said cause; and this respondent alleges that to compel him to answer the questions and comply with the requests and produce for inspection and for purpose of being offered in evidence the books and papers referred to in said order to show cause and the petition and schedules aforesaid, and which he has declined to answer and comply with or produce, if material to said cause, would be contrary to the provisions of said Fourth and Fifth Amendments to the Constitution of the United States, and also contrary to the well established rule of the common law and of equity jurisprudence, that no person will be compelled to discover any fact or matter which may subject him to forfeiture or penalty or anything in the nature of a forfeiture or penalty.

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of its products so sold have been equalized with the prices and amounts received or realized of any and all of the other defendant companies for which the paper company is or has been the exclusive agent; (*c*) the amounts and proportions of earnings or profits of the paper company received by the respective companies from and through the paper company, either in the form of rebates, credits or otherwise.

Second. All contracts, agreements, writings and account books, including journals, ledgers and other books, kept by or under the control of the respective companies, showing the agreement, arrangement or understanding under and pursuant to each, and the manner in which the prices and amounts realized by the respective companies upon the various kinds and grades of paper manufactured by it and sold by and through the paper company, are and have been, since July 5, 1900, equalized, or the profits arising from the sale of such paper distributed or apportioned, as between the respective companies and other defendants manufacturing and selling through the paper company similar kinds or grades of paper, or among all of the defendants manufacturing similar kinds or grades of paper, and then and there to testify and the truth to say, in a certain matter in controversy in said court, between the United States as complainant against the General Paper Company *et al.*, defendants, on the part of the complainant.

There is no uncertainty, therefore, either in the issue or the means of proof. In other words, the United States charges a conspiracy upon the part of the defendant corporations for the cessation of competition between the manufacturing defendants by creating a general selling and distributing agent, the General Paper Company, which restricts the output of the mills, fixes the prices of their products, determines to whom, and the terms and conditions upon which, such products shall be sold, into what States and places they shall be shipped, and what publishers and customers each mill shall supply. The means of proof of the charge are obviously the conditions of the companies before and after the formation of the paper company,

its organization and the purpose of its organization, the means of its operation, how and by what means it equalizes the output and price of products, and the distribution of the proceeds of their sale, and the relations and accounts between it and the other defendant companies, and their books, accounts and minutes of proceedings.

The questions were directed to these ends. They were directed to ascertain whether the prices received for the various paper materials were equalized, and whether during the time the General Paper Company was the selling agent of the materials there was in existence an arrangement whereby the prices received through the paper company were equalized between the other defendant companies. The questions were put in various ways to show such equalization and the arrangements to equalize, and to show the allowances to each mill, the fixing of definite prices, and the distribution of the balances received among the companies on the basis of their average daily output of the grade of paper inquired about. And there were also questions asked as to whether the board of directors or the executive committee of the paper company fixed the prices of paper to be paid to each of the mills by or through the paper company, and the compensation to be paid to the mills making butchers' fibre paper, because it was less profitable, and other questions as to conversations between gentlemen representing the different mills in regard to the organization of a corporation to act as general selling agent in order to eliminate competition. There were also questions as to whether the books showed the things expressed in the other questions. The objection made to each of the questions before the examiner was that the testimony sought was irrelevant, incompetent and immaterial, and counsel advised the witnesses not to answer. As to the books and papers the following is a sample of the proceedings:

"Q. Do the books, journals or ledgers of the Hennepin Paper Company show any agreement or arrangement or understanding under and pursuant to which and the manner in which the prices and amounts realized by the Hennepin Paper Company

upon various grades of paper manufactured by it and sold by or through the defendant the General Paper Company, are and have been, since the 5th day of July, 1900, equalized or the profits arising from the sale of such paper distributed or apportioned as between the defendants?

"MR. FLANDERS: All objections renewed, and I give the witness the same advice.

"(No answer.)

"Q. Do you refuse, Mr. Nelson, to produce the books?

"MR. FLANDERS: As I said before, you may assume for the purposes of these questions that the books and all the papers called for are present in court, but on behalf of the Hennepin Paper Company and the witness and the General Paper Company I decline to submit those to the inspection of the Government counsel.

"MR. KELLOGG: Or to allow them or any part of them to be put in evidence, Mr. Flanders?

"MR. FLANDERS: Yes."

Other facts will appear in the opinion.

Mr. James G. Flanders, with whom *Mr. Charles F. Fawsett* and *Mr. William Brace* were on the brief, for plaintiffs in error in these cases and for appellants in Nos. 381, 382, 383, 384 and 385 argued simultaneously herewith.[1]

The evidence, documentary and oral, which the witnesses were required to produce was not shown to be material to plaintiff's case.

The documentary evidence called for is the property of the General Paper Company or some other of the defendant corporations. The proceeding, therefore, is a method of compelling the production of books and documents belonging to parties to the suit, and it is governed by the rules prescribed for the protection of parties from whom a discovery is demanded.

The right of a plaintiff in equity to the benefit of a defendant's oath is limited to a discovery of such material facts as relate

[1] *Alexander* v. *United States, post,* p. 117.

to the plaintiff's case and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established. 1 Daniell's Ch. Pl. & Pr. 5 Am. ed. *579, 580; Wigram's Law of Discovery, 1st Am. ed. 15; Story's Eq. Pl. §§ 565, 568.

The plaintiff must show by clear averment the materiality of the documents sought to be disclosed. This rule applies to proceedings under a statute to compel production upon or in preparation for trial. 23 Am. & Eng. Ency. of Law, 176; *Owhyee L. & I. Co.* v. *Tautphaus*, 109 Fed. Rep. 547; *Condict* v. *Wood*, 25 N. J. L. 319; *Bank* v. *Mansfield*, 48 Illinois, 494; *Lester* v. *People*, 150 Illinois, 408; *Bentley* v. *People*, 104 Ill. App. 353; *Wynn* v. *Taylor*, 109 Ill. App. 603; *Walsh* v. *Press Co.*, 48 App. Div. N. Y. 333; *S. F. Copper M. & R. Co.* v. *Humphrey*, 111 Fed. Rep. 772; *Eschbach* v. *Lightner*, 34 Maryland, 528, 533; *Jenkins* v. *Bennett*, 40 S. Car. 393, 400; *Berry* v. *Matthews*, 7 Georgia, 457, 462, 463.

A plaintiff's right to any compulsory production of books is strictly limited to such documents as contain evidence relevant to his case. His right to inspect is never larger than his right to read in evidence. The defendant is not compelled to discover his evidence if it cannot tend to establish affirmatively the case of the plaintiff. Hare on Discovery, 187, 198; *Compton* v. *Earl Gray*, 1 Y. & J. 154; *Bolton* v. *Liverpool*, 3 Sim. 489; *S. C.*, 1 My. & K.; *Harris* v. *Harris*, 3 Hare, 450; *Van Kleeck* v. *Ref. Dutch Ch.*, 6 Paige, 600; *S. C.*, 20 Wend. 458.

Before the plaintiff is entitled to the production of a given document he must show *aliunde* that its contents are such as to entitle him to read it in evidence. He cannot compel production in order to prove that he is entitled to production. Wigram's Law of Discovery, § 293; *Story* v. *Lennox*, 1 Myl. & Cr. 534; Langdell on Eq. Pl. § 164; *Bligh* v. *Benson*, 7 Price, 205; *Stroud* v. *Deacon*, 1 Vesey, 27; *Barnett* v. *Noble*, 1 Jacob & W. 227.

Any party who is required to produce his books of account or other documents, may seal such portions thereof as he swears

contain nothing relating to the purposes of the discovery sought, and his affidavit that the parts so sealed do not relate to the matters in litigation is sufficient protection. 23 Am. & Eng. Ency. of Law, 182; 2 Wait's Pr. 548; *Titus* v. *Cortelyou*, 1 Barb. 444; *Robbins* v. *Davis*, 1 Blatch. 238, 242; *Campbell* v. *French*, 2 Cox Ch. Cas. 286; *Girard* v. *Penswick*, 1 Wilson Ch. 222; *Pynchon* v. *Day*, 118 Illinois, 9.

Under Rev. Stat. § 724 it has been held that production will only be ordered where a discovery would be decreed under the same circumstances in chancery. *Jacques* v. *Collins*, 2 Blatch. 23. See *Caspary* v. *Carter*, 84 Fed. Rep. 416; *Birchoffsheim* v. *Brown*, 29 Fed. Rep. 341; *Ryder* v. *Bateman*, 93 Fed. Rep. 31; *Bloede Co.* v. *Bancroft & Sons Co.*, 98 Fed. Rep. 175; *Boyd* v. *United States*, 116 U. S. 616.

The doctrine is not confined to documentary evidence. It applies also to the case of oral testimony. The materiality of any question must be made to appear before a witness can be required to answer it and before he can be adjudged guilty of a contempt of court for a refusal to answer. The leading case is *In re William Judson*, 3 Blatch. 148. See also *In re Allis*, 44 Fed. Rep. 216; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The evidence, documentary and oral, required to be produced, if material to the plaintiff's case, is in the nature of incriminating evidence which the witnesses and the defendants are privileged from furnishing to the plaintiff under the Fourth and Fifth Amendments of the Federal Constitution and the well recognized principles of equity procedure.

The discovery which by the orders appealed from the witnesses are required to make, might also tend to subject them to penalties and forfeitures under the laws of the State of Wisconsin. Wisconsin Statutes (1898), §§ 1747*e*, 1747*h*; *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Saline Bank*, 1 Pet. 100.

It is not within the province of Congress to suspend the operation of these state statutes or to interfere with their enforce-

ment in their relation to trade within the State, and therefore the immunity clause would be ineffectual to relieve the appellants against liability under the state law.

The jurisdiction of state authority over trade within the State is as exclusive and unqualified as the jurisdiction of Congress over trade between the States. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211 (where injunction previously issued was modified to make it conform to this rule); *Allen* v. *Pullman Co.*, 191 U. S. 171; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115.

It is the settled law of this court that the Fifth Amendment has no application to state courts and their proceedings under state laws. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Brown* v. *Walker*, 161 U. S. 591, distinguished.

These Amendments to the Constitution were merely declaratory of the equity and common law rules of evidence, and it was firmly settled by them at the time of the adoption of the Amendments that no person could be compelled to discover any fact, either by producing documents or answering questions, which might subject him either directly or eventually to liability to a penalty or forfeiture, or anything in the nature of a penalty or forfeiture. 1 Daniell's Chancery Pleading & Practice, 5th Am. ed. *562, 563; 2 Story's Eq. Jur. § 1494; 1 Pomeroy's Eq. Jur. 202; *Livingston* v. *Harris*, 3 Paige, 527; aff'd 11 Wend. 329; *Northrop* v. *Hatch*, 6 Connecticut, 361, 363; *Livingston* v. *Tompkins*, 4 Johns. Ch. 432, and cases there cited; *Vanderveer* v. *Holcomb*, 17 N. J. Eq. 91; *United States* v. *National Lead Co.*, 75 Fed. Rep. 94; *Newgold* v. *American Electrical &c. Co.*, 108 Fed. Rep. 341; *United States* v. *Boyd*, 116 U. S. 631.

The consequences which must result to the appellants from the passing of the decree prayed for in the complaint are in the nature of a forfeiture. They should not be required to furnish the evidence to subject them to such forfeiture. 13 Am. & Eng. Ency. of Law, 54.

The witnesses were entitled to decline to answer not only on

the ground of personal privilege, but also on the ground that their answers would be the answers of the General Paper Company and the other defendants whose officers and directors they were, and might tend to subject said defendants to fines, penalties and forfeitures and to loss or damage in the nature of a forfeiture. A corporation is a person and as such entitled to the privileges and immunities of persons. *Covington Turnpike Co.* v. *Sanford*, 164 U. S. 578. It performs its functions only through its officers and agents and they cannot be compelled to testify. *State* v. *Simmons Hardware Co.*, 15 L. R. A. 676; *Davis* v. *Lincoln Natl. Bank*, 4 N. Y. Supp. 373; *Bank of Oldtown* v. *Houlton*, 21 Maine, 502.

The orders are appealable under the judiciary act of March 3, 1891, and under the act of February 11, 1903, to expedite the determination of suits in equity under the Anti Trust Act and the Interstate Commerce Act.

In appealing from the order of the Circuit Court appellants have followed the practice indicated in the two cases of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, and *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. In each case it was held that the application by the Interstate Commerce Commission made a "case" and that the order denying the application was a final order and therefore appealable.

The two cases cited differ from the present ones only in this: that no action was there pending in any Circuit Court to which the proceedings to compel the testimony of witnesses and the production of books and papers could be said to be ancillary. Otherwise, however, the proceeding itself was in every substantial respect the same as that adopted in the present cases.

The words "final decree" have been given a liberal and reasonable construction as respects the right of appeal. *Eau Claire* v. *Payson*, 107 Fed. Rep. 552.

There may be more than one final order and more than one appeal in the same suit. *Trustees* v. *Greenough*, 105 U. S. 527; *Tuttle* v. *Claflin*, 88 Fed. Rep. 122; *Rouse* v. *Letcher*, 156 U. S. 47.

These proceedings are not properly incidental, but collateral, having a distinct and independent character. They belong to the class known as ancillary, in which the form is determined by the circumstances of each case. So far as the question of appealability goes, they are subject to the same rules as original and independent actions. *Krippendorf* v. *Hyde*, 110 U. S. 276, 280, 287; *Freeman* v. *Howe*, 24 How. 450, 460; *Christmas* v. *Russell*, 14 Wall. 69, 80; *Rouse* v. *Letcher*, 156 U. S. 47, 50; *Stewart* v. *Dunham*, 115 U. S. 61, 64; *Carey* v. *Houston &c. Ry. Co.*, 161 U. S. 115, 126; *Pope* v. *Louisville &c. Ry. Co.*, 173 U. S. 573.

The present proceedings have all the distinguishing characteristics of any suit in equity or action at law.

The test of finality as to any particular order, under the decisions of this court, is this: An order, to be appealable, or final for the purposes of appeal, must be conclusive upon the merits and must leave the matter in controversy in such a condition that if there be an affirmance here the court will have nothing to do but to execute the order it has already entered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *St. L. &c. R. Co.* v. *Southern Expr. Co.*, 108 U. S. 24; *Winthrop I. Co.* v. *Meeker*, 109 U. S. 180; *Mower* v. *Fletcher*, 114 U. S. 127; *Trustees* v. *Greenough*, 105 U. S. 527.

It has been held that the final order or decree in ancillary proceedings is governed by the same rules, in respect of appeals to the Supreme Court, as the decree in the principal suit. *Pope* v. *Louisville &c. Ry. Co.*, 173 U. S. 573; *Carey* v. *Houston &c. Ry. Co.*, 161 U. S. 115; *Rouse* v. *Letcher*, 156 U. S. 47.

If, however, there is any question whether the act of February 11, 1903, applies to appeals in such cases as the present, there can be no doubt of the right of appellants to obtain a review of the orders appealed from by direct appeal to the Supreme Court under the provisions of section 5 of the act of March 3, 1891. *Loeb* v. *Township Trustees*, 179 U. S. 472; *W. U. Tel. Co.* v. *A. A. R. R. Co.*, 178 U. S. 239; *Penn. Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685.

Mr. Frank B. Kellogg and *Mr. James M. Beck*, Special Assistants to the Attorney General, with whom *The Attorney General* was on the brief, for the United States in these cases and in Nos. 381, 382, 383, 384 and 385:

Whether finally admissible or not, the evidence should be given and received before the examiner, inasmuch as all questions of materiality, relevancy and competency must be left primarily for determination upon final hearing by the United States Circuit Court for the District of Minnesota where the cause is pending, and ultimately for decision by this court when the suit shall be considered here on appeal. *Blease* v. *Garlington*, 92 U. S. 1.

Had the witnesses, instead of appealing from the order and taking a writ of error from the judgment of contempt, sued out a writ of *habeas corpus*, this court would have had jurisdiction on appeal from a judgment discharging the writ. *Ekiu* v. *United States*, 142 U. S. 651; *Horner* v. *United States*, 146 U. S. 120. And it is only the question of the validity of the judgment overruling their plea under the Constitution that can be considered. *In re Tyler*, 149 U. S. 164; *In re Lennon*, 166 U. S. 552. A writ of error from the judgment of contempt will bring up no other question. *Bessette* v. *Conkey Co.*, 194 U. S. 324.

The rule in *Blease* v. *Garlington* has been followed in numerous cases. *In re Allis*, 44 Fed. Rep. 216, *contra*, is not in point, and it does not appear that *Blease* v. *Garlington* was called to the attention of the judge deciding the case.

The evidence was material and admissible. Where the existence of the books and papers desired is established, the ability to produce them is shown, and the books and papers are apparently important and material to the case of the moving party, their production will be required. It is obviously impossible in applications of this character to determine the materiality of all of the contents of the books and papers in advance. *United States* v. *Babcock*, Fed. Cas. No. 14,484; *Coit* v. *North Carolina, Gold &c. Co.*, 9 Fed. Rep. 577.

There is no doubt that as a witness a party can be compelled

by a *subpœna duces tecum* to produce books, documents and papers in his possession in the same manner as any other witness. *Bischoffsheim* v. *Brown*, 29 Fed. Rep. 341, 343. And the officers of a corporation may be required as witnesses to produce its books when the books are necessary evidence. *Wertheim* v. *Continental Ry. & Trust Co.*, 15 Fed. Rep. 716; *Johnson Steel Street-rail Co.* v. *North Branch Steel Co.*, 48 Fed. Rep. 196; *Edison Electric Light Co.* v. *U. S. Electric Ltg. Co.*, 44 Fed. Rep. 294; *S. C.*, 45 Fed. Rep. 55; *Johnson Co.* v. *North Branch Co.*, 48 Fed. Rep. 191.

Under issues of the character raised in this cause, the entire manner of conducting the business of the General Paper Company is competent and material evidence. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25.

The claim of privilege is solely a personal one. Wigmore on Evidence, §§ 2195–2210; *Brown* v. *Walker*, 161 U. S. 597.

These witnesses cannot claim the privilege of silence either under the general principles of common law and equity jurisprudence and procedure, or under the Fourth and Fifth Amendments.

It is true that under the ancient practice in actions at common law a party might not compel his opponent to furnish evidence as a witness. His only remedy was by way of a bill of discovery in equity. Wigmore on Evidence, §§ 2217, 2218. This limitation, however, never existed in equity. 1 Greenleaf on Evidence, 15th ed. § 361; 1 Daniells on Ch. Prac. 5th ed. 885, note 6; Adams on Equity, 7th ed. 36; Wigmore on Evidence, §§ 2218, 2219, pp. 3012, 3014–3016.

A party will be compelled to make a disclosure of all facts within his knowledge, or books and documents in his possession, which tend either to establish his opponent's case or to refute the position which he himself takes. *Bustros* v. *White*, Eng. Law Rep. Q. B. Div. 423; *Atty. Gen.* v. *Emerson and another*, Law Rep. 10 Q. B. Div. 191; *Arnold* v. *Pawtuxet Valley Water Co.*, 18 R. I. 189.

Modern legislation has made the bill of discovery an unnec-

essary adjunct even in actions at law. Material evidence may now be required of a party in such actions, without resorting to this cumbersome proceeding. 1 Pomeroy on Eq. Jur. 2d ed. § 193; Wigmore on Evidence, § 2219; 14 and 15 Victoria, c. 99, § 6; Rev. Stat. of Wisconsin (1898), § 4183, as amended by c. 244, Laws of 1901; Rev. Stat. § 858.

The guaranty of the Fifth Amendment that no person shall be compelled in a criminal case to be a witness against himself does not protect corporations. *Brown* v. *Walker*, 161 U. S. 591; *Interstate Com. Com.* v. *Baird*, 194 U. S. 25; *Morgan* v. *Halberstadt*, 60 Fed. Rep. 592; *N. Y. Life Ins. Co.* v. *People*, 195 Illinois, 430; *State* v. *Jack*, 69 Kansas, 387.

In so far as the penalty or forfeiture may be criminal in its character the guaranty of the Fifth Amendment applies, and is entirely saved by the immunity statute; in so far as the penalty or forfeiture is other than criminal, in so far as it involves the loss or forfeiture of the claim to a continued violation of the laws of the land, there is no principle either of constitutional law or of equity jurisprudence which may be invoked to relieve against it.

It was settled at an early date that pecuniary loss to the witness was not one of the penalties or forfeitures intended to be protected against by the Constitution. See opinion of Chief Justice Shaw in *Bull* v. *Loveland*, 10 Pick. 9, which has been followed uniformly by all of the courts in the United States. 1 Greenleaf on Evidence, 15th ed. § 452; *Lowney* v. *Perham*, 20 Maine, 240; *Ward* v. *Sharp*, 15 Vermont, 115; *Harper* v. *Borough*, 6 Ired. 30; *Robinson* v. *Neal*, 21 Kentucky, 212.

It is also held that a penalty of forfeiture must be penal in its nature, as distinguished from pecuniary loss suffered as a consequence of civil liability. *Boyd* v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476; *Huntington* v. *Attrill*, 146 U. S. 657; *Brady* v. *Daly*, 175 U. S. 148; *City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 Fed. Rep. 900; *State* v. *Jack*, 69 Kansas, 387; *State* v. *Standard Oil Co.*, 61 Nebraska, 28; *Southern Ry. Co.* v. *Bush*, 122 Alabama, 470; *Levy* v. *Supe-*

rior Court, 105 California, 600; *Ames* v. *Kansas*, 111 U. S. 449; 3 Wigmore on Evidence, § 256; 2 Beach on Private Corporations, § 840.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

Plaintiffs in error urge three main contentions, which we will consider in their order.

I. That the evidence, documentary and oral, which the witnesses were required to produce, was not shown to be material to plaintiff's case.

1. There are three answers to this contention. (1) The evidence is clearly material. The charge of the bill is that the defendant manufacturing corporations entered into a conspiracy and combination in violation of the act of July 2, 1890, to suppress competition between themselves, and that they accomplished this purpose by organizing the General Paper Company, and gave it certain controlling powers over the output of the mills and the prices and distribution of their products.

Before the application to the court for the orders under review there were certain facts established. It was established that in the fall of 1889 and the spring of 1900 there were preliminary meetings of the parties to ultimately form the paper company, and that it was subsequently formed by those representing the manufacturing companies, who subscribed for the stock. In July, 1900, the corporations as represented in the paper company, fourteen in all, entered into contracts with it, making it their exclusive selling agent; that each constituent manufacturing company was represented by one of its principal officers upon the board of directors of the paper company, and the number of directors have been increased as other corporations have made the paper company their selling agent. A table of the constituent companies was given and the times the companies became members of the paper company. And it was established that there was an executive committee, comprised

substantially of the same persons who constituted the board of directors, and that the paper company had books and records containing the minutes of the meetings of stockholders, directors and the executive committee, and that the treasurers and sales agents had presented reports to the stockholders, directors and executive committee. It was stipulated that all the subscriptions to stock of the paper company were for the benefit of some paper manufacturing company and in its name, that it was the beneficial owner thereof, and that the dividends declared thereon were its property; that said stock was from time to time allotted to such corporations as made contracts with the paper company, making it their exclusive selling agent upon the basis of estimated relative productions of paper. A list of the individuals to whom stock was issued, the names of the corporations represented by them, and the days of the issuances of the stock were given.

The questions were framed to prove the combination charged in the bill, and the powers and operation of the General Paper Company and the relations of the other companies to it. What the answers will show we do not know, nor what the books and documents will disclose. The organization of the paper company had a purpose, and whether it was a legal or illegal instrument for competing companies to use we do not have now to determine. By the admissions of the answers the paper company entered into contracts with those companies, became their selling agent, and was entitled to a certain percentage of the sales. Presumably it exercised its powers, made sales and received profits. In all that it did the manufacturing corporations were interested; they owned its stock, were entitled to its dividends. This we may admit for argument's sake, not prejudging in any way, may be consistent with continued competition between the companies, but it may be otherwise. At any rate, the manner in which the paper company executed its functions may be links in the evidence adduced by the United States, and this is enough to establish the materiality of the evidence.

It must not be overlooked that not only an inspection of the

books was refused, but questions directed to ascertain the contents of the books were objected to, not answered. We have given one illustration; we will give another. Counsel for defendant corporations stated at the examination: "That for the purpose of any question the Government counsel see fit to ask it may be assumed that all the books, papers and documents" described in the subpœna "are present here in court, and we decline to submit them to the inspection of the Government counsel." The following then took place:

"Q. State whether those books show the amounts, kinds or grades of paper manufactured by the defendant Northwest Paper Company and sold by or through the defendant General Paper Company as the exclusive sales agent of the defendant Northwest Paper Company since the 8th day of April, 1902, or since about the 1st of May, 1902, if that is the date the business commenced.

"Same objections by defendants, and the witness given the same advice.

"Q. You decline to answer?

"A. I decline on advice of attorney.

"Q. Do the books also show where the said paper so manufactured was sold and into what States and Territories it was shipped since the 8th day of April, 1902, or the 1st day of May, 1902?

"Mr. Flanders: I wish to make the same objections, and I give the witness the same advice.

"A. Same answer."

And counsel for the United States, not only as to the matters expressed in the foregoing questions, but as to other matters which the bill charged against the companies, and which had been inquired about, said, that he desired to use the books and offer them in evidence to show such matters. An inspection of the books was refused, and all evidence of their contents withheld.

Necessarily the books contained the information. The paper company was the selling agent of the Northwest Paper Com-

pany and must have kept an account of its sales and into what States the paper of the company was shipped and sold. Such accounts are material and relevant to complainant's case. They may or may not, in connection with other evidence, sustain the charge of the United States, but they are elements in the proof, having tendency enough to sustain the charge to be considered material.

2. The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the Circuit Court. The procedure before an examiner and his powers are explained in *Blease* v. *Garlington*, 92 U. S. 1. It is there said: "The examiner before whom the witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of Congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there."

And an application to a court to compel the delivery of testimony in aid of the examination does not change the rule. The testimony is taken to be submitted to the court where the suit is pending and all questions upon the evidence, its materiality and sufficiency, are to be determined by it and after it by an appellate court. Even if the trial court permit the examination of witnesses orally in open court upon the hearing in cases in equity, as further said in *Blease* v. *Garlington*, the testimony must be taken "down or its substance stated in writing and made part of the record, or it will only be disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record subject to the objec-

tion, or the ruling will not be considered by us." *Blease* v. *Garlington* has been applied at Circuit in a number of cases.[1]

3. These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal, as we shall presently see.

II. That the documentary evidence called for was not shown to be in the possession or under the control of the witnesses. This contention is untenable. The ground of it is that the possession of the witnesses was not personal, but was that of the respective corporations of which they were officers. Granting this to be so and that the witnesses could have set up whatever privileges the corporations had, nevertheless they had the custody (actual possession) of the books and were summoned from necessity as representing the corporations. It is hardly necessary to observe that the witnesses had all the possession human beings could have had or can have, and if the objection is to prevail the books of a corporation can be withdrawn from the reach of compulsory process.

It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for,

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[1] *Thomson-Houston Elec. Co.* v. *Jeffrey Mfg. Co.*, 83 Fed. Rep. 614; *Maxim-Nordenfelt Guns & Am. Co., Ltd.*, v. *Colt's Patent Firearms Mfg. Co.*, 103 Fed. Rep. 39; *Parisian Comb Co.* v. *Eschwege*, 92 Fed. Rep. 721; *Fayerweather* v. *Ritch*, 89 Fed. Rep. 529; *Appleton* v. *Ecaubert*, 45 Fed. Rep. 281; *Edison Elec. Lt. Co.* v. *U. S. Elec. Ltg. Co.*, 45 Fed. Rep. 55, 59; *Johnson Steel Street Rail Co.* v. *North Branch Steel Co.*, 48 Fed. Rep. 196; *Adee* v. *J. L. Mott Iron Works*, 46 Fed. Rep. 39; *Lloyd* v. *Pennie*, 50 Fed. Rep. 4; *Brown* v. *Worster*, 113 Fed. Rep. 20; *MacWilliam* v. *Conn. Web. Co.*, 119 Fed. Rep. 509; *Whitehead & Hoag Co.* v. *O'Callahan*, 139 Fed. Rep. 243,

that the law directs its process of subpœna and must procure its evidence.

III. That the evidence, documentary and oral, required to be produced, was in the nature of incriminating evidence which the witnesses and the defendants are privileged from furnishing to the plaintiff under the provisions of the Federal Constitution and the well recognized principles of equity procedure.

This contention asserts rights personal to the plaintiffs and rights of the corporation defendants in the suit. The basis of both rights is the protection of the Fourth and Fifth Amendments to the Constitution of the United States.

The argument submitted is substantially the same as that made by appellants in *Hale* v. *Henkel* and *McAlister* v. *Henkel*. It is insisted that the immunity [1] given by the act of February 25, 1903, is not as broad as the penalties and forfeitures to which the plaintiffs in error or the corporations of which they are officers will be subjected. If the immunity, it is urged, protects from the penalties of the Anti Trust Act of 1890 it does not protect, nor has Congress the power to protect, from the penalties of the Minnesota laws, which make criminal a combination and conspiracy in restraint of trade and subject to forfeiture the charters of corporations who become parties to such combination and conspiracy. Sections 6955, 6956, 5962, Statutes of Minnesota, 1894.

The extent of the immunity and its application to corporations was considered in *Hale* v. *Henkel* and *McAlister* v. *Henkel*, and decided adversely to the contention of plaintiffs in error.

Judgment affirmed.

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[1] "Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts: Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." Act February 25, 1903; Comp. Stats., Sup. 1903, pp. 366, 367.

ALEXANDER *v.* UNITED STATES.
WHITING *v.* SAME.
STUART *v.* SAME.
GENERAL PAPER COMPANY *v.* SAME.
HARMON AND GENERAL PAPER COMPANY *v.* SAME.

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

Nos. 381, 382, 383, 384, 385. Argued January 5, 8, 1906.—Decided March 12, 1906.

In a suit in a Circuit Court of the United States brought by the United States against corporations for violations of the Anti Trust Law of July 2, 1890, a witness refused to answer questions or produce books before the examiner on the ground of immateriality, also pleading the privileges of the Fifth Amendment; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, that:

While such an order might leave the witness no alternative except to obey or be punished for contempt it is interlocutory in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an appeal will not lie therefrom to this court.

If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case.

THE facts are stated in the opinion.

Mr. James G. Flanders, with whom *Mr. Charles F. Fawsett* and *Mr. William Brace* were on the brief, for appellants.[1]

Mr. Frank B. Kellogg and *Mr. James M. Beck*, Special Assistants to the Attorney General, for the United States.[1]

[1] For abstracts of arguments see abstracts in *Nelson* v. *United States*, *ante*, p. 92, argued simultaneously herewith.

MR. JUSTICE MCKENNA delivered the opinion of the court.

At the very beginning we encounter a question of jurisdiction. Are the orders of which the appellants complain appealable? The orders direct the appellants respectively to appear before Robert F. Taylor, special examiner in the case, at the time and place to be designated, and directs each of them to "answer each and every question put to them respectively by the counsel for the complainant, the United States of America," and to produce before such commissioner certain books, papers, records, documents, reports and contracts, "for the purpose of their respective examination in said cause, and for use in evidence of the complaint of the United States of America in said examination." And it is ordered that the complainant's counsel shall have the right to inspect the said books, etc., and to introduce them or any of them in evidence; but, except as necessary for such purposes, the books, etc., to remain in the custody of the appellants.

A brief statement of the proceedings is all that is necessary. The United States by its proper officers brought suit in the Circuit Court of the United States for the District of Minnesota against the General Paper Company and twenty-three other corporations, defendants, under and pursuant to the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." It is alleged in the bill that the defendants, other than the General Paper Company and the Manufacturers' Paper Company, were engaged in the manufacture of manilla and fibre papers in active competition with one another, and that they entered into an agreement, combination and conspiracy to control, regulate and monopolize, not only the manufacture of news print, manilla, fibre and other papers, but also the distribution and shipment thereof among and throughout the Middle, Southern and Western States. The General Paper Company was the means employed to execute the combination and conspiracy. That company is a corporation organized, the bill alleges, by

the other defendants, under the laws of the State of Wisconsin, with a capital stock of $100,000, divided into one thousand shares, which were distributed among and owned and held by the other defendants, in proportions based upon the average daily output of the mills of each defendant. It is authorized to become at its principal place of business the sales agent of the products of the defendants' mills in the State of Wisconsin and elsewhere. Absolute power is conferred upon it to control and restrict the output of the mills, fix the price of their products, and determine to whom and the terms and conditions upon which such products shall be sold, into what States and places they shall be shipped, and what publishers and customers each mill shall supply.

The Manufacturers' Paper Company, it is alleged, is a New York corporation, with its principal place of business in Chicago, and from about the year 1897 to 1902, acted as the sales agent of various manufacturers of paper for the sale of newsprint and other papers; that in 1902 it became a party to the combination and conspiracy alleged in the bill and agreed with the General Paper Company not to compete with it in certain territories.

It is admitted that, prior to the formation of the General Paper Company, the other defendants except the Manufacturers' Paper Company, were in active competition. The formation of the General Paper Company is also admitted and that it became, by contract with the defendants who manufacture paper, their selling agent. The defendants deny, however, a purpose to violate the act of July 2, 1890. The violation of that law is the issue in the case, and the bill prays an injunction against the defendants and their officers from doing the acts or executing the purpose charged against them.

In trial of the issue thus made the Circuit Court appointed Robert S. Taylor special examiner, with authority to hear and take testimony within and without the District of Minnesota, and made an order fixing the time to take the testimony for the United States the sixteenth day May, 1905, at the city of Mil-

waukee, State of Wisconsin. The order was duly served on the counsel of the respective parties. Thereupon the United States petitioned the Circuit Court for an order directing the clerk of the Circuit Court to issue a *subpœna duces tecum*. The subpœna was duly issued and served on the appellants as individuals and as officers of certain of the defendant companies. They appeared before the examiner in obedience to the subpœna, but, under the advice of counsel, they refused to permit the use of books or certain parts of them, and refused to answer certain questions put to them, the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced. The United States then presented a petition to the United States Circuit Court for the District of Wisconsin, which recited the issues in the case and the statement of the questions asked and the parts of the books and documents sought to be used. To this petition the appellants filed separate answers.

The answers may be regarded for our present purpose as identical. They allege the immateriality of the evidence and that its materiality should be established as a condition precedent to its production; that they are officers of the companies, and as such officers, the custodians of the books, papers and documents, and that the same are of interest and value to the company in its business, and the company forbids their production; that the United States seeks evidence to convict the company and the individual appellants of violations of the act of July 2, 1890, to annul the contracts and agreements of the company, and subject it and the other appellants to the penalties prescribed in that act, and to compel the company and the other appellants to furnish evidence against themselves, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, which provides that no person shall be a witness against himself; also contrary to the Fourth Amendment of the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. It is also said that the alleged acts of the

paper company complained of in the original petition of the United States and which the United States is endeavoring to establish would, if committed by the company, be violations of the laws of Wisconsin, and would subject the company to forfeiture of its charter and other penalties under said laws, and to compel it through its officers to produce the books and documents sought would be to compel it to furnish evidence tending to establish that it has violated the law of the State, and such purpose is contrary to the provisions of the Fourth and Fifth Amendments of the Constitution of the United States.

As we have said, the court entered orders requiring the appellants to answer the questions put to them and to produce the books, papers and documents requested. Appeals were allowed to this court. To justify the appeals, appellants contend that the orders of the Circuit Court constitute practically independent proceedings and amount to final judgments. To sustain the contention, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, and *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, are cited.

Those cases rested on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences. In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case. Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court? Testimony, at times, must be taken out of court. In instances like those in the case at bar the officer who takes the testimony, having no power to

issue process, is given the aid of the clerk of a court of the United States; having no power to enforce obedience to the process or to command testimony, he is given the aid of the judge of the court whose clerk issued the process, and if there be disobedience of the process, or refusal to testify or to produce documents, such judge may "proceed to enforce obedience . . . or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court." Sections 868, 869, Revised Statutes. This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit. This is clearly pointed out by Circuit Judge Van Deventer, disallowing an appeal from an order like those under review, in the case of *Nelson* v. *United States* (No. 490), in error to the Circuit Court of the United States for the District of Minnesota. The learned judge said:

"I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

See also *Logan* v. *Penn. R. R. Co.*, 132 Pa. St. 403, 410.

This court having no jurisdiction, the appeals must be dismissed, and

It is so ordered.

FELTS *v.* MURPHY, WARDEN.

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

No. 533. Argued February 26, 27, 1906.—Decided March 12, 1906.

Where in the criminal trial of a person *compos mentis*, but almost totally deaf, the state court has jurisdiction of the subject matter and of the person, and also to direct and enforce the judgment which was entered, the jurisdiction is not lost by any irregularities caused by the failure of the court to have the testimony repeated to the accused through an ear trumpet; nor is the accused thereby deprived of his liberty without due process of law in violation of the Fourteenth Amendment. Even though the case be a hard one Federal courts cannot on *habeas corpus* proceedings grant relief from the judgment; their power is limited to the question of jurisdiction.

The writ of *habeas corpus* cannot perform the functions of a writ of error. *Re Nielsen*, 131 U. S. 176, distinguished.

THE appellant was indicted in the Circuit Court of Winnebago County, in the State of Illinois, for the crime of murder. He was tried at the January term of that court, held in 1905, found guilty, and sentenced to the penitentiary for his natural life. He made an application to the Circuit Court of Cook County for a writ of *habeas corpus*, after judgment upon the verdict had been entered, and that court denied the writ. He then made a like application to the Supreme Court of the State of Illinois, which was denied. The appellant says that he was unable to obtain a writ of error in the state court, because, as he avers, it would cost between $700 and $800 to print the record, and that he was absolutely penniless, except that he had a pension of some $24 a month. Hence he was unable to obtain any relief in the state courts.

Subsequently the appellant applied by written petition to the United States Circuit Court for the Northern District of Illinois, Eastern Division, for the same writ, to be directed to the warden of the Illinois state penitentiary, where the petitioner was con-

fined under the judgment entered upon the verdict of guilty upon the trial of the indictment. The appellant alleged in his petition the foregoing facts, and also, among other things, that he was not guilty of the crime of which he was indicted and had been convicted. He further stated and described the circumstances in which the killing was done, and said that he had been set upon on a dark night by someone unknown to him, who came upon him from behind and grasped him by the neck and almost broke it as he ran him about in the dark; that his neck was very badly hurt in the struggle and marks were left upon it visible for days thereafter. In the struggle the person was killed and the petitioner was subsequently convicted of his murder. The petitioner is a veteran of the Civil War and lost his hearing in the line of his duty as a soldier, and is now between 60 and 70 years of age. He is so deaf that he can only hear when a person speaks into the mouthpiece of his ear trumpet close to his ear.

He alleged in his petition that upon the trial of the case he did not hear one single word of the examination of the jurors, either by the State's attorney or by his own counsel; that he did not hear the names of the jurors nor their business, and could not confer intelligently with his counsel as to the advisability of acceptance or rejection of a juror, and, as a matter of fact, he was not consulted and did not know the facts elicited by the examination of the jurors before acceptance; that if he had known the facts as they occurred he would have counseled the rejection of certain jurors on account of their relationship to other people; that he did not hear or have communicated to him, in any way, the evidence of the witnesses on the trial of his case, and that he was unable to suggest to his counsel any questions for their examination or cross-examination during the trial, and that the substance of their evidence was not communicated to him, and he did not know what it was until he saw some partial reports of it in the newspapers, when it was too late to suggest to his counsel proper cross-questions; that the first thing communicated to him after the beginning of the

trial, which lasted about two weeks, was the verdict; he was in the court room, with his ear trumpet, but was unable to hear the verdict, and did not know what the verdict was until the clerk of the court wrote it upon a piece of paper and gave it to him.

He was present in the court room during the motion for a new trial, but did not hear a word that was said by either counsel, and the only thing communicated to him was when he was called to the bar to be sentenced.

The record shows that after the motion for a new trial had been made, the court said, "on reviewing the entire case I am disposed to say that the motion for a new trial be overruled." Continuing, the court said:

"It is regretted in one sense that the defendant, on account of his infirmity, is unable to know clearly what has been done. He should be informed, I suppose, of the fact that his motion for a new trial has been overruled. Mr. Sheriff, will you bring Mr. Felts forward? I wish you would say to Mr. Felts that his motion for a new trial has been overruled.

"The SHERIFF: The court wishes me to tell you that motion for a new trial is overruled. Do you understand?

"FELTS: I understand; yes.

"The COURT: You may ask him if he has anything to say why sentence of the court should not now be pronounced.

"The SHERIFF: Have you anything to say why sentence of the court should not now be pronounced?

"FELTS: False swearing is all I got to say.

"The COURT: Well, under the circumstances of course it is practically impossible for me to say anything to this defendant.

"(Here follows the sentence of the court), which sentence was transmitted to the defendant by the sheriff through a tube."

The record shows that the appellant was himself examined as a witness on his trial and had the benefit of counsel, who appeared for and defended him upon such trial.

He contended before the Federal Circuit Court, on his appli-

cation for the writ of *habeas corpus*, that, on account of the manner in which he was tried, his constitutional rights had been denied him, and that his conviction was without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that he was entitled, therefore, to be discharged from imprisonment under the judgment. He also urged that the same was void, as being rendered without jurisdiction on account of the violation of his constitutional rights. The Circuit Court denied the application for the writ, and from the order denying the same the appellant has appealed to this court.

Mr. William E. Mason for appellant:

Under the common law there can be no trial unless the defendant is permitted to know and understand the nature and purpose of the trial, and he could not have his common-law rights and what were clearly his constitutional rights unless he could hear, or have communicated to him in some proper way, the evidence of witnesses, examination of jurors, and all of the details of the trial.

Both by the state constitution and the Constitution of the United States the accused was entitled to the common-law right of trial by jury, conducted according to the well-known practice in criminal cases. *Harris* v. *People*, 128 Illinois, 585.

The rules of practice in cases where the accused is suffering from deafness have long been established. 1 Hale's Pleas of the Crown, 34. See *State* v. *Harris*, 53 N. Car. 8, where the defendant was a deaf mute. *Rex* v. *Dyson*, 2 Lewin's Crim. Cas. 64. Also the case of a deaf mute where the jury were instructed to find her not sane if through defect of her faculties she could not understand the nature of the proceedings against her. See also *Rex* v. *Pritchard*, 7 Car. & Payne, 303. In the case first cited it was held, after reviewing the authorities, that the defendant on account of his infirmities, could not be tried.

The defendant never had a trial as contemplated by the constitution of the State and of the United States. He was never

permitted to plead in person and the failure to communicate to him the details of the trial was a denial of his constitutional rights. *Thompson's Case*, 2 Lewin, 137; *Berry's Case*, 13 Foxe's Crim. Law, 189.

These rights could not be waived. *Harris* v. *People*, 128 Illinois, 585; *Ex parte Ulrich*, 42 Fed. Rep. 587; *In re Nielsen*, 131 U. S. 183.

Mr. Harry B. North, with whom *Mr. William H. Stead*, Attorney General of the State of Illinois, and *Mr. Edgar Eldridge* were on the brief, for appellee:

It has been too frequently decided to be now open to question that a writ of *habeas corpus* cannot be made use of to perform the functions of a writ of error or an appeal. *In re Lennon*, 166 U. S. 552; *In re Eckart*, 166 U. S. 481; *United States* v. *Pridgeon*, 153 U. S. 48; *Reid* v. *Jones*, 187 U. S. 153; *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Belt*, 159 U. S. 95; *Storti* v. *Massachusetts*, 183 U. S. 138; *Ex parte Tyler*, 149 U. S. 164; *Ex parte Cuddy*, 131 U. S. 280; *Ex parte Terry*, 128 U. S. 289; *In re Coy*, 127 U. S. 731; *In re Schneider*, 148 U. S. 162; *In re Debs*, 158 U. S. 564, 600; *Ex parte Yarborough*, 110 U. S. 651; *In re Swan*, 150 U. S. 637; *Ex parte Ayers*, 123 U. S. 443; *Ex parte Fiske*, 113 U. S. 713.

Mere errors in the judgment or proceedings upon which the judgment was founded will not be sufficient to obtain the writ. 15 Am. & Eng. Ency. of Law, 2d ed. 172; *People* v. *Allen*, 160 Illinois, 400.

If the court has jurisdiction of the person and of the subject matter the judgment cannot be inquired into in a collateral proceeding. *People* v. *Murphy*, 202 Illinois, 493; *People* v. *Allen*, 160 Illinois, 400; Church on *Habeas Corpus*, 2d ed. § 356.

Having acquired complete jurisdiction to hear, determine and adjudicate in reference to the subject matter before it, the court did not, nor could it lose that jurisdiction by any error that may have been subsequently committed; for error intervening after the judgment attached, the judgment must be reversed in a

direct proceeding on appeal or writ of error, but that cannot be urged in a collateral suit. *Herandex* v. *Drake*, 81 Illinois, 34; *People* v. *Murphy*, 202 Illinois, 493.

Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State the constitutional requirement is satisfied. Due process is secured by laws operating on all alike. *Maxwell* v. *Dow*, 176 U. S. 581; *Bergemann* v. *Backer*, 157 U. S. 655.

Provision has been made by statute in Illinois to try the question of mental capacity of one charged with crime. Hurd's Statutes of Ill. c. 38, 1897 ed. §§ 282, 284, 285, and 286.

The case of *State* v. *Harris*, 53 N. Car. 136, and cases cited therein, determined the practice obtained by common law to try the question of the mental condition of one charged with crime, and if insane or of insufficient intellect to comprehend the course of the proceedings on the trial, such person could not be found guilty of crime, but was held and dealt with as an insane person. They go no further. In the case at bar no such case is presented. There is no claim that relator was mentally incapable of being tried, but that his hearing was impaired only. But if it be conceded for argument that the trial court should have provided means of interpreting to relator questions to, and answers from, jurors and witnesses on the trial, such omission at best would have been but error or irregularity, which could be corrected by writ of error and not by writ of *habeas corpus*.

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

The uncontradicted facts are that this unfortunate man has been convicted of the crime of murder and sentenced to imprisonment for life, although he did not hear a word of the evidence that was given upon his trial, because of his almost total deafness, his inability to hear being such that it required a person to speak through his ear trumpet, close to his ear, in order that such person should be heard by him.

Counsel for the appellant has cited in his brief cases regarding the mode of procedure which has been sometimes adopted where, from the condition of mind of the individual to be tried, it was doubtful if he were able to understand or comprehend the proceedings of the trial, and it may well be that such a method might properly have been adopted in this case. But upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial and if it continued all through, then the application for the writ was properly denied by the Circuit Court, and its order must be affirmed. The writ cannot perform the function of a writ of error. *Ex parte Bigelow*, 113 U. S. 328; *In re Lennon*, 166 U. S. 548, 552; *In re Eckart*, 166 U. S. 481.

In this case the state court had jurisdiction both of the subject matter and of the person upon the trial of the accused, and such jurisdiction was not lost during his trial but continued to its end, and it had jurisdiction to direct the judgment which was entered and to have the same executed. If there were any irregularities in the trial of the appellant, because of the failure of the court to see to it that the testimony in the case was repeated to him through the ear trumpet which he had with him, it was at most an error, which did not take away from the court its jurisdiction over the subject matter and over the person of the accused. The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution. That Amendment, it has been said by this court, "did not radically change the whole theory of the relations of the state and Federal Governments to each other and of both governments to the people." *In re Kemmler*, 136 U. S. 436, 448; *Brown* v. *New Jersey*, 175 U. S. 172, 175.

We are unable to see how jurisdiction was lost in this case by the manner of trial. The accused was *compos mentis*. No claim to the contrary is made. He knew he was being tried, on account of the killing of the deceased. He had counsel and understood the fact that he was on trial on the indictment men-

tioned, but he did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court.

Upon the point that the failure to have repeated to the appellant the testimony given on the trial caused the court to lose jurisdiction, the case of *Nielsen, Petitioner*, 131 U. S. 176, is cited by appellant. We think it plain that the case does not substantiate the contention. The sentence imposed in that case was held by this court to have been beyond the jurisdiction of the trial court to pronounce, because it was against the express provisions of the Constitution, which bounds and limits all jurisdiction; but we are entirely clear that in this case the trial was so conducted that there was not at any time any lack of jurisdiction in the court, and that the most that can be urged is that there might have been an error committed by the trial court in omitting to have the evidence repeated to the appellant as it was given by the witnesses at the trial, even though no demand of the kind was made by petitioner or his counsel.

Although the conviction and punishment of the appellant under the facts appearing on this record may seem to be somewhat hard, yet this court has no jurisdiction to grant the relief asked for.

The order of the Circuit Court refusing the writ was right, and is

Affirmed.

VALENTINA *v.* MERCER, SHERIFF.

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

No. 404. Argued February 27, 1906.—Decided March 12, 1906.

Felts v. *Murphy*, *ante*, p. 123, followed, to effect that the writ of *habeas corpus* cannot perform the functions of a writ of error and that the power of Federal courts to review the judgments of state courts is limited entirely to the question of jurisdiction.

On a trial for murder the accused admitted the killing, and after all the facts were presented the court charged the jury to consider all the evidence and that if the killing was premeditated to find a verdict of guilty in the first degree, if not, then on the admitted facts it was murder in the second degree. The jury found in the first degree. The highest court of the State held the charge was without error. *Held*, that on the record there was a valid trial by a court having jurisdiction of the subject matter and the person and there was no loss of jurisdiction over either at any time during the trial and the judgment of the state court could not be reviewed on *habeas corpus* proceedings in the Federal courts.

THE appellant has appealed from an order of the United States Circuit Court for the District of New Jersey, refusing her application for a writ of *habeas corpus*.

In her application for the writ, appellant stated that she had been indicted in the Bergen County Court of Oyer and Terminer, in the State of New Jersey, in April, 1904, for the murder of one Rosa Salza, and that she had been convicted on the trial of such indictment by a jury, and sentenced to be hanged on the nineteenth day of May, 1904. She averred that she had been convicted without authority of law, and that her conviction was null and void, because the question of her guilt or innocence of murder was not entertained by the court or submitted to the jury, as the law of New Jersey expressly requires in all cases where parties are indicted for murder, but, on the contrary, she averred that evidence was taken in said court in said proceedings on her trial merely to determine the degree of her guilt; that her counsel, assigned by the court to represent

her in said proceedings, had so stated in a petition in her behalf made to the Court of Pardons of the State of New Jersey. She further said that it was stated by her counsel, in that same petition, that she had pleaded guilty when she was arraigned, but that, under the direction of the court, a plea of not guilty was entered so that evidence might be taken for the purpose of determining the degree of guilt. This averment she denied. The petitioner claimed that the proceedings were wholly unwarranted by the law of New Jersey; and that the court and her counsel proceeded under the impression that section 68 of the act for the punishment of crimes, approved March 27, 1874 (Revision), which provided that "if a person indicted for murder should be convicted by confession in open court, the court should proceed by examining witnesses to determine the degree of the crime," was then in existence, whereas the said act had been repealed in 1893, and the present law passed, which provides, "if, upon arraignment, such plea of guilty should be offered, it shall be disregarded, and a plea of not guilty entered, and a jury, duly impanelled, shall try the case in manner aforesaid." The petitioner urged in her petition that by the proceedings adopted upon her trial she was deprived of all benefit of the presumption of innocence and of reasonable doubt to which she was entitled by law, and that the questions of self-defense and manslaughter, fairly raised by her testimony, were excluded from the consideration of the jury, and the question submitted to them was limited by the court simply as to whether she was guilty of murder in the first degree or not, and the benefit of reasonable doubt was confined to that point.

A writ of error was sued out by the petitioner and her case was brought before the Court of Errors and Appeals, the highest court of the State of New Jersey, for the purpose of review, and, after a hearing, that court refused a new trial. The case is reported in 71 N. J. Law, 552.

It appears from the record herein that upon the trial proof was given that the petitioner stabbed the deceased with a knife a great many times in the neck and breast, killing her instantly.

Counsel who had been assigned to defend the petitioner called her as a witness, and she admitted that she stabbed the deceased and killed her. She said that the deceased had a child in her arms at the time and that the petitioner said to her that she did not want to raise any trouble, and told her to put the child away, but that the deceased had the knife in her hand, right behind her dress, and that when petitioner saw that she had the knife and that the deceased was going to stab her, petitioner took the knife and grabbed the deceased by the hair, and before deceased stabbed her she took the knife away from her and stabbed the deceased.

Upon opening for the defense her counsel said as follows:

"This defendant, when arraigned in open court, made confession of the commission of this crime, and you, gentlemen of the jury, from the evidence that has been produced on the part of the State, and that which shall be offered on the part of the defense, will simply have to determine what the degree of guilt shall be; your verdict will be either that she is guilty of the taking of the life of this woman, Mrs. Salza, with malice aforethought, premeditated, which would mean a verdict of murder in the first degree, or your verdict will be murder in the second degree; so that I find myself in a very peculiar position. It is one of those cases around which—the circumstances being such —that we stand, as it were, with only the defendant to testify. After you have heard her testimony, and possibly one or two witnesses in connection therewith, the case will then be given to you for you to determine whether this woman shall forfeit her life for the act which she committed on March 10th, last, or whether she shall suffer the penalty which the law will inflict by reason of a verdict of murder in the second degree."

After that the evidence was given on the part of the defense, and the defendant was called as a witness, and admitted the killing.

Mr. James M. Trimble for appellant:

The proceedings which resulted in appellant's sentence to

death was not a trial at common law or a proceeding authorized by statute. It was a mere inquiry to determine the degree of murder of which defendant was guilty; it being assumed, certainly by counsel, and apparently by the court, that at her arraignment Anna Valentina "had confessed to the commission of this crime" (of which there was no proof before the court and jury) and that all that remained for the jury was to determine what degree of murder she was guilty of. This is evident from the opening of counsel for the defense, the certificate of the presiding justice, and the charge of the court.

It is unquestionable that counsel for the defense understood and conceived of the proceedings as a mere inquiry; he so told the jury in his opening. A mere inquiry to determine the degree of a crime is not a trial. *People* v. *Noll*, 20 California, 164.

Section 68 of the Criminal Procedure Act, 1874, which was considered by this court in the case of *Hallenger* v. *Davis*, 146 U. S. 314, and which formerly authorized the court to accept a plea of guilty of murder and then to proceed by the examination of witnesses to determine the degree of the crime, was abolished by the amendment to the Criminal Procedure Act, March, 1893, and does not form any part of the present act. Rev. Stat., 1898, P. L., 1898, p. 825. That amendment was: "If, upon arraignment, such plea of guilty shall be offered, it shall be disregarded, and a plea of not guilty entered, and a jury impanelled shall try the case in manner aforesaid."

The peremptory direction to the jury that they must find the defendant guilty of murder in one degree or the other, was a plain violation of the specific terms of the present statute, because that statute says that the jury shall designate by their verdict whether it shall be murder in the first or second degree, "if they find such person guilty." Revised Statutes, p. 1100, § 271; Revision 1898, P. L. 1898, pp. 824, 825. By this amendment it has been held that the common-law right of confession in open court of a crime of murder was abolished, and the statute substituted for the advice of the judge the

mandate of the law that the citizen shall not be adjudged to death upon his own confession, but that *infavorem vitæ* the State shall prove to the satisfaction of a jury the crime laid in the indictment. *State* v. *Genz*, 28 Vr. 463.

In this case counsel for defense withheld, and the court excluded all of the possibilities except conviction of murder in one or the other degree. If this is possible in this case it is possible in any case of murder when the judge sees fit, and it is therefore tantamount to the absolute abolition of trial by jury.

There is no such power in the judge at common law. The plea of not guilty traversed every material fact alleged in the indictment. 3 Greenleaf, Evidence, part 5, § 12.

Under the indictment there could have been a conviction of any grade of manslaughter established by the evidence, and defendant could only be convicted of that degree which the evidence established beyond reasonable doubt. Charge of Judge Magie in *Wilson* v. *State*, 31 Vr. 172. This is merely declaratory of the common law. Roscoe's Criminal Evidence, 82.

Appellant was entitled to the presumption of innocence and reasonable doubt on the whole case, and not on a part thereof. 3 Greenleaf, Evidence, part 5, § 29. In this case the application of reasonable doubt was limited by the court to the question whether appellant was guilty of murder in the first degree.

The constitution of New Jersey provides that the accused shall be informed of the nature and cause of the accusation and shall be confronted with the witnesses against him. Art. 1, subd. 8. "Confronted" does not mean merely bodily presence; the barrier of language is quite as great as the barrier of distance; and in cases like the present one, where a foreigner, not speaking English, is on trial, this constitutional provision is not satisfied, unless the testimony and proceedings are translated to the accused. An examination of the record will show that nothing was translated to this defendant, except specific questions. Cooley, Const. Lim., 7th ed., 457; *Dougherty* v. *Commonwealth*, 69 Pa. St. 286.

The State has full control over the procedure in its courts subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. *Brown* v. *New Jersey*, 175 U. S. 172. But here is denial of fundamental rights. Here is conflict with the specific and applicable provision of the Federal Constitution.

It is not alone the question of jurisdiction which may be inquired into in proceedings on *habeas corpus*. *Storti* v. *Massachusetts*, 183 U. S. 138.

Mr. Robert H. McCarter, Attorney General of the State of New Jersey, for appellee:

The permission accorded by § 753 of the United States Revised Statutes to Federal judges to issue writs of *habeas corpus* in all cases of this kind, does not justify the Circuit Court, or this court, on review of its action, to consider questions as on writ of error or appeal. The writ of *habeas corpus* thus authorized cannot be made to perform the functions of a writ of error or appeal. See 15 Am. and Eng. Ency. of Law, pp. 174 *et seq.*, and cases cited.

This proceeding is exactly like that condemned by this court in *Storti* v. *Massachusetts*, 183 U. S. 138, 141. See also *In re Wood*, 140 U. S. 278; *In re Tyler*, 149 U. S. 164; *Anderson* v. *Treat*, 172 U. S. 24.

In *In re Eckart*, 166 U. S. 481, the prisoner was held not entitled to a discharge on *habeas corpus* because the degree of the crime when divided into degrees, with punishment varying according to the degree, was not specified in the indictment; that the indictment was found on improper evidence—*Harkrader* v. *Wodley*, 172 U. S. 148; the arbitrary exclusion from the panel of persons of the race of the accused—*Andrews* v. *Schwarts*, 156 U. S. 272; the refusal of the appellate tribunal of the State to grant the accused a writ of error. *Bergemann* v. *Backer*, 157 U. S. 655.

The supposed unconstitutional feature of this trial is the

fact that the court, acting upon the concession of the learned counsel for the defendant, that the evidence made the case either one of murder in the first or second degree, directed the jurors' attention solely to the legal difference between these two degrees of crime. This action of the trial judge was the subject of severe criticism in the Court of Errors and Appeals, and was directly sustained by that court upon the ground that the circumstances conclusively established the crime of murder.

The bare fact that the record fails to disclose, in the proceedings at the trial or in the Court of Errors and Appeals, a single suggestion that the petitioner was deprived of her rights under the Constitution, treaties and laws of the United States, or that the same were in any way involved, is enough to defeat this application. To permit this court to review cases of this character, the alleged deprivation of the rights secured by the Constitution or laws of the United States must have been set up in the state court. *Clark* v. *Pennsylvania*, 128 U. S. 397; *Caldwell* v. *Texas*, 137 U. S. 692; *McNulty* v. *California*, 149 U. S. 645.

There is no dispute in this case that the petitioner was amenable to the jurisdiction of the state court; that she was legally indicted; that she pleaded not guilty; had counsel assigned to her; that she was tried and convicted under a statute of the State in no way repugnant to the Constitution or laws of the United States, and this conviction was duly affirmed by the Court of Errors and Appeals. Under such circumstances the Federal courts have no authority to interfere, by *habeas corpus*, with the execution of the sentence by the state court. *Bergemann* v. *Backer*, 157 U. S. 655.

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. 697.

Almost every question here involved has been directly passed upon by this court in previous cases. See *Kohl* v.

Lehlbach, 160 U. S. 193; *In re Jugiro*, 140 U. S. 291; *Lambert* v. *Barrett*, 159 U. S. 660; *Caldwell* v. *Texas*, 137 U. S. 692; *Hallinger* v. *Davis*, 146 U. S. 314.

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

In this case, as in that of *Felts* v. *Murphy*, decided this day, the question arises on an appeal from an order of the Circuit Court of the United States for the District of New Jersey, refusing appellant's petition for a writ of *habeas corpus*. Our power to interfere in cases of this nature is limited entirely to the question of jurisdiction. If the state court had jurisdiction to try the case, and had jurisdiction over the person of the accused, and never lost such jurisdiction, the Federal Circuit Court was right in denying the application of petitioner for a writ, and its order must be affirmed. A writ of this nature cannot perform the function of a writ of error. We again cite the authorities referred to in the *Felts* case: *Ex parte Bigelow*, 113 U. S. 328; *In re Lennon*, 166 U. S. 548, 552; *In re Eckart*, 166 U. S. 481.

The contention of the counsel for the petitioner is that the proceedings upon the trial, which resulted in appellant's sentence to death, did not amount to a trial at common law, or a proceeding authorized by any statute. That it was a mere inquiry to determine the degree of murder of which defendant was guilty, and hence she has never had a trial by due process of law, and the action of the state court was without jurisdiction. A perusal of the charge of the court to the jury shows that the whole case was presented to the jury upon the evidence that was produced in court. Upon all the evidence given the court stated to the jury that there was no evidence to show that the defendant killed the deceased in her necessary self-defense, and the court instructed the jury that it would not be justified in acquitting the defendant on the ground of self-defense. The court further said that there was no question

of manslaughter in the case, and that, not only as a necessary conclusion from the evidence, but upon the admitted facts in the case, the defendant was guilty of the crime of murder, and the only question left for the consideration of the jury was whether it was murder in the first degree or second degree. The court gave an extended explanation as to what constituted murder in the first degree and what constituted murder in the second degree, and stated that the defendant was guilty of murder in the second degree, unless the evidence satisfied the jury beyond a reasonable doubt that the defendant intended to take the life of deceased, and that the intent was carried into execution deliberately, willfully and with premeditation. Finally, the court submitted to the jury the case and instructed it to consider all the evidence according to the recollection of the jury, and giving to the evidence such weight as it possessed on the mind of the jury. The court stated it was the duty of the jury to determine whether the defendant intended to kill the deceased, and carried out that purpose willfully, deliberately and with premeditation. If she did, she was guilty of murder in the first degree, and it was the duty of the jury to say so. If not, then on the admitted facts she was guilty of murder in the second degree, and it was the duty of the jury to say that by its verdict. The jury found the petitioner guilty of murder in the first degree.

The charge of the court was the subject of review by the court of last resort of the State of New Jersey, and it was held by that court to be without error. Upon the record in this case there can, in our judgment, be no possible doubt that the petitioner has had a valid trial by a court having jurisdiction of the subject matter and of the person of the accused, and that there was no loss of jurisdiction over either at any time during the trial. What effect was to be given by the court to the admission of counsel (above set forth) was a question of law for the court to decide, and the charge of the court did not oust it of jurisdiction to proceed in the trial of the case.

This is to us so plain a proposition that it is unnecessary to enlarge upon it.

Having no power to review on this writ any other question than that of the jurisdiction of the court in the trial and sentence pronounced upon the verdict of guilty, and concluding that there was the necessary jurisdiction, the order of the Circuit Court refusing the writ of *habeas corpus* is

Affirmed.

OTIS COMPANY *v.* LUDLOW MANUFACTURING COMPANY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 73. Argued March 1, 2, 1906.—Decided March 12, 1906.

Where the Federal question is distinctly set up in the bill, and insisted on at every stage, and the state court could not have decided as it did without overruling the claim, this court has jurisdiction to review the judgment on writ of error.

In determining whether a statute of a State is constitutional, this court cannot wholly neglect the long-settled law and common understanding of that State, and will not, under the Fourteenth Amendment, upset what has long been established and accepted. Even the incidents of ownership may be cut down by the peculiar laws and usages of a State.

Under the Massachusetts Mill Act the right of the lower owner only becomes complete when the land is flowed, and then it is only a right to maintain a dam subject to paying the upper owners for harm actually done, in pursuance of the terms of the act. In a suit at equity brought by the upper owner to restrain the lower owner from building a dam, the state court having declared generally that the Mill Act is valid, but not having definitely expressed itself as to its constitutionality, and as the opinion of this court may depend upon the interpretation of the act by the state court, *held*, that the bill should be dismissed without prejudice, or retained until plaintiff's rights have been determined in an action for damages under the statute pending in the state court.

THE facts are stated in the opinion.

Mr. Boyd B. Jones, with whom *Mr. Charles L. Gardiner* and *Mr. John J. Winn* were on the brief, for plaintiff in error:

Whether the state court considered or failed to consider the Federal questions is immaterial. These questions were in fact presented by the record and argued by the plaintiff, and the judgment in the case necessarily involved a decision of them. A refusal or failure to consider a Federal question is equivalent to a decision against the Federal right involved therein. *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148; *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552.

A riparian proprietor on a non-navigable stream has the exclusive private right to the use of its waters as they flow through his land, and such right is parcel of the land and as sacred as the right to the soil over which they flow. *Watuppa Reservoir Co.* v. *Fall River*, 147 Massachusetts, 548, 560, 561; *S. C.*, 154 Massachusetts, 305; *Fitch* v. *Stevens*, 4 Met. 426; *King* v. *King*, 7 Massachusetts, 496; *Ingraham* v. *Wilkinson*, 4 Pick. 268, 271; *Drake* v. *Hamilton Woolen Mill Co.*, 99 Massachusetts, 574, 581; *Commonwealth* v. *Vincent*, 108 Massachusetts, 441, 446, 447; *Merrifield* v. *Worcester*, 110 Massachusetts, 216; *Maynard* v. *Northampton*, 157 Massachusetts, 218; *Fales* v. *Easthampton*, 162 Massachusetts, 422; *Sprague* v. *Dorr*, 185 Massachusetts, 10.

A riparian proprietor has a private right to use the natural fall of the stream as it passes through his land for hydraulic purposes, and may maintain an action of tort for damages, or a bill in equity to enjoin the continuance of the obstruction to the flow, or may enter upon the premises of the wrongdoer and abate the nuisance. *Williams* v. *Nelson*, 23 Pick. 141, 142; *Hill* v. *Sayles*, 12 Met. 142; *S. C.*, 4 Cush. 549; *S. C.*, 12 Cush. 454; *Tourtellot* v. *Phelps*, 4 Gray, 370, 376; *Pratt* v. *Lamson*, 2 Allen, 275; *Smith* v. *Agawam Canal*, 2 Allen, 355; *Brigham* v. *Wheeler*, 12 Allen, 89, 90; *Drake* v. *Hamilton Woolen Co.*, 99 Massachusetts, 574, 581; *Clapp* v. *Herrick*, 129 Massachusetts, 292; *Otis Co.* v. *Ludlow Mfg. Co.*, 186 Massachusetts, 89.

Setting the waters back is actionable as a violation of a pri-

vate right even though unaccompanied by actual damages. *Ludlow Mfg. Co.* v. *Indian Orchard Co.*, 177 Massachusetts, 61.

The Mill Act takes away the common law right of the landowner to abate a dam which flowed his land as well as his right to have the flowing enjoined by a court of equity. *Fuller* v. *Chicopee Mfg. Co.*, 16 Gray, 43; *Gould* v. *Boston Duck Co.*, 13 Gray, 442.

The right of the plaintiff to use its land for general purposes, and its right as a riparian proprietor to make use of the stream for hydraulic purposes, are property rights within the meaning of the due process of law clause of the Fourteenth Amendment. *Kaukauna Water Power Co.* v. *G. B. & M. Canal Co.*, 142 U. S. 254; *Boom Co.* v. *Patterson*, 98 U. S. 403; *Chicago &c. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Wynehamer* v. *People*, 13 N. Y. 378; *Heard* v. *Middlesex Canal*, 5 Met. 81; *Mill Corporation* v. *Newman*, 12 Pick. 467.

Whether an interference with property rights is a taking of property within the due process of law clause of the Fourteenth Amendment, is a Federal and not a local question. *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, 241; *Mo. Pac. Ry. Co.* v. *Nebraska Co.*, 164 U. S. 403; *Smyth* v. *Ames*, 169 U. S. 466.

Flowing the land of another under the authority of a mill act or other statute so as to deprive the owner of riparian rights, or so as to exclude him from the beneficial use of the land itself, or taking the right so to flow by such authority, is a taking of property within the due process of law clause of the Fourteenth Amendment, entitling the owner to compensation.

Flowing the land of another is such a taking. *Pumpelly* v. *Green Bay & M. Canal Co.*, 13 Wall. 166; *Head* v. *Amoskeag Co.*, 113 U. S. 9, 26; *United States* v. *Lynah*, 188 U. S. 445; *Mill Corp.* v. *Newman*, 12 Pick. 467, 478, 482; *Sinnickson* v. *Johnson*, 17 N. J. L. 129; *Eaton* v. *B. C. & M. R. R.*, 51 N. H. 504; *Arimond* v. *Canal Co.*, 31 Wisconsin, 316; *Lee* v. *Pembroke Iron Co.*, 57 Maine, 481, 488; *Ingram* v. *Water Co.*, 98 Maine, 566, 572.

An owner is deprived of his property when he is deprived

of the right to use and enjoy it. *Edwards* v. *Bruorton*, 184 Massachusetts, 529; *Howe* v. *Weymouth*, 148 Massachusetts, 605; *In re Wall St.*, 17 Barb. 617; *Portland* v. *Lee Sam*, 7 Oregon, 397; *Driver* v. *Western Union Tel. Co.*, 32 Wisconsin, 569; *Forster* v. *Scott*, 136 N. Y. 577; *Whyte* v. *Kansas*, 22 Mo. App. 409; *Isele* v. *Schwamb*, 131 Massachusetts, 337.

A right taken is to be paid for without regard to time when or the extent to which the taker may see fit to exercise it. *Newton* v. *Perry*, 163 Massachusetts, 319; *Imbescheid* v. *Old Colony R. R. Co.*, 171 Massachusetts, 209.

The Mill Act, Mass. Pub. Sts. c. 190, authorizes depriving a person of property without due process of law within the meaning of the Fourteenth Amendment, because, as interpreted by the state court, it authorizes the taking of the property of another without notice to the owner thereof, by acts of occupation, like the making of the excavation in the present case, so unintelligible and ambiguous as to utterly fail to indicate how much of the property of the owner was or is to be taken, or even that any of his property is to be injuriously affected. See *Pumpelly* v. *Green Bay & M. Canal Co.*, 13 Wall. 166, and cases *supra*, and *Gloucester* v. *Gloucester Water Supply Co.*, 179 Massachusetts, 365; *Brickett* v. *Haverhill Aqueduct Co.*, 142 Massachusetts, 394.

This Mill Act also violates the Fourteenth Amendment because it does not make adequate provision for just compensation to the owner thereof for property taken under the authority of said act.

Adequate provision for making just compensation to the owner of property taken is required by the due process of law clause of the Fourteenth Amendment. *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 241; *Williams* v. *Parker*, 188 U. S. 491; *Mt. Hope Cemetery Proprietors* v. *Boston*, 158 Massachusetts, 509, 519.

If adequate provision for payment of compensation be made, possession of property or enjoyment of right taken may be had before such payment. *Cherokee Nation* v. *Southern Kansas*

R. R., 135 U. S. 641; *Backus* v. *Ft. St. Union Depot Co.*, 169 U. S. 557; *Sweet* v. *Rechel*, 159 U. S. 380; *Williams* v. *Parker*, 188 U. S. 491. But the owner is entitled to reasonable, certain and adequate provisions for obtaining compensation before his occupancy is disturbed. *Cherokee Nation* v. *So. Kansas R. R. supra*; *Norwood* v. *Baker*, 172 U. S. 269, 277.

A provision that compensation shall be paid by an individual or business corporation, but affording merely a right of action to obtain it, does not satisfy the constitutional requirement. *Attorney General* v. *Old Colony Ry.*, 160 Massachusetts, 62, 90; *Ash* v. *Cummings*, 50 N. H. 591; *Steinhart* v. *Superior Court*, 137 California, 575; *Howe* v. *Norman*, 13 R. I. 488; *Powers* v. *Bears*, 12 Wisconsin, 213, 221; Lewis, Eminent Domain, §§ 457, 458.

A provision that compensation shall be paid by the State, county, or city of permanent solvency, supported as it is by public faith and credit, and not "liable to go up and down like that of an individual," is security within the constitutional requirement. *Williams* v. *Parker*, 188 U. S. 491, 504; *Smeaton* v. *Martin*, 57 Wisconsin, 364, 376; *Great Falls Mfg. Co.* v. *Garland*, 25 Fed. Rep. 521, 529; Cooley Const. Lim., 7th ed., 816. It is not sufficient that the provisions for compensation are such that it will probably be paid. *Conn. River R. R. Co.* v. *County Commissioners*, 127 Massachusetts, 50.

The intimations of this court are fully in accord with the decisions that the responsibility of a private person or corporation is not an adequate fund. *Williams* v. *Parker*, 188 U S. 491; *Sweet* v. *Rechel*, 159 U. S. 380, 406.

The Massachusetts Mill Act, Pub. Sts., c. 190, violates the Fourteenth Amendment because it denies the owner of vacant land any compensation whatever for the loss caused by flowing under the authority of said act of that portion of its market value arising from its adaptability for mill purposes. *Fuller* v. *Chicopee Mfg. Co.*, 16 Gray, 43; *Boom Co.* v. *Patterson*, 98 U. S. 403; *Fales* v. *Easthampton*, 162 Massachusetts, 422; *Watuppa Reservoir Co.* v. *Fall River*, 147 Massachusetts, 548.

This Mill Act is also unconstitutional because under its provisions one riparian owner is authorized, by an act of occupation of his land, to thereby acquire the right to flow the land of an upper proprietor, and at a later date to abandon such taking without flowing and without liability to the upper proprietor for damages resulting from such taking, and because it does not give the owner of property taken a right to compensation simultaneous with the taking, but makes such right dependent upon the future volition of the taker. Pub. Stats., c. 190, § 4; *Thompson* v. *Moore*, 2 Allen, 350; *Storm* v. *Manchaug Co.*, 13 Allen, 10; *Palmer Co.* v. *Ferrill*, 17 Pick. 58.

An upper proprietor in such case is restricted in the use and enjoyment of his land, between the commencement of occupation of a mill-site and the abandonment thereof by another, because he cannot improve his land without danger of loss of the value of such improvements by flowage. This liability to loss is a prohibition against the use and enjoyment of his land, which, unless just compensation be provided therefor, is unconstitutional. *Re Wall St.*, 17 Barb. 617; *Portland* v. *Lee Sam*, 7 Oregon, 397; *Forster* v. *Scott*, 136 N. Y. 577; *Driver* v. *Western Union Tel. Co.*, 32 Wisconsin, 569; *Edwards* v. *Bruorton*, 184 Massachusetts, 529; *Whyte* v. *Kansas*, 22 Mo. App. 409.

This Mill Act also violates the due process of law clause of the Fourteenth Amendment, because it authorizes the flowing of the land of another and his consequent exclusion from the use thereof for the time between the flowing and the filing and recording of the verdict, usually a period of at least two years, without first requiring the payment of the damages caused during that period. *Stuart* v. *Palmer*, 74 N. Y. 183; *Montana Co.* v. *St. Louis M. & M. Co.*, 152 U. S. 160.

The Mill Act also violates the due process of law clause of the Fourteenth Amendment, because it fails to require the payment in advance of damages accruing after the date of such verdict, or to provide any certain and definite fund out of which such damages shall be paid.

The doctrine announced in the Supreme Judicial Court to

the effect that an interference with the rights of a landowner, which forces him either to have his lands flowed by a lower owner or to incur the expense of building an embankment and thereby flow it to the same extent, is not a taking, is opposed to the decisions of this court and is generally condemned by courts of other jurisdictions. *Turner* v. *Nye*, 154 Massachusetts, 579, 586; *Kenison* v. *Arlington*, 144 Massachusetts, 456, 457; *Isele* v. *Bank*, 135 Massachusetts, 142, 144; *Isele* v. *Schwamb*, 131 Massachusetts, 337; *Chase* v. *Sutton Mfg. Co.*, 4 Cush. 152, 169; *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467; *Talbot* v. *Hudson*, 16 Gray, 417, 425, 426; *Avery* v. *Vermont Electric Co.*, 75 Vermont, 235; Lewis, Eminent Domain, § 183.

The State, in the exercise of the police powers, may prohibit, without compensation to the owner, any use of property injurious to the health, morals, or safety of the community; but it cannot take such property without adequate provision for compensation, and much less can it, without compensation, deprive an owner of the right to the beneficial enjoyment of his property for general purposes in order that another person may use such property for a single purpose. *Austin* v. *Tennessee*, 179 U. S. 343, 344; *Commonwealth* v. *Alger*, 7 Cush. 53, 84; *Sweet* v. *Rechel*, 159 U. S. 380, 398; *Smyth* v. *Ames*, 169 U. S. 466; *Miller* v. *Horton*, 152 Massachusetts, 544; *Bent* v. *Emery*, 173 Massachusetts, 495; *Yates* v. *Milwaukee*, 10 Wall. 497; *Pumpelly* v. *G. B. & M. Canal Co.*, 13 Wall. 166; *Barney* v. *Keokuk*, 94 U. S. 324.

The Massachusetts Mill Act violates the Fourteenth Amendment because it authorizes the taking of private property for private purposes. *Cole* v. *LaGrange*, 113 U. S. 1; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403.

Taking property from one party who holds it for public use, by another, to hold it for the same public use, is a violation of the Fourteenth Amendment. *Cary Library* v. *Bliss*, 151 Massachusetts, 364.

Present conditions may be considered in determining the constitutionality of an act which under former or other conditions might have been valid. *Clark* v. *Nash*, 198 U. S. 361; *Stowell* v. *Flagg*, 11 Massachusetts, 364.

This court is unaffected by considerations of contemporaneous construction and acquiescence which have led different state courts to diverse conclusions. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 239; *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395, 396.

Mr. James B. Carroll and *Mr. William H. Brooks*, with whom *Mr. Walter S. Robinson* was on the brief, for defendants in error:

There was no Federal question before the court. The real controversy related to the question of whether the owner who first commenced or who first finished his dam was entitled to relief. It was a question of construction of the act and not its validity. *Comm. Bank of Cincinnati* v. *Buckingham*, 5 How. 317, 343; *Walker* v. *Sauvinet*, 92 U. S. 90; *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Knox* v. *Exchange Bank*, 12 Wall. 379.

If a Federal question was involved the plaintiff waived it. By proceeding under the particular statute it acquiesced in its validity. *Hale* v. *Lewis*, 181 U. S. 473; *Electric Co.* v. *Dow*, 166 U. S. 489; *Eustis* v. *Bolles*, 150 U. S. 361; *Pitkin* v. *Springfield*, 112 Massachusetts, 509; *Baker* v. *Braman*, 6 Hill, 47; *Dewhurst* v. *Allegheny*, 95 Pa. St. 437.

A party who seeks in the state court to litigate rights and is given an opportunity to do so, cannot raise a Federal question simply because he is unsuccessful. *Remington Paper Co.* v. *Watson*, 173 U. S. 443; Cooley on Const. Lim., 6th ed., 214; Bigelow on Estoppel, 689; *Wright* v. *Wilkin*, 4 D. G. & J. 141.

The plaintiff is not entitled to relief because guilty of laches. *Whitney* v. *Union Railroad Co.*, 11 Gray, 359.

The decision of the state court was not in fact or necessarily based on any Federal question, and if the state court could

have rendered judgment upon grounds not involving a Federal question this court will not take jurisdiction. *Klinger* v. *Missouri*, 13 Wall. 257; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Chouteau* v. *Gibson*, 111 U. S. 200; *Hammond* v. *Johnston*, 142 U. S. 73; *Eustis* v. *Bolles*, 150 U. S. 361.

The Mill Acts of Massachusetts, Pub. Stats., c. 190, are in accord with the constitution of that Commonwealth, and have been assumed to be so by the highest court of the State for more than one hundred years without dispute.

In cases where the question has been directly raised, the validity of the statutes known as the "Mill Acts" has been sustained and they have been declared constitutional. *Murdock* v. *Stickney*, 8 Cush. 113; *Hazen* v. *Essex Company*, 12 Cush. 475; *Lowell* v. *Boston*, 111 Massachusetts, 454; *Turner* v. *Nye*, 154 Massachusetts, 579. This being the construction of these statutes by the highest court of the State, such construction is conclusive on the Federal Supreme Court on a writ of error to the state court. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Noble* v. *Mitchell*, 164 U. S. 367; *Carstairs* v. *Cochran*, 193 U. S. 11; *Walker* v. *Sauvinet*, 92 U. S. 90; *Merchants' & Mfrs. Natl. Bank* v. *Pennsylvania*, 167 U. S. 461; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200; *Morley* v. *Lake Shore & Michigan Southern R. R.*, 146 U. S. 162.

The Mill Acts of Massachusetts are not in violation of the Fourteenth Amendment of the Constitution of the United States. *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9. They have been in existence with little change since the statute of 12 Anne, c. 8.

They were enacted to enhance the wealth of the Commonwealth, for the public welfare, for the promotion of and increase of industries and manufactures, and incidentally for the discouragement of controversies between riparian proprietors and for the regulation of the rights of property owners upon streams adaptable for power purposes.

The enactment was a legitimate exercise of legislative authority within the scope of its power to provide for the welfare

and prosperity of the people of the State. *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 26; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Wurts* v. *Hoagland*, 114 U. S. 606; *Barbier* v. *Connolly*, 113 U. S. 27; *Manigault* v. *Springs*, 199 U. S. 473.

No title to the land flowed is acquired by a lower proprietor under this Mill Act, and no land is taken thereby. The landowner cannot obtain damages for an alleged restriction on the use of his land by the contemplated raising of the water thereon or thereover, until the flowage caused by the raising of the waters of the stream by the dam of the lower proprietor actually takes place.

It is also true that before the water is raised by the dam of the lower proprietor, the upper proprietor may dike, embank or dig canals on his own land. See *Williams* v. *Nelson*, 23 Pick. 141; *Murdock* v. *Stickney*, 8 Cush. 113; *Storm* v. *Manchaug Co.*, 13 Allen, 10; *Manigault* v. *Springs*, 199 U. S. 473; *Wurts* v. *Hoagland*, 114 U. S. 606; *Barbier* v. *Connolly*, 113 U. S. 27.

Plaintiff waived any notice of defendant's acts to which it might have been entitled. *Allen* v. *Charlestown*, 111 Massachusetts, 123, 124; *Holt* v. *City Council of Somerville*, 127 Massachusetts, 408, 410; *Gately* v. *Old Colony R. R. Co.*, 171 Massachusetts, 494; *Appleton* v. *Newton*, 178 Massachusetts, 277, 281; *Lancy* v. *Boston*, 185 Massachusetts, 219, 221; *Sweet* v. *Rechel*, 159 U. S. 380.

If an upper proprietor has notice at any stage of the proceedings his rights are fully protected. *Spencer* v. *Merchant*, 125 U. S. 345; *C., B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57; *Cincinnati, N. O. & T. P. R. R. Co.* v. *Kentucky*, 115 U. S. 321.

Having actually received notice of the acts of appropriation of the defendant the plaintiff is not entitled to relief, by reason of the fact that the Mill Act may not in terms contain a provision requiring notice. *Tyler* v. *Judges of Registration*, 179 U. S. 405; *C., B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57; *Reetz* v. *Michigan*, 188 U. S. 505; *Detroit &c. Railway* v. *Os-*

born, 189 U. S. 383. Notice is a local question. *Castillo* v. *McConnico*, 168 U. S. 674.

The Mill Act accords constitutional compensation for damages sustained. *Otis Co.* v. *Ludlow Mfg. Co.*, 186 Massachusetts, 89; *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9; *Morley* v. *Lake Shore R. R.*, 146 U S. 162; *Manigault* v. *Springs*, 199 U. S. 473. The principles or elements of damages cannot be considered here. The only question for consideration here is whether the plaintiff has been deprived of due process of law.

The plaintiff has had the process of law due according to the law of the land and therefore "due process of law." *Marchant* v. *Pennsylvania R. Co.*, 153 U. S. 380, 385; *Davidson* v. *New Orleans*, 96 U. S. 97; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 157, 158; *Walker* v. *Sauvinet*, 92 U. S. 90; *Kennard* v. *Morgan*, 92 U. S. 480.

A decision that as between riparian proprietors priority of occupation gives the better right is not contrary to the Fourteenth Amendment of the Constitution of the United States. The question of fact that was decided in favor of the defendant cannot be reviewed by this court. *Backus* v. *Ft. Street Union Depot Co.*, 169 U. S. 557, 566.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity to restrain the defendants in error from flooding the plaintiff's land by means of a dam erected under the Massachusetts Mill Act. The injunction is asked on alternative grounds—either that the Mill Act does not authorize the dam, or that, if it does, then it is contrary to the Fourteenth Amendment of the Constitution of the United States. The case was tried in the Superior Court and reported to the Supreme Judicial Court, which held that the statute authorized the dam and was valid, and ordered the bill be dismissed. 186 Massachusetts, 89. A decree was entered in accordance with the rescript and the case then was brought here. The claim under the Constitution was distinctly set up

in the bill, and was insisted on at every stage. The court could not have decided as it did without overruling that claim, so that the jurisdiction of this court is clear, although it was denied.

The dam in question is built across the Chicopee River, a non-navigable stream, at Red Bridge. It was begun, in pursurance of a long previous determination, on August 3, 1899, and was completed within a reasonable time. The plaintiff owned a mill and dam, more than two miles above, and land below its dam on the two sides of the watercourse, down to within about two miles from the principal defendant's dam. On April 4, 1900, the plaintiff determined to build a dam near its lower boundary, and began the work of construction on August 11 of the same year. This dam was completed before, although it was begun after, the defendants', and will be rendered nearly or wholly useless by the back flow from the defendants' structure. The plaintiff's original dam and mill will not be interfered with. The Supreme Judicial Court decided that under the statute then in force, Pub. Stats., c. 190, § 2, the principal defendant, herein called the defendant, acquired the prior right, and that the statute was constitutional. It postponed the consideration of the plaintiff's rights in reference to damages, but decided that the provision for compensation was adequate to satisfy whatever rights the plaintiff might have.

The only question which it is necessary for us to consider is whether the act as construed violates the Fourteenth Amendment.—General objections to Mill Acts as taking property for private use or on other grounds have been disposed of by *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9. See further *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527. Such acts have been in force in Massachusetts ever since an act of 1714, c. 15. 1 Prov. Laws, 729. The practice sanctioned by them would seem from the recitals of that act to have been still older. It may have begun with grist mills and may have had its justification in the public needs which exempted from military watch-

ings and warnings one miller to each grist mill; act of 1693, c. 3, § 13; 1 Prov. Laws, 130; and in the public duties which were expressed in the act of 1728, c. 6, § 3; 2 Prov. Laws, 497. But at all events, the liability of streams to this kind of appropriation and use has become so familiar a conception in New England, where water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams as there understood.

However, the liability of upper land to be flowed is not a liability to be flowed without payment. The principal objection made to the law is that it makes no adequate provision for payment, if it is construed as it has been construed by the state court. There has been no substantial change in the form of this provision for the better part of a century. It reads: "A person whose land is overflowed or otherwise injured by such dam, may obtain compensation therefor upon his complaint before the superior court for the county where the land or any part thereof lies; but no compensation shall be awarded for damages sustained more than three years before the institution of the complaint." Pub. Stats., c. 190, § 4. The jury is to take into consideration damage to other land as well as the damage to the land overflowed. Section 14. It is to assess the damages sustained within three years, § 16, and to determine what sum, to be paid annually, would be reasonable compensation for the damages that may be occasioned thereafter, and also a sum in gross for all damages from the use of the dam in the manner fixed by it, § 18, the jury having power to regulate the height of the dam. Section 17. The complainant is given an election to take the gross sum, in which case the owner of the dam loses all benefit of the act after three months until he pays. Sections 19, 20. Otherwise the complainant has an action for the annual compensation and a lien on the dam and lands used with it. Section 21 *et seq.* And, finally, if dissatisfied with the amount of the annual compensation, he may bring a new complaint. Section 30.

In considering whether these provisions are sufficient it is important to know exactly what the upper owner loses by the dam. The state court lays it down that there is no taking under the right of eminent domain. 186 Massachusetts, 95. We assume this to mean what often has been said with regard to the Mill Acts, that under them no easement or title of any kind is gained in or over the upper land, and that the water could be diked out, *Storm* v. *Manchaug Co.*, 13 Allen, 10, 13; *Lowell* v. *Boston*, 111 Massachusetts, 454, 466; although the language has not been uniform and it seems to have been held otherwise when the damages are paid in gross. *Isele* v. *Arlington Five Cents Savings Bank*, 135 Massachusetts, 142. Taking the law to be as stated by the court, it would follow that only the damage physically suffered is to be paid for. When a title is taken, for instance, to the waters of a stream, it is held that the whole value of the title must be paid, although a considerable use may be left in fact to the party aggrieved. *Howe* v. *Weymouth*, 148 Massachusetts, 605; *Imbescheid* v. *Old Colony Railroad Co.*, 171 Massachusetts, 209. Flowage under the Mill Acts seems to be regarded as presenting the converse case. As no title is gained to have the water on the upper land, the dam owner pays only for the harm actually done from time to time. If this is so, somewhat less elaborate provisions might be justified than could be sustained when the title is lost. So far as security goes, looking to the reasonable probabilities in such cases, it would seem to be sufficient. We must bear in mind, as we presume the state court meant to suggest by its citation of the case of *Brickett* v. *Haverhill Aqueduct Co.*, 142 Massachusetts, 394, 397, that, as was said there in words that need but little change, if other remedies proved ineffectual, the "court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam." In other words, the right to an injunction, if necessary, is taken into account in Massachusetts, in deciding whether the security for payment is sufficient, even when there is a taking by eminent domain. See

also *Attorney General* v. *Old Colony Railroad*, 160 Massachusetts, 62, 90; *Manigault* v. *Springs*, 199 U. S. 473, 485, 486. This seems an answer to the objection that in the state of the business of the courts a judgment for past damages may not be recorded for several years, that the defendant may be insolvent, the dam inadequate security, and valuable improvements destroyed. It is said that the lower owner might abandon his dam and thereby escape liability for gross damages after an election to take them. But we presume that in that case he would be held to pay the temporary damage caused and the case would stand like one where the choice had been the other way. *Hunt* v. *Whitney*, 4 Met. 603, 608.

Again, we cannot wholly neglect the long settled law and common understanding of a particular State in considering the plaintiff's rights. We are bound to be very cautious in coming to the conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time. Even the incidents of ownership may be cut down by the peculiar laws and usages of a State. *Eldridge* v. *Trezevant*, 160 U. S. 452, 466. For a century the remedy given by the statute has been supposed to be sufficient, and in 1832 it was decided to be so under a somewhat similar statute which was held to create a servitude. *Boston & Roxbury Mill Corporation* v. *Newman*, 12 Pick. 467. We are not prepared to pronounce the statute void on the ground that the security for payment is not enough.

But it is argued that not all the serious damage which is, or may be, suffered is compensated. It is said that only damages caused by flowing can be recovered. But the cases cited only show that damages regarded as too remote on general principles are disallowed, *Fuller* v. *Chicopee Manufacturing Co.*, 16 Gray, 46, or that not being within the protection of the Mill Acts they are to be recovered by an action at common law. *Eames* v. *New England Worsted Co.*, 11 Met. 570. And the statute now expressly provides for a "person whose land is overflowed or otherwise injured," § 4, and that the jury

shall take into consideration any damage occasioned to other land as well as that to the land overflowed. Section 14. A graver doubt is raised by another argument. It is decided that the prior right is gained by the dam first begun, provided it is completed and put in operation within a reasonable time. If, as in the present case, the upper owner builds a dam in the meantime, it may be held that he is entitled to no compensation for its being rendered useless, even if he builds without notice of the earlier appropriation, as well might happen. On the other hand if he refrains from using his land as he desires, he may be denied compensation for being deprived of the use of his land. We do not perceive why the latter result should follow. As to the former it may be held that, notwithstanding the priority of the lower owner, the upper owner has a right to improve his land until it actually is flowed. Otherwise the former might have it in his power to keep the latter in suspense for a year or two and then abandon his dam. Because the plaintiff was too late to prohibit the defendant's dam it does not follow that it may not be entitled to all the damages which it suffers when the flowing takes place. That it would be entitled to them perhaps may be inferred from *Baird* v. *Wells*, 22 Pick. 312, decided under a different statute but still applicable so far as this principle is concerned. See further *Storm* v. *Manchaug Co.*, 13 Allen, 10, 15; *Edwards* v. *Bruorton*, 184 Massachusetts, 529, 532.

The state court has confined itself to a general declaration that the act is valid and has not expressed itself definitely upon these points. Yet our opinion upon the constitutional question may depend upon its interpretation of the statute in a case which could not be brought here. Obviously it would be unjust that the plaintiff should be concluded upon a doubtful construction assumed by us which the state court hereafter may not adopt. Therefore it seems to us proper that this bill should be dismissed without prejudice, or retained until the plaintiff's rights shall have been determined in the proceedings for damages under the statutes, which it is admitted have been

brought. The objection to the act on the ground of want of notice does not impress us except in its bearing upon the point just mentioned. The right of the lower owner only becomes complete when the land is flowed, and, as, even then, it is not a right to maintain the water upon the plaintiff's land, but merely a right to maintain the dam subject to paying for the harm actually done, we see nothing to complain of in that regard.

Decree modified and affirmed.

Ex parte NATIONAL ENAMELING AND STAMPING COMPANY, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 17, Original. Argued February 19, 1906.—Decided March 19, 1906.

Plaintiffs brought suit upon a single patent, in which there were twelve claims. The Circuit Court found that three of the claims were invalid and nine valid, of which five had been infringed, and referred it to a master to report the amount of damages and dismissed the bill as to the claims found invalid and not infringed. Defendants appealed from the decree and plaintiffs also filed cross appeal assigning as errors the rulings adverse to them. The Circuit Court of Appeals dismissed the cross appeal. Petition for mandamus to compel that court to take jurisdiction of the cross appeal denied and *held*, that:

The decree was interlocutory and not final and in the Federal courts no appeal can as a general rule be taken except from a final decree.

The appeal authorized by § 7 of the act of March 3, 1891, does not bring up the cause as a whole; and, unless otherwise specially ordered, the case, except for hearing of the appeal from the interlocutory order, proceeds in the lower court as though no appeal had been taken until final judgment.

Cases in which a bill has been dismissed as to some of the defendants and a separable controversy as to others referred to a master for an accounting, and in which the dismissal has been treated as a final decree, have no application to a case of joint liability, or in which there is only a single defendant.

In March, 1903, the petitioners filed their bill in the Circuit

Court of the United States for the Southern District of New York against the New England Enameling Company, to restrain the further infringement by that company of letters patent of the United States, No, 527,361, for improvements in enameling metal ware, and to recover damages for past infringement. After answer and proofs the case came on for hearing, and on July 8, 1905, a decree was entered, reciting that nine of the twelve claims in the patent were good and valid, that three were invalid and void by reason of the fact that the patentee was not the original or first inventor or discoverer, that five of the nine valid claims had been infringed by the defendant, but the remaining four had not been. As to the claims held invalid and those found to have been not infringed, it was ordered that the bill of complaint be dismissed. As to the remaining five claims, those held to be infringed, it was ordered that the plaintiffs recover the gains, profits, savings and advantages which the defendant had derived by reason of the infringement, and that the case be referred to a master to report the amount thereof, and also that an injunction issue against further infringement. On August 1, 1905, the defendant appealed from said decree to the Court of Appeals and filed its assignment of errors. On August 8 the plaintiffs also appealed to the Circuit Court of Appeals and assigned as errors the rulings in the decree adverse to them. On January 3, 1906, this cross appeal of the plaintiffs was dismissed by the Court of Appeals, on the ground that it had no jurisdiction thereof. Thereupon the plaintiffs filed in this court this petition for a writ of mandamus commanding the judges of the Circuit Court of Appeals to take jurisdiction of said cross appeal, and to dispose of it simultaneously with the appeal of the defendant.

Mr. Louis Marshall, with whom *Mr. Arthur v. Briesen* and *Mr. Walter D. Evans* were on the brief, for petitioners.

Mr. Philip Mauro, with whom *Mr. Harold Binney* and *Mr.*

C. A. L. Massie were on the brief, for petitioner in No. 18, original, argued simultaneously herewith.[1]

Mandamus is the proper remedy where, as here, a court refuses to act in a matter properly before it, or to take jurisdiction in a proper case, and from such refusal no writ of error or appeal will lie. *Insurance Co.* v. *Comstock*, 16 Wall. 258, 271; *Matter of Christensen Engineering Co.*, 194 U. S. 458; *Ex parte Hollon Parker*, 131 U. S. 221; *Re Farmers' Loan & Trust Co.*, 129 U. S. 206; *Re Hohorst*, 150 U. S. 653.

Jurisdiction to entertain petitioners' cross appeal logically and reasonably follows from the principles laid down in *Smith* v. *Vulcan Iron Works*, 165 U. S. 518; *Chicago Wooden Ware Co.* v. *Miller Co.*, 133 Fed. Rep. 541; *Scriven* v. *North*, 134 Fed. Rep. 366. A situation is presented by reason of the conflict in the decision of this case and the two cases last cited calling for certiorari in order that this court may make the practice uniform.

The decree was in effect a final decision within the meaning of the act of 1891. *Forgay* v. *Conrad*, 6 How. 201; *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52; *Scriven* v. *North*, *supra*; *United Nickel Co.* v. *California Works*, 25 Fed. Rep. 475; *Borturek* v. *Brinckerhoff*, 106 U. S. 3. The history of the amendment of 1900 and the plain meaning show that either party aggrieved by the granting of an injunction may appeal.

Mr. Robert N. Kenyon, with whom *Mr. Walter F. Rogers* and *Mr. Jacob Steinhardt* were on the brief, for respondent.

Mr. W. Clyde Jones, with whom *Mr. John Ridout* was on the brief, for respondent in No. 18, original, argued simultaneously herewith.[1]

Section 7 of the Judiciary Act of 1891, as amended in 1900, is not ambiguous but clearly means that an appeal will lie only

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[1] *Ex parte Automatic Switch Co.*, *post*, p. 166.

by the defendant who has been enjoined by an interlocutory order or decree, and for the purpose of determining whether the injunction was properly granted. The amendments of 1895 and 1900 have not changed its provisions in this respect. The original act has been uniformly held to confer no jurisdiction to entertain an appeal from such portions of an interlocutory decree as dismissed the bill. *Marden* v. *Campbell Co.*, 67 Fed. Rep. 809; *Kilmer Co.* v. *Griswold*, 67 Fed. Rep. 1017; *Eagle Lock Co.* v. *Corbin*, 64 Fed. Rep. 789.

Under the act as amended in 1900, the following decisions were rendered on exactly the same question and to the same effect. *National Co.* v. *Automatic Co.*, 105 Fed. Rep. 670; *Thomson-Houston* v. *Nassau Co.*, 112 Fed. Rep. 676; *Western Elec. Co.* v. *Abbott*, 108 Fed. Rep. 953; *Dowagiac* v. *Superior Co.*, 115 Fed. Rep. 886, 890.

Cases construing the statute in the same way, but relating specifically to appeals from interlocutory orders rather than decrees are *Westinghouse* v. *Christensen*, 104 Fed. Rep. 622; *Wire Co.* v. *Boyce*, 104 Fed. Rep. 172; *Frye & Bruhn* v. *Carstens*, 130 Fed. Rep. 766. See also *Metallic Extraction Co.* v. *Brown*, 104 Fed. Rep. 345, 354.

In *Smith* v. *Vulcan Iron Works* the present question did not arise. That case is not in conflict with the decisions of the Circuit Courts of Appeals denying the right of complainant to a cross appeal. It considered only the extent of the relief that could be given to a defendant improperly enjoined, not the extent of the jurisdiction. See *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485; *In re Tampa Suburban Railroad Co.*, 168 U. S. 583.

The history of this legislation and of the times shows that it was the intention of Congress to give the right of appeal to the defendant but to deny it to the complainant. Cong. Rec. 51st Cong., 1st Sess., pp. 3,298, 10,193, 10,199, 10,217, 10,222, 10,278, 10,302, 10,335, 10,363; 2d Sess., pp. 2,198, 3,087, 3,535, 3,583.

This court will not allow a mandamus to be used in place

of an appeal. *Ex parte Schwab*, 98 U. S. 240; *Ex parte Perry*, 159 U. S. 186.

The decree was interlocutory, not final, within the meaning of the Judiciary Act. *Barnard* v. *Gibson*, 7 How. 650; *McGourkey* v. *Toledo R. R. Co.*, 146 U. S. 536; *Hohorst* v. *Hamburg-Amer. Packet Co.*, 148 U. S. 262; *Estey* v. *Burdett*, 109 U. S. 633; *Hill* v. *Chicago R. R. Co.*, 140 U. S. 52; *Dainese* v. *Kendall*, 119 U. S. 53; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180; *Keystone Iron Co.* v. *Martin*, 132 U. S. 91. In patent cases there cannot be two final decrees. *Morden* v. *Campbell Co.*, 67 Fed. Rep. 809.

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

The decree entered by the Circuit Court was interlocutory and not final. *Barnard* v. *Gibson*, 7 How. 650; *Humiston* v. *Stainthorp*, 2 Wall. 106, and cases cited in note; *Estey* v. *Burdett*, 109 U. S. 633, 637; *McGourkey* v. *Toledo & Ohio Railway Company*, 146 U. S. 536 (in this case is a full discussion of the differences between an interlocutory and a final decree); *Hohorst* v. *Hamburg-American Packet Company*, 148 U. S. 262; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518.

Plaintiffs brought one suit upon a single patent. The findings of the Circuit Court that three of the twelve claims were invalid and that the remaining nine were valid, but that four of them had not been infringed by the defendant, did not break this one suit into twelve. They were a guide to the master in his ascertainment of the damages and indicated the scope of the final decree.

In the Federal courts no appeal can, as a general rule, be taken, except from a final decree. As said by Mr. Chief Justice Taney in *Forgay* v. *Conrad*, 6 How. 201, 205:

"In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of

the Chancellor, which decides a right of property in dispute. . . . But the case is otherwise in the courts of the United States, where the right of appeal is by law limited to final decrees." See also *McLish* v. *Roff*, 141 U. S. 661, 665.

In the latter case this was held persuasive against extending the right of review given by section 5 of the Circuit Court of Appeals act of March 3, 1891, 26 Stat. 826, to other cases than those in which there was a final judgment or decree, although the word "final" is omitted in some of the clauses of the section.

By section 7 of that act, however, an appeal was provided from certain interlocutory orders or decrees. That section has been twice amended. 28 Stat. 666; 31 Stat. 160. As it now stands it reads:

"SEC. 7. That where, upon a hearing in equity in a District Court or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the Circuit Court of Appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: *Provided, further*, That the court below may in its discretion require as a condition of the appeal an additional bond."

It will be noticed that the appeal is allowed from an interlocutory order or decree granting or continuing an injunction, that it must be taken within thirty days, that it is given precedence in the appellate court, that the other proceedings in the lower court are not to be stayed, and that the lower

court may require an additional bond. Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered. It may be true, as alleged by petitioners, that "it is of the utmost importance to all of the parties in said cause that there shall be the speediest possible adjudication by the United States Circuit Court of Appeals as to the validity of all of the claims of the aforesaid letters patent which are the subject matter thereof." But it was not intended by this section to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the purpose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings and not an advancement generally over other litigation.

Petitioners rely mainly on *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. In that case it was held that when an appeal is taken from an interlocutory order granting or continuing an injunction, the whole of the order is taken up, and the appellate court may (if upon an examination of the record as thus presented it is satisfied that the bill is entirely destitute of equity) direct a dismissal, and is not limited to a mere reversal of the order granting or continuing the injunction. Take an ordinary patent case. If an injunction is granted by an interlocutory order and the order is taken on appeal to the Circuit Court of Appeals, and that court is of opinion that the patent is on its face absolutely void, it would be a waste of time and an unnecessary continuance of litigation to simply enter an order setting aside the injunction and remanding the case for further proceedings. The direct and obvious way is to order

a dismissal of the case, and thus end the litigation. And such is the scope of the opinion in that case. After noticing the general rule that appeals will not lie until after final decree, and that an order or decree in a patent case granting an injunction and sending the cause to a master for accounting is interlocutory only, and therefore not reviewable on appeal before the final decree in the case, it referred to the provision of section 7, and said (p. 525):

"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

But nowhere in the opinion is it intimated that the plaintiff was entitled to take any cross appeal or to obtain a final decree in the appellate court. This view of the scope of section 7 was reaffirmed in *Mast, Foos & Co.* v. *Stover Manufacturing Company*, 177 U. S. 485, 494, 495.

It is suggested that, as to the claims held to be invalid and those held to be valid but not infrigned, the bill was dismissed; that thus, in fact, a final decree was entered which entitled the plaintiff to an appeal. *Forgay* v. *Conrad, supra,* and *Hill* v. *Chicago & Evanston Railroad Company*, 140 U. S. 52, are cited as authorities. In both these cases there were several defendants and the decrees were adjudged final only in respect to certain of the defendants. In the first the Circuit Court passed a decree declaring sundry deeds to be fraudulent and void and directing the lands and slaves therein mentioned to be delivered up to the complainant, and also directing one of the defendants named in the decree to pay him $11,000, and "that the com-

plainant do have execution for the several matters aforesaid in conformity with law and the practice described by the Supreme Court of the United States." The court refused to dismiss the appeal, holding that, while the decree was not final in the strict technical sense of the term, yet in view of the effect of the orders entered and the fact that unless review was granted at once there might be irreparable injury, the decree must be regarded as final to that extent. At the same time it criticised the terms of the decree, said that the final orders should have been delayed until the master's report was received, and added, after its comments upon the procedure below (6 How. 206):

"These remarks are not made for the purpose of censuring the learned judge by whom this decree was pronounced, but in order to call the attention of the Circuit Courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this court as altogether inconsistent with the object and policy of the acts of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated, by successive appeals, to produce great and unreasonable delays in suits in chancery. For it may well happen that, when the accounts are taken and reported by the master, this case may again come here upon exceptions to his report, allowed or disallowed by the Circuit Court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one."

In the subsequent case of *Beebe* v. *Russell*, 19 How. 283, in which the rule in reference to the finality of decrees was further considered, it was said, in explanation of the decision in the *Forgay* case (p. 287):

"In Forgay's case, it [the question] was made upon the decree given by the court below, and it was adjudged by this court to be final to give this court jurisdiction of it. But it was so, upon the ground that the whole merits of the controversy between the parties had been determined, *that execution*

had been awarded, and that the case had been referred to the master merely for the purpose of adjusting the accounts. The fact is, *the order of the court in that case for referring it to a master was peculiar*, making it doubtful, if it could in any way control or qualify the antecedent decree of the court upon the whole merits of the controversy, or modify it in any way, *except upon a petition for a rehearing*."

In *Hill* v. *Chicago & Evanston Railroad Company*, *supra*, there had been an order of dismissal in favor of some of defendants, together with a reference to a master of a separable controversy between the plaintiff and other parties, and the court observed (p. 54):

"But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled. It was, however, a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable, did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment."

But as held in *Hohorst* v. *Hamburg-American Packet Company*, *supra*, that rule does not apply to cases where the liability of the defendants is alleged to be joint; and, therefore, cannot to a case in which there is but a single defendant.

The rule is discharged, and the application for a writ of mandamus is denied.

Ex parte AUTOMATIC SWITCH COMPANY OF BALTIMORE CITY, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 18, Original. Argued February 19, 1906.—Decided March 19, 1906.

Decided on authority of *Ex parte National Enameling and Stamping Co.*, *ante*, p. 156.

Mr. Philip Mauro, with whom *Mr. Harold Binney* and *Mr. C. A. L. Massie* were on the brief, for petitioner.[1]

Mr. W. Clyde Jones, with whom *Mr. John Ridout* was on the brief, for respondent.

MR. JUSTICE BREWER delivered the opinion of the court.

This case, though differing in its facts somewhat from the one immediately preceding, presents the same question, and the same order will be entered.

A. LESCHEN & SONS ROPE COMPANY *v.* BRODERICK & BASCOM ROPE COMPANY.

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

No. 187. Argued March 1, 1906.—Decided March 19, 1906.

A trade-mark for wire rope of a red or other distinctively colored streak applied to or woven in the rope is too wide and too indefinite.
Where color is made the essential feature of a trade-mark it must be so

[1] For abstracts of arguments of counsel see *ante*, p. 157, 158.

defined or connected with some symbol or design that other manufacturers may know what they can safely do.

A trade-mark not limited to a particular color must stand or fall in its entirety and if the description is too broad it cannot be sustained by proof that only a particular color is used.

Quære, whether mere color not impressed in a particular design can constitute a valid trade-mark.

In an equity action between citizens of the same State for infringement of trade-mark the jurisdiction of the Federal court depends solely on whether plaintiff's registered trade-mark is valid, and if it is not valid jurisdiction cannot be assumed of the case as one where defendant has used plaintiff's device for the purpose of fraudulently palming off his goods as those of the plaintiff.

THIS was a bill in equity brought in the Circuit Court for the Eastern District of Missouri by the appellant, a Missouri corporation, against the appellee, another Missouri corporation, for the infringement of a trade-mark for wire rope, registered under the act of Congress of March 3, 1881, 21 Stat. 502.

The bill alleged that the plaintiff, the A. Leschen & Sons Rope Company, in 1888 had "adopted for its use as a trade-mark for its highest and best grade of wire rope, a strand of a different color from the other strands of the rope, the said trade-mark then and now being effected by your orator by painting one of the strands of the rope so as to make it distinctly unlike the other strands of the rope;" that it had continuously used the trade-mark to the present day; that it had been extensively advertised; that its sale had been very great, and that the company had obtained, December 4, 1900, a registration of such trade-mark in the office of the Commissioner of Patents.

The bill further averred that early in the year 1900 the defendant company "commenced to paint one of the strands of its wire rope so as to make it of a distinctly different color from the other strands of the rope;" that on October 31, 1900, it applied to the Commissioner of Patents for a registration; that the Commissioner declared an interference with the plaintiff, upon which proofs were taken, the case fully

argued, and plaintiff was declared to be the first to adopt the trade-mark; that notwithstanding this, defendant continued its unlawful use of this trade-mark with the intent to defraud plaintiff, to deceive the public, and to take unfair advantage of the demand for plaintiff's wire ropes, and that said mark is being used by said defendant to make sales of rope upon the strength of plaintiff's reputation. The bill further alleged the use of the trade-mark by both parties in commerce between the United States and foreign countries.

Defendant demurred on the ground that the trade-mark set up in the bill was not a lawful and valid trade-mark. The demurrer was sustained, the bill dismissed (123 Fed. Rep. 149), and the decree of the Circuit Court affirmed by the Circuit Court of Appeals. 134 Fed. Rep. 571.

Mr. Melville Church, with whom *Mr. Hervey S. Knight*, *Mr. J. C. Jones* and *Mr. George H. Knight* were on the brief, for appellant:

The marking of appellant's goods was such a distinctive mark of authenticity as to bring it clearly within the protection of the law. *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665. The complainant's trade-mark is not merely descriptive in the sense that it was taken from or descriptive of the place where it was produced. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Canal Co.* v. *Clark*, 13 Wall. 311; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665.

The application of the distinctive colored streak throughout the entire length of appellant's goods does not take it out of the category of distinctive trade-marks. If it is good when applied to the first few feet of a coil of rope it is equally good for its entire length. A familiar example of this is the water-marking of paper.

The act of March 3, 1881, lodges judicial power in the Commissioner of Patents. *United States* v. *Duell*, 172 U. S. 576; *Bernadine* v. *Seymour*, 10 App. D. C. 294. The judgment of the Commissioner, therefore, on the question of priority nec-

essarily involved the question of validity. *Hill* v. *Wooster*, 132 U. S. 693. The question has become *res judicata* and the defendant cannot question the decision in this proceeding between the same parties and in respect to the same subject matter. *Aurora City* v. *West*, 7 Wall. 82; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683.

There was no appearance for appellee.

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

As both parties are citizens of the State of Missouri, the jurisdiction of the Circuit Court can only be sustained upon the theory that the case is one arising under the Constitution and laws of the United States.

By an act of Congress of July 8, 1870, 16 Stat. 198, 210, § 77, to revise the statutes relating to patents and copyrights, Rev. Stat. § 4937, permission was given citizens of the United States and some others, "who are entitled to the exclusive use of any lawful trade-mark, or intend to adopt and use any trade-mark for exclusive use within the United States," to obtain registration of such trade-mark in the Patent Office; and by act of August 14, 1876, 19 Stat. 141, a punishment was provided for a fraudulent use of such trade-marks by others. But in the *Trade-mark Cases*, 100 U. S. 82, this legislation was declared to be unconstitutional upon the ground that it was intended to embrace all commerce, including that between citizens of the same State; and it was held that, if the power of Congress extended to the registration of trade-marks at all, it must be limited to their use in commerce with foreign nations and between the several States and with the Indian tribes.

Apparently in consequence of this decision, Congress, by the act of March 3, 1881, 21 Stat. 502, passed a new act, declaring that the "owners of trade-marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall

be domiciled in the United States, or located in any foreign country, or tribes, which by treaty, convention, or law, affords similar privileges to citizens of the United States, may obtain registration of such trade-marks . . . by causing to be recorded at the Patent Office a statement specifying name, domicil, location, and citizenship of the party applying; . . . a description of the trade-mark itself with fac similes thereof, and a statement of the mode in which the same is applied and affixed to goods," etc.

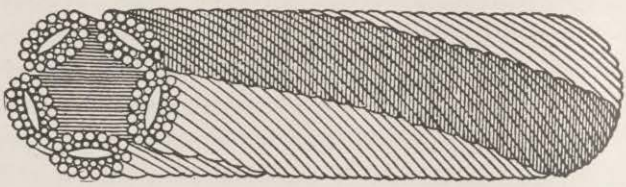
The registration of the trade-mark in question contains the following description:

"The trade-mark consists of a red or other distinctively colored streak applied to or woven in a wire rope. The color of the streak may be varied at will, so long as it is distinctive from the color and body of the rope.

"The essential feature of the trade-mark is the streak of distinctive color produced in or applied to a wire rope.

"This mark is usually applied by painting one strand of the wire rope a distinctive color, usually red."

It is true that the drawing annexed to the registration, a copy of which is here given, as well as the exhibits furnished, shows one of the strands colored red; and if the trade-mark were restricted to a strand thus colored, perhaps it might be sustained; but the description of a colored streak, which would



be answered by a streak of any color painted spirally *with* the strand, longitudinally *across* the strands, or by a circular streak around the rope, was held by both courts, and we think properly, too indefinite to be the subject of a valid trade-mark. Certainly a trade-mark could not be claimed of a rope, the en-

tire surface of which was colored; and if color be made the essential feature, it should be so defined, or connected with some symbol or design, that other manufacturers may know what they may safely do. Upon the plaintiff's theory, a wire rope containing a streak of any description or of any color would be an infringement, and a manufacturer honestly desiring to distinguish his wire rope from that of the plaintiff's by difference in color might, by adopting a white streak running along the length of the rope across the strands, find himself an infringer, when his real object may have been to obtain a mark which would distinguish his manufacture from that of the plaintiff's. Even if it were conceded that a person might claim a wire rope colored red or white, or any other color, it would clearly be too broad to embrace all colors. So, although it might be possible to claim the imprint of a colored figure on a wire rope, the figures should be so described that other manufacturers would know how to avoid it. If the trade-mark be a colored streak, it should be, at least, described and a statement of the mode in which the same is applied and affixed to the rope; and a trade-mark which may be infringed by a streak of any color, however applied, is manifestly too broad.

It would not aid plaintiff's case even if it were shown that it made use of a colored strand, and that defendant made use of a strand similarly colored, since the trade-mark must stand or fall in its entirety, and if the description therein be too broad, it cannot be sustained by showing that defendant imitated its color and its method of applying it. Perhaps, however, the defendant might be liable under a bill framed upon the theory that it was endeavoring to dispose of its goods as those of the plaintiff.

Whether mere color can constitute a valid trade-mark may admit of doubt. Doubtless it may, if it be impressed in a particular design, as a circle, square, triangle, a cross, or a star. But the authorities do not go farther than this. In the case of *Handon's Trade-mark*, 37 Chan. Div. 112, in which a trade-mark was claimed for a red, white and blue label, in imitation

of the French tri-color, for French coffee, it was held not entitled to registration under the English statute, which requires a trade-mark to be distinctive in order to be valid. The court remarked as follows:

"It is the plain intention of the act that, where the distinction of a mark depends upon color, that will not do. You may register a mark, which is otherwise distinctive, in color, and that gives you the right to use it in any color you like; but you cannot register a mark of which the only distinction is the use of a color, because practically under the terms of the act that would give you a monopoly of all the colors of the rainbow."

It is unnecessary to express an opinion whether, if the trade-mark had been restricted to a strand of rope distinctively colored, it would have been valid. As already observed, the claim is much broader than this. Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the act of Congress, and, for the reasons above given, we think it has not.

Affirmed.

ST. LOUIS DRESSED BEEF AND PROVISION COMPANY v. MARYLAND CASUALTY COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 197. Argued March 7, 1906.—Decided March 19, 1906.

An insurance company issued its policy insuring the assured against statutory and common-law liability for damages caused by negligence of insured or its employés, the insured to give immediate notice of any accident to the company, which agreed to defend any suit for damages brought against the assured, the latter not to make any settlement without the company's consent, and not to bring any action under the policy except for loss actually paid in satisfaction of judgment after trial. After an accident of which notice was duly given the assured was sued and the company refused to defend on the ground that the accident was not within the risks assumed. The assured to avoid heavy judgments settled the suits out of court and sued the company. *Held*, that:

The refusal of the company to defend the suits constituted such a breach of the contract that it released the assured from the agreement not to settle the claim without its consent and amounted to a waiver of the condition that it was only liable for judgment rendered against the assured after trial and satisfied.

Under the circumstances of this case the liability of the assured to the person injured and the extent of the liability may be litigated in the first instance in the action brought by the assured against the company on the policy.

THIS case was brought here on the following certificate:

"The judgment which the writ of error challenges sustained a demurrer to the petition and dismissed the action. The plaintiff in its petition alleged the existence of these facts: The plaintiff is a corporation of the State of Missouri, and the defendant is a corporation of the State of Maryland. On June 16, 1900, the defendant in consideration of the payment of $168 issued to the plaintiff a policy which contained these provisions: 'In consideration of the application for this policy, a copy of which is hereto attached and which is made part

of this contract, and of one hundred sixty-eight dollars ($168) premium, Maryland Casualty Company, of Baltimore, Maryland (hereinafter called "the company"), does hereby agree to indemnify St. Louis Dressed Beef & Provision Co. of St. Louis, county of ——, State of Missouri, hereinafter called "the assured" for the term of one year beginning on the fifth day of July, 1900, at noon, and ending on the fifth day of July, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application and while in the charge of the assured or his employés. Provided, however, that:

" 'A. The company's liability for an accident resulting in injuries to, or in the death of one person is limited to five thousand dollars ($5,000) and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of any number of persons is limited to ten thousand dollars ($10,000).

" 'This insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract:

" '1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars to the home office of any claim which may be made on account of such accident.

" '2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause "A" of special agreements as limited therein.

" '3. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information and evidence and in effecting settlements, and in case the company calls for the attendance of any employé or employés as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

" '8. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. In no case except that of minors shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy.

" 'This policy shall only cover losses sustained by and liability for any claims against the assured as a result of the risk specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed.'

"The portion of the policy hereinbefore quoted commencing with the words 'against loss from common law or statutory

liability' and ending with the words 'entitled to make under this policy' at the close of paragraph numbered 8, were printed on the slip attached to the policy.

"On May 25, 1901, the plaintiff became liable for damages on account of bodily injuries accidentally suffered by Mrs. Nellie Heideman and caused through the negligence of the plaintiff by means of a horse and vehicle in its service and the use thereof as described in the application for the policy and while in charge of one John Berry, who was one of the plaintiff's employés. The plaintiff immediately gave the defendant notice of the accident and of the fact that Nellie Heideman made a claim against the plaintiff for damages on account of the bodily injuries she had suffered from the accident and that Henry Heideman, her husband, also made a claim for damages against it on account of the loss of the services of his wife and of the expenses of physicians and nurses which resulted to him from her bodily injuries. On August 16, 1901, the defendant notified the plaintiff that it denied that it was liable to it on account of the damages resulting from the accident under its policy because, as it alleged, the driver of the plaintiff's wagon was not an employé of the plaintiff, but the fact was that this driver was an employé of the plaintiff and the accident and the damages were covered by the policy. On November 23, 1901, Nellie Heideman sued the plaintiff for $10,000 damages on account of the bodily injuries to her caused by the negligence of the plaintiff's driver and by the accident, and Henry Heideman brought an action against it for $3,000 damages which he alleged he sustained from the same cause. On November 29, 1901, the plaintiff in writing notified the defendant of the commencement of these suits and requested it to undertake the defense of said suits as its said policy provides it would do. But the defendant declined to undertake the defense upon the alleged ground that its policy did not cover the accident or the claims, while the fact was that it covered both. The injuries to Mrs. Heideman were, among others, the breaking of her right hipjoint socket bone, were serious and permanent and

the plaintiff was liable for damages in each of the suits. It feared heavy judgments if the actions were permitted to proceed to trial. Thereupon, on April 15, 1902, it compromised the suits and paid Mrs. Heideman $2,000 damages and her husband $500 damages on account of the injuries caused by the accident and the negligence of its driver.

"The petition also contained the following averments: 'The plaintiff served on defendant a written notice notifying it of the terms of settlement offered by said Nellie Heideman and Henry Heideman for the injuries sustained and damages suffered by them respectively, as aforesaid, and that plaintiff proposed to accept said settlements and pay said amounts, and to hold defendant responsible for such payment under its aforesaid policy; that defendant interposed no objection to said proposed settlements, relying upon its disclaimer of any liability under said policy by reason of its alleged claim that the driver of said wagon was not in the employ of the plaintiff herein; and that said defendant by reason of the said denial and disclaimer of any liability waived all the conditions of the said policy as herein set forth. Plaintiff further states that by reason of defendant's failure and refusal to defend said actions brought by Nellie Heideman and Henry Heideman against plaintiff, and by reason of the waiver aforesaid, it was obliged to and did defend said actions and employed counsel for that purpose, at an expense of two hundred and fifty dollars ($250.00), and that said employment of counsel was reasonably necessary, and that said sum of $250.00 is the reasonable value of said services so performed.'

"And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented by the assignment of errors in this case, that their decision is indispensable to a decision of this case and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

"1. Did the denial of all liability by the assurer and its re-

fusal to defend the suits in the name and on behalf of the assured as provided by paragraph 2 of the policy constitute such a breach of the contract on its part that it released the assured from its agreement in paragraph 3 that it would not settle any claim except at its own cost without the consent of the assurer previously given in writing, and from the provision of paragraph 8 that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

"2. Were the provisions of paragraphs 3 and 8 of the policy that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy and by its failure and refusal to defend the suits against the assured according to the provision in paragraph 2?

"3. Did the compromise by the assured of the suits against it after the assurer denied liability and refused to defend them and the payment by the assured of the damages claimed of it pursuant to the compromise, without the consent of the assurer and without the rendition of a judgment or a trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident and injuries described?

"4. Considering the terms of the policy, is the right of the assurer to insist upon the condition of paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured dependent upon the assurer's defense of the action against the assured according to the provision in paragraph 2?

"5. Considering the terms of the policy, is the assurer's denial of liability under the policy a waiver of the condition in paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured?

"6. Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer where the assurer has denied its liability under the policy and has refused to defend an action brought against the assured by the injured person?"

Mr. Ford W. Thompson with whom *Mr. William B. Thompson* and *Mr. Ralph Crews* were on the brief, for St. Louis Beef Co.

This question of the difference between contracts of indemnity against loss and indemnity against liability for loss, has never been presented to this court for decision. It has, however, been presented to several of the Supreme Courts of the States. See *Fenton* v. *Fidelity & Casualty Company*, 36 Oregon, 283; *Hoven* v. *Lake Superior Iron Co.*, 93 Wisconsin, 201.

The fact that $3,000 has been paid to compromise the loss does not fix the amount; it establishes the fact that all the loss which the complainant was liable for, or has sustained, has been paid. A judgment against an indemnitee, after notice to the insurer to defend suit, is conclusive of the amount and liability. 16 Am. & Eng. Ency. of Law, 180, note 4, and cases cited; *Showers* v. *Wadsworth*, 81 California, 270.

Such a judgment, without any notice to an indemnitor, is presumptive evidence of liability and its amount only. 16 Am. & Eng. Ency. of Law, 180, note 5; *Kansas City &c. R. Co.* v. *Southern Ry. News*, 151 Missouri, 373, 391; *Laing* v. *Hanson* (Texas), 36 S. W. Rep. 116, 118.

The provision for the judgment and its payment is of the same nature and effect as the provision in fire insurance policies for a determination of amount and liability by arbitration, and that such arbitration "shall be a condition precedent to any right of action in law or in equity to recover for such loss." Such contracts are valid and binding as long as the indemnitor proceeds in accordance with them, and does not deny its liability. *Hamilton* v. *Ins. Co.*, 136 U. S. 242, 252.

But they are ineffective and are waived when the insurer

denies all liability. *Weiner* v. *Fire Ins. Co.*, 153 Massachusetts, 235, 238; *Savage* v. *Phœnix Ins. Co.*, 12 Montana, 458; *Pensel* v. *Home Ins. Co.*, 3 Washington, 485.

The provisions of this contract are nothing more than a method of proof which is waived when the company denies its liability and refuses to follow that method. *Ross* v. *American &c. Ins. Co.*, 56 N. J. Eq. 55; *Southern Ry. News Co.* v. *Fidelity & Casualty Co.*, 83 S. W. Rep. (Ky.) 620. See also *Taylor* v. *Insurance Co.*, 9 How. 390; 4 Joyce on Insurance, § 3211; *Knickerbocker Ins. Co.* v. *Pendleton*, 112 U. S. 696; *Bailey* v. *Ætna Ins. Co.*, 46 N. W. Rep. (Wis.) 440; Beach on Insurance, § 1244.

Mr. Frank Gosnell and *Mr. Geo. Weems Williams* for the Casualty Co.:

The company agreed to indemnify the insured against loss from common law or statutory liability only. There is a clear distinction between a contract against "liability for damages" and a contract of indemnity against "loss from liability for damages." Under the latter clause no liability arises until payment by the assured of a judgment after a trial. *Gilbert* v. *Wiman*, 1 N. Y. 550; *Frye* v. *Bath Gas Co.*, 97 Maine, 241; *Moses* v. *Travellers Ins. Co.*, 63 N. J. Eq. 260; *Finby* v. *United States Casualty Co.*, 83 S. W. Rep. 2; *Cushman* v. *Fuel Co.*, 122 Iowa, 656; *Connolly* v. *Bolster*, 72 N. E. Rep. (Mass.) 981; *O'Connell* v. *N. Y., N. H. & H. R. R.*, 187 Massachusetts, 272. *Sanders* v. *Frankfort Ins. Co.*, 72 N. H. 465, distinguished.

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

An elementary remark or two will do something toward answering these questions. The form of the declaration does not appear, but we may suppose a count upon the Casualty Company's refusal to defend the suit against the plaintiff. If the defendant's contention is right, that breach made it impossible for the plaintiff to entitle itself to the payment promised in the policy according to its terms. But the defendant could not set

itself free by so simple a device. In general, when one party by his fault prevents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit less the value or cost of what the plaintiff would have had to do to get it. In this case the plaintiff had nothing more to do or to pay after it had been compelled to satisfy the claim against it. And therefore, on general principles, it would be entitled to demand the whole amount which the jury might find that it would have received had the contract been performed. *Hinckley* v. *Pittsburg Bessemer Steel Co.*, 121 U. S. 264.

It is suggested, to be sure, that the plaintiff should have defended the suit against it. But not only was that not one of the plaintiff's undertakings, but it was expressly forbidden to the plaintiff by the contract, as no doubt the defendant would have pointed out had that course been taken. Moreover, the defendant, by its refusal, cut at the very root of the mutual obligation and put an end to its right to demand further compliance with the supposed term of the contract on the other side. The only concern of the plaintiff was to establish reasonable ground for believing that if the defendant had not broken its contract it would have been called on to make a payment to the plaintiff, and how much that payment would have been.

Looking at the substance of the matter, it makes no practical difference, no difference in the amount of the defendant's liability, whether we say that the defendant by its conduct made performance of the conditions by the plaintiff impossible, and therefore was chargeable for the sum which it would have had to pay if those conditions had been performed, or answer, in the language of the questions, that performance of the conditions was waived. The sole difference would be in the form of the declaration. In either case the plaintiff would declare upon the policy, only the breaches assigned would not be the same. In the former the breach would be the refusal to defend, in the latter the refusal to pay. If it is necessary to con-

sider the question in a technical aspect, we think that the plaintiff was entitled to treat the contract as on foot, notwithstanding the defendant's act, and go on with it *cypres*. Under the circumstances it could not comply literally with the words, and was justified in doing the best thing that could be done for the interest of both. The defendant by its abdication put the plaintiff in its place with all its rights. To limit its liability as if its only promise was to pay a loss paid upon a judgment is to neglect the meaning and purpose of the reference to a judgment, and even the words of the promise. The promise in form is to indemnify against loss by certain kinds of liability. The judgment contemplated in the condition is a judgment in a suit defended by the defendant in case it elects not to settle. The substance of the promise is to pay a loss which the plaintiff shall have been compelled to pay, after such precautions and with such safeguards as the defendant may insist upon. It saw fit to insist upon none.

We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution.

But there is another aspect of the eighth condition of the slip which requires a few words more. It is said that this condition expressly contemplates a breach of contract by the company and defines the plaintiff's rights in that case. The words "no action shall lie against the company as respects any loss under this policy unless," etc., certainly do contemplate a case in court in which the company may turn out to be in the wrong, and therefore technically guilty of a breach of contract. But notwithstanding the contrary suggestion in *Sanders* v. *Frankfort Marine, Accident & Plate Glass Ins. Co.*, 72 N. H. 485, 498, 499, we think that the only breach which that condition has

in view is a refusal by the company to pay after the decision in a case of which it has taken charge, when, notwithstanding the judgment, it conceives itself to have a defense. The action referred to is an action for money alleged to be due under the policy. Contracts rarely provide in detail for their nonperformance. It would be stretching the words quoted to a significance equally hurtful to both parties, and probably equally absent from the minds of both, to read them as having within their scope an initial repudiation of liability by the defendant and a requirement that in that event the plaintiff should be bound to try the case against itself, although it should be plain that by a compromise it could reduce its claim on the defendant as well as its own loss.

If there is anything in the doubt whether the defendant, by assuming the defense of the original suit, would not lose its right to deny that the policy applied, even if it purported to save that right, it does not change our opinion. The requirement of a trial and judgment would not accomplish the object suggested, to make collusion impossible. The objections to thus hampering the *dominus litis* have been touched upon, and there would be presented the anomaly, if not the monstrosity, of a party attempting to provide by contract that if he should do what by general principles of contract forfeited his right to make further requirements of the other side, his conduct, on the contrary, should impose new obligations on the other side. If the defendant kept its contract, it would defend the suit, and the plaintiff would have no duties. If it refused to do as it had promised, we cannot think that it was entitled to complain that the plaintiff did not do it when the interest of both was the other way. Before a policy should be construed to have such an extraordinary effect honesty requires that the assured should be notified of his duties in unmistakable words.

We answer the first, second, fourth and fifth questions in the affirmative, the third in the negative and the sixth in the affirmative, so far as the question is warranted by the facts set forth. *It will be so certified.*

BROWN *v.* GURNEY.
SMALL *v.* BROWN.
BROWN *v.* SMALL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

Nos. 97, 98 and 99. Argued December 5, 1905.—Decided April 2, 1906.

The Land Department refused to issue a patent on a mining lode location for which the local office had issued final certificate on the ground that the entry embraced two tracts separated by a placer claim; but gave the applicant the privilege for a definite period of electing which tract he would take, the entry to be cancelled on one of the tracts specified unless he meanwhile appealed or made his election. Within the period he waived his appeal and elected to take the other tract. Subsequently the Land Department entered a formal order cancelling the entry as to the tract abandoned. Meanwhile three entries were made of the abandoned tract. The first immediately after the Land Department had refused the patent; the second immediately after the election and relinquishment was made; and the third immediately after the final order of cancellation was entered. In consolidated adverse proceedings between these three entrymen, *held*, that:

In adverse proceedings each party is practically a plaintiff and must show his title.

The order refusing to grant the patent did not of itself restore the land to the public domain during the period of election, but the relinquishment of the original entryman to the abandoned tract operated to do so *eo instanti*, and the formal order of cancellation merely recorded a pre-existing fact, and the rights of the party entering the land immediately after the relinquishment were superior to those of the other entrymen.

Rulings of the Land Department as to land covered by a location cannot be challenged collaterally in separate proceedings and the principle of freedom from collateral attack is equally applicable in cases of final entry as in those where patent has issued.

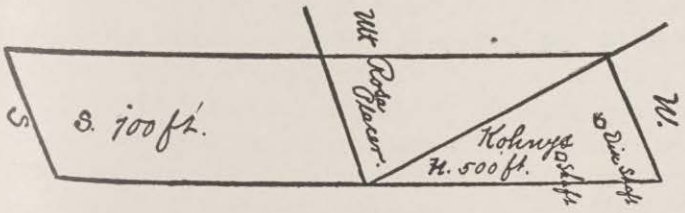
A final certificate issued after submission of final proof and payment of purchase price is for many purposes equivalent to a patent.

Brown applied for a patent on a mining claim, known as the Scorpion, and Gurney adversed this application as the owner and claimant of the Hobson's Choice, as did Small,

also, as the owner and claimant of the P. G. claim. Thereafter each brought suit in support of his adverse claim in the District Court of Teller County, Colorado. The cases were tried together on an agreed statement of facts. This showed that the Scorpion, Hobson's Choice and P. G. locations covered substantially the same tract of ground, and were all made in compliance with law, with the exception repeated in connection with each of said locations: "*Provided, however,* that it is not admitted that at the time of said location the ground enbraced in said location was a part of the vacant and unappropriated public domain."

It appeared that prior to May 28, 1895, a mining lode location called the Kohnyo was owned by the Cripple Creek Mining Company, which claim was divided into two non-contiguous tracts by the Mt. Rosa placer claim. The north end of the Kohnyo, comprising five hundred feet of the claim, was where the discovery of mineral was made, and it also contained a discovery shaft and the other workings and improvements of the claim. The south end being seven hundred feet in length, did not show mineral, and was without development work of any kind.

The following diagram illustrates the situation:



The local Land Office permitted the claimant of the Kohnyo to enter the two tracts as one claim, but the Department ultimately refused to issue a patent for such tracts, basing the refusal upon the ground that two portions of a lode mining claim, separated by a patented placer, could not be included within one patent. The Land Office gave the applicant, however, the privilege to apply for a patent upon either of

the segregated tracts, and directed that, in default of an election or appeal by the claimant within sixty days from the date of the order, the entry of that portion of the claim lying south of the Mt. Rosa claim should be cancelled without further notice. This decision was rendered May 28, 1895, and no appeal was taken from it; but the claimant of the Kohnyo instituted proceedings against the claimant of the Mt. Rosa placer, the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer claim which conflicted with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimant's contention of a known vein in the placer conflict.

June 14, 1898, the claimant of the Kohnyo filed in the Land Office a written instrument, dated June 10, by which it elected to retain and patent the north end of the Kohnyo claim, and in which it also waived any right to further question or review the decision of the Secretary of the Interior of May 7, 1898, affirming the decision of May 28, 1895.

July 15, 1898, the Commissioner of the General Land Office cancelled the entry of the Kohyno claim as to that portion south of the Mt. Rosa placer.

May 13, 1898, Brown located this seven hundred feet as the Scorpion lode claim. June 23, 1898, Gurney located the same premises as the Hobson's Choice lode claim, and July 16, 1898, Small located the same ground as the P. G. lode claim. July 15 and 16, 1898, the claimant of the Scorpion filed amended and second amended certificates.

On these facts, judgment was rendered for defendant in each case, from which plaintiffs appealed to the Supreme Court of the State. That court reversed the judgment in *Gurney* v. *Brown*, and entered judgment that Gurney recover the premises included in the Hobson's Choice location, and for costs; and reversed the judgment in *Small* v. *Brown*, and entered judgment "that neither party has established any right to the

premises in controversy," and for costs. The opinion is reported in 32 Colorado, 472.

Mr. William C. Prentiss, with whom *Mr. Charles F. Potter* and *Mr. Horace F. Clark* were on the brief, for Brown, plaintiff in error in Nos. 97 and 99, and defendant in error in No. 98:

The stipulation contains no evidence upon the question of whether or not the land in question was vacant or unappropriated and subject to location.

The acceptance of the application of Brown by the local officers is evidence that the land was unappropriated and subject to entry, but even in the absence of evidence the presumption must be that land in the so-called public land States has remained unappropriated, *Lockhart* v. *Johnson*, 181 U. S. 516, and, therefore, Brown, being prior in time, must be held to be paramount in right of possession.

There is no competent evidence of the existence of the Kohnyo location or the fact that entry of the same had been made. The Land Department decisions are not proof. The proper proof of a mineral entry is the full record of the application and final receipt accompanied by the survey so as to fix the *locus*. *Culver* v. *Uthe*, 133 U. S. 655. And proper proof of a mining location, embraces evidence of discovery, etc., location notice, certificate of location and assessment work.

A missing fact cannot be supplied by a concession of counsel. This has been repeatedly held in Colorado. *Pueblo* v. *Robinson*, 12 Colorado, 593; *Townsend* v. *Fulton Co.*, 17 Colorado, 145. The rule is the same in this court. *Zadig* v. *Baldwin*, 166 U. S. 485.

The pendency of a mineral entry does not prevent location by another of the ground covered thereby, and such location becomes effective if the entry be cancelled or relinquished and the possessory title forfeited or abandoned. *Lavagnino* v. *Uhlig*, 198 U. S. 443.

Location proceedings and patent proceedings are distinct,

and application for patent and entry do not affect the status of the ground, so far as possessory title is concerned, unless patent finally issue and, by relation back, cut out any intervening claims. If the patent proceedings prove abortive and the entry be cancelled there can be no relation back, and it follows that the effect of the certificate of purchase is destroyed. In such case the applicant is relegated to his possessory title. *Clipper Mining Company* v. *Eli Mining and Land Company*, 194 U. S. 220, 226; *Jaw Bone Lode* v. *Damon Placer*, 34 L. D. 72. See also *Murray* v. *Polglase*, 23 Montana, 401; *Adams* v. *Polglase*, 32 L. D. 477; *S. C.*, 33 L. D. 30.

The Kohnyo entry, as to the south 700 feet thereof, if not invalid, was eliminated at the expiration of sixty days from notice of Commissioner's decision of May 28, 1895, which was a direction to the local officers to cancel the Kohnyo entry as to the south 700 feet thereof upon default by the claimant in making election and furnishing evidence as therein allowed or taking appeal. *Guillery* v. *Butler*, 24 L. D. 209; *Northern Pacific R. R. Co.* v. *DeLacey*, 174 U. S. 622.

And in such case the application for reinstatement takes effect as of the date formal application is made to the register of the local office for republication of notice. *Jaw Bone Lode* v. *Damon Placer*, 34 L. D. 72.

The entry as to the southerly 700 feet was not eliminated by the filing of a relinquishment. It was not cancelled by formal order. 3 Copp's Land Owner, 38.

Mr. Charles C. Butler, with whom *Mr. J. C. Helm* was on the brief, for Gurney, defendant in error in No. 97, submitted:

That the land in question was vacant and unappropriated was assumed to be true throughout the case. It cannot now be denied. *Pratt* v. *Conway*, 148 Missouri, 291; *Humes* v. *Proctor*, 151 N. Y. 520; 2 Ency. Law & Procedure, 675; *Lemmon* v. *Sibert*, 15 Colo. App. 136; Elliott on Appellate Procedure, § 489.

The act of 1881 has always been construed to mean that it

is not sufficient to entitle the applicant for patent to a judgment in his favor, that the plaintiff fails to prove title to the ground in the contesting location. It is held that before defendant, who is a patent applicant, can have judgment, he must prove that he has title to the ground. And it is also held that, in making such proofs, all the requirements of law, relating to the location of a mineral claim must be shown to have been complied with. And if neither the plaintiff nor the defendant has made such proofs, then the jury must return a verdict accordingly and judgment be entered that neither party is entitled to the ground. *McGinnis* v. *Egbert*, 8 Colorado, 55; *Becker* v. *Pugh*, 9 Colorado, 589; *Manning* v. *Strahlor*, 11 Colorado, 453; Lindley on Mines, § 763; *Perego* v. *Dodge*, 163 U. S. 168; *Brannigan* v. *Dulaney*, 2 L. D. 751.

The territorial extent of the Kohnyo location is *res adjudicata* and is not subject to collateral attack. The action of the Land Department in matters within its jurisdiction is just as conclusive and binding and impervious to collateral attack as is judicial action by one of the ordinary and usual judicial tribunals. *Steel* v. *Smelting Co.*, 106 U. S. 450; *Smelting Co.* v. *Kemp*, 104 U. S. 640; Lindley on Mines, § 208.

There was no appearance for Small, plaintiff in error in No. 98, and defendant in error in No. 99.

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

The question in these cases, which was intended to be, and was, passed upon, is when, in respect of the three locations, did the premises in controversy become subject to location?

In the state Supreme Court, counsel for Brown contended that the judgments below must be affirmed because the agreed facts failed to identify the premises in dispute as part of the Kohnyo claim; did not establish the validity of that location; and did not affirmatively show that the premises, when lo-

cated as the Scorpion, were not part of the unappropriated public domain.

But the Supreme Court applied the rule that where the existence of certain facts is assumed in the trial court and the trial proceeds, without objection, on that assumption, and the case is decided in reliance thereon, neither party will be heard in the court of review to question there for the first time the existence of the facts, and especially not where the alleged omissions might have been supplied if called to the attention of the trial court. And properly applied it, for the identity of the ground in controversy and the validity of the original Kohnyo location were conceded by both parties; and, indeed, counsel really does not deny them as matters of fact but simply objects that the stipulation did not include them. Moreover, we think the stipulation and exhibits attached containing the various proceedings before the Commissioner of the General Land Office and the Secretary of the Interior establish the validity of the Kohnyo location. According to that record, the Kohnyo claim had passed to final entry; this entry had been recognized by the Commissioner of the General Land Office and the Secretary; the question litigated in the Land Department for something like three years, as to the knowledge of the placer applicant at the time of his application for patent of the existence of the Kohnyo vein in the placer ground, had been decided adversely to the Kohnyo claim; the Kohnyo claimant had thereupon accepted this decision, acquiesced therein, and availed himself of the privilege extended by the Commissioner's decision of May 28, 1895, and elected to retain the northerly tract of the Kohnyo claim, which amounted to a relinquishment of the southerly tract, and the entry as to that tract was thereafter formally cancelled.

It may be added also that in adverse proceedings each party is practically a plaintiff and must show his title. *Jackson* v. *Roby*, 109 U. S. 440; *Perego* v. *Dodge*, 163 U. S. 160, 167. By the act of Congress of March 3, 1881, 21 Stat. 505, c. 140, it was provided that if in an adverse suit "title to the ground

in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict." Under that act it is held that before the applicant for a patent can have judgment he must prove his claim of title to the ground. The object of the statute was, as we said in *Perego* v. *Dodge, supra,* to provide, in the case of a total failure of proof of title, for an adjudication "that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the Land Office simply because the adverse claimant had failed to make out his case, if he had also failed." 2 Lindley on Mines, § 763, and cases cited.

Of course it is essential that at the date of a location the ground located on should be part of the public domain, and in the present case the specific question affirmatively raised was whether the ground in controversy was a part of the public domain at the time of the respective contested locations.

It seems to us that when the Scorpion locator attempted to make that location he conceded the validity of the Kohnyo location and the segregation by that location from the public domain of the southerly portion of that claim, but assumed that the decision of the Secretary of May 7, 1898, operated to restore that tract to the public domain as of that date, since he relocated it on May 13, and on the following fifteenth of July filed an amended location. But the filing of the latter certificate did not cure the defect arising from the fact that the discovery shaft of the Scorpion was upon ground covered by the Kohnyo's claim, and the filing of the amended certificate could not perfect the Scorpion location in view of the previous location of the Hobson's Choice, which created intervening rights in favor of a third person.

The stipulation of facts was evidently prepared in respect of the inquiry concerning the date at which the ground in controversy reverted to and became a part of the public domain, and that embraced the question whether that resulted from the decision of the Secretary of May 7, 1898; or from

the filing of the Kohnyo claimant of its election to retain the northerly tract and relinquish the other, June 14, 1898; or upon the formal cancellation of the entry July 15, 1898.

Nevertheless it is further contended that the proceedings in the Land Department between May 28, 1895, and May 7, 1898, did not suspend the operation of the decision of the Commissioner of May 28, 1895, and since by that order the Kohnyo's applicant was required to make its election within sixty days from that date, as to which end of the claim it would retain and patent, in default of which election the entry of the southerly portion became cancelled, and the Kohnyo's claimant did not make such election until June, 1898, that the entry became cancelled as to the ground in controversy, at the expiration of sixty days from May 28, 1895, and thereupon the tract reverted to the public domain. The Land Department ruled otherwise. It treated the order of May 28, 1895, as suspended during the intermediate period, while the proceedings as to the knowledge of the placer claimant of the existence of the Kohnyo lode were pending. Manifestly because if it was known by the placer applicant at the time of application for the patent that the Kohnyo vein extended through the placer ground, then the vein did not pass by the patent, and the Kohnyo's claimant might be entitled to patent both ends of its claim, embracing the vein and a strip through the placer location.

And when on July 15, 1898, the Department cancelled the Kohnyo entry as to the tract in controversy, it was declared that: "In view of the fact that no motion for a review of the departmental decision of May 7, 1898, affirming the decision of this office of May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final, and it now devolves upon this office to execute the same."

The election, then, by the Kohnyo claimant, filed in the Land Office June 14, 1898, was an abandonment of the south seven hundred feet of the Kohnyo claim, which took effect *eo instanti*. Lindley, §§ 642, 643, 644; *Derry* v. *Ross*, 5 Colo-

rado, 295, 300. This was voluntarily done, and took effect notwithstanding the receiver's receipt had not been formally cancelled. The order of cancellation of July 15 simply recorded a preëxisting fact, and did not change the effect of the previous abandonment. By reason of that abandonment the southerly tract, for the first time, reverted to and became a part of the public domain. And as the Hobson's Choice was the first location of the ground made after such abandonment, it follows that it was valid, and that its owner was entitled to a decision in its favor.

We again state the dates of the respective locations. The Scorpion was located May 13, 1898. The Hobson's Choice was located June 23, 1898. The location of the P. G. was July 16. Thus it is seen that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice was located when the premises had reverted to the public domain; and that the location of the P. G. was after that date.

We have accepted the rulings of the Land Department that the Kohnyo location covered the southerly as well as the northerly end of that claim. Such was the decision of May 28, 1895, and that of the Secretary of the Interior of May 7, 1898, and the formal cancellation of July 15, 1898. In this separate distinct proceeding counsel cannot challenge these rulings. The attack is collateral and cannot be entertained. *Steel* v. *Smelting Company*, 106 U. S. 447; *Smelting Company* v. *Kemp*, 104 U. S. 636. True those decisions refer to instances where the patent had issued, but the principle of freedom from collateral attack is equally applicable where final entry has been made. The final certificate issued by the receiver after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent. We are advised in argument that the patent was issued, but it is objected that though such may be the fact it is not so stated in the facts agreed.

The cancellation of the entry of the seven hundred feet did

not rest on any defect in the original location. On the contrary, the Land Department held the proceedings sufficient to entitle the Kohnyo claimant to proceed to patent for this particular tract if it should so elect. It was only when the Kohnyo claimant abandoned that tract by making its election that it waived its right to patent it, and permitted the receiver's receipt to be cancelled to that extent.

That cancellation did not itself operate to restore the southerly tract to the public domain, which had already taken place by the action of the Kohnyo claimant in compliance with the judgment of the Land Department.

We concur in the conclusions of the Supreme Court of Colorado, and the judgments are

Affirmed.

AMADEO *v.* NORTHERN ASSURANCE COMPANY. AMADEO *v.* ROYAL INSURANCE COMPANY. SAME *v.* SAME.

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

Nos. 199, 200 and 201. Argued March 8, 1906.—Decided April 2, 1906.

Royal Insurance Co. v. *Miller*, 199 U. S. 353, followed to effect that, in the absence of express legislation affecting Porto Rico, the law prior to the extension of the Civil Code thereto in 1889 concerning limitations of personal actions, is that generally prevailing under Spanish law and in these cases on insurance policies, the loss under which had occurred prior to 1889, the twenty-year term applied and not the fifteen-year term applicable under the Civil Code after its extension to Porto Rico.

A party having no legal interest in maintaining or reversing a judgment is not always a necessary party to writ of error or appeal, and if the defendant has pleaded below that a party plaintiff has no interest in the cause of action, having assigned the same, and as a result of such plea the assignee has been substituted, the defendant cannot assert in this court that the original plaintiff was more than a nominal party, and the writ will not be dismissed on account of his death and failure to give notice to his succession.

Objections as to forms of writ of error not taken below will not be entertained here to defeat the jurisdiction of this court—and an amendment bringing in a corporation in liquidation as assignee of the party plaintiff *held*, under such conditions, to bring in the liquidator also.

Although irregularities may exist in appeal bonds, if the cases are sent back for further proceedings no order need be entered here regarding them.

THE facts are stated in the opinion.

Mr. Fritz v. Briesen, with whom *Mr. Charles M. Boerman* was on the brief, for plaintiffs in error:

The period of prescription on an action on a policy of fire insurance, accruing in 1885, is twenty years. *Royal Insurance Company* v. *Miller*, 199 U. S. 353. The decision in that case is controlling and these cases must be reversed.

Antonio José Amadeo is only a nominal plaintiff. He, or his estate, has no further pecuniary interest in this litigation. This is a fact admitted upon the record by both sides. The policies and the proceeds thereof have been assigned to the firm of Pastor Marquez Company, in liquidation, one of the plaintiffs in error, as shown by the record.

The death of one of several appellants or plaintiffs in error does not abate a suit, nor necessitate a revival of it in the Appellate Court. The cause survives to, and may be prosecuted by, the other plaintiffs in error. 2 Cyc. 771; 5 Ency. Pl. & Pr. 815; *McKinney* v. *Carroll*, 12 Pet. 66, 71; *Moses* v. *Wooster*, 115 U. S. 285; *Palmer* v. *Davis*, 28 N. Y. 242.

Amadeo was a proper party, but he was not a necessary party, and his representatives need not intervene. If he was an unnecessary party, the court below may be ordered to strike his name from the title of the suit, leaving only the Pastor Marquez Company, the real party in interest.

Mr. Frederic D. McKenney, with whom *Mr. Francis H. Dexter* and *Mr. John Spalding Flannery* were on the brief, for defendants in error:

The writs of error in these cases should be dismissed for manifest irregularities, both in form and in prosecution.

Amadeo having died subsequent to judgment, and before any writ of error was sued out, no valid writ of error could thereafter be sued out or prosecuted in his name, and assuming that "The Pastor Marquez Company" was otherwise authorized and competent to seek relief in this court, it could only do so in this case after notification to the succession of the deceased. It appears from the pleadings that Pastor Marquez Company was in liquidation, and that Pedro Salazar was the liquidator. Under the Spanish law as under English common law this action, in so far as in favor of Pastor Marquez Company was and is concerned, could only be maintained in the name of the liquidator.

While the absence of an appeal bond or the failure of the trial judge to note his approval thereon will not render the writs of error void, still the filing of duly approved security is prerequisite to the prosecution of such writs in the appellate court.

Passing the irregularities in the matter of the appeal bonds, which, in so far at least as the absence of the approval thereof by the district judge is concerned, might be corrected in this court, *Seymour* v. *Freer*, 5 Wall. 822; *Dodge* v. *Knowles*, 114 U. S. 430; *Stewart* v. *Masterson*, 124 U. S. 493; *Beardsley* v. *Arkansas &c. Co.*, 158 U. S. 123, the defects in the writ of error are irretrievable.

As Amadeo was dead at the time the writ of error was prayed for and issued, the suit, as to him, abated, subject to be revived only upon compliance with the statutory requirements, sec. 9, act of March 3, 1875, 18 Stat. 473, or the rules of this court.

Amadeo, originally the sole plaintiff, by amendment to the declaration was made joint plaintiff with "Pastor Marquez Company, in liquidation," of which Pedro Salazar was the liquidator. Amadeo having died, his legal representatives or successors alone had the right to prosecute an appeal in the interest of his estate. The failure of his representatives or successors to appeal or sue out a writ of error did not authorize his co-plaintiff to wage the writ on his behalf or in his interest or that of his succession, nor can such co-plaintiff prosecute

an appeal or writ of error to reverse the judgment against him, even where the right of action survives, except such death shall have been suggested upon the record. Rev. Stat. § 956; *Masterson* v. *Herndon*, 10 Wallace, 416.

In such cases no importance is to be attached to the technical mode of proceeding called summons and severance, but it is settled that it must appear in some way from the record that the missing parties had been notified to appear and had failed to do so, or, if appearing, had refused to join. *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608, 611; *Feibelman* 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; *Sipperly* v. *Smith*, 155 U. S. 86.

A writ of error in such a case cannot be amended by inserting the names of other plaintiffs in error, nor can a judgment of severance be now had even with their consent. *Mason* v. *United States*, 136 U. S. 581.

The writ of error, having been sued out without notification to the representatives of the deceased, may not be amended, but should be dismissed. *Dolan* v. *Jennings*, 139 U. S. 385.

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

In No. 199 the action was commenced April 21, 1903, by Antonio José Amadeo as sole plaintiff to recover from the Northern Assurance Company damages in the sum of $10,000 on a certain fire insurance policy issued on property in Porto Rico. The policy was dated December 21, 1884, and insured plaintiff against loss by fire for one year from that date. The loss was alleged to have occurred February 7, 1885.

Defendant filed several pleas, and, among others, that "the alleged cause of action did not accrue within fifteen years before this suit," and that prior to the institution of the suit the policy and its proceeds had been duly sold and transferred by plaintiff "to the firm of Pastor Marquez and Company, who are the only persons entitled to sue herein."

Plaintiff demurred to both these pleas but, subsequently, by leave of court, amended his declaration by adding to the caption, after the name Amadeo, the words "for the use of and together with Pastor Marquez Company, in liquidation," and by inserting in the body of the declaration the following: "And plaintiff avers that about the month of August, 1885, the said policy was assigned to the Pastor Marquez Company, which is a company in liquidation and of which Pedro Salazar is liquidator."

Thereafter plaintiff's demurrer to defendant's pleas of prescription was overruled by the court, and plaintiff excepted, and subsequently replied that the prescription pleaded had been interrupted "extrajudicially." To that replication defendant interposed a demurrer, which was sustained by the court. Plaintiffs thereupon declined to plead further and the court entered judgment, January 12, 1904, as follows: "And it is therefore adjudged by the court that issue is found in favor of the defendant and that the plaintiffs recover nothing herein, and that the defendant go hence with judgment for costs against the plaintiffs." It now appears that plaintiff Amadeo died intestate May 14, 1904. September 20, 1904, application was made for the allowance of a writ of error from this court to review the judgment, which was allowed September 21, 1904. On December 20, 1904, an appeal bond in the sum of $500, wherein Pastor Marquez and Company was named as principal and Lucas Amadeo and Felix Salazar as sureties, was filed in the clerk's office of the District Court, but the bond did not bear the approval of the judge. The bond was entitled "Antonio José Amadeo and Pastor Marquez and Co. *vs.* Northern Assurance Co.;" recited that "whereas the above-named plaintiffs have sued out a writ of error to the Supreme Court," etc., and was conditioned that "the above-named plaintiffs shall prosecute said writ to effect," etc. It was signed "Pastor Marquez & Com. en Liqid. E. Salazar, Lucas Amadeo, Felipe Salazar." The writ of error, which is dated December 31, 1904, bears the allowance of the district judge, who

also signed the citation under that date. The writ of error and the citation describe "Antonio José Amadeo for the use of and together with the Pastor Marquez Company in liquidation" as plaintiffs in error. The writ of error asserts that the error complained of wrought damage to "said Antonio José Amadeo for the use of and together with the Pastor Marquez Company in liquidation." The transcript of record was docketed in this court March 15, 1905.

In No. 200, the action was brought by Antonio José Amadeo alone, upon two policies of insurance against the Royal Insurance Company, April 21, 1903. The policies of insurance were dated September 15 and December 21, 1884, respectively, and insured plaintiff against loss and damage for one year from their respective dates. The loss as alleged occurred February 7, 1885. Defendant, among other defenses, pleaded prescription of fifteen years and transfer by plaintiff, prior to the institution of the suit, of the policies and all interest therein. To these pleas plaintiff at first demurred, but subsequently with leave of the court amended his declaration as follows: In the title, after the name of the plaintiff, by adding the following words, "for the use of and together with the Pastor Marquez Company in liquidation," and by adding in the body of the declaration the following: "And plaintiff avers that on or about August, 1885, the said policy was assigned to the Pastor Marquez Company, which is a company in liquidation and of which Pedro Salazar is liquidator." Plaintiff's demurrer to defendant's pleas of prescription having been overruled and exception thereto noted, plaintiff replied that the prescription had been interrupted "by extrajudicial demand;" to which replication defendant interposed a demurrer, which was sustained. And plaintiff having refused to plead further to defendant's pleas of prescription and "failing to offer proofs as to the other issues made and tendered," judgment was on the fifteenth day of January, 1904, entered for defendant as follows: "That the plaintiffs herein, Antonio José Amadeo, for himself and for the use and benefit of the firm of Pastor

Marquez and Company, and Pedro Salazar as liquidating partner of the said Pastor Marquez and Company, take nothing by either of their said suits, and that the defendants go hence without day and recover of and from the said plaintiffs all costs in this behalf incurred or expended, for which execution may issue." Petition for allowance of writ of error was filed September 20, 1904, and allowed the next day. An appeal bond entitled "*José Antonio Amadeo and Pastor Marquez and Company* vs. *Royal Insurance Co.*" was "filed and approved Dec. 20th, 1904," but the copy of the bond in the transcript of record does not show the approval of the district judge. This bond was signed by "Pastor Marquez & Co. en liqui., E. Salazar, Felipe Salazar, Lucas Amadeo," Pastor Marquez & Co. being described as principal and Lucas Amadeo and Felipe Salazar as sureties. The writ of error and citation were as in case No. 199. Record filed March 15, 1905.

No. 201 was a consolidation of two similar actions, and the course of procedure was like that in Nos. 199 and 200. The judgment was rendered January 15, 1904, in favor of defendant and against "Frederico Amadeo, for himself and for the use and benefit of the firm of Pastor Marquez and Company, and Pedro Salazar as liquidating partner of the said Pastor Marquez & Company."

The appeal bond was filed December 20, 1904, and was signed by "Pastor Marquez and Co. in liquidation, E. Salazar, Felipe Salazar and Lucas Amadeo;" and did not bear the approval of the district judge. The record was filed March 15, 1905.

The sureties on each of the appeal bonds in Nos. 199, 200 and 201 made affidavit as to their responsibility before the clerk of the District Court, and acknowledged the execution of the bonds before him.

It was admitted at the bar that on the merits these judgments must be reversed. *Royal Insurance Company* v. *Miller*, 199 U. S. 353.

But it is insisted that the writs of error in Nos. 199 and 200

should be dismissed because Antonio José Amadeo died after judgment and before the writs of error were sued out, and the Pastor Marquez Company, if otherwise competent, could not prosecute the writs until after notice to the succession of the deceased. And, further, that as it appeared the Pastor Marquez Company was in liquidation, the writs of error as well as the actions could only be prosecuted in the name of the liquidator, which was denied to be the fact here. And that the writ of error in No. 201 should be dismissed on the latter ground as well as because of want of summons and severance.

Antonio José Amadeo was dead when the writs of error issued in Nos. 199 and 200, and it is contended that the writs cannot be maintained because the actions had not been revived below, the death was not suggested on the record, and no notice of intention to take out the writs was given to his succession. Defendant, however, pleaded, among other defenses, that Amadeo had no interest in the cause of action, because the policies and their proceeds had been duly sold and transferred to Pastor Marquez and Company, who were alone entitled to sue. And thereafter the complaints were amended, as previously stated. For the purposes of these motions to dismiss, defendant in error cannot be permitted in this court to assert that Amadeo was other than a nominal plaintiff, and the cases fall within the principle, occasionally applicable, that parties having no legal interest in maintaining or reversing a judgment or decree are not necessary parties to a writ of error or appeal. *Basket* v. *Hassell*, 107 U. S. 602; *Germain* v. *Mason*, 12 Wall. 259; *Forgay* v. *Conrad*, 6 How. 201.

And although these records are much confused and very carelessly made up, we think that it may be properly held that the effect of the amendments was to bring the liquidator into court with the liquidating company, and, at all events, that, in view of defendants' pleas, the amendments thereupon, and the want of objection below in respect of the liquidator, that objection should not now be entertained in defeat of our jurisdiction. These considerations control the disposition of No. 201.

As to the suggested irregularities in the appeal bonds, they do not render the writs of error void, and we do not feel called on to enter any orders in regard to them, as these cases must go back for further proceedings.

Judgments reversed and causes remanded for further proceedings in conformity with law.

WISCONSIN *v.* HITCHCOCK.

IN EQUITY.

No. 12, Original. Argued February 21, 1906.—Decided April 2, 1906.

The provisions in the enabling act of August 6, 1846, authorizing the people of the then Territory of Wisconsin to form a state government, and by which section 16 in every township of the public lands, in that Territory, not sold or otherwise disposed of was granted to the State for the use of schools, did not operate to vest in the State section 16 of townships within the La Pointe or Bad River and the Flambeau Indian Reservations from which the Indians have never been required to remove; and this notwithstanding by the provisions in treaties executed prior to 1846 the Indians occupying them ceded those lands to the United States only retaining the privileges of occupancy thereof until required to remove therefrom by the President of the United States, and that after 1846 the same lands were included in the reservations as they now exist.

United States v. *Thomas*, 151 U. S. 557, followed, as determinative of this case (although it did not have reference to the particular Reservation involved in this case). It was held that the court will not, at this time and at the instance of the State, interfere with the administration by the Interior Department of the lands in question for the benefit of the Indians for whom the Reservation was established.

THE State of Wisconsin seeks by this suit to enjoin the defendant as Secretary of the Interior from interfering, in anywise, with its use, possession or enjoyment of certain lands, embraced within the present La Pointe or Bad River and the Flambeau Indian Reservations in that State.

The State traces its title back to the act of Congress of August 6, 1846, authorizing the people of Wisconsin Territory to form a state constitution and providing for the admission of such State into the Union. 9 Stat. 56, c. 89.

The defendant Hitchcock, as Secretary of the Interior, demurred to the bill upon the ground, among others, that it did not appear that the State was entitled to the relief asked.

The general question is whether the State has such interest, present or prospective, in the lands in dispute as to preclude their being administered by the Secretary of the Interior for the benefit of certain Indians.

The case, as presented by the record and by official documents of which judicial notice may be taken, is as follows:

On the twenty-eighth day of March, 1843, by a treaty between the United States and the Chippewa Indians of "the Mississippi and Lake Superior," the latter ceded to the United States all the country embraced within a specified boundary, including the lands here in controversy. The second and third articles of that treaty provided: "Art. 2. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges *of occupancy, until required to remove by the President of the United States*, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress. Art. 3. It is agreed by the parties to this treaty that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands shall be the common property and home of all the Indian party to this treaty." In consideration of the above cession the United States (art. 4) engaged to pay the Indians annually for twenty-five years certain sums; and this consideration for the ceded lands was paid by the United States. Revision of Indian Treaties, 217.

By an act of Congress approved August 6, 1846, the people of the then Territory of Wisconsin were authorized to form a consti-

tution and state government for the purpose of being admitted into the Union on an equal footing with the original States in all respects whatsoever, with certain specified boundaries. The seventh section of that act was as follows: "That the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin, for acceptance or rejection; and if accepted by said convention, and ratified by an article in said constitution, they shall be obligatory on the United States: 'First. That section numbered sixteen, in every township of the public lands in said State, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. . . .' " 9 Stat. 57.

The conditions prescribed by the enabling act of 1846 were duly accepted by Wisconsin, and that Territory was admitted into the Union as a State by an act of Congress approved May 29, 1848. 2 Charters and Constitutions, 2029; 9 Stat. 233.

By a treaty made and concluded September 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi, and which treaty was proclaimed January 29, 1855, 10 Stat. 1109, the Chippewas of Lake Superior ceded to the United States the lands theretofore owned by them in common with the Chippewas of the Mississippi within the present boundary of Minnesota and lying east of a certain boundary. The Chippewas of the Mississippi assented to that cession and agreed that the whole amount of the consideration money for the country ceded as above should be paid to the Chippewas of Lake Superior, the latter relinquishing to the Chippewas of the Mississippi all their interest in and claims to the lands theretofore owned by them in common, lying west of the above boundary line.

The lands described in the first article of the treaty of 1854 are within the present State of Minnesota and constitute no part of the land embraced in the treaty of 1843.

By the second article of that treaty the United States agreed,

among other things, to set apart and withhold from sale certain lands for the use of the La Pointe band and such other Indians as might settle with them. For the other Wisconsin bands, a tract of land was to be set apart and withheld from sale, "lying about Lac de Flambeau, and another tract on La Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President." The lands described in that article of the treaty of 1854 to be set apart and withheld from sale "for the La Pointe band" and "for the other Wisconsin bands" *were part of the lands ceded to the United States by the treaty of* 1843.

The third article of the treaty was in these words: "Article 3. The United States shall define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or a single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts, or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The bill alleges: "That under the enabling act of Congress

aforesaid and under the state constitution and under and in view of the cession of their lands by said Chippewa Indians, contained in said treaty of 1843, all of the lands surveyed and to be surveyed as sections 16 of the various townships within the territory covered by said treaty vested in the State of Wisconsin, and said State of Wisconsin has at all times heretofore, since its admission to the Union, claimed a right to the fee of all lands in sections 16 in the several townships within said reservations, and, since the sectional survey thereof by the United States, has claimed the actual fee in said sections and has exercised dominion and ownership over the same and has issued sundry and divers patents to divers persons and corporations for portions thereof, sundry of which persons and corporations, grantees of the State as aforesaid, have also exercised acts of ownership thereof, and have paid taxes and made improvements thereon, and have cut and hauled timber therefrom until forbidden by orders of the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, as hereinafter more particularly mentioned; that patents for all of said sections 16 within said La Pointe Reservation have heretofore been issued by said State to divers parties, and patents upon about fourteen forties of said sections 16 within said Lac Du Flambeau Reservation have been issued by said State to divers parties, and there still remain about twenty-nine forties in said sections 16 within said Lac Du Flambeau Reservation, the title to which is still in and claimed by said State. That under the treaty of 1854 aforesaid and in carrying out its provisions, the said Secretary of the Interior has proceeded, through the United States Indian Department, to allot from time to time to the various members of said tribes of La Pointe bands of Indians and to various members of the Wisconsin bands on said Lac Du Flambeau Reservation eighty acres per capita of lands within said reservations and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States, and have terminated their tribal relations, and have ceased to

occupy any material part of said reservation in common. That the lands within said reservation, exclusive of the lands in section 16, are sufficient to secure eighty acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of Indians of any land embraced within any of said sections 16. That beginning about the year 1899, and from thence hitherto, the defendant, Ethan Allen Hitchcock, as Secretary of the Interior, and the Commissioner of the Indian Office of the United States, and divers agents and servants under them, have set up on behalf of said La Pointe and other bands of Indians, or the members thereof, a claim of interest or title in and to sections 16 aforesaid in the reservation townships aforesaid, paramount and adverse to the title of the State of Wisconsin, and have claimed and continue to claim that said sections 16 are still held by the United States in trust for said Indians to the same extent as other lands in said reserved townships, and have forbidden purchasers of such lands holding patents from the State to enter or make improvements or cut any timber thereon, and have thereby cast a cloud upon the title of the State and its grantees to said lands, and have interfered with, and are continuing to interfere with the use and enjoyment of the same by the owners thereof. . . . That by Chap. 95 of the Laws of the State of Wisconsin for the year 1903, approved April 20, 1903, the Attorney General of the State of Wisconsin was duly authorized to institute proceedings in this court under the provisions of the act of Congress passed March 2, 1901, and hereinbefore referred to, to determine the rights of said State to what are commonly known as school lands within any reservation or Indian cession within said State, where any Indian tribe claims any right to or interest in said lands, or to the disposition thereof by the United States, and particularly to determine the title of the lands embraced within sections 16 in the several townships constituting the present Bad River or La Pointe and the Flambeau Indian Reservations within said State."

Mr. T. W. Spence, with whom *Mr. L. M. Sturtevant*, Attorney General of the State of Wisconsin, was on the brief, for complainant:

The cession of the Chippewa territory in Wisconsin in 1843 conveyed the whole Indian title and right of occupancy.

There can be no doubt that these Indians parted with every vestige of claim, legal, equitable, or as wards of a Nation, to every parcel of land embraced within the treaty, except a license to wander over any part which the United States failed otherwise to dispose of, until ordered by the President to get off. The United States was not, by such a stipulation for temporary occupancy, disabled from, or fettered in, making a disposition of specific portions of the lands.

Such a privilege of temporary Indian occupancy was considered in *Ward* v. *Race Horse*, 160 U. S. 504, and held to be destroyed and terminated by the mere act of admitting the State (Wyoming) into the Union. It is characterized by the court (p. 510) as "temporary and precarious" and not in any way to stay the advance of settlement and improvement or the jurisdiction of the newly created State over the territory. Although not expressly overruling the *ex parte* decision in *United States* v. *Thomas*, the principles announced are incompatible with the language relied upon by the Government in the Thomas case.

The United States, having the complete title to the land, unincumbered by anything but a temporary license to roam and hunt over it, when Wisconsin was admitted as a State, could not after its specific grant to the State make such license a basis or consideration for creating an adverse title, whether the land were surveyed or not at the time of the grant.

From 1843 to 1854 there was no Chippewa Indian Reservation or country in Wisconsin. It had all been ceded by the treaty of 1843. The members of the tribe hunted and fished over it merely by sufferance. The United States had and exercised the right during that period, at will, to dispose of any portion to settlers or otherwise, and in 1848 contracted with and

granted to the new State of Wisconsin, for school purposes, practically one thirty-sixth of the territory covered by the cession of 1843 and not previously disposed of. The right of Wisconsin to the land covered by such grant thereupon became absolute; the legal title awaited the survey, but the *jus ad rem* arose simultaneously with the birth of the State. *Beecher* v. *Wetherby*, 95 U. S. 524. *Minnesota* v. *Hitchcock*, 185 U. S. 390, distinguished.

The treaty of 1854 expressly saved all precedent rights granted by the United States under the title acquired by it through the cession by the Indians in 1843.

Under the treaty of 1843 the Indians reserved no title, and under the treaty of 1854 acquired no right to any particular land in the territory. The intervening title granted by the United States to the State is paramount, and that the treaty of 1854 only promised the Indians the equivalent in area or acres of the reservations provided for. *Gaines* v. *Nicholson*, 9 How. 365.

The State had a grant of explicitly designated portions of the land within the territory, not in every instance surveyed at the time of the grant, but unmistakably ascertainable by survey. As far as the lands in question are concerned, the inclosing township and range lines were actually surveyed by the Land Department prior to 1854.

The conditions in the case of *Minnesota* v. *Hitchcock*, 185 U. S. 373, are, therefore, entirely reversed in the present case. In the *Minnesota* case the lands involved were unceded Indian lands at the date of Minnesota's admission into the Union.

Mr. A. C. Campbell, special assistant to the Attorney General, with whom *Mr. Frank L. Campbell*, Assistant Attorney General, was on the brief, for defendant:

The grant describes and is confined to public lands. Lands are not public unless they are subject to sale or other disposal under the general land laws. They are not subject to sale and disposal under such laws if, at the date of the grant, they are

burdened with an Indian right of occupancy. Nor are they public lands, as the term is understood, until surveyed into townships and designated by sections. *Newhall* v. *Sanger*, 92 U. S. 761, 763; *Leavenworth &c. Railway Company* v. *United States*, 92 U. S. 733, 741; *Missouri, Kansas and Texas Railroad Company* v. *Roberts*, 152 U. S. 114, 119; *Northern Pac. R. R. Co.* v. *Musser-Sauntry Company*, 168 U. S. 604, 609; *In re Tyler B. Thompson*, 32 L. D. 468, 470.

No title to sections mentioned in a school grant vests in a State until the same are identified by a public survey. *Gaines* v. *Nicholson*, 9 How. 356, 365; *Cooper* v. *Roberts*, 18 How. 173, 179; *Sherman* v. *Buick*, 93 U. S. 209, 214, 215; *Heydenfeldt* v. *Daney Gold &c. Company*, 93 U. S. 634, 640; *Beecher* v. *Wetherby*, 95 U. S. 517, 524; *Water & Mining Company* v. *Bugbey*, 96 U. S. 165, 167; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 393; *Bullock* v. *Rouse*, 81 California, 591, 593, *State of Colorado*, 6 L. D. 412, 415; *Barnhurst* v. *State of Utah*, 30 L. D. 314, 317; *Mahoganey Number 2 Lode Claim*, 33 L. D. 37.

Sections of land contemplated by a school grant which, while unsurveyed, fall within an Indian reservation are subject to the Indian right of occupancy, and until such occupancy has been extinguished such sections are in suspension. Cases *supra* and *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 48; *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388, 389; *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Rickert*, 188 U. S. 432; *Scott* v. *Carver*, 196 U. S. 100, 109, 111; *United States* v. *Winans*, 198 U. S. 371, 380, 381; *Northern Pacific Railroad Company* v. *Maclay et al.*, 61 Fed. Rep. 554, 556.

If, at the time of the public survey, a tract of land contemplated by a school grant is encumbered by a right of occupancy in an Indian tribe, the State may elect to take equivalent lands, or it may wait until such right of occupancy has been extinguished and take the land contemplated. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *State of Colorado*, 6 L. D. 412; *State of Colorado*, 12 L. D. 70, 71; *State of Louisiana*, 17 L. D. 440.

At the date of a school grant to a State, if the sections are

not identified by the Government survey, and are within an Indian reservation, Congress is not obliged to transform them from their original status, and may dispose of them for other purposes. *Minnesota* v. *Hitchcock*, 185 U. S. 373.

It is not necessary that the treaty providing for a reservation should describe the particular tract to be thereafter occupied by the Indians, nor is it necessary that a particular tract be designated for that purpose by Congress or by the President. If, after the treaty is signed, the Indians occupy a particular tract without objection by, or interference from, the Government, such tract is a reservation to the same extent as though it had been specifically designated by the treaty. *United States* v. *Carpenter*, 111 U. S. 347, 349; *Spalding* v. *Chandler*, 160 U. S. 394, 404; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 390; *State of Minnesota*, 22 L. D. 388.

A treaty which provides for a reservation for the Indians is a grant of rights from and not to them, and a retention to them of rights not granted. *United States* v. *Winans*, 198 U. S. 371, 381.

The Secretary of the Interior, under the direction of the President, has the power, and it is his duty, to prevent intrusion upon Indian reservations and to remove intruders therefrom. *Morris* v. *Hitchcock*, 194 U. S. 384, 391, 392; *United States* v. *Mullin*, 71 Fed. Rep. 286, 288, 289.

Where a treaty with an Indian tribe, or an act of Congress, provides that an Indian reservation shall be allotted to the Indians in severalty, the Secretary of the Interior, pending allotment, has jurisdiction over the reservation and the power to remove intruders therefrom, and the courts will not interfere with his action in respect to allotment or with the exercise of his power to remove intruders. *Morris* v. *Hitchcock*, *supra*; *Brown* v. *Hitchcock*, 173 U. S. 473, 477; *New Orleans* v. *Payne*, 147 U. S. 261, 264.

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

The State contends that the effect of the treaty of 1843 was

that the Chippewa Indians released to the United States all of their claim of title or interest in or to the lands therein described and each and every part thereof, and ceded the same to the United States, which thereupon became the absolute owner thereof free from any claim of said Indians; and that the State, upon its acceptance of the conditions prescribed by the enabling act of 1846, and its admission into the Union, became vested with an absolute right in and to all the sections 16 within said territory previously surveyed, as well as to the lands subsequently surveyed by the United States, with the right in the State to have the temporary possession or occupancy of the Indians terminated by the United States.

The determination of the question suggested by this contention and the decision of this case is controlled by *United States* v. *Thomas*, 151 U. S. 577. That case involved the rights of the State of Wisconsin in and over certain lands in the La Court Orielles Reservation, as established for the benefit of the Chippewa Indians. Thomas, an Indian of the Chippewa tribe, was indicted for the murder of another Indian of the same tribe, committed within the limits of that reservation. The evidence showed that the offense was committed upon section 16 in a township embraced in the reservation. The accused contended that by the provisions of the enabling act by which Wisconsin was admitted into the Union, section 16 in every township in that State was ceded to it for school purposes, and could not be subsequently taken by the United States as part of an Indian reservation. It appeared that previous to the alleged murder, namely in 1859, the section upon which the crime was committed, had been settled, platted and set apart by the United States as a part and parcel of said reservation and was continuously thereafter occupied by the Indians as such, although claimed and sold by the State as and for a part of the school land ceded to it by the act of Congress. By act of Congress, approved March 3, 1885, c. 341, 23 Stat. 362, 385, it was provided that Indians committing certain crimes, among them murder, "against the person or property of another Indian or

other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." So the question was distinctly presented as to the relative rights of the State and the Indians in said section 16 within the Indian reservation on which the alleged murder was committed.

This court said: "The Indians have never been removed from the lands thus ceded (meaning by the treaty of 1842) and no executive order has ever been made for their removal and no change has taken place in their occupancy of the lands except as provided by the treaty of September 30, 1854, 10 Stat. 1109. By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Orielles Reservation. In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandered lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations. As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the enabling act, the Indians stipulated for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the lands until they were required to surrender it by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired

by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized. The general rule established by the Land Department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize."

Again: "We therefore are of the opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the State may claim ultimately in the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for the permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians." *United States* v. *Thomas*, 151 U. S. 577, 582, 584.

It is true that the *Thomas* case did not have reference to the particular Indian reservations involved in the present suit—the Bad River or La Pointe and Flambeau Reservations—but only to the La Court Orielles Indian Reservation. But all

three reservations had their origin alike in the same treaties—that of 1842, proclaimed in 1843, and that of 1854; and the effect of those treaties was considered in that case in connection with the enabling act of 1846 under which the State now claims, as it claimed in that case, absolute title to and full control over all the sections 16 named in that act. What the court said in the *Thomas* case as to the rights of Indians in virtue of their occupancy of the lands set apart for their use in the La Court Orielles Reservation, is strictly applicable to the rights of the Indians who have occupied, and, so far as appears, still occupy, the Bad River or La Pointe and Flambeau Reservations. We could not sustain the claim of the State in the present suit without overruling the principles announced in the *Thomas* case; and that we are not disposed to do. The principles of the *Thomas* case were recognized and enforced in *Minnesota* v. *Hitchcock,* 185 U. S. 373, 391 *et seq.*, which related to an act of Congress for the admission of Minnesota into the Union, and which act contained a provision similar to the one found in the enabling act for Wisconsin, namely, that certain sections "in every township of public lands in said State, and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

Without repeating all that was said in previous decisions, we hold, on the authority of those decisions, that the State is not entitled to the relief asked nor to any order that would interfere, at this time, with the administration by the Interior Department, of the lands in question for the benefit of the Indians for whom the Bad River or La Pointe Reservation and the Flambeau Reservations were established. Consequently, the bill must be dismissed.

It is so ordered.

CHRISTOPHER *v.* NORVELL.

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

No. 211. Submitted March 9, 1906.—Decided April 2, 1906.

Although in a limited sense there is an element of contract in becoming a shareholder of a national bank, the liability for debts of the institution is not contractual but is based on the provisions to that effect in the national banking law. The Government creating the bank has prescribed the terms upon which ownership of its shares can be acquired, and only those are exempted from liability who are specially described in the statute; nor can any shareholders be exempted from such liability by a state statute.

Under § 5151, Rev. Stat., a married woman residing in Florida, who has inherited stock in a national bank, which has been transferred to her and on which she has received and accepted dividends, is subject to a personal judgment for an assessment of the comptroller, notwithstanding that under the laws of Florida a married woman cannot enter into a contract.

Nothing in the law of Florida incapacitates a married woman in that State from becoming the owner, by bequest or otherwise, of stock in a national bank. How and from what property such a judgment shall be satisfied not involved or decided in this action.

THE facts, which involve the right of a receiver of a national bank in Florida to enforce the statutory liability under § 5151, Rev. Stat., against a married woman, a resident of that State and owner of record of shares of stock of the bank, are stated in the opinion.

Mr. H. H. Buckman for plaintiffs in error:

In order to maintain this judgment it must be held either that the relation of the stockholder is not contractual or that the national banking act is paramount to the constitution and laws of a State.

If the liability is to be determined by the act it must turn upon the legal definition of the terms "persons" and "share-

holders," the act says only "natural persons" can be incorporators. Section 5139, Rev. Stat.

An act authorizing persons to form a corporation means persons of full age, though no age be stated. 1 Cook on Corporations, 4th ed., p. 1, n. 1; *Re Globe Association*, 63 Hun, 263; *Re Saxon*, 1 Ch. 210. A pledgee of such stock is not liable to such assessment, even though he had caused the stock, for his protection, to be transferred to him on the books of the bank. *Pauley* v. *State Loan & Trust Co.*, 165 U. S. 606.

The terms "persons" and "shareholders" are technical and must be given their accepted legal definitions as defined at the time of the passage of the act, and mean only such persons who were *sui juris* and competent to contract, the act expressly providing that persons under disability might be the owners or holders of stock through their trustees, guardians, etc., and yet not liable personally. Section 5152, Rev. Stat.

The relation between the shareholders and the corporation is a contractual one, and the liability for an assessment upon stock in the case of insolvency is a contract and not a penalty liability. Cook on Corporations, 4th ed., § 10, n. 1, p. 30; n. 1, p. 31, §§ 64, 66, 67, 318, 319; *Godfrey* v. *Terry*, 97 U. S. 171; *Carroll* v. *Green*, 92 U. S. 509; *Norris* v. *Wrenshall*, 34 Maryland, 492; *Wickson* v. *Nesmeth*, 46 N. H. 371; *Corning* v. *McCullough*, 1 N. Y. 47; *Coleman* v. *White*, 14 Wisconsin, 700; *Huntington* v. *Atrill*, 146 U. S. 657; 2 Purdy's Beach on Corporations, § 220.

Whether a liability exists or not must be determined by the status of the persons at the time, and according to the law of the place when the contract was made and not by the national banking act or the act creating the corporation. The competency of a married woman to take, hold and transfer shares of stock is governed by the law of her domicil. 1 Purdy's Beach on Corporations, §§ 353, 390. So also as to infants, persons under duress or under coverture. Story, Conflict of Laws, §§ 97, 103.

Florida was the domicil of both this corporation and the married woman. Liability in case of insolvency under the national banking act is a statutory liability, and the defenses to this liability are substantially the same as in other cases of statutory liability. Cook on Corporations, 4th ed., 405. So held as to defenses based on the statute of limitations. *Howell* v. *Roberts*, 29 Nebraska, 483; *Queenan* v. *Palmer*, 117 Illinois, 619; *Richmond* v. *Iron*, 121 U. S. 27; *Child* v. *Coffin*, 17 Massachusetts, 64; *Carroll* v. *Green*, 92 U. S. 509; *Godfrey* v. *Terry*, 97 U. S. 171; *Moores* v. *Nat. Bank*, 104 U. S. 625. See also *Bank* v. *Whitney*, 103 U. S. 130.

The personal competency or incompetency of parties to a contract can always be set up as a defense to the avoidance of such alleged contract or as to any liability growing out of the same, and this includes idiots, infants, persons under duress, and persons under coverture. Gould, Pleading, 257, 258.

No person under legal disability could therefore be included in the legal contemplation of the terms "persons" and "shareholders" used in the national banking act, as such persons would be incapable of entering into the contractual relation in those States or jurisdictions where those disabilities existed; and at common law neither an infant, a married woman, nor a person *non compos* could make a contract, and could not, therefore, be a shareholder in a corporation. Cook on Corporations, 4th ed., §§ 66, 250, 318, 319, 320; 9 Ry. and Corp., L. J. 197; 1 Parsons on Contracts, 369; *Canal Bank* v. *Partee*, 99 U. S. 325. The common law is still in force in Florida and a married woman cannot make a contract; and no action at law may be brought or judgment rendered against her.

The Supreme Court of Florida has decided that a married woman in this State cannot bind her person by contract either at law or in equity, *Dollner* v. *Snow*, 16 Florida, 86, or become a partner, *De Graum* v. *Jones*, 23 Florida, 83, and her promissory note is void. *Hodges* v. *Price*, 18 Florida, 342; *Dollner* v. *Snow*, 16 Florida, 86; *Goss* v. *Turner*, 21 Florida, 406; *Randall* v. *Bougardis*, 23 Florida, 264.

All laws passed by state authority not contrary to the constitutional provisions of the United States, are supreme within the States and cannot be gainsaid by the Federal Government. Sutherland on Statutory Construction, §§ 21, 22.

The husband of the married woman is and was but a nominal party defendant; the only object of the suit was to enforce an alleged liability growing out of a contract, the result of which could only have been a personal money judgment against a married woman which both the law and procedure of the State of Florida prohibit. The United States Court was bound to have been governed by the law and procedure in force in the State of Florida, and that law had determined that the courts of the State were without jurisdiction to entertain or enforce such a proceeding or to render such a judgment.

The national banking act provides no remedy or method of procedure for the enforcement or collection of these liabilities. Resort must, therefore, be had to the law of that jurisdiction in which the alleged liability is sought to be enforced, and the law of the forum must govern as to the remedy. *Glenn* v. *Sumner*, 132 U. S. 152; *Robertson* v. *Perkins*, 129 U. S. 233; *Williams* v. *Benedict*, 8 How. 107; Simonton on Federal Courts, 152.

Mr. Duncan Upshaw Fletcher for defendant in error:

A married woman is under no disabilities in Florida as to the property she may acquire and own. *Alston* v. *Rawles*, 13 Florida, 117; *Hall* v. *Einstein*, 34 Florida, 602; Constitution, Florida, Art. XI; Rev. Stat. Florida, §§ 1197, 1793, 2069, 2070.

If she is not incapacitated from becoming the owner of the stock she became a shareholder, and is such now, and is liable to assessment under the national banking laws. It must be conceded that a married woman may own and hold stock in a national bank in Florida, and her liability and the means of enforcing it are controlled by the laws of the United States and not by those of the State. She became liable as a shareholder

under the laws of the United States, and the remedy of the receiver is an action at law as in the case of any other shareholder. *Keyser* v. *Hitz*, 133 U. S. 138, 150; *In re First National Bank of St. Albans*, 49 Fed. Rep. 120; *Bandy* v. *Cocke*, 128 U. S. 138; Zane on Banks and Banking, 77, 674. See also *Lamoser* v. *Keeler*, 123 U. S. 376. The remedy is at law. *Kennedy* v. *Gibson*, 8 Wall. 498. The United States court has jurisdiction herein without regard to the amount involved. *Brown* v. *Smith*, 88 Fed. Rep. 565.

This statutory liability is not in favor of the bank, but of its creditors. *Wickham* v. *Hull* (Iowa), 71 N. W. Rep. 352, 353; *Irons* v. *Manufacturers' Bank*, 21 Fed. Rep. 197.

Even if a married woman should subscribe for stock and only pay in a part of the par value, she might be assessed with other stockholders and be obliged to pay, because her obligation is created by statute of the United States. The element of power to contract might enter into such a case, perhaps, but in the case at bar the stock was bequeathed to plaintiff in error and transferred to her on the books, and she "received and accepted" it, as she avers in her plea. Her obligation, in this instance particularly, is created by the acts of Congress and not by any law of Florida. *McDonald* v. *Thompson*, 184 U. S. 71; *Aldrich* v. *Campbell*, 97 Fed. Rep. 663.

A married woman is liable to assessment whether her stock was bought by her or bequeathed to her. *Witters* v. *Sowles*, 32 Fed. Rep. 767; *Kerr* v. *Urie* (Ind.), 37 Atl. Rep. 789; *Keyser* v. *Hitz*, 133 U. S. 139.

The judgment of the Comptroller is conclusive as to the necessity for and amount of the assessment. Zane on Banking, 112; *Casey* v. *Galli*, 94 U. S. 673. One who allows himself to be represented on the books of the bank as owner of stock will not be heard to dispute liability. Zane on Banking, 82.

National banks are instrumentalities of the Federal Government, created for a public purpose, and as such, necessarily subject to the paramount authority of the United States. *Easton* v. *Iowa*, 188 U. S. 220.

If a married woman becomes a stockholder she assumes the liability of one under the acts of Congress. Otherwise we have the peculiar spectacle, which shocks the conscience, of a shareholder in a national bank who is entitled to all the benefits, dividends, rights and privileges of the other shareholders, but can disclaim and prevent the enforcement of the obligations and liabilities which rest on the other shareholders, not only as against the bank, but as against the creditors as well.

MR. JUSTICE HARLAN delivered the opinion of the court.

By the Revised Statutes of the United States it is provided that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; that persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders, the estates and funds in their hands being liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name; and, that a receiver of a national bank may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Rev. Stat. §§ 5151, 5152, 5234.

Proceeding under these statutes the receiver of the First National Bank of Florida brought this action against Henrietta S. Christopher (her husband John G. Christopher being joined as co-defendant) to recover the amount due from her as a shareholder of that bank under an assessment made by the Comptroller of the Currency against the stockholders of that bank in order to pay its debts.

The case made by the record is this: At the time of the failure

of the bank, on March 14, 1903, fifteen shares of its stock stood in the name of Mrs. Christopher. The stock was bequeathed to her by her father in 1886, and his executors caused it to be transferred to her name on the books of the bank. This was done without any request from or direction by her. Although not aware of such transfer until the stock had been issued and delivered to her in November, 1887, since that date she has held the certificate for the fifteen shares. It is shown that in 1894 she joined with other shareholders in securing an amendment of the bank's articles of association, which extended the corporate existence of the bank until the close of business on May 26, 1914. It further appears that she received several semi-annual dividends, from three to five per cent, on her stock from November, 1887, up to and including February 1, 1896, at which time the last dividend on the capital stock of the bank was declared and paid to stockholders. The dividends were paid by checks made payable to her order and personally indorsed by her. After the transfer of the stock Mrs. Christopher's name appeared on the registry of shareholders as the owner of the fifteen shares of stock, and the books kept by the bank showed the amount of dividends paid to her from time to time on those shares.

A personal judgment was rendered in the Circuit Court against Mrs. Christopher for the amount due on the assessment made by the Comptroller. The judgment was affirmed by the Circuit Court of Appeals which held that nothing in the law of Florida disabled married women from owning in their own right stock in national banking associations, and from incurring the liabilities resulting therefrom. 134 Fed. Rep. 842.

That the Comptroller had authority to make the assessment against stockholders, and that such assessment is conclusive as to the amount to be collected, cannot be questioned. *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673, 681; *Keyser* v. *Hitz*, 133 U. S. 138; *Bushnell* v. *Leland*, 164 U. S. 684, 685.

Did the coverture of Mrs. Christopher at the time her name was placed on the books of the bank as a shareholder as well as when she received the certificate of stock, protect her against a *personal* judgment at law for the amount due under the assessment made by the Comptroller of the Currency? That is the controlling question in the case.

This question is, we think, substantially answered by the judgment of this court in *Keyser* v. *Hitz*, 133 U. S. 138, 150, 152. That was an action at law against Mrs. Hitz, a married woman, who owned shares of stock in a savings bank which was converted into a national bank. The action against her was based on an assessment made by the Comptroller of the Currency. One of the contentions in the case was that the coverture of the defendant at the time she acquired the stock, as well as when the bank failed, protected her against an assessment under the act of Congress. The transaction occurred in the District of Columbia, where the bank was located. It was not contended that the defendant was incapacitated by the laws of the District from becoming the owner of bank stock, and hence the court did not consider what would have been the result, if the local statutes had prohibited married women from becoming the owners of bank stock. Upon that basis, the court said: "Assuming then, that she was not incapacitated from becoming the owner of stock in a bank, and that she was a shareholder in the savings bank, she became, upon the conversion of that bank into a national bank, a shareholder in the latter. Rev. Stat. § 5154. In that event she became, *by force of the statute*, individually responsible to the amount of her stock, at the par value thereof, for the contracts, debts and engagements of the national bank equally and ratably with other shareholders. Section 5151, which imposes such individual responsibility upon the shareholders of national banks, makes no exception in favor of married women. The only persons holding shares of national bank stock, whom the statute exempts from this personal responsibility, are executors, administrators, guardians, or trustees. Section 5152. It is not for

the courts, by mere construction, to recognize an exemption which Congress has not given." Again: "We are of the opinion that the coverture of the defendant did not prevent the plaintiff from recovering a judgment against her for the amount of the assessment in question, if she was, *within the meaning of the statute*, a shareholder in the bank at the time of its suspension. But the question as to what property may be reached in the enforcement of such judgment is not before us, and we express no opinion upon it."

The present defendant insists that she was incapacitated under the constitution of Florida and under the decisions of the Supreme Court of that State from becoming the owner of the stock bequeathed to her by her father. In support of this proposition we are referred to the following provision in a statute of Florida enacted November 6, 1829: "The common and statute laws of England, which are of a general and not of a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, be and the same are hereby declared to be in force in this Territory: *Provided*, The said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislative Council of this Territory." Also, to the following provisions of the Constitution of Florida: "All property, real and personal, of a wife owned by her before marriage or lawfully acquired afterward by gift, devise, bequest, descent or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent, given by some instrument in writing, executed according to the laws respecting conveyances by married women." Art. 11, § 1. "A married woman's real or personal property may be charged in equity and sold, or the uses, rents and profits thereof sequestrated for the purchase money thereof, or for money or thing due upon any agreement made by her in writing for the benefit of her separate property, or for the price of any property purchased by her, or for labor and material used with her knowledge or assent in

the construction of buildings, or repairs, or improvements upon her property, or for agriculture or other labor bestowed thereon with her knowledge or consent." Art. 11, § 2.

The argument is that at common law a married woman could not make, or bind herself personally by, a contract, and was incapable, by the law of Florida, as at common law, of entering into a contract, at least one that would subject her to personal liability; that the relation of a shareholder to a national banking association was of a contractual character; and consequently, to render a personal judgment against the defendant Mrs. Christopher was, in effect, to hold her personally bound by a contract which under the laws of Florida she was incapable of making.

The vice in this argument is in the assumption that the liability of Mrs. Christopher as a shareholder arises *wholly* out of *contract* between herself and the bank or its creditors; whereas, upon becoming a shareholder, she made, strictly, no direct contract with anyone, and became, as was held in *Keyser* v. *Hitz*, above cited, *by force of the statute* individually responsible to the amount of her stock, for the contracts, debts and engagements of the bank equally and ratably with other shareholders. Such statutory liability was created for the protection of creditors, and in order to strengthen the bank in the confidence of the public. The bank, although its shares of stock were private property, was an instrumentality of the General Government in the conduct of its affairs. *Farmers' &c. Nat. Bank* v. *Dearing*, 91 U. S. 29, 33. In *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283, the court said that "national banks are instrumentalities of the Federal Government, created for public purposes, and as such are necessarily subject to the paramount authority of the United States." This principle was reaffirmed in *Easton* v. *Iowa*, 188 U. S. 220, 237. See, also, *Pacific Nat. Bank* v. *Mixter*, 124 U. S. 721.

In *McClaine* v. *Rankin*, 197 U. S. 154, 161, 163, which was an action against a shareholder of a national bank to recover the amount due on an assessment made by the Comptroller of

the Currency, and in which the question was as to the nature of the cause of action, this court said: "Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If § 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of § 5151 do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of *its* contract to pay, and is collateral and *statutory*. . . . But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order *was the basis of the suit*. The statute of limitations did not commence to run until assessment made, and then it ran as against an action *to enforce the statutory liability*, and not an action for breach of contract."

In *Robinson* v. *Turrentine*, 59 Fed. Rep. 554, 555, it was held that the liability of a married woman for an assessment upon national bank stock did not grow out of contract, although it was one of a class of liabilities which may be enforced by an action in form *ex contractu*. In the same case it was said: "By the banking laws of the United States all the shares in the stock of national banks are liable to an assessment like the one levied on the stock of plaintiff's bank. To hold that a state law, were there such a law, could except certain shares from the liability, would enable States to defeat the policy of the Federal Government in establishing the national banking system. That the Congress has power to establish and legislate for such banks has not, since 1819, been an open question. *McCulloch* v. *Maryland*, 4 Wheat. 316. If a purchase of stocks in a national bank by a married woman without the written consent of her husband gives her the ownership of such stock, judgment must be given against the *feme* de-

fendant. If she owned the stock at the failure of the bank, she is liable to the assessment; if she did not, she is not liable. While the Federal Government exclusively controls the question of the liabilities of stockholders in national banks, it is not doubted but that a State has power to say that, for reasons seeming good to its legislature, and not in conflict with organic law, a particular class of persons shall not be permitted to own particular classes of property."

In *Kerr* v. *Urie*, 86 Maryland, 72, 77, it was held that a married woman residing in Maryland was capable of holding shares of stock in a national bank located in Texas, and, as such shareholder, was subject to the personal liability imposed by the national banking laws, without regard to the question whether she was entitled under the laws of the State where the bank was located to become the owner of such stock. The court said: "We conclude, therefore, that by virtue of the transfer in Maryland, and without regard to the laws of Texas, Mrs. Urie became the equitable and real holder of the stock in question, and if this be so, no question as to her powers of disposition, or as to whether she is or is not capable under the laws of Texas to make contracts, can arise in this case, for the liability of the stockholder arises not under any law of Texas, which it is contended has not been proven in this case, but under the act of Congress. And the contracts which it is claimed she is liable on are not her contracts, but the contracts of the bank. *Witters* v. *Sowles*, 35 Fed. Rep. 641; § 5152, Rev. Stat. The right to be a stockholder is given to her by the law of the State where she resides, and her rights *and liabilities* as such are provided *by the acts of Congress*."

Recurring to the provisions in the statute and constitution of Florida, it is clear that they do not incapacitate a married woman in that State from becoming the owner by bequest or otherwise of stock in a national banking association. On the contrary, it seems that all property, real and personal, owned by a married woman before marriage, or lawfully acquired afterward by gift, devise, bequest, descent or purchase, is her

separate property. Nevertheless, it is said, by the settled course of decisions in that State a married woman cannot bind herself personally by contract at law or in equity, or by becoming a partner, or by making a promissory note. *Dollner* v. *Snow*, 16 Florida, 86; *Hodges* v. *Price*, 18 Florida, 342; *Goss* v. *Furman*, 21 Florida, 406; *De Graum* v. *Jones*, 23 Florida, 83, and *Randall* v. *Bourgardez*, 23 Florida, 264. But those cases are not in point here; for, in each of them, the personal liability attempted to be imposed upon the married woman arose *entirely* out of contract, express or implied, on her part, and not by force of any statute. The argument made in this case in behalf of Mrs. Christopher assumes that the liability sought to be fastened upon her arises wholly out of contract; that is, out of an implied obligation, at the time her name was placed on the registry of shares and she received dividends, to contribute to the extent of the value of such shares to the payment of the debts of the bank. But that implied obligation, although contractual in its nature, could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all. No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder. Her liability for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each shareholder, in whatever way he may have become such. There have been cases in which there appeared such elements of contract as were deemed sufficient, in particular circumstances, to support an action. *Concord First Nat. Bank* v. *Hawkins*, 174 U. S. 364, 372; *Whitman* v. *Oxford Nat. Bank*, 176 U. S. 559, 565, 566; *Matteson* v. *Dent*, 176 U. S. 521. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute.

In *McDonald* v. *Thompson*, 184 U. S. 71, 73, which was the case of a formal subscription to the capital stock of a national bank, and which also involved the meaning of the words "contract or promise in writing" in a statute of limitations, the court said: "There was no contract in writing with the creditors or depositors of the bank, and none with the bank itself, to which the receiver could be said to be a privy, except to pay for the stock as originally issued. Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; but it was not a contract in writing within the meaning of the Nebraska act [of limitation], since the writing—that is, the subscription—contained no reference whatever to the statutory obligation, and no promise to respond beyond the amount of the subscription. In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association." All shareholders of stock in national banks become such, subject to the condition, declared by statute, that liability, to the extent of their shares, is imposed upon them for the contracts, debts and engagements of the bank. The statute, in effect, says to all who become owners of national bank stock, no matter in what way they become shareholders, that they cannot enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts and engagements of the bank. In other words, the Government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by shareholders —executors, administrators, guardians or trustees only being exempted from individual liability. No exception is made in favor of married women holding property. If the constitution or statutes of Florida had expressly incapacitated or forbidden

a married woman from becoming under any circumstances the owner of bank shares—as counsel for plaintiff in error insists is the case—a question would be presented that does not arise upon the record of this case; and as the local law does not forbid married women from becoming the owners of bank stock, we do not go beyond what is necessary for the decision of the present case under the national banking law. All that we now decide is that the court below properly interpreted the statute, and did not err in rendering a personal judgment against Mrs. Christopher, as a shareholder in the bank, for the amount due under the assessment of the Comptroller. In what way the plaintiff may proceed in order to obtain satisfaction of the judgment is not a question to be determined in this action.

Judgment affirmed.

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

WYMAN *v.* WALLACE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 191. Submitted March 6, 1906.—Decided April 2, 1906.

Where a national bank has gone into liquidation under § 5220, Rev. Stat., and one holding its notes seeks to enforce the additional liability imposed by § 5151, Rev. Stat., against a stockholder by a suit in the nature of a creditor's bill on behalf of himself and all other creditors, a case is presented under the laws of the United States giving the Circuit Court jurisdiction independently of diverse citizenship, and the decree of the Circuit Court of Appeals is not final but an appeal therefrom will lie to this court.

It is not necessary in order to maintain such a suit that the creditor should first obtain judgment on the notes.

A national bank finding itself embarrassed though possessed of a large amount of assets apparently in excess of its obligations is not prohibited

by the national banking act from borrowing, and it has the power to borrow, money to meet pressing demands, which it has not the cash to meet, and to give its time obligations therefor, secured by all of its assets; and if it subsequently goes into liquidation, and the collateral is insufficient to meet the obligations, the stockholders, both assenting and non-assenting to the liquidation are subject to the additional liability to the extent imposed by § 5151, Rev. Stat., and the holder of the notes can enforce the same by creditor's bill.

Prior to December 21, 1895, the American National Bank and the Union National Bank, hereinafter called respectively the American Bank and the Union Bank, were each engaged in business in the city of Omaha, Nebraska. During that month the American Bank was in such financial condition that it became necessary for it to provide for the payment of a large amount of deposits on or about January 1, 1896, for though possessed of abundant nominal assets it did not have sufficient cash to make such payment. It knew that a neglect to pay would precipitate a run and bring on a failure of the bank. Thereupon in order to obtain the money necessary therefor its officers and leading stockholders entered into negotiations with the Union Bank for the payment of its immediate obligations and thus enabling it to secure an opportunity to realize upon its assets. As a result of such negotiations a contract was entered into by and between the two banks through their boards of directors. By its terms the Union Bank was to assume the payment of all the liabilities of the American Bank, receiving therefor cash and such bills receivable as it was willing to accept at par and without recourse. The difference between the amounts so received and the liabilities assumed was to be represented by three non-negotiable promissory notes of the American Bank, the payment of which was to be secured by a pledge of all its remaining assets to Thomas L. Kimball, as trustee. This contract was carried out. The Union Bank moved into and took possession of the offices of the American Bank. Upon adjustment, as above indicated, the difference was found to be $201,000, for which the American Bank executed to the Union Bank three non-negotiable promissory

notes, each being for $67,000, and payable in one, two and three years, respectively. In accordance with the contract the remaining assets of the American Bank were placed in the hands of the trustee, Thomas L. Kimball, who proceeded to collect them and apply the proceeds on the notes until his death during the pendency of this suit. Subsequently a successor was appointed, who continued in performance of the trust until the entry of the decree. The execution of the contract of December 21, 1895, by the president and cashier of the American Bank was directed by resolution of its board of directors. On January 14, 1896, at an annual meeting of the shareholders of that bank, at which was represented 1,665¾ shares out of a total of 2,000, a resolution was adopted instructing the directors to take action looking to the liquidation of the bank. On February 25, 1896, another meeting of the shareholders was held, at which 1,696 shares were represented, and a resolution for voluntary liquidation was adopted by an affirmative vote of 1,639¾ shares. The Union Bank fulfilled its obligations under the contract, having taken up all the liabilities assumed by it. The trustee meeting with little success in collection of the assets, this suit was, after the first note had matured, instituted in the Circuit Court of the United States for the District of Nebraska by Sumner Wallace, a citizen of New Hampshire, to whom the note had been transferred, against the Union Bank, Thomas L. Kimball the trustee, the American Bank and its stockholders, including the appellants. By an amended bill the complainant sought on behalf of himself and all other creditors of the American Bank the winding up of the affairs of that bank, the determination of the amount due upon his note, the ascertainment of all the creditors and the amounts of their claims, the subjection of the remaining assets to the payment of those claims and the enforcement of the liability of the stockholders. He had not reduced the note to judgment prior to the commencement of this suit. Upon a final hearing a decree was entered ascertaining the amounts due the complainant and the Union Bank

(they being the only creditors), after the application of all credits, the number of shares of stock held by each shareholder of the American Bank and directing a recovery of $97.23 on account of each share of stock. This decree was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, 68 C. C. A. 40; 135 Fed. Rep. 286, from whose decision an appeal was taken to this court.

Mr. W. W. Morsman and *Mr. Howard B. Smith* for appellants in this case and in Nos. 192 and 193, submitted simultaneously herewith.[1]

Mr. Richard S. Horton for appellant in No. 194, argued at time of submission hereof.[2]

Mr. Richard S. Horton and *Mr. Charles Battelle* for appellants in No. 195, submitted simultaneously herewith.[3]

The court did not have jurisdiction on the ground of citizenship, because complainant is the assignee of a non-negotiable chose in action and his assignor, the Union National Bank, is a bank located in Nebraska, while the American National Bank, Kimball, and these appellants, were also citizens of Nebraska. *Wilson* v. *Knox Co.*, 43 Fed. Rep. 481; *Parker* v. *Armsby*, 141 U. S. 81; *Mexican Nat. R. R. Co.* v. *Davidson*, 157 U. S. 201; *Cloud* v. *City of Sumas*, 32 Fed. Rep. 177.

The American National Bank did not go into voluntary liquidation within the meaning and purpose of the United States banking laws. The word "liquidation," used in said sec. 2 and in sec. 5220, Rev. Stat., has a definite meaning and presupposes the existence of assets to be liquidated in the manner provided. But there remained under the control of the American National Bank or of its directors nothing to liquidate. All the assets of the American had been turned

[1] No. 192, *Frenzer* v. *Wallace;* No. 193, *Morsman* v. *Wallace*, *post*, pp. 244, 245.

[2] No. 194, *Poppleton* v. *Wallace*, *post*, p. 245.

[3] No. 195, *McClellan* v. *Wallace*, *post*, p. 244.

over to the Union and Kimball, for them to collect and apply to the payment of the three notes, and they had proceeded to do this and were still engaged in the process of liquidation at the time the vote was taken.

The complainant has not filed "a bill in the nature of a creditor's bill," as positively required by said sec. 2; for neither of his bills alleges and his proof does not show, any action at law upon his note. But a creditor's bill presupposes two things: (1), that the creditor has been able to establish his claim to be a valid and honest claim before the proper court at law; and (2), that he needs the assistance of a court of equity in order to realize upon it. *Jones* v. *Green*, 1 Wall. 330; *Smith* v. *Railroad Co.*, 99 U. S. 398; *Scott* v. *Neely*, 140 U. S. 106; *Nat. Tube Works Co.* v. *Ballou*, 140 U. S. 517; *Hollins* v. *Brierfield C. & I. Co.*, 150 U. S. 371.

The American National Bank and its shareholders have been deprived of their right to have the validity of the note sued on determined in the proper court and before a jury. This right to a jury trial is preserved by the Seventh Amendment to the Constitution of the United States, and by sec. VI of Art. I of the constitution of Nebraska. *Cates* v. *Allen*, 149 U. S. 451; *Scott* v. *Neely*, 140 U. S. 106.

There are only two methods of liquidating a national bank, one by direction of the Comptroller and the other under § 5220, Rev. Stat., and the bringing of this action by a party not a judgment creditor conflicts with both of these methods.

The American National Bank was not obligated to make good any deficiency remaining after the exhaustion of its assets in the hands of the Union National Bank and Kimball, and hence appellants were not liable therefor as shareholders.

Cases in the Federal courts sustain the power of national banks to borrow money only where the moneys were loaned, borrowed and used by banks in good faith in the usual course of the business of banking; or if not actually so used the loaning banks had no knowledge of the diversion thereof and were not parties thereto. Those cases establish that the power to

borrow money is incidental and limited to occasions when borrowing is necessary to carry on the business of banking, and that all borrowing must be of a temporary nature. *First Nat. Bank* v. *Nat. Exch. Bank*, 92 U. S. 122; *Western Nat. Bank* v. *Armstrong*, 152 U. S. 346, 351; *U. S. Nat. Bank* v. *First Nat. Bank*, 27 U. S. App. 605; *Auten* v. *U. S. Nat. Bank*, 174 U. S. 125; *Stapleton* v. *Stockton*, 91 Fed. Rep. 326; *Ditty* v. *Dominion Nat. Bank*, 75 Fed. Rep. 769; *Aldrich* v. *Chemical Nat. Bank*, 176 U. S. 618.

In this case the nature of the transaction and its natural and inevitable results was not a simple borrowing of money but was one beyond the powers of the board of directors acting alone, and *ultra vires* the bank itself.

Directors have no power to perform acts not within the ordinary business of the corporation. *Chicago City Ry. Co.* v. *Allerton*, 18 Wall. 233.

If a national bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, the Comptroller should have been notified and the shareholders of the bank would, under § 5205, have then been by him given the option either to continue the business of the bank by making good its capital stock, or to submit to liquidation under the supervision of the Comptroller. *Roberts* v. *Hill*, 24 Fed. Rep. 571.

If, on the other hand, a bank is insolvent only when it is unable to meet the demands actually made upon it, then the circumstances did not authorize the directors to take the action they did; and the condition of the American National Bank was well known to the officers of the Union National Bank.

Corporations, including national banks, have such powers and such powers only as are expressly or impliedly conferred upon them, and any act which is not within the powers so conferred is impliedly prohibited. *Germania &c. Co.* v. *Boynton*, 71 Fed. Rep. 797, 801; *Central Trans. Co.* v. *P. P. C. Co.*, 139 U. S. 24; *Cal. Nat. Bank* v. *Kennedy*, 167 U. S. 362, 366.

The power to enter into this transaction, if existing, must be an incidental power, as it is not expressly conferred. The incidental powers of national banks are defined and limited in and by § 5136, Rev. Stat., and do not authorize a transaction such as the one between the banks. The power to enter into such a transaction is impliedly denied by the general trend of the laws governing national banks and the object such laws have in view.

The power to enter into such a transaction is impliedly prohibited by Rev. Stat. §§ 5133, 5137, 5145, 5146, 5147, 5153, 5202, 5222, 5230, 5497 and expressly prohibited by § 5242.

National banks are public corporations and the banking laws governing them are complete in themselves, provide expressly when and by whom a bank shall be liquidated, and exclude all other methods. *National Bank* v. *United States*, 107 U. S. 445; *In re Mfrs. Nat. Bank*, 5 Biss. 499; *First Nat. Bank* v. *Colby*, 21 Wall. 609; *Hunt* v. *American &c. Co.*, 81 Fed. Rep. 532; *Bank Commissioners* v. *The Bank of Brest*, 1 Harr. Ch. (Mich.) 106, 111, 112.

The fact that a contract had been executed by one party of which the other party has received the benefit, does not give the contract validity, and no action will lie on the contract, and stockholders of a bank may show the nature of the transaction, *i. e.*, that it was not such as to impose any liability upon them. *Pearce* v. *Madison R. R.*, 21 How. 441; *Central Trans. Co.* v. *P. P. C. Co.*, 139 U. S. 24; *Louisville &c.* v. *Louisville &c.*, 174 U. S. 552, 567; *O'Brien* v. *Whelock*, 184 U. S. 450, 490; *Whitman* v. *Nat. Bank*, 176 U. S. 559; *Ward* v. *Joslin*, 186 U. S. 142.

The liability of shareholders in national banks is a restricted liability and the transaction between the banks was of such a nature that appellants are not liable for any deficit arising therefrom. Sec. 5151, Rev. Stat., is the only provision imposing liability upon shareholders of national banks; and the cases show: that the liability imposed by § 5151 is a means of securing the payment of a bank's debts at the time when

it is no longer able to continue business; that the purpose of the section is to secure the effectual winding up of the bank's affairs; that such liability cannot be prolonged; and that there can be no liability on the part of shareholders unless the contracts, debts and engagements of the bank have been contracted duly, and in the ordinary course of the business of banking. They further show that the fact, that the new obligation takes the place of an old obligation for which the shareholders may have been liable, does not make them liable for such new obligation. *Richmond* v. *Irons*, 121 U. S. 27; *Schrader* v. *Mfrs. Nat. Bank*, 133 U. S. 67; *Ward* v. *Joslin*, 186 U. S. 142, 152.

The "business of banking" is defined in *Mercantile Bank* v. *New York*, 121 U. S. 138 (1887), and the transaction between the two banks does not fall under that definition.

The debt represented by the note sued on was not duly contracted because the transaction was *ultra vires* not only the board of directors but the bank itself, and because the debt was not incurred in the ordinary course of the business of banking, and because the transaction was such as to increase and prolong the liability of the shareholders as it existed on December 21, 23, 1895.

Such a transaction and the debt arising therefrom cannot be said to have been within the "legal contemplation" of the shareholders of the American National Bank at the time they purchased the shares held by them.

Appellants have not done anything to estop them to deny their liability to make good the balance remaining unpaid upon the notes.

Assuming that a contract *ultra vires* a corporation can be rendered enforceable against its shareholders by the principle of estoppel, the doctrines of estoppel can be applied only to persons individually, not *en masse*. No official action was taken by the shareholders in meeting assembled and none of these appellants did or failed to do anything from which ratification could be implied. Their silence could not affect their

rights, as the duty to speak was not imposed on them. There was no express ratification such as could give validity to the original transaction. *Scovill* v. *Thayer*, 105 U. S. 143; *Thomas* v. *West Jersey R. R. Co.*, 101 U. S. 71; *Bloomfield* v. *Charter Oak Nat. Bank*, 121 U. S. 121, 135; *Mutual Life Ins. Co.* v. *Mowry*, 96 U. S. 544, 547.

But a contract *ultra vires* a corporation cannot be rendered enforceable against its shareholders by ratification or by estoppel. *Central Trans. Co.* v. *P. P. C. Co.*, 139 U. S. 24; *Cal. Nat. Bank* v. *Kennedy*, 167 U. S. 362; *First Nat. Bank* v. *Conrad*, 174 U. S. 364, 372; *Ward* v. *Joslin*, 186 U. S. 142, 151.

To hold that the notes represented contracts, debts and engagements of the American for which its shareholders were liable and that for that reason the Union should recover against appellants, would be to overrule in effect the cases cited last above. Such a conclusion is not based upon any averment in the bill or the amended bill; is opposed to *Richmond* v. *Irons*, *Schrader* v. *Mfrs. Nat. Bank* and *Ward* v. *Joslin*, *supra*, and would deprive the shareholders of their right to contest their liability for such claims.

The transaction was an entirely new deal and the Union National Bank was under no prior obligation to pay the debts of the American National and was a volunteer. *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 548.

Mr. James M. Woolworth and *Mr. R. S. Hall* for appellees in this case and in Nos. 192, 193, 194 and 195, submitted:

The jurisdiction of the Circuit Court did not depend upon citizenship but on sec. 2 of the act of June 30, 1876, which has never been repealed. *King* v. *Pomeroy*, 121 Fed. Rep. 287; *Williamson* v. *American Bank*, 115 Fed. Rep. 793.

A suit arises under the Constitution and laws of the United States whenever its correct decision depends upon the construction of either. *Cohens* v. *Virginia*, 6 Wheat. 262; *Tennessee* v. *Davis*, 100 U. S. 258; *Starin* v. *New York*, 115 U. S. 249; *Union National Bank* v. *Miller*, 15 Fed. Rep. 703.

A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities is not *ultra vires* but is within its power conferred by statute to conduct a general banking business. *Schofield* v. *State National Bank*, 97 Fed. Rep. 282.

The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. *Railway Co.* v. *McCarthy*, 96 U. S. 258; *Benseik* v. *Thomas*, 66 Fed. Rep. 104; *American National Bank* v. *National Wall Paper Company*, 77 Fed. Rep. 85; *Aldrich* v. *Chemical National Bank*, 176 U. S. 611. See also *Western National Bank* v. *Armstrong*, 152 U. S. 346; *Ditty* v. *Dominion National Bank*, 22 C. C. A. 376; *S. C.*, 75 Fed. Rep. 769.

If the directors of the American National Bank possessed the authority to protect its depositors and to borrow money to discharge the obligations as held in the case of *Schofield* v. *State National Bank*, 97 Fed. Rep. 282, then the stockholders, of course, will be liable and if the American is liable upon the theory of money had and received to its use and benefit, then the stockholders are liable also.

The bank is clearly liable for money had and received even assuming that the directors did not act in due form. *Cary* v. *Curtis*, 3 How. 236; *Kennedy* v. *Baltimore Ins. Co.*, 3 H. & J. 367. Assumpsit will lie whenever the defendant received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. *Byrne et al.* v. *United States*, 93 U. S. 642, 643. And the form of the indebtedness or the mode in which it was incurred, is immaterial, and the obligations arising in this manner are binding even on the United States. *United States* v. *State Bank*, 96 U. S. 30.

There is no statutory authority for the borrowing of money. The courts, however, hold that it can do so. *State* v. *First*

Nat. Bank of Orleans, 88 Fed. Rep. 947; *First Nat. Bank* v. *Exchange Nat. Bank*, 92 U. S. 127; *Western Nat. Bank* v. *Armstrong*, 152 U. S. 347; *Armstrong* v. *Chemical Nat. Bank*, 83 Fed. Rep. 565.

The transaction was a loan and not a sale.

If the language in this contract is at all ambiguous, the way in which the parties understood it and acted upon it will be of aid to the court.

The practical interpretation given to it by the parties themselves, when engaged in the performance of the agreement, and before any controversy has arisen concerning it, is one of the best indications of its true intent. *Schofield* v. *State National Bank*, 97 Fed. Rep. 285. Also *Topliff* v. *Topliff*, 122 U. S. 121; *Chicago* v. *Sheldon*, 9 Wall. 50, 54.

The Federal court on the equity side has jurisdiction to sustain a bill brought by a general creditor under the statute.

The statute plainly says "any creditor." Without this statute the judgment creditor or lien holder might maintain his bill in equity. This statute did not take away any equitable rights. But because to exhaust the remedy at law, in cases like these of national banks, would practically destroy the benefit to the creditor, this statute was passed giving to "any creditor" the right to file a bill in the nature of a creditor's bill, thus affording a speedy and efficient remedy to a creditor. *Darrigh* v. *H. Wetter Mfg. Co.*, 78 Fed. Rep. 7; *Nat. Security Co.* v. *State Bank*, 120 Fed. Rep. 593; *Jones* v. *Mutual Fidelity Co.*, 123 Fed. Rep. 508.

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

A matter of jurisdiction is first presented. The note, which is the foundation of plaintiff's suit, is one made by the American Bank to the Union Bank, both located in Nebraska, and under the statute, for the purpose of jurisdiction, to be considered citizens of Nebraska. 25 Stat. 436; sec. 4. The plaintiff is a citizen of New Hampshire. He could not main-

tain an action against the maker of the note, although a citizen of a State other than that of the maker and payee. 25 Stat. 434; sec. 1. But if diverse citizenship was the sole basis of the jurisdiction of the Circuit Court, the decision of the Court of Appeals would be final and there would be no appeal to this court. 26 Stat. 828, § 6. The jurisdiction of the Circuit Court, however, was not invoked on the ground of diverse citizenship—at least, not on that alone. The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws. Section 5220, Rev. Stat., reads: "Any [national banking] association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

By section 5151, Rev. Stat., stockholders in national banks are made liable for "all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Section 2 of the act of June 30, 1876, 19 Stat. 63, is as follows:

"SEC. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

More than two-thirds of the stock voted, on February 25, 1896, for a voluntary liquidation, and on April 27, 1896, the Comptroller of the Currency formally approved the liquidation and notified the cashier of the American Bank to that effect.

In proceeding, therefore, by this suit to enforce in behalf

of himself and all other creditors of the American Bank the extra liability imposed by Rev. Stat. § 5151, a case was presented arising under the laws of the United States, and of which, independently of the matter of diverse citizenship, the Circuit Court had jurisdiction.

The bill is not multifarious. "The two subjects of applying the assets of the bank and enforcing the liability of a stockholder, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank." *Richmond* v. *Irons*, 121 U. S. 27, 50.

It is suggested that no judgment had been obtained upon the note prior to this suit in equity, but as one object of the suit was to subject to the satisfaction of the debt certain property conveyed to a trustee as security therefor, no judgment at law was a prerequisite. *Day* v. *Washburn*, 24 How. 352; *Case* v. *Beauregard*, 101 U. S. 688, 691, in which the court said:

"Without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan* v. *Evans*, 11 N. H. 311; *Holt* v. *Bancroft*, 30 Alabama, 193."

We come then to the final question in the case, and that is whether the notes executed by the American Bank were its valid obligations. And in reference to this question these are the significant facts: The demands against the American Bank were pressing. It had not the money with which to meet them. It arranged with the Union Bank to advance the money for the payment of all its outstanding obligations. When the Union Bank paid these obligations of the American Bank it was the same as though it advanced money to that bank to pay them. To reimburse and secure the former the latter bank turned over certain property, and executed these notes for the balance, securing them by a pledge of all its other assets which were placed in the hands of its president, as trustee.

All the stipulations and agreements made by the directors of the two banks were carried out in good faith; and, with full knowledge of what had been done, the stockholders voted for a voluntary liquidation. The borrowing of the money by the American Bank did not necessarily put it into liquidation. It had a large amount of assets, and if the real had equaled the nominal value of these assets it would have been enabled after discharging its obligation to the Union Bank to continue business. But on an examination the stockholders felt that it was wiser to stop at once. But that decision did not at all impugn the wisdom or *bona fides* of the transaction by which the money was obtained to pay off the pressing demands of the American Bank. The question, therefore, is, whether a national bank, finding itself embarrassed, with a large amount of assets, much in excess of its obligations, yet without the cash to make payment of those which are due and urgent, can borrow to meet those pressing demands. A very natural answer is, why not? It is not borrowing money to engage in new business. It simply exchanges one creditor for others. There may be wisdom in consolidating all its debts into the hands of one person. At least such a consolidation cannot be pronounced beyond its powers. When time is obtained by the new indebtedness (in this case a year) it gives the borrowing bank and its officers and stockholders time to consider and determine the wisdom of attempting a further prosecution of business. In the case of an individual it would be a legitimate and often a wise transaction. It is not in terms prohibited by the national banking act. *Aldrich* v. *Chemical National Bank*, 176 U. S. 618, is very clearly in point. The opinion in that case is quite lengthy and considers many authorities, but the gist of the decision is expressed in these words (p. 635):

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the latter used the money so obtained in

its banking business and for its own benefit, that bank having enjoyed the fruits of the transaction cannot avoid accountability to the Chemical Bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money."

We are of the opinion that the notes given by the American Bank for the money advanced by the Union Bank were its valid obligations and can, therefore, be enforced against its stockholders. The decree of the Circuit Court of Appeals is

Affirmed.

FRENZER *v.* WALLACE.
MORSMAN *v.* SAME.
McCLELLAN *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 192, 193, 195. Submitted March 6, 1906.—Decided April 2, 1906.

Decided on authority of *Wyman* v. *Wallace*, *ante*, p. 230.

Mr. W. W. Morsman and *Mr. Howard B. Smith* for appellants in Nos. 192 and 193. *Mr. Charles Battelle* and *Mr. Richard S. Horton* for appellants in No. 195.[1]

Mr. James M. Woolworth and *Mr. R. S. Hall* for appellees.[1]

Mr. JUSTICE BREWER: These are separate appeals by other stockholders from the same decree, and present no questions other than those considered in the former opinion, and the same decrees of affirmance will be entered.

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[1] For abstracts of briefs see *Wyman* v. *Wallace*, *ante*, p. 230.

POPPLETON *v.* WALLACE.

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

No. 194. Argued March 6, 1906.—Decided April 2, 1906.

Decided on authority of *Wyman* v. *Wallace*, *ante*, p. 230.

Mr. Richard S. Horton for appellant.[1]

Mr. James M. Woolworth and *Mr. R. S. Hall* for appellees, submitted.[1]

Mr. JUSTICE BREWER: This case is also an appeal by a stockholder from the same decree, and presents only this difference: This stockholder voted against the resolutions passed by the stockholders looking to a voluntary liquidation. There is, therefore, nothing of a personal estoppel to be adjudged against him, but we do not think that that is material. The requisite amount of stock was voted in favor of what was done in the way of voluntary liquidation, and he as a stockholder is bound by that, although personally he dissented from the action. The same decree of affirmance will be entered in this case.

MICHIGAN CENTRAL RAILROAD COMPANY *v.* POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN.[2]

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

No. 397. Argued February 21, 23, 26, 1906.—Decided April 2, 1906.

A state statute may be unconstitutional because conflicting with the constitution of the State or with that of the United States, but all objections

[1] For abstracts of arguments see *Wyman* v. *Wallace*, *ante*, p. 230.

[2] For docket titles of cases, in which other railroad companies were

to its validity whether state or Federal may be presented in a single suit and call for consideration and determination; and as a Federal court has the jurisdiction it may be its duty, when the question is properly presented, to pass upon an alleged conflict between a state statute and the state constitution even before the question has been considered by the state tribunals. It will however be reluctant to do so especially when the statute is one affecting public revenues of the State.

There is no general supervision by the Nation over state taxation, in regard to which the State has, generally speaking, the freedom of a sovereign both as to objects and methods.

While there is always a possibility of misconduct on the part of officials, legislation may proceed on the assumption of their properly discharging their duties.

Where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year, and created without reference to the matter of that rate, there is no abdication of the legislative function, but on the contrary there is a direct legislative determination of that rate.

Unless there is some specific provision in the state constitution compelling other action a State may treat its entire territory as composing but a single taxing district, and deal with all property as within the district and subject it to taxation accordingly.

This court may in a case of this nature take judicial notice of the fact that the State of Michigan is traversed in almost every direction by railroads and that the county in which there are no railroads, if any there be, is an exception.

Nothing in the Federal Constitution prevents a State from separating a particular class of property and subjecting it to assessment and taxation in a mode and by a rate different from that imposed on other property and applying the proceeds to state rather than local purposes.

One hearing is sufficient to constitute due process and a state statute giving a state assessing board power to correct valuations, naming time and place at which any person interested may be heard, does not deprive the persons assessed of their property without due process of law because those parties do not have further opportunities to be heard by a court or the legislature.

A legislature is not bound to impose the same rate of tax upon one class of property that it does upon another; it is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them.

This court generally accepts the finding of a trial court upon a question of fact when the evidence is conflicting; and so held in this case as to a charge of systematic under-valuation which the trial court found against.

Act No. 173, Michigan Laws of 1901, imposing upon railroad and corporate

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appellants against the same appellee, and submitted simultaneously with this case, see page 302, *post*.

property the average rate of tax upon other property subject to ad valorem taxes, applying the proceeds to state purposes, and providing for ascertaining the rate by mathematical computations by the state board of assessors based upon reports from the local assessors, does not conflict with the constitution of the State or with that of the United States.

THIS suit was brought in the Circuit Court of the United States for the Western District of Michigan to restrain the respondent, the Auditor General of the State, from enforcing against the appellant the provisions of Act No. 173 of the Michigan laws of 1901, an act to provide for the assessment of the property of railroad and certain other companies, for the levying of taxes thereon by a state board of assessors and for the collection of such taxes. The taxes involved in the suit are those for 1902, resulting from the first assessment under the statute. Prior to the year 1900 the constitution of Michigan contained, in Art. XIV, the following sections applicable to taxation:

"SEC. 10. The State may continue to collect all specific taxes accuring to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank road and other corporations hereafter created.

"SEC. 11. The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

"SEC. 12. All assessments hereafter authorized shall be on property at its cash value.

"SEC. 13. The legislature shall provide for an equalization by a state board in the year one thousand eight hundred and fifty-one, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes.

"SEC. 14. Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

In that year sections 10, 11 and 13 were amended so as to read as follows:

"SEC. 10. The State may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value, by a state board of assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under laws in force on November sixth, A. D. nineteen hundred, shall be applied as provided for specific state taxes in section one of this article.

"SEC. 11. The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: *Provided*, That the legislature shall provide a uniform rule of taxation for such property as shall be assessed by a state board of assessors, and the rate of taxation on such property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes."

"SEC. 13. In the year one thousand nine hundred and one, and every fifth year thereafter, and at such other times as the legislature may direct, the legislature shall provide for an equalization of assessments by a state board, on all taxable property, except that taxed under laws passed pursuant to section 10 of this article."

This change in the constitution was doubtless owing to a decision of the Supreme Court of the State, *Pingree* v. *Auditor General*, 120 Michigan, 95, of date of April 26, 1899, holding unconstitutional an act passed in 1881 in respect to the assessment and taxation of telegraph and telephone lines. An act, No. 19 of 1899, passed March 15, 1899, and commonly called the "Atkinson bill," was subject to the same objections as the

act of 1881 and was evidently regarded as equally unconstitutional. Indeed, though not directly involved in that suit, it was referred to in the opinion of Mr. Justice Montgomery.

The act in controversy, Pub. Acts 1901; Act No. 173, provides that the board of state tax commissioners shall constitute a state board of assessors, who are to assess the railroad and certain other corporate property in the State. Section 5 contains the following:

"SEC. 5. The term property as used in this act shall be deemed to include all property, real or personal, belonging to the corporation subject to taxation under this act, including the right of way, roadbed, stations, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph or telephone poles, wires, conduits, switchboards, and all other property used in carrying on the business of said corporations or owned by them respectively, and all other real and personal property and all franchises, said franchises not to be directly assessed, but to be taken into consideration in determining the value of the other property: *Provided, however,* That this definition shall not include, apply to or subject to taxation such real estate as is owned and can be conveyed by such corporations under the laws of this State which is not actually occupied in the exercise of their franchises or in use in the proper operation of their roads or their corporate business; but such real estate so excepted shall be liable to taxation in the same manner and for the same purposes and to the same extent and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities in which the same may be situate. The term company, corporation or association, wherever used in this act, shall apply to and be construed as referring respectively to any railroad company, union station and depot company, express company, car loaning company or refrigerator or fast freight line company, and any and all other corporations subject to taxation under this act. The term 'property having a situs in this State' shall include all the property, real and per-

sonal, of the corporations enumerated in this act, owned, used and occupied by them within the limits of this State, and also such proportion of the rolling stock, cars and other property of such corporations as is used partly within and partly without this State, as herein provided to be determined."

By sections 6 and 7 the several corporations are required to furnish information as to various matters of fact bearing on the matter of assessment. By section 8 property is to be assessed at its "true cash value" on the second Monday of April of each year, and for the purposes of the assessment the board of assessors is authorized to make personal inspection of the property, to take into consideration the reports filed under the act, and such other evidence as may be obtainable bearing thereon. In respect to the property of railroads running partly within and partly without the State, the board is directed to be guided in respect to the matter of taxation of property within the State by the relation which the number of miles of main track within the State bears to the entire mileage of the main track both within and without the State. By section 10 the board is required to meet at the capitol at Lansing on the third Monday of December, and continue in session so long as may be necessary, not later than January 15 next thereafter, for the purpose of reviewing the assessment roll, and any person or company interested has the right to appear during said period and be heard by the assessors, and they are authorized on such application, or on their own motion, to correct the assessment or valuation. Sections 11 and 12 prescribe the method for fixing the rate of tax, the purpose being to impose upon the railroad property the average rate of taxation levied upon other property upon which ad valorem taxes are assessed. This method is accurately described by counsel for the railroad company in these words:

"The new and peculiar feature of the statute lies in the application to corporate property of a special rate of tax, known as the 'average rate'; which is derived by the following process: The total ad valorem taxes for all purposes, state, county, city,

township, village and school district, paid by property in Michigan which is taxed otherwise than under Act 173, are divided by the total assessments of such property, whether made by one or another assessor, and the quotient resulting from this process of division is the rate of tax applied to corporate property under Act 173."

By section 16 the taxes collected from corporations under this act are to "be applied in paying the interest upon the primary school, university and other educational funds, and the interest and principal of the state debt, in the order herein recited, until the extinguishment of the state debt other than the amounts due to educational funds, when such taxes shall be added to and constitute a part of the primary school interest fund."

After a full hearing upon pleadings and proofs the Circuit Court entered a decree dismissing the bill, 138 Fed. Rep. 223, whereupon the plaintiff appealed directly to this court, under section 5 of the Circuit Court of Appeals act.

Mr. Lloyd W. Bowers, Mr. O. E. Butterfield and *Mr. Benton Hanchett,* with whom *Mr. A. C. Angell, Mr. Henry Russell* and *Mr. Ashley Pond* were on the brief, for appellant:

The court has jurisdiction of the case to enjoin the collection of the taxes levied against the plaintiff's property. Whenever an officer, by virtue of his position under a state government, by his acts is doing that by which a person is deprived of life, liberty or property without due process of law, and is denied the equal protection of the laws, he acts without authority and the Federal courts have jurisdiction over him personally to restrain his acts. *Prout* v. *Starr,* 188 U. S. 537; *Smyth* v. *Ames,* 169 U. S. 466; *Tindal* v. *Wesley,* 167 U. S. 204; *Chicago &c. R. R. Co.* v. *Chicago,* 166 U. S. 226; *Scott* v. *Donald,* 165 U. S. 58; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *In re Tyler,* 149 U. S. 164; *Neal* v. *Delaware,* 103 U. S. 370; *Ex parte Virginia,* 100 U. S. 339.

Federal courts may restrain the collection of invalid taxes

where by the provisions of the law under which they are levied they become a lien upon the real property of the party against whom they are levied and a cloud upon his title, and the remedy at law is held to be inadequate. *Union Pacific R. R. Co.* v. *Cheyenne*, 113 U. S. 516; *Ogden* v. *Armstrong*, 168 U. S. 224; *Wilson* v. *Lambert*, 168 U. S. 611; *Lyon* v. *Alley*, 130 U. S. 177; *Illinois Cent. R. R. Co.* v. *Adams*, 180 U. S. 28; *Northern Pacific R. R. Co.* v. *Walker*, 148 U. S. 391; *Lindsay* v. *Shreveport Bank*, 156 U. S. 485; *Osborn* v. *United States Bank*, 9 Wheat. 738; *State Railroad Tax Cases*, 92 U. S. 575; Cooley on Taxation, 2d ed., 780.

The controversy presented under the Constitution of the United States is real. In such case the court has jurisdiction of the whole case, including the non-Federal questions arising under the constitution and statutes of the State which do not involve the Federal questions, the appeal being from the Circuit Court of the United States, and not from the Supreme Court of the State. 1 U. S. Comp. Laws, p. 508, § 5, p. 549; *Chappell* v. *United States*, 160 U. S. 499; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105; *Scott* v. *Donald*, 165 U. S. 58; *Horner* v. *United States*, 143 U. S. 570; *Giles* v. *Harris*, 189 U. S. 475; *Missouri* v. *Dockery*, 191 U. S. 165.

The taxing method of Act 173 of the Michigan laws of 1901 is not "due process of law." It makes the "average-rate" depend directly upon, and grow with, the local taxes of all the counties, cities, villages, towns and school districts of Michigan, including those where the taxed railroad has no office and no property.

The tax is not founded upon, and measured by, a judgment or estimate by the state legislature of the revenue needed for the state government.

The tax is directly founded upon, and proportionate to, the expenses (partly governmental and partly proprietary) of local communities in which the taxpayer neither resides nor has property, and whose government and local enterprises, therefore, do not benefit the taxpayer.

The tax is not founded upon what the legislature considers a just relation between the taxes of those persons who live or have property under the same governments, but upon what the legislature thinks a just division between persons living in different parts of the State, under different local governments, of the expenses of all those governments.

The amount of state tax imposed upon the railroad taxpayer is not fixed by the state legislature itself; but the power of fixing that amount is delegated to the local legislatures of the State's various political subdivisions—counties, cities, towns, villages and school districts—in many of which the taxpayer has no office or property.

The taxpayer is deprived of the right to be heard concerning the amount of his tax.

Such faults in the statute are forbidden by the Federal Constitution. Cooley on Taxation, 3d ed., 50, 83, and cases cited.

Taxation is limited in its exercise by its own nature, characteristics and purposes. *Matter of Washington St.*, 69 Pa. St. 352, 363; Cooley on Taxation, 3d ed., 183.

As to the fundamental restrictions upon taxation, existing apart from the Fourteenth Amendment or other express constitutional provision see *Loan Association* v. *Topeka*, 20 Wall. 655, 662, 663, holding that taxes cannot be levied for a private purpose.

When elements, fundamental in the very conception of a tax, are absent, the charge is not a tax at all, but a form of confiscation. Judson on Taxation, §§ 340, 341, 392; *Tax Commissioners* v. *Holliday*, 150 Indiana, 216; *Lexington* v. *McQuillan's Heirs*, 8 Dana (Ky.), 513, 517, 518; *Woodbridge* v. *Detroit*, 8 Michigan, 274, 301; *State* v. *Township of Redington*, 36 N. J. L. 66, 69.

Due process of law requires the preservation of all features of taxation necessary to its fundamental justice, or to its consistency with the nature of free institutions. An exact and

full definition of the phrase has never been made, or even attempted, by the courts, but descriptions of it have been given that disclose its larger significance. If not in conflict with any provision of the Constitution we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. *Holden* v. *Hardy*, 169 U. S. 366, 389; *Hurtado* v. *California*, 110 U. S. 516, 535, 546; *Hagar* v. *Reclamation District*, 111 U. S. 701, 707. See also Mr. Webster's argument in *Dartmouth College Case*, 4 Wheat. 518, 581; Cooley on Const. Lim., *355; Johnson, J., in 4 Wheat. 235, 244; Guthrie on Fourteenth Amendment, 66, 67 (and notes); Story on Const., 5th ed., § 1945; Judson on Taxation, §§ 318, 340, 343, 431.

The course of history and long established usage are of large importance in ascertaining what is due process. *Murray* v. *Hoboken Land Co.*, 18 How. 272, 276; *Weimer* v. *Bunbury*, 30 Michigan, 201, 213; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 237.

"Due process of law" does not permit unlimited taxes, without restraint by consideration of the needs of government; or that the taxes of those who live under one government be measured by the expenses of other governments; or persons or property to be taxed for the relief of others from the expenses of governments under which the taxpayers neither reside nor have property; or the amount of a tax to be determined by any other legislature than that of the community to which the taxpayer belongs; or the amount of a tax to be fixed without the taxpayers being accorded the privilege of hearing.

The taxing of property by a State for private use (even with compensation) is not due process of law. *Mo. Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403; Judson on Taxation, §§ 346, 350, 391. The taking of property even for public

use without compensation is not due process. *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 241; *Scott* v. *Toledo*, 36 Fed. Rep. 385; Guthrie on Fourteenth Amendment, 93.

The attempt by a government to tax property beyond its jurisdiction is not due process. *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *D., L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Wells* v. *City of Weston*, 22 Missouri, 384.

Due process requires that the taxpayer be given opportunity for hearing concerning the amount of his tax. *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 535; *D., L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341.

Undue interference with liberty of contract is not due process of law. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. The legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice. *Turpin* v. *Lemon*, 187 U. S. 51, 60.

The Fourteenth Amendment controls the action of all branches of government,—legislative, executive and judicial. *Blake* v. *McClung*, 172 U. S. 239, 260; *Scott* v. *McNeill*, 154 U. S. 34, 45; *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 373; *Ex parte Virginia*, 100 U. S. 339, 346.

Due process of law requires taxes to be laid by a representative legislature,—*i. e.*, by one chosen by the community to which the person or property taxed belongs; which acts in the interest of that community; and which is responsible to the taxpayers.

As said by Chief Justice Marshall: "The only security against the abuse of the power of taxation is found in the structure of government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation." *McCulloch* v. *Maryland*, 4 Wheat. 427.

This language contemplates a representative legislature as fundamental in our plan of government. *Providence Bank* v. *Billings*, 4 Pet. 514, 563. See also *Wilcox* v. *Paddock*, 65

Michigan, 23, 28; *People* v. *Hurlbut*, 24 Michigan, 44; *Board of Park Com'rs* v. *Detroit*, 28 Michigan, 227, 244; *Board of Com'rs* v. *Abbott*, 34 Pac. Rep. (Kan.) 416; *Schultes* v. *Eberly*, 82 Alabama, 242, 246; *Parks* v. *Board of Com'rs*, 61 Fed. Rep. 436; *Harward* v. *St. Clair Drainage Co.*, 51 Illinois, 130, 134; *United States* v. *New Orleans*, 98 U. S. 381, 392; *Thompson* v. *Allen County*, 115 U. S. 550, 555; *Lexington* v. *McQuillan's Heirs*, 8 Dana (Ky.), 513, 517.

The provision for the equal protection of the laws is to be liberally construed to carry out its purposes. *Strauder* v. *West Virginia*, 100 U. S. 303; *Boyd* v. *United States*, 116 U. S. 616; *Gulf &c. R. Co.* v. *Ellis*, 165 U. S. 150.

Equal protection of the laws means the protection of equal laws. The inquiry is not limited to the operation of a single law. The question is whether, under the different and several laws of the State, a protection of rights is afforded to a part of the persons within the State which is denied to others. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

If the probable effect of the provisions of the statutes of the State is to produce the discrimination against persons which the equal protection of the Constitution forbids, taxation by which such discrimination is made is unlawful. *San Francisco National Bank* v. *Dodge*, 197 U. S. 70; *Davenport Bank* v. *Davenport*, 123 U. S. 83; *People* v. *Weaver*, 100 U. S. 539; *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, 101 U. S. 153; *Hills* v. *Exchange Bank*, 105 U. S. 319.

The method for the assessment and collection of taxes provided by the State shall not be inconsistent with natural justice. *Turpin* v. *Lemon*, 187 U. S. 51.

In this manner other taxpayers of the State not subjected to taxation under said Act No. 173 are protected by the principle everywhere recognized as fundamental, viz.: the principle of self-taxation by the legislative action of representatives who are directly responsible to the taxpayers of the district in which the taxes are levied. This is especially the funda-

mental principle of taxation in the State of Michigan. Cases *supra* and Cooley on Taxation, 2d ed., 61, 62, 63, 141, 142, 241, 242; *Metropolitan Police* v. *Board of Auditors*, 68 Michigan, 576; *Attorney General* v. *Detroit Common Council*, 58 Michigan, 213; *State Railroad Tax Cases*, 92 U. S. 575; *Heine* v. *Levee Commissioners*, 19 Wall. 655; *Meriwether* v. *Garrett*, 102 U. S. 472.

The rule that taxes must be for public, and not private, purposes rests upon the same foundation of representative legislation. The people do not tax themselves when a tax is laid by the legislature for a private purpose, because they have not authorized their legislative representatives to act on other than public matters or for other than public purposes.

By Article IV, § 4, the Constitution of the United States guarantees to every State in this Union a republican form of government. Legislation by persons who are not members of the legislature that represents the community subjected to the legislation is not republican government, and a tax laid without the authority of a legislative representative of the community that pays the tax is not due process of law.

Due process of law requires, in judicial proceedings, a court having jurisdiction over the subject matter and also over the person or property to be affected by the judgment. *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

The right of appeal to the courts for relief from action of the legislature which is claimed to violate private rights is requisite to due process of law; and, therefore, a statute which forbids it is unconstitutional. *C., M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418, 456, 457.

As to all persons, natural or artificial, in the State, the following statutory and constitutional provisions apply, but are denied to appellants:

The amount of state tax is determined by the legislature. Constitution, Art. XIV, §§ 1, 14. The amount of the county tax is determined by the board of supervisors and the electors of the county. Constitution, Art. X, § 1; 1 Comp. Laws of

1897, § 2484. The township taxes are determined by the electors of the township and the township board. 1 Comp. Laws, §§ 2269, 2349. The amount of school district taxes is determined by the electors of the district or the school district board. 2 Comp. Laws, §§ 4665, 4674. The amount of city and village taxes is determined by the city and village councils, or the electors of the cities and villages, as provided by their special charters, or the general law for the incorporation of cities and villages. Constitution, Michigan, Art. IV, § 38; Art. XV, § 13; 1 Comp. Laws, §§ 3290–3308 (as to cities); 1 Comp. Laws, §§ 2852–2857, 2873 (as to villages).

The tax levied upon the railroad companies is strictly a state tax, imposed for state purposes, yet the legislature does not determine the amount of the tax, nor is it determined by any legislative action which considers the subject of the tax, nor is it determined by representatives who are responsible for their action to the stockholders of the railroad companies, who are the real payers of the tax.

Municipal corporations are created for the general purposes of government, in which capacity their action is subject to the control of the legislature. They are also granted powers which they exercise for the benefit of their own citizens. The exercise of these powers is discretionary with them, and they are not subject to the control of the legislature. In the exercise of those powers they act in the capacity of private corporations.

It is in the exercise of these powers, and in their character of private corporations, that they provide for the local conveniences for their citizens in furnishing water, light, sewerage, fire protection, public grounds, parks, fountains, adornments, paved streets, water works for private as well as public use, electric light plants for private as well as public lighting, and various other conveniences. Cases *supra* and Cooley on Taxation, 2d ed., 688, 689; *Attorney General* v. *Burrell*, 31 Michigan, 25; *Davock* v. *Moore*, 105 Michigan, 120; *Ill. Trust & Savings Bank* v. *Arkansas City*, 76 Fed. Rep. 271; *People* v. *Coler*,

166 N. Y. 1; *People* v. *Batchellor,* 53 N. Y. 128; *Bailey* v. *Mayor,* 3 Hill, 531; *Safety &c. Co.* v. *Baltimore,* 66 Fed. Rep. 140.

All the various properties acquired by cities, villages and townships for the benefit and enjoyment of their inhabitants are investments, and they are owned by the municipalities in their private character as the property of private corporations. *Mayor* v. *Park Commissioners,* 44 Michigan, 602; *Mt. Hope Cemetery* v. *Boston,* 158 Massachusetts, 509; *Chicago &c. R. R. Co.* v. *Chicago,* 166 U. S. 226.

These so-called taxes are not founded upon, or measured by, the State's actual need of revenue, or a legislative estimate of it. They are the outgrowth of a legislative declaration that a railroad must pay, to the State, as much in proportion to the value of its property as other persons throughout the State pay, on the average, for both state and local purposes (*i. e.,* the expenses not only of the State, but of county, city, town, village and school district organizations), whether that amount of tax be what is needed by the State or not. There is no reasonable, or real, relation between the revenue which comes to the State under this statute, as a result of the amounts of tax levies made by local legislatures for local purposes, and the State's need of revenue. The statute turns the general problem of taxation upside down—by making the apportionment of taxation generally, as between all citizens for all purposes, control the amount of the State's revenue.

The power to tax for state purposes is limited by a fair legislative discretion as to the amount of revenue needed by the State. Otherwise, the legislature can take for the State everything its citizens have,—arbitrarily. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399; *Schultes* v. *Eberly,* 82 Alabama, 242.

Constitutional limitations may be implied as well as express; and their implication may result either from the essential nature of government or from the general plan of the constitution. *Board of Com'rs* v. *Abbott,* 34 Pac. Rep. 416; *State* v. *Barker,*

57 L. R. A. 244, 250; *People* v. *Fire Association*, 52 N. Y. 311; *State* v. *Parker*, 26 Vermont, 365.

It is the right and duty of this court to consider the real tendency of the taxing process prescribed by the statute in hand, with reference to the question whether it establishes a reasonable connection between state tax and the State's need of revenue. *G., C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, 154.

The principles of due process of law in respect to taxation, require that the process shall be pursued in the ordinary mode prescribed by law, be just to the parties affected, be adapted to the end to be attained and, when necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought, and there must be the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hagar* v. *Reclamation District*, 111 U. S. 701; *Davidson* v. *New Orleans*, 96 U. S. 97; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Lent* v. *Tillson*, 140 U. S. 316; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Norwood* v. *Baker*, 172 U. S. 269; *Roller* v. *Holly*, 176 U. S. 398; *Weimer* v. *Bunbury*, 30 Michigan, 201; *French* v. *Barber Asphalt Co.*, 181 U. S. 324; Miller on the Constitution, 666; Cooley on Taxation, 2d ed., 51; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Santa Clara County* v. *So. Pacific R. Co.*, 18 Fed. Rep. 385.

To determine the tax, when it is an ad valorem tax, requires that the legislature state the amount to be raised or the rate of the tax upon the dollar of the valuation. The determination of the amount to be raised, or the rate of taxation on the valuation is the essential, the chief and necessary act in taxation. In the nature of the case the determination of the amount, or the rate, is a legislative act.

Being a necessary act of the legislature it is not in the power of the State in the preservation of the established principles of American law, which constitute the law of the land, to delegate or refer such determination to the action of any other body of officials. It cannot be referred to and made to depend

upon the legislative or discretionary action of the municipalities. *Morton* v. *Comptroller General*, 4 S. Car. 430; *Houghton* v. *Austin*, 47 California, 646; *S. F. & N. P. R. R.* v. *State Board*, 60 California, 12; Constitution of Michigan, Art. XIV, § 14.

It is an essential of just legislation that the legislature act in view of, and determine the needs of the public in respect to, the objects for which moneys are to be raised by taxation, and of the amount necessary to provide for those needs, and also the extent to which it is just to burden the taxpayers against whom the taxes are to be charged. *Midland* v. *Roscommon*, 39 Michigan, 424; *Michigan Land &c. Co.* v. *Township of L'Anse*, 63 Michigan, 700.

It is an axiom of our law that the power to tax is a power to destroy. Where the amount of the tax to be raised, or the rate of taxation, is determined by the legislature itself, the taxpayers who are to be charged with the taxes have a right to, and an opportunity to, be heard by the legislature upon the whole subject of the taxation, including the purpose of the tax, the needs of the public for the promotion of the object for which the taxes are to be imposed, the amount of taxation required for those needs, and the amount which can be properly and justly charged against the taxpayers.

The right to such a hearing is the right of petition to the legislature upon the subject which is pending before the legislature and upon which it is proceeding to act. This right is a part of the law of the land. Cooley on Const. Lim., 7th ed., 497, 498; 2 Story on the Constitution, § 1894; *United States* v. *Cruikshank*, 92 U. S. 542; *Citizens' Bank* v. *Board of Assessors*, 54 Fed. Rep. 73.

The constitution of Michigan grants to the taxpayers the absolute right to a hearing before the legislature upon the measures to be adopted for their taxation. Article XVIII, § 10; *The State Tax-Law Cases*, 54 Michigan, 350.

This court has held that the determination of a district for taxation—that is, what property shall be subject to taxation

—for local purposes, is legislative action, and when, instead of the legislature making that determination, it delegates to a board of commissioners the power to determine the taxing district the taxpayers have a right to a hearing upon that subject before such board. The deprivation of the right to such hearing would be taking property by taxation without due process of law. *Paulsen* v. *Portland*, 149 U. S. 30; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Spencer* v. *Merchant*, 125 U. S. 345; *French* v. *Barber Asphalt Co.*, 181 U. S. 324.

The equal protection of the laws is denied to the railroad companies in that the protection which is extended by § 14, Art. XIV, constitution of Michigan, to all other taxpayers of the State is denied to said railroad companies.

This provision was adopted into the constitution literally from the constitution of New York of 1846.

The interpretation of this provision of the constitution of New York, by the Court of Appeals, is that it is designed for the protection of the taxpayer. It requires that when the legislature imposes a tax the legislature must determine the amount of tax to be raised, and cannot leave that amount to be determined by the legislative action or discretion of any other department of the State. *People* v. *Board of Supervisors*, 52 N. Y. 556. See also *Central R. R. Co.* v. *State Board*, 49 N. J. L. 1, 17; *Muldenberg Co.* v. *Morehead*, 46 S. W. Rep. (Ky.) 484; *Fleming* v. *Dyer*, 47 S. W. Rep. (Ky.) 444; *Dawson* v. *Ward*, 71 Texas, 72, 76; *Wade* v. *State*, 22 Tex. App. 629; *McCabe* v. *Carpenter*, 102 California, 469; *Schultes* v. *Eberly*, 82 Alabama, 242; *Wells* v. *City of Weston*, 22 Missouri, 384; *Wilcox* v. *Paddock*, 65 Michigan, 23, 28, 29; *State* v. *Des Moines*, 103 Iowa, 76; *Marr* v. *Enloe*, 9 Tennessee, 452; *Board* v. *Houston*, 71 Illinois, 318; *Gage* v. *Graham*, 57 Illinois, 144. And for instances of delegation of legislative power, in other fields than taxation. See *King* v. *C. F. Ins. Co.*, 103 N. W. Rep. (Mich.) 616; *Elliott* v. *Detroit*, 121 Michigan, 611; *Bradshaw* v. *Langford*, 73 Maryland, 428; *Dowling* v. *Lancashire Ins. Co.*, 92 Wisconsin, 62; *O'Neil* v. *Ins. Co.*, 166 Pa. St. 77; *State* v.

Bound Brook, 48 Atl. Rep. (N. J.) 1022; *Stevens* v. *Truman*, 127 California, 155; *Jernigan* v. *Madisonville*, 102 Kentucky, 313; *Schaezlein* v. *Cabaniss*, 135 California, 466; *Harmon* v. *State*, 66 Ohio St. 249; *Beasley* v. *Ridout*, 94 Maryland, 641, 658; *State* v. *Rogers*, 73 N. E. Rep. (Ohio) 461.

The power of the legislature, in establishing different methods of taxation for different persons and property, is that of classification, and such power is recognized on all hands; but the extent of the power depends upon the meaning of classification. The right to classify is not the right to act arbitrarily, or to deprive persons of the most fundamental sorts of protection accorded to persons generally. Classification means only the division of persons or properties into different classes on some basis or principle that, from its own nature and from the nature of the persons or properties classified, affords a reasonable and just ground for the different treatment of the different classes. *Gulf, Colorado & S. F. Ry.* v. *Ellis*, 165 U. S. 150.

The basis of classification must be natural, and not arbitrary. *De Brell* v. *Morrissey's Heirs*, 15 S. W. Rep. 87, 95; *S. & N. Alabama R. R.* v. *Morris*, 65 Alabama, 193, 199; *State* v. *Loomis*, 115 Missouri, 307, 314.

The question is distinctly this: Does the State deny to the companies taxed under Act No. 173 the equal protection of the laws, by denying to them the protection of equalization of the assessment of their own property and the property of others by which the rate and amount of their taxation are determined, while it affords to all other taxpayers of the State (corporations and all persons against whom ad valorem taxes are assessed) the protection of the equalization of the assessment of their own property and the property of others, by which the rate and amount of their taxation are determined?

The granting the protection in the one case and denying it in the other is clearly a denial of the equal protection of the laws, and the denial of the protection of equal laws. It is

class legislation. *Railroad and Telephone Companies* v. *Board of Equalizers*, 85 Fed. Rep. 302; *Nashville &c. R. R. Co.* v. *Taylor*, 86 Fed. Rep. 168; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Railroad Tax Cases*, 13 Fed. Rep. 722; *Santa Clara County* v. *So. Pac. R. Co.*, 18 Fed. Rep. 385; *Lake Shore & Michigan So. R. R. Co.* v. *Smith*, 173 U. S. 684; *State* v. *Jones*, 51 Ohio St. 492; *Burrows* v. *Brooks*, 113 Michigan, 307; *Stimson* v. *Muskegon Booming Co.*, 100 Michigan, 347; *Park* v. *Detroit Free Press Co.*, 72 Michigan, 560; *Kuhn* v. *Common Council of Detroit*, 70 Michigan, 534; *Brown* v. *Alabama &c. R. Co.*, 87 Alabama, 370; *Pearson* v. *City of Portland*, 69 Maine, 278; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *In re Yot Sang*, 75 Fed. Rep. 983; *Louisville Trust Co.* v. *Stone*, 107 Fed. Rep. 305 306 (C. C. A.).

Said act denies to the companies the equal protection of the laws in this: That under the general laws of Michigan in the assessment of the personal property of the inhabitants of the State (other than the companies taxed under said act), the credits of such persons are assessed only so far as they exceed the amounts owed by such persons, whereas Act No. 173 requires the assessment and taxation of the credits of said companies at their cash value without any deduction of the indebtedness owed by them. Cases cited under last point and *Russell* v. *Croy*, 164 Missouri, 69; *Detroit Citizens' St. Ry. Co.* v. *Common Council of Detroit*, 125 Michigan, 673; *Standard Ins. Co.* v. *Assessors*, 95 Michigan, 466; *People* v. *Weaver*, 100 U. S. 539; *Supervisors* v. *Stanley*, 105 U. S. 305.

It neglects the legislative history of Michigan. The tax laws of that State have allowed deductions of debts from credits since 1838. See Rev. Stat. 1838, p. 76, title V, ch. 1, § 3; Rev. Stat. 1857, title VIII, ch. 17, § 3; being part of "an act to provide for assessing property at its true value, and for levying and collecting taxes thereon," approved Feb. 14, 1853; Comp. Laws 1871, title VII, ch. 21, § 3; Howell's Statutes (1882), vol. 1, p. 1265; being sec. 2 of "an act to provide

for the assessment of property," approved March 14, 1882; Howell's Statutes (1883–1890), vol. 3, § 1170 a-1; being Act 195 of Public Acts of 1889 (p. 230); Act 200 of Public Acts of 1891, § 2 (p. 280); Act 206 of Public Acts of 1893, § 8; being the first enactment of what is now sec. 3831, subd. 6, of the Comp. Laws of 1897.

This is a legislative interpretation of the constitution for fifty-five years. The people themselves have never moved for a change either of the statutes or of the constitution. And, finally, the judiciary of the State has recognized that rule repeatedly, and never questioned its validity. *First Nat. Bank* v. *Township of St. Joseph*, 46 Michigan, 526, 530; *Beecher* v. *Common Council of Detroit*, 110 Michigan, 456; *Detroit F. & M. I. Co.* v. *Hartz*, 132 Michigan, 518, 520; *Sears* v. *Cottrell*, 5 Michigan, 251, 262; *City of Marquette* v. *M. I. & L. Co.*, 132 Michigan, 130; *Village of Howell* v. *Gordon*, 127 Michigan, 517, 519; *Bears* v. *Grand Rapids*, 129 Michigan, 572, 575; *City of Detroit* v. *Lewis*, 109 Michigan, 155, 159; *Latham* v. *Board of Assessors*, 91 Michigan, 509, 512; *Davenport* v. *Auditor General*, 70 Michigan, 192, 193; *Humphrey* v. *Auditor General*, 70 Michigan, 295; *Attorney General* v. *Supervisors*, 71 Michigan, 16, 22, 26.

This practical construction cannot be disregarded, but must be allowed to control the interpretation to be placed upon the language by this court. *State* v. *Moffett*, 64 Minnesota, 292; *Treasurer of Fayette County* v. *P. & D. Bank*, 47 Ohio St. 503.

Such a rule for deducting debts from credits exists very commonly in the United States; and is deemed important to fair taxation. *Florer* v. *Sheridan*, 137 Indiana, 28; *State* v. *Smith*, 158 Indiana, 543; *Treasurer of Fayette Co.* v. *P. & D. Bank*, 47 Ohio St. 503, 521; *State* v. *Moffett*, 64 Minnesota, 292; *Arosin* v. *L. & N. W. Am. M. Co.*, 83 N. W. Rep. 339; *Pullman State Bank* v. *Mauring*, 51 Pac. Rep. 464; *National Bank of Wellington* v. *Chapman*, 173 U. S. 215.

The taxation under the provisions of the act is not authorized by the power reserved to the State to alter, amend

or repeal the statutes under which the railroad companies were organized. The act applies to the properties which had been previously acquired by the railroad companies and were possessed and owned by them at the time of the adoption of the act.

It is not questioned that in authorizing the formation of corporations and granting to them their operating franchises, the State may impose such conditions in respect to taking by taxation the properties of the corporations thereafter to be acquired by them as the legislature may from time to time deem proper, but the State under said reserved power to alter or amend does not possess the same power of taxation in respect to the property of the corporations which has been acquired by them under charters which were free from such conditions.

As to property so acquired, the corporations are entitled to the same protection of due process of law, and the equal protection of the laws which natural persons have in respect to their property.

There can be no taxation of such property of the corporations under the reserved power of amendment or alteration which does not afford such protection. *Sinking-Fund Cases*, 99 U. S. 700; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *St. Louis &c. R. Co.* v. *Paul*, 173 U. S. 404; *Lake Shore &c. R. Co.* v. *Smith*, 173 U. S. 684; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Detroit* v. *Detroit &c. Plank Road Co.*, 43 Michigan, 140; *People* v. *Lake Shore &c. R. Co.*, 52 Michigan, 277; *Commonwealth* v. *Essex Co.*, 13 Gray, 239; *People* v. *O'Brien*, 111 N. Y. 1.

Mr. Charles A. Blair, *Mr. Roger Irving Wyckes* and *Mr. Loyal E. Knappen*, with whom *Mr. John E. Bird*, Attorney General of the State of Michigan, and *Mr. Charles E. Townsend* were on the brief, for appellee:

The taxing power of the State is one of its highest attributes of sovereignty and is essential to its continued existence. It

is not derived from, but exists in the States independently of, the United States Constitution and may be exercised to an unlimited extent, upon all property, trades, business and avocations carried on within the territorial boundaries of the State except so far as it has been surrendered to the Federal Government, either expressly or by necessary implication. *Union Pacific R. R. Co.* v. *Peniston*, 18 Wall. 5; *McCulloch* v. *State*, 4 Wheat. 316, 428; *Picard* v. *East Tenn. &c. R. R. Co.*, 130 U. S. 641. It is most essential to the State and most extensive in its operation, and where it exists it recognizes no limit. *Weston* v. *Charleston*, 2 Pet. 466; *Providence Bank* v. *Billings*, 4 Pet. 351, 353.

The Fourteenth Amendment is general. It was not designed or intended to limit the taxing powers of the States but for an entirely different purpose, as is indicated by the history of its enactment and the early decisions—the protection of the newly emancipated negro. *Slaughter House Cases*, 16 Wall. 36; *Delaware Railroad Tax*, 18 Wall. 206.

The presumption of constitutionality following taxing statutes is stronger than applies to laws generally and only where a taxing system clearly and palpably violates the fundamental law will it be held invalid. *Bridge Company* v. *Henderson City*, 173 U. S. 592; *King* v. *Mullins*, 171 U. S. 404; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 754; *Florida Central &c. R. R. Co.* v. *Reynolds*, 183 U. S. 479; *Central Pacific R. R. Co.* v. *Evans*, 111 Fed. Rep. 76.

The Fourteenth Amendment to the Federal Constitution was not designed or intended to prevent the State from adjusting its system of taxation in all proper and reasonable ways, nor intended to compel it to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation or the imposition of different rates upon different classes; but permits classification for purposes of taxation, the application of different rules of assessment, valuation and review to different classes and the imposition of different rates thereon; and

it is sufficient that all persons within the same class are treated alike and that there is no discrimination in favor of one as against another of the same class. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Giozza* v. *Tiernan,* 148 U. S. 657, 662; *Adams Express Co.* v. *Ohio,* 165 U. S. 228; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293; *Billings* v. *Illinois,* 188 U. S. 97.

The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. *Merchants & M. Nat. Bank* v. *Pennsylvania,* 167 U. S. 461; *Kentucky Railroad Tax Cases,* 115 U. S. 321; *Home Insurance Co.* v. *New York,* 134 U. S. 594; *Gulf &c. Ry. Co.* v. *Ellis,* 165 U. S. 150; *Clark* v. *Titusville,* 184 U. S. 329; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *New York* v. *Barker,* 179 U. S. 279; *Charlotte &c. R. R. Co.* v. *Gibbes,* 142 U. S. 386; *Travelers' Life Ins. Co.* v. *Connecticut,* 185 U. S. 364; *Kidd* v. *Alabama,* 188 U. S. 730; *Cook* v. *Marshall County,* 196 U. S. 269; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 608, 609; *Field* v. *Barber Asphalt Paving Co.,* 194 U. S. 621, 622.

The limitations upon this power require it to rest upon some difference, bearing a just and reasonable relation to the act in respect to which the classification is proposed, and it is enough that there is no discrimination in favor of one as against another of the same class. *Gulf &c. Ry. Co.* v. *Ellis,* 165 U. S. 155; *Missouri* v. *Lewis,* 101 U. S. 22; *Barbier* v. *Connolly,* 113 U. S. 27; *Duncan* v. *Missouri,* 152 U. S. 377, 382; *Bell's Gap Ry. Co.* v. *Pennsylvania,* 134 U. S. 232; *Home Life Ins. Co.* v. *New York,* 134 U. S. 594; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339.

Different rules apply to, and fix and limit the power of classification in cases of taxation than in other cases. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 562, 563; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Billings* v. *Illinois,* 188 U. S. 102; *Cook* v. *Marshall County,* 196 U. S. 274.

The classification made by Act 173 is based upon such reasonable differences of property, situation, circumstance, or use, as to satisfy the requirements of the Fourteenth Amendment. That the Fourteenth Amendment, as applied to railroad and other public service corporations, permits separate classification of those corporations and their property, for purposes of taxation, must be regarded as placed at rest by the cases, and the laws of the several States have uniformly provided separate and distinct systems and rules of taxation for railroad property, which have been generally sustained. *State Railroad Tax Cases*, 92 U. S. 575; *Kentucky Railroad Tax Cases*, 115 U. S. 321 (81 Kentucky, 492, 512); *Columbus &c. Ry. Co.* v. *Wright*, 151 U. S. 470; *S. C.*, 89 Georgia, 574; *Charlotte R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 421; *S. C.*, 133 Indiana, 625; *Northern Pacific R. R. Co.* v. *Barnes*, 2 N. Dak. 310; *McHenry* v. *Alford*, 168 U. S. 651; *Florida R. R. Co.* v. *Reynolds*, 183 U. S. 480; *Missouri River R. R. Co.* v. *Morris*, 7 Kansas, 210; *State Board of Assessors* v. *Central R. R. Co.*, 48 N. J. L. 146, 278; *Central Iowa Ry. Co.* v. *Board of Supervisors*, 67 Iowa, 199; *City of Dubuque* v. *C. D. & M. R. R. Co.*, 47 Iowa, 200; *Owensboro & N. Ry. Co.* v. *Davies County*, 3 S. W. Rep. (Ky.) 164; *Ames* v. *People*, 56 Pac. Rep. (Col.) 656; *Yazoo & M. V. R. Co.* v. *Adams*, 25 So. Rep. 355; *Louisville & N. R. Co.* v. *Louisville*, 29 S. W. Rep. (Ky.) 865; *St. Louis &c. Ry. Co.* v. *Worthen*, 52 Arkansas, 529; *Chamberlain* v. *Walter*, 60 Fed. Rep. 788; *Sawyer* v. *Dooley*, 21 Nevada, 390, 398; *State* v. *Severance*, 55 Missouri, 378; Elliott on Railroads, § 740 and cases cited; Cooley on Taxation, 3d ed., 72 *et seq.*; Guthrie on the Fourteenth Amendment, 113 and cases cited.

Railroad corporations possess franchises of a character peculiar to themselves and different from those possessed by other corporations as follows: The right of eminent domain; perpetual existence; the use of public property (Comp. Laws 1897, § 6234); the right of succession to franchises of existing corporations is permitted to purchasing corporations (Comp.

Laws 1897, § 6224); power to enforce connections with other companies; the sale value of franchises is recognized by statute and provision is made for their transfer (Comp. Laws 1897, §§ 6328, 6331, 6333, 6339, 6341).

The intangible value attaching to railroad property differs from that attached to property generally: It exists in more permanent character with railroad than other corporations; the railroad corporation's business is, in a sense, monopolistic; railways are peculiarly benefited by the growth of the territory in which they exist; in railway business, economies are made possible by increased density of traffic.

The railway corporation is engaged in rendering a public service in which the State itself might engage and to which it may attach such limitations as it chooses. *Cotting* v. *Goddard*, 183 U. S. 93, 94.

The property of railroad corporations exists as a connected whole in a large number of municipalities, rendering it impossible to reach its actual value through assessment and taxation as other property is assessed and taxed. *Adams Express Co.* v. *Ohio*, 166 U. S. 219; *S. V. R. R. Co.* v. *Supervisors*, 78 Virginia, 279; Rohrer on Railroads, 1499, § 14; *Dubuque* v. *C. D. & M. Ry.*, 47 Iowa, 202; *State Board of Assessors* v. *Central Railroad*, 48 N. J. L. 322. See briefs in *California & Pacific R. R. Co.*, 127 U. S. 1.

As a public service corporation, the railroad has received public aid to a large extent.

Perpetual existence is denied to other corporations. Mich. Const. § 10, Art. XIV.

The right to alter, amend, or repeal is reserved in the charters under which Michigan railroad corporations do business; this permits different treatment for taxation purposes, as long as fundamental rights are not interfered with. *St. Louis, I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 408, 409.

The usage and practice in Michigan has always been to tax railroad corporations by a distinct rule or system. Such requirements as proceed within reasonable limits and general

usage are within the discretion of the legislature. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 94; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 233; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 294.

The same principles which permit the taxation of railroad corporations by a specific system allow its separate treatment for the purposes of an ad valorem system. The specific tax has been uniformly sustained. *Delaware Railway Tax,* 18 Wall. 206, 231; *McHenry* v. *Alvord,* 168 U. S. 651; *Northern Pacific R. R. Co.* v. *Barnes,* 2 N. Dak. 310, 395.

The rates of railroad companies are, and have always been, regulated by the State. Const., Art. XIXa, § 1; subd. Ninth, § 9, Art. II, Mich. General Railroad Law, § 6234, Comp. Laws 1897.

The differences above pointed out between the property, business, privileges and franchises possessed by railroad corporations from those possessed by other property owners and individuals, are such as to justify their separate classification for taxation or other purposes. The fact of difference appearing, the question of the propriety of the classification is one of policy for the legislature.

Numerous elements exist in the classification made, which justify the legislature in making it: No claim is made in the pleadings or the lower court that property other than railroad property was possessed by complainant or included in its assessment. The purpose of Act 173 is to subject to its provisions, and to the system of taxation which it invokes, only property engaged in railroad business. Secs. 5, 9, Act 173 of 1901. Section 5 of the act construed by the rule that general, following special, words are to be confined to things *ejusdem generis* is limited to railroad property. *American Transportation Co.* v. *Moore,* 5 Michigan, 368; *S. C.,* 24 How. 1; *McDade* v. *People,* 29 Michigan, 50; *Brooks* v. *Cook,* 44 Michigan, 617.

The system of taxation under Act 173 was intended to cover the same property previously taxed specifically. This was

property engaged in railroad business. Secs. 6277, 3830, cl. 8, Comp. Laws 1897, and § 11, Act 235 of 1903.

Classification of railroad property, for the application of different systems of taxation, based on the nature of its use, is proper. *Northern Pac. R. R. Co.* v. *Walker*, 47 Fed. Rep. 685; *McHenry* v. *Alford*, 168 U. S. 668; *Stearns* v. *Minnesota*, 179 U. S. 223.

If property was possessed by complainant, and included in its assessment, which was not engaged in its railroad business, it was its duty to disclose the fact. *Adams Express Co.* v. *Ohio*, 166 U. S. 223.

The railroad property is made a separate class for the purpose of the imposition of a separate and distinct tax. This warrants its being made the subject of a separate system of taxation. *Travelers' Life Ins. Co.* v. *Connecticut*, 185 U. S. 364. Numerous statutes, limited in operation to railroad corporations, have been sustained. *Minneapolis &c. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Tullis* v. *Lake Erie & Western R. R. Co.*, 175 U. S. 348; *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512; *Louisville & N. Ry. Co.* v. *Tenn. Ry. Com.*, 19 Fed. Rep. 679. See also *Commonwealth* v. *Sharon Coal Co.*, 164 Pa. St. 284, 304; *New York* v. *Barker*, 179 U. S. 279. Railroad companies have always been regarded as special subjects of classification for other purposes than taxation, notwithstanding the more stringent rule of classification for other purposes. *Minneapolis Ry.* v. *Beckwith*, 129 U. S. 26; *Missouri Pacific Ry.* v. *Mackey*, 127 U. S. 205; *Minn. & St. L. Ry.* v. *Herrick*, 127 U. S. 210; *Atchison, T. & S. F. R. R.* v. *Matthews*, 174 U. S. 96; *St. Louis Ry.* v. *Paul*, 173 U. S. 404; *Chicago, B. & Q. Ry.* v. *Chicago*, 166 U. S. 258; *McCandless* v. *Richmond, W. D. R. R.*, 18 L. R. A. 440; *Schoolcraft* v. *Louisville N. R. Co.*, 92 Kentucky, 233; *Georgia R. R. & Banking Co.* v. *Miller*, 90 Georgia, 571; *Minn. & St. L. R. Co.* v. *Emmons*, 149 U. S. 364; *New York & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556; *Clark* v. *Russell*, 97 Fed. Rep. 900 (C. C. A); *Gulf &c. R. R. Co.* v. *Ellis*, 165 U. S. 150; *Missouri, Kansas &*

Texas Ry. v. *May*, 194 U. S. 269; *Central Pacific Ry.* v. *Evans*, 111 Fed. Rep. 76.

Should the property of specific companies, or of specific character, have been classed with that of complainant to render the statute constitutional? The property of sleeping-car companies and the business in which they are engaged are different from those of the railroad company. They do business under different circumstances and conditions and are properly taxed by different systems. *Pacific Express Co.* v. *Seibert*, 44 Fed. Rep. 310, 316; *S. C.*, 142 U. S. 354; *West. Un. Tel. Co.* v. *Indiana*, 165 U. S. 304; *Pullman Co.* v. *Gaines*, 3 Tenn. Ch. 587; *Robbins* v. *Taxing District*, 81 Tennessee, 309; *Gibson County* v. *Pullman Co.*, 42 Fed. Rep. 574. But see *Car Company* v. *Texas*, 64 Texas, 274.

The business of an institution or its property is to be classified for taxation with reference to its entire business, rather than by a comparison with some other business or property which is engaged, in part in, or, in part of, the same business. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 95; *Cook* v. *Marshall County*, 196 U. S. 274, 275.

The property of interurban street railways forms a different class for taxation purposes than that of the railroad corporation engaged in its railroad business as the use of the property belonging to the two institutions is different. See *Erb* v. *Morasch*, 177 U. S. 584; *Savannah T. & I. Ry.* v. *Mayor*, 198 U. S. 392. Classification distinguishing street from steam railroads has been held valid as based on reasonable differences. *Kentucky Railroad Tax Cases*, 115 U. S. 337. See also *Jersey City* v. *B. Ry. Co.*, 65 N. J. L. 501; *Camden & A. R. Co.* v. *Atlantic City*, 58 N. J. L. 316; *S. C.*, aff'd 41 Atl. Rep. 1116; *Lookout Incline & L. E. R. R.* v. *King*, 59 S. W. Rep. 805; *Cedar Rapids & M. C. Ry.* v. *Cedar Rapids*, 106 Iowa, 476.

Questions of whether, in the construction of particular statutes, street railroads are included within the term "railroads" are considered in many cases which indicate that it has never been considered essential to classify the two to-

gether and that they are in fact different in character. *Mass. Loan & Trust Co.* v. *Hamilton*, 11 Am. & Eng. R. R. Cases (N. S.), 771; *S. C.*, 88 Fed. Rep. 588; *Fidelity Loan & Trust Co.* v. *Douglas*, 104 Iowa, 536; *Cordray* v. *Savannah Ry.*, 30 Am. & Eng. R. R. Cases (N. S.), 286; *Savannah Ry. Co.* v. *Williams*, 30 Am. & Eng. R. R. Cases (N. S.), 279; *State* v. *Duluth Gas & Water Co.*, 76 Minnesota, 76; *Riley* v. *Galveston City Ry. Co.*, 13 Texas Civ. App. 247; *Louisville & P. R. R. Co.* v. *Louisville City Ry. Co.*, 2 Duv. (Ky.) 175; *Front St. Cable Co.* v. *Johnson*, 47 Am. & Eng. R. R. Cases (N. S.), 287.

Street railways have, in Michigan, always been subjected to separate rules of taxation from steam railroads; the street railway paying its fair proportion of the public burden; the steam railroad enjoying partial exemption through the payment of specific taxes. This, in a new taxing system, justifies different classification of these institutions. *Railroad Co.* v. *Harris*, 99 Tennessee, 706, 707; *Kidd* v. *Alabama*, 188 U. S. 732.

The result of complainant's contention that steam and interurban street railways are to be classified together, is that all steam railroads and street railways must be similarly taxed. The interurban railway may possess elements of both the steam railroad and the street railway. It is a question of legislative judgment to determine with which it will be classed.

Unincorporated railroads in Michigan are not engaged in the same business as is the property of complainant. The only unincorporated railroads which exist here, operate principally in carrying on a private business, such as a lumbering business, and operate the railroad owned only as incident to their principal business and carry freight for other persons, if at all, under conditions dissimilar to those existing and practiced with reference to, or by, the incorporated railroads engaged in the business of common carriers. The entire value of the property of the unincorporated roads is less than $150,000 and their entire annual business for persons other than the owner would be limited to less than $2,000. See

Mercantile Bank v. *New York*, 121 U. S. 161, 162. The fact that one class is engaged principally in carrying on business for itself, while the other is engaged almost exclusively in carrying on a general business for others is, of itself, a basis of distinct classification. *Dayton* v. *Coal & Iron Co.*, 99 Tennessee, 578, 581; *Billings* v. *Illinois*, 188 U. S. 102.

That railroad property has always enjoyed a partial exemption from taxation, the present change in the taxing system being for the purpose of bringing it to the same basis for taxation purposes as other property, justifies its separate classification from property which has not enjoyed this partial exemption. *Railroad Co.* v. *Harris*, 99 Tennessee, 706, 707; *Kidd* v. *Alabama*, 188 U. S. 732.

If necessary to classify railroads with sleeping-car companies, interurban street railways and unincorporated railroads for taxation purposes it would be necessary to classify them together for the purpose of police regulations.

Classification among railroads, based upon differences in the amount of gross earnings, in the territory in which they operate, in the length or amount or mileage, etc., has always been permitted. *Commissioners of Railroads* v. *Wabash R. R. Co.*, 123 Michigan, 669; *San Francisco & N. P. Ry. Co.* v. *Board of Equalization*, 60 California, 12; *Chicago, B. & Q.* v. *Iowa*, 94 U. S. 155; *Wellman* v. *Chicago & G. T. Ry. Co.*, 83 Michigan, 592, 599; *Dow* v. *Biedelman*, 125 U. S. 680; *S. C.*, 49 Arkansas, 294, 335; *Tullis* v. *Lake Erie & Western Ry. Co.*, 175 U. S. 351; *St. Louis & I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 406.

Instead of being injured by the separate classification of these institutions, the complainant, has, in fact, been materially benefited. The classification can only be complained of if complainant has been injured. *Cummings* v. *National Bank*, 101 U. S. 160; *Clark* v. *Kansas City*, 176 U. S. 118; *Supervisors* v. *Stanley*, 105 U. S. 305. The differences between the system applied to complainant's property and these other institutions is rather of form than substance, and

of such character that complainant has waived its right to complain through incorporation under a law reserving the right to alter, amend and repeal. *St. Louis & I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 406; *Leep* v. *Railway Co.*, 58 Arkansas, 407.

The Fourteenth Amendment permits exemptions. The legislature could have exempted the property of these other institutions absolutely, while taxing that of complainant. The principles permitting this, permit also its taxation at different rates and according to different systems. *Florida Central &c. R. R. Co.* v. *Reynolds*, 183 U. S. 480; *Missouri* v. *Dockery*, 191 U. S. 170, 171; *Billings* v. *Illinois*, 188 U. S. 97; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Cook* v. *Marshall County*, 196 U. S. 274.

The Fourteenth Amendment is not violated in permitting the deduction of debts from credits to property owners generally but not permitting the deduction under Act 173. If the classification made by Act 173 is proper, different rules of valuation, assessment and review applying to, and the imposition of different rates of taxation upon, the several classes is permissible and the deduction of debts from credits, in one but not in another class, is proper. *Travelers' Life Ins. Co.* v. *Connecticut*, 185 U. S. 364. Act 173 does not tax the property of the railroad corporation simply because of railroad ownership but because it is engaged in a particular use in the carrying on of a particular business.

Railroad corporations in Michigan are not expressly permitted to own property not engaged in railroad business.

Railroad credits are railroad property and the nature of their use affects them as fully for taxation purposes as does the use of other property affect it. *Detroit, Grand Rapids & Western R. R. Co.* v. *Railroad Com'rs*, 119 Michigan, 132; *Chamberlain* v. *Walter*, 60 Fed. Rep. 788, 793; *Franklin County* v. *Nashville &c. Ry. Co.*, 12 Lea (Tenn.), 521, 537; *Adams Express Co.* v. *Ohio*, 166 U. S. 185; *McHenry* v. *Alford*, 168

U. S. 651, 656. The only credits shown by the record to be possessed by railroad corporations are those arising in the railroad business; presumptively all the property of a corporation is engaged in its business. *Adams Express Co.* v. *Ohio*, 166 U. S. 223; *S. C.*, 165 U. S. 227.

Act 173 makes no specific requirement of the taxation of credits without deduction for debts; if deduction be necessary to render the statute constitutional the statute must be construed in connection with the constitutional requirements as permitting the deduction. *First Nat. Bank* v. *St. Joseph*, 46 Michigan, 529.

The state board of assessors in making this assessment did not include credits. This, taken as a contemporaneous construction, is entitled to consideration. *Attorney General* v. *Glaser*, 102 Michigan, 405.

If the act could be construed as subjecting credits of the corporation, taxed thereunder, to taxation without deduction for indebtedness, and, so construed, invades rights of complainant, such provision could be eliminated without disturbing the statute. *Supervisors* v. *Stanley*, 105 U. S. 305; *Evansville Bank* v. *Britton*, 105 U. S. 322; *Hill* v. *Exchange Bank*, 105 U. S. 319, 322; *Insurance Co.* v. *Board of Assessors*, 95 Michigan, 468; *State* v. *Smiley*, 65 Kansas, 265; *Pullman State Bank* v. *Manring*, 18 Washington, 255; *State* v. *Duluth Gas & Water Co.*, 78 N. W. Rep. (Minn.) 1032.

Complainant made no claim at the time of assessment or on review that it possessed, or that there was included in assessment, credits representing investments apart from the railroad business, nor is there any proof that it possessed such property. It made no complaint of the inclusion of its credits without deduction for debts owed by it, and made no application to the board of review for a deduction on account of indebtedness. It is not open to it now, to claim an unwarranted inclusion of credits. *First Nat. Bank* v. *St. Joseph*, 46 Michigan, 526; *Central Pacific Ry. Co.* v. *California*, 162 U. S. 128; *Pittsburgh &c.* v. *Backus*, 154 U. S. 421; *Town-*

ship of Caledonia v. *Rose*, 94 Michigan, 216; *State* v. *Clark*, 79 N. W. Rep. (Minn.) 829; *Stanley* v. *Supervisors of Albany*, 121 U. S. 535; *Hepburn* v. *School Directors*, 23 Wall. 480. The deduction of debts from credits is nothing more or less than an exemption. It does not amount to a rule of valuation. The propriety of permitting a deduction of debts from credits to one and not to another class, and the effect of the resulting discrimination, has never, in an applicable case, been passed upon by this court. Mr. Justice Field, sitting in circuit in California, did pass upon a very similar proposition in the cases of *San Mateo County* v. *Southern Pacific*, 13 Fed. Rep. 722; *Santa Clara County* v. *Southern Pacific*, 18 Fed. Rep. 385. These cases differ from that at bar. Here the deduction of debts from credits amounts simply to an exemption to one class which may not be permitted to another. Where the classes are properly formed, it is permissible to give exemptions to one not given to another class. The Michigan system is limited to taxing, by a special system, the property of railroad corporations engaged in their separate and peculiar business. In the California cases the effect was to cause the railroad corporation to bear the burden of taxation of the mortgagees or bondholders. The decisions of Mr. Justice Field are not in accord with the later decisions of this court which have made clear the character and extent of the application of the Fourteenth Amendment in matters of taxation.

Mr. Justice Field's decisions have never been followed in California. The constitutional provision, which he declared unconstitutional, is still followed, and taxes imposed in accordance therewith are paid without protest. *Central Pacific R. R. Co.* v. *California*, 162 U. S. 91, 117. The chronological history of the decisions of Mr. Justice Field, in the *San Mateo* and *Santa Clara County* cases in connection with the *Albany Bank* cases, shows that this court has expressly refused to recognize the decisions of Mr. Justice Field, in opposition to the rule declared in the *Albany Bank* cases. *Supervisors* v.

Stanley, 105 U. S. 305; *Hills* v. *Exchange Bank*, 105 U. S. 319, 322; *Evansville Bank* v. *Britton*, 105 U. S. 322; *Supervisors* v. *Stanley*, 121 U. S. 535.

If it is not permissible to grant deduction of debts from credits to one class, unless it is granted to all classes, the result is not the unconstitutionality of Act 173, but rather of the provision of the general tax law, permitting deduction from credits only, and not permitting similar deduction from other personal property. This invalidity might result under the provision of the state constitution requiring uniformity, the provision requiring assessments at cash value and the Fourteenth Amendment. State statutes permitting deduction of debts from credits, not permitting the deduction from other personalty, have been held invalid. *In re Construction of Revenue Law*, 48 N. W. Rep. (S. Dak.) 813; *Citizens St. Ry. Co.* v. *Common Council*, 125 Michigan, 694; *Exchange Bank* v. *Himes*, 3 Ohio St. 1; *San Mateo Co.* v. *So. Pac. R. R. Co.*, 13 Fed. Rep. 722; *Santa Clara Co.* v. *So. Pac. R. R. Co.*, 18 Fed. Rep. 385; *State* v. *Duluth Gas & Water Co.*, 78 N. W. Rep. (Minn.) 1032; *Jacksonville* v. *McConnel*, 12 Illinois, 138; *People's Loan Association* v. *Keith*, 153 Illinois, 609; *People* v. *McCreery*, 34 California, 432; *People* v. *Whortenby*, 38 California, 461; but see *contra*, *State* v. *Smith*, 63 N. E. Rep. (Ind.) 25; *S. C.*, 64 N. E. Rep. (Ind.) 18, rehearing; *State* v. *Moffett*, 64 Minnesota, 292; *Fayette Co.* v. *Bank*, 10 L. R. A. 196; *Florer* v. *Sheridan*, 137 Indiana, 28; *Central Pac. R. R. Co.* v. *Board of Equalization*, 60 California, 35.

The objection that the rate is dependent upon the action of local assessing officers within whose jurisdiction complainant has no property, before whom it has no right to be heard and against whose acts, if illegal, it has no redress, is based upon a false premise that the local officers fix and determine the rate. This is not the fact. The rate is fixed by the legislature in carrying into effect the constitutional provision. The local officers do no act which affects directly the rate to be applied to complainant. The rate varies from year to

year, with the varying of the average tax rate throughout the State, and when the tax rate in the several municipalities has become a fact of record, this rate is averaged and the result applied in the assessment of the property of complainant and similar companies.

The legislature by statute, and the people by constitutional provision, have the right to impose any tax rate they see fit. The rate imposed, the reasons for its imposition, and the basis of its measurement, are all matters of policy which do not concern the courts and which are within the exclusive jurisdiction of the legislature and the people. *Spencer* v. *Merchant*, 125 U. S. 345; *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *Providence Bank* v. *Billings*, 4 Pet. 563; *Wharton* v. *School District*, 42 Pa. St. 358; Cooley on Taxation, 2d ed., 343; Guthrie on the Fourteenth Amendment, 95 *et seq.*

The validity of the tax can, in no way, be dependent upon the mode the State may see fit to adopt in fixing the amount for any year. *Home Life Ins. Co.* v. *New York*, 134 U. S. 594, 600; *Maine* v. *Grand Trunk*, 142 U. S. 217, 228; *Wis. & Mich. Ry. Co.* v. *Powers*, 191 U. S. 387; *Snyder* v. *Bettman*, 190 U. S. 254; *Plummer* v. *Coler*, 178 U. S. 115; *Cumberland & Penn. R. R. Co.* v. *State*, 92 Maryland, 668, 690; *Commissioner of Railroads* v. *Wabash R. R. Co.*, 126 Michigan, 115; *Legal Tender Cases*, 12 Wall. 561; *State* v. *Terre Haute*, 130 Indiana, 443; *Society for Savings* v. *Ciote*, 6 Wall. 594, 608; *State* v. *Haworth*, 122 Indiana, 466, 467.

Complainant is not without right to appear before the local reviewing board and be heard upon questions affecting its interests. Michigan Comp. Laws, 1897, §§ 3852, 3853. The authority of a property owner to object upon review to irregularity of assessments, is not limited to those of his own property. *Avery* v. *East Saginaw*, 44 Michigan, 590; *Dundee Mortgage Co.* v. *Charlton*, 32 Fed. Rep. 192, 194; *State* v. *Dodge Co.*, 20 Nebraska, 600; *St. Louis Bridge Co.* v. *People*, 128 Illinois, 428; *Detroit Common Council* v. *Detroit Board of Assessors*, 91 Michigan, 88. The appearance to correct assessments of

the general property, is not required to be before the local officers, but might be before the tax commissioners, who have supervision of all the tax rolls of the State. Act 154 of 1899, §§ 152, 153.

The average rate system is not invalid as compelling payment of taxes by complainant based on expenditures of local governments, whose benefits it does not share, while other property owners pay taxes based on expenditures of municipalities in which their property is located.

The plenary authority of the legislature to use any basis of measurement it sees fit, in fixing the tax rate, is controlling here. The railroad corporations are taxed for a different purpose than property generally. The tax imposed is a distinct and particular state tax. *Pingree* v. *Auditor General,* 120 Michigan, 102.

Only a certain amount each year is required to maintain the State and its municipalities. The portion of this burden paid by one class, is not borne by another and the average rate system operates to equalize the burden among the classes. The complainant and all other railroad companies benefit particularly from disbursements made in the local municipalities for municipal improvements and their tax rate is very properly proportioned to that borne in the local municipalities.

The fact that the burdens of taxation as compared with the benefits, are unequally shared, does not invalidate the taxes. If property receives any benefit, from a disbursement, however small, it can be made to share equally in the taxation, and this, though its property is not in the municipality making the disbursement for which the tax is levied, and though some other property has been more directly benefited. *Foster* v. *Pryor,* 189 U. S. 325, 331; *Wagoner* v. *Evans,* 170 U. S. 592; *Thomas* v. *Gay,* 169 U. S. 264; *Kelly* v. *Pittsburgh,* 104 U. S. 78. The State has determined that the railroad corporations receive protection and benefits from its laws equal in amount to the expenditures and taxes of the several municipalities

for state, county, township, school and municipal purposes and equal to that received by other property throughout the State. This is conclusive upon this court. *French* v. *Barber Asphalt Co.*, 181 U. S. 341, 344; *Parsons* v. *District of Columbia*, 170 U. S. 45; *Chadwick* v. *Kelly*, 187 U. S. 544.

The complainant is not denied the right of hearing on the rate of taxation, which is accorded to others. The function of the board of assessors in determining the tax rate, was purely ministerial, for the purpose of reducing to a certainty the rate fixed in the constitution and statutes. *Board of Education* v. *State Board of Assessors*, 133 Michigan, 116. In the performance of ministerial functions, there is no necessity for hearing, as a hearing could not affect the result. That result must, in all instances, be the same, where the method pointed out by the statute is carried out. *Hagar* v. *Reclamation District*, 111 U. S. 708, 709; *Emery* v. *Keokuk*, 72 Iowa, 704; *Gillette* v. *Denver*, 21 Fed. Rep. 824; *Reclamation District* v. *Phillips*, 108 California, 314; *Hoge* v. *Muscatine County*, 196 U. S. 280. The legislature designated the class and the rate of taxation it shall bear; there is no apportionment among the members of the class and no opportunity of hearing upon the rate is required to be given; full hearing has been accorded upon the assessments. *Spencer* v. *Merchant*, 125 U. S. 353, 354; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 174; *Walston* v. *Nevin*, 128 U. S. 582; *Paulsen* v. *Portland*, 149 U. S. 39, 40; *Nottage* v. *Portland*, 35 Oregon, 553, 554; Guthrie on the Fourteenth Amendment, 96. If the state board of assessors, in reaching the rate, pursues a wrong method or assumes an excess of authority, the property owner affected by such erroneous procurement of the rate is entitled to redress his or its grievances in the courts. This satisfies all constitutional requirements. *McMillen* v. *Anderson*, 95 U. S. 37; *Glidden* v. *Harrington*, 189 U. S. 259, 260.

The system, under Act 173, is capable of subjecting both classes to equality of taxation as fully as any that could be devised. Inequality, resulting from a system reasonably de-

signed to secure equality, is without redress. *Travelers' Life Ins. Co.* v. *Connecticut*, 185 U. S. 364, 371; *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 504; *State Railroad Tax Cases*, 92 U. S. 575, 612; *Merchants' & Manufacturers Bank* v. *Pennsylvania*, 167 U. S. 461; *Atchison, T. & S. F. R. R.* v. *Matthews*, 174 U. S. 96.

If the act makes a valid classification in selecting the railroad and other property subject thereto, for the purpose of applying to it a different rule of taxation than is applied to other property, there is no requirement that it impose the same rate on the property of both classes. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Clark* v. *Titusville*, 184 U. S. 329; *Bell's Gap &c. R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Home Life Ins. Co.* v. *New York*, 134 U. S. 594; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351; Brannon on the Fourteenth Amendment, 340, 352; Guthrie on the Fourteenth Amendment, 128, 130, 131. If, in the administration of the law, any inequality results, that defect of administration does not invalidate the act itself; it is only where officers charged with the administration of the law are moved by corrupt motives, that courts give relief from illegal assessments. *Cummings* v. *National Bank*, 101 U. S. 153, 161; *Central Railroad Co.* v. *State Board of Assessors*, 48 N. J. L. 1, 7; *Dundee Mortgage Co.* v. *School Dist.*, 21 Fed. Rep. 151, 155, 156; *Wagoner* v. *Loomis*, 37 Ohio St. 571, 578, 580; *Taylor* v. *Louisville & N. R. Co.*, 88 Fed. Rep. 350; *Muskegon* v. *Boyce*, 123 Michigan, 535.

The neglect to provide for equalization of the assessments of the property taxed under Act 173, in the manner given to other property, does not violate the Fourteenth Amendment.

The classification made by Act 173 is proper and the difference in the rule of equalization applied to different classes is no greater than applied and sustained in many cases. *State Railroad Tax Cases*, 92 U. S. 575; *Columbus R. R. Co.* v. *Wright*, 151 U. S. 470; *Pitts., C. C. & St. L. R. R. Co.* v. *Backus*, 154

U. S. 421; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Florida* v. *Reynolds*, 183 U. S. 480; *Chamberlain* v. *Walter*, 60 Fed. Rep. 788; *Louisville & Nashville R. Co.* v. *Louisville*, 29 S. W. Rep. (Ky.) 865; *Charlotte R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Northern Pacific R. Co.* v. *Barnes*, 2 N. Dak. 310, 395–397; *McHenry* v. *Alford*, 168 U. S. 651; *Central Iowa Railroad Co.* v. *Supervisors*, 67 Iowa, 199; *St. Louis &c. Railroad Co.* v. *Wrothen*, 52 Arkansas, 529; *New York* v. *Barker*, 179 U. S. 286.

The different purposes for which, and methods by which, taxation of the different classes is had, justifies different treatment in regard to equalization.

There is no occasion for equalization of the character accorded in Michigan between property taxed under Act 173 and that taxed generally. The equalization is not for the purpose of affecting values, but to equitably distribute the taxes simultaneously spread. No taxes are spread simultaneously upon the railroad and general property. Equalization in Michigan does not deal with under-valuation. This condition is corrected by reviews, in which railroad property fully participates. The men constituting the state board of assessors have supervision of all the assessments of the State with the authority to bring them to cash value; this dispenses with all necessity for equalization.

Equalization, so far as it affects individual rights and interests, is as fully given to railroads as to other property. It is only a matter of right in cases of fraudulent under-valuation; there the courts furnish it.

The Fourteenth Amendment does not require a legislative determination of the needs of a particular year as a prerequisite to the validity of a tax; nor does the state constitution require it.

Taxation of railway companies by the average rate is not novel or confined to Michigan.

Such systems are in force in New Hampshire, Massachusetts, Missouri and Wisconsin.

It is unnecessary for this act to state the tax or its object. The tax is in reality fixed in the constitution itself. The constitutional provision, requiring the statement of the tax and its object applies only to taxes recurring annually and those imposed generally upon the entire property of the State. *Matter of McPherson*, 104 N. Y. 306, 318; *People* v. *Fire Assn. of Philadelphia*, 92 N. Y. 311, 327; *Jones* v. *Chamberlain*, 109 N. Y. 100; *Ford's Petition*, 6 Lans. (N. Y.) 97; *Guest* v. *Brooklyn*, 8 Hun, 97. The requirement that a law imposing a tax shall state its object does not apply where the constitution fixes the object. *Walcott* v. *People*, 17 Michigan, 68; *Union Trust Co.* v. *Wayne Probate Judge*, 125 Michigan, 487; *Pingree* v. *Auditor General*, 120 Michigan, 108, 109.

The constitutional provision and statute do not deprive of property without due process of law. As applied to matters of taxation, it has been uniformly held that any system, which gives to the party any means of questioning the validity or amount of the tax at some stage of the proceeding, either before it is determined and fixed, or to contest subsequent proceedings for collection, is due process. Brannon on Fourteenth Amendment, 349, 350, 351; *State Railroad Tax Cases*, 92 U. S. 575, 610; *McMillen* v. *Anderson*, 95 U. S. 37; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Winona R. R.* v. *Minnesota*, 159 U. S. 537; *Pittsburgh, C. C. & St. L. Ry.* v. *Board of Public Works*, 172 U. S. 45; *Weyerhaueser* v. *Minnesota*, 176 U. S. 556, 557; *Voigt* v. *Detroit*, 184 U. S. 122; *King* v. *Portland City*, 184 U. S. 69, 70; *Turpin* v. *Lemon*, 187 U. S. 58; *Glidden* v. *Harrington*, 189 U. S. 259, 260; *Leigh* v. *Green*, 193 U. S. 88; *Cass Farm Company* v. *Detroit*, 181 U. S. 396; *French* v. *Barber Asphalt Co.*, 181 U. S. 324; *Tonawanda* v. *Lyon*, 181 U. S. 389; *Detroit* v. *Parker*, 181 U. S. 399.

The statute gives the necessary opportunity for and notice of hearing. The corporations taxed are permitted to make report of the character, description and value of their property and after assessments based upon such reports, review is had, at which every person or company interested is entitled to be

heard; the statute fixing the time and place at which this review shall take place.

The premise assumed by complainant—that its taxes are not imposed by a representative legislature—is erroneous. The rate is fixed by the constitution and complainant has had full representation. The right of suffrage is not essential to the validity of taxing statutes. Cooley on Taxation, 3d ed., 96; *Thomas* v. *Gay*, 169 U. S. 264, 275; *Wheeler* v. *Wall*, 6 Allen (Mass.), 558; *Smith* v. *Macon*, 20 Arkansas, 17.

The guaranty, to every State, of a republican form of government, was not a guaranty of any rigidly fixed form of government, but of one similar to that existing in the several States at the time of the adoption of the Constitution. Story on Constitution, 5th ed., § 1841; Cooley, Const. Lim., 7th ed., 238; *Minor* v. *Happersett*, 21 Wall. 162, 175. The guaranty was not intended to guard individual rights and interests but was to the States, as States. *Documentary History*, Const. of U. S., pp. 19, 64, 108, 123, 370, 371, 322, 456, 651, 652, 732; Cooley, Const. Lim., 7th ed., 45; *Kadderly* v. *Portland*, 74 Pac. Rep. 710, 719; Story on Constitution, 5th ed., § 1815; Tucker on Constitution, 638. Questions of whether a government exists or is republican in form are not properly presented to the judiciary. The nature of the thing attempted to be secured, the means, methods and action and judgment for securing it are political in character, to be determined by Congress and not the courts. *Luther* v. *Borden*, 7 How. 39, 42, 47, 57; *White* v. *Hart*, 13 Wall. 649, 652; Tucker on Constitution, 637, 638; Story on Constitution (Cooley's note), 5th ed., 593; Cooley, Const. Lim., 7th ed., 237, 238.

No hearing on the rate of taxation is essential, as the rate is fixed in the constitution and by the legislature in the exercise of governmental powers. *Spencer* v. *Merchant*, 125 U. S. 345; *Hagar* v. *Reclamation District*, 111 U. S. 701; *French* v. *Barber Asphalt Co.*, 181 U. S. 341, 344; *Williams* v. *Eggleston*, 170 U. S. 311; *Parsons* v. *District of Columbia*, 170 U. S. 45, 50;

Paulsen v. *Portland*, 149 U. S. 39, 40; Judson on Taxation, § 377.

Complainant has not averred or shown any injury from the application of this method. As a prerequisite to injunction to restrain the collection of taxes, it must make clear that it ought not, in equity, to pay taxes from which it asks relief. *Mercantile National Bank* v. *Hubbard*, 98 Fed. Rep. 465, 469; *Musselman* v. *Logansport*, 29 Indiana, 533; *Cowell* v. *Doub*, 12 California, 273; *Anderson* v. *City of Mayfield*, 93 Kentucky, 230, 237; *Streight* v. *Durham*, 10 Oklahoma, 361, 373; *Dundy* v. *Richardson Co. Comrs.*, 8 Nebraska, 508, 519; *South Platte Land Co.* v. *Crete*, 11 Nebraska, 344, 347; *Jones* v. *Summer*, 27 Indiana, 511; *Porter* v. *R. R. I. & St. L. R. Co.*, 76 Illinois, 596; *Conway* v. *Younkin*, 28 Iowa, 295; *Warden* v. *Supervisors*, 14 Wisconsin, 618; *Miltimore* v. *Supervisors*, 15 Wisconsin, 10; Cooley on Taxation, 3d ed., 1443.

Interstate commerce is not interfered with. While the States have no authority to interfere with transportation between the States, to impose any restraint upon the right, privilege, occupation or business of engaging therein or to burden the receipts therefrom, the rule is now placed beyond question, that they have full authority to tax property used in, and instrumentalities of, interstate commerce, regardless of such use, or that the large portion of the value upon which tax is laid originates in such interstate use.

This right has been sustained as to railroads: *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 421; *Cleveland, C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 439; *Delaware Railroad Tax*, 18 Wall. 206, 231, 232. Cars: *Union Transit Co.* v. *Lynch*, 177 U. S. 149; *American Transit Co.* v. *Hall*, 174 U. S. 70; *S. C.*, 24 Colorado, 300; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 19; *Marye* v. *B. & O. R. R. Co.*, 127 U. S. 117. Bridges: *Bridge Co.* v. *Henderson City*, 173 U. S. 592, 623; *Pittsburgh &c. Ry. Co.* v. *Board of Public Works*, 172 U. S. 32; *Henderson Bridge Company* v. *Henderson City*, 141 U. S. 689. Express companies' property: *Adams Express Co.* v. *Ohio*, 165

U. S. 194; *Adams Express Co.* v. *Ohio*, 166 U. S. 185; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 180; *Fargo* v. *Hart*, 193 U. S. 490. Telegraph lines and property: *Western Union Tel. Co.* v. *Missouri*, 190 U. S. 412; *Atlantic & Pacific Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 163; *West. Un. Tel. Co.* v. *Taggart*, 163 U. S. 1; *Postal Tel. & Cable Co.* v. *Adams*, 155 U. S. 688, 697; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 590; *West. Un. Tel. Co.* v. *Massachusetts*, 141 U. S. 40. Steamships: *Transportation Company* v. *Wheeling*, 99 U. S. 273; *Moran* v. *New Orleans*, 112 U. S. 69.

The rule extends so far as to permit the States, where taxing property engaged in, and instrumentalities of, interstate commerce, to include the intangible value resulting from interstate commerce. Cases *supra* and *Central Pacific R. R. Co.* v. *California*, 162 U. S. 91; *New York, L. E. & W. R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 437; *Railway Co.* v. *Backus*, 154 U. S. 446, 447.

The attitude of this court has been to sustain, if possible, statutes apparently imposing a burden on interstate transportation, or receipts therefrom. Where it has been possible to say that the tax, while not directly imposed on, was on account of, property, the corporation owned and which received protection of the laws, within the State, the court has done so and has sustained taxes where the amount was determined by reference to receipts, capital stock, or other elements. Cases *supra* and *New York, L. E. & W. R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438, 439; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217. See also *Fairbank* v. *United States*, 181 U. S. 297; *State Tax on Railway Gross Receipts*, 15 Wall. 284.

The mileage basis of apportionment prescribed in the statute is proper. A railroad system may, for purposes of taxation, be treated and valued as a unit, the whole contributing to the value of every part; and where it extends into several States, the value may be apportioned among the several States, on a mileage basis. Statutes using this basis of apportionment

are in force in many States. *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 180.

To the use of a strict mileage basis there are only two exceptions; it cannot be applied: First, so as to bring within the taxing State, property not connected with or a part of the railroad business and which has an actual *situs* in some other State, nor, second, where, by reason of the existence of valuable terminals in one State, which contribute to and greatly enhance the value of the system, its application would be unfair, as bringing within the taxing State a greater proportion of the value than that State would equitably be entitled to. Cases *supra*.

The statute does not require apportionment among the States on an absolute mileage basis, but permits apportionment, in accordance with the fact, on the judgment of the board of assessors.

The act permits the board of assessors to exercise their discretion in making the apportionment; that discretion, when once exercised, is absolute and cannot be overcome except in cases of fraud. Cases *supra* and *Maish* v. *Arizona*, 164 U. S. 611; *McLeod* v. *Receiver*, 71 Fed. Rep. 458.

The system of taxation, invoked by Act 173, as applied to railroad corporations, is a proper exercise of the right to amend corporate charters. The act became a part of the charters and governing laws of Michigan railroad corporations. *New York & New Eng. R. R. Co.'s Appeal*, 62 Connecticut, 527, 538; *Columbia &c. R. R. Co.* v. *Gibbes*, 24 S. Car. 60, 73; *Alabama & V. Ry. Co.* v. *Odeneal*, 73 Mississippi, 34; *St. L., I. M. & S. Ry. Co.* v. *Paul*, 64 Arkansas, 83; *S. C.*, 173 U. S. 404; *Northern Central Ry. Co.* v. *Maryland*, 187 U. S. 258; *State* v. *Northern Central Ry. Co.*, 90 Maryland, 447, 469; *Bangor, Oldtown & Milford R. Co.* v. *Smith*, 47 Maine, 34; *Durand* v. *N. H. & N. Co.*, 42 Connecticut, 211, 223; *Roxbury* v. *Boston &c. R. R. Co.*, 60 Massachusetts, 432; *St. Albans* v. *Car Co.*, 57 Vermont, 82; *Tomlinson* v. *Jessup*, 15 Wall. 454, 457; *Leep* v. *Railway Co.*, 58 Arkansas, 407; *Stearns* v. *Minnesota*, 179

U. S. 260 (dissenting opinion); *Penna. R. R. Co.* v. *Duncan*, 111 Pa. St. 352. The general railroad law and Act 173 are *pari materia*, to be read and construed as one enactment. *Chicago, R. I. & P. Ry. Co.* v. *Zernecke*, 59 Nebraska, 689, 696; *McHenry* v. *Brett*, 9 N. Dak. 68, 70; *Dennison* v. *Allen*, 106 Michigan, 295; *Shannon* v. *People*, 5 Michigan, 36, 50; *Ryan* v. *Carter*, 93 U. S. 78, 84; *Alexander* v. *Mayor*, 5 Cranch, 7; *Hendrix* v. *Rieman*, 6 Nebraska, 517, 522; Black on Interpretation of Laws, p. 204, § 86.

The Federal cases uphold the right of the State to repeal, alter or amend corporate charters where the right to do so is reserved. Vested rights cannot be impaired under such a reserved power, but the power may be exercised and to almost any extent, to carry into effect the original purpose of the grant, to protect the rights of the public and the corporators, or to promote due administration of the affairs of the corporation. *Union Passenger Ry. Co.* v. *Philadelphia*, 101 U. S. 528; *Hoge* v. *Railway Co.*, 99 U. S. 348, 351; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Railroad Co.* v. *Maine*, 96 U. S. 499; *Louisville Water Co.* v. *Clark*, 143 U. S. 10, and cases cited; *Sinking Fund Cases*, 99 U. S. 700; *Pearsall* v. *Great Northern Ry.*, 161 U. S. 663; *Covington* v. *Kentucky*, 173 U. S. 232; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636; *Tomlinson* v. *Jessup*, 15 Wall. 454; *United States* v. *Union Pacific Ry.*, 160 U. S. 37. See also *Miller* v. *State*, 15 Wall. 478, 499; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Pennsylvania College Cases*, 13 Wall. 190; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 222; *St. L., I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 404; *New Jersey* v. *Yard*, 95 U. S. 104; *Gas Light Co.* v. *Hamilton City*, 146 U. S. 271.

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

The unconstitutionality of a statute may depend upon its conflict with the constitution of the State or with that of the

United States. If conflict with the state constitution is the sole ground of attack, the Supreme Court of the State is the final authority, *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited in the opinion, while in the other case the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the Federal court and by this suit, and conflict with both constitutions is alleged. Undoubtedly a Federal court has the jurisdiction, and when the question is properly presented it may often become its duty to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the Federal Constitution, may be presented in a single suit and call for consideration and determination. At the same time the Federal courts will be reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals. Especially is this true when the statute is one affecting the revenues of the State, and therefore of general public interest. *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 609. And this reluctance becomes more imperative when the statute has been before the highest court of the State and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined.

In the case at bar the rate of taxation imposed upon the railroad and other corporate property is the average rate of taxation upon other property subject to ad valorem taxes, and that average rate is ascertained by dividing the total tax levy on all such property by the value of the property. In *Board of Education* v. *State Assessors*, 133 Michigan, 116, the following case arising under the statute was presented (p. 117):

"This is an application for a mandamus. It sets out, in substance, that the state board of assessors, in levying the tax upon the railroad property of this State, has assumed to fix the rate

of taxation by dividing the total tax levy on all property other than railroad property by the value of such other property as determined by the defendant board, by adding to the actual assessed value of such property, as fixed by the local assessors and by the board of state tax commissioners acting under the authority of the law relating to the assessment of taxes, the sum of $296,748,142, thus making the aggregate divisor in determining the rate of taxation that much in excess of the assessed valuation, thereby reducing the rate to be levied upon the railroad property of the State, and thus reducing the amount which the relator would receive as its proportion of the tax assessed against railroad property by a very substantial sum."

This application was sustained, the court holding that the state board of assessors had no power to increase the value as returned to them by the local assessors and board of state tax commissioners, and saying (p. 119):

"A fair reading of this language of the statute, we think, leads to the conclusion that the board of assessors has imposed upon it the duty, ministerial in character, of determining by a computation from *data*, which the law provides for placing in its hands, the rate of taxation which other property in the State is subjected to, as it appears by assessment rolls which are supposed to contain an accurate and true assessment of all property at its full cash value."

While this case did not directly determine the constitutionality of the statute, a fair implication is that it was not regarded as obviously in conflict with the state constitution, for in that event the court would scarcely have taken time to consider the validity of proceedings under its authority.

We, therefore, proceed to inquire whether the provisions of this act and the method of taxation therein prescribed are open to any constitutional objection. We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision

on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the Circuit Court in this case (p. 232):

"There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an ironclad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice. *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Adams Express Company* v. *Ohio*, 165 U. S. 194, 228; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Billings* v. *Illinois*, 188 U. S. 97; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Home Insurance Company* v. *New York State*, 134 U. S. 594; *Gulf, Colorado & Santa Fe Railroad Company* v. *Ellis*, 165 U. S. 150; *Clark* v. *Titusville*, 184 U. S. 329; *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89; *New York State* v. *Barker*, 179 U. S. 279; *Charlotte &c. Railway Company* v. *Gibbes*, 142 U. S. 386; *Travelers' Insurance Company* v. *Connecticut*, 185 U. S. 364; *Kidd* v. *Alabama*, 188 U. S. 730; *Turpin* v. *Lemon*, 187 U. S. 51; *Florida &c. Railroad Company* v. *Reynolds*, 183 U. S. 471."

The first and principal matter of attack is the "average rate." It is contended that the fixing of the rate of taxation is a legislative function; that in ascertaining the average rate by the method described there is no exercise of the legislative judgment, but that it is determined by the action of the various local assessing and taxing boards, who, though charged with no

duty of inquiry as to the necessities of the State or the proper rate of taxation of railroad property, are in fact the only officials exercising any discretion and judgment.

There might be a question whether, even if there were a clear delegation of legislative functions to other departments of the state government, it would be void under the Federal Constitution. Whatever, in view of the distinct grant in the Federal Constitution to the President, Congress and the Judiciary of separately the executive, legislative and judicial powers of the Nation, may be the power of Congress in the delegation of legislative functions, a very different question is presented when the restrictions of the Federal Constitution are invoked to restrain like action in a State. Crimes against the Nation must be prosecuted by indictment, yet a State may proceed by information. Suppose a State by its constitution grants legislative functions to the executive, or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of Government, or be a denial of due process, or equal protection?

But it is unnecessary to enter into a discussion of this question, for in the case at bar there is no abandonment by the legislature of its functions in respect to taxation. The statute prescribes as the rate of taxation upon railroad property the average rate of taxation on all other property subject to ad valorem taxes. It provides the most direct way for ascertaining such average rate, deducing it from a consideration of all the other rates. No authority is given to the local assessors to apply their judgment to the question of the railroad rate. Their authority in respect to the matter of taxation is precisely the same as it was before and independently of this statute. Their duty is to act according to their judgments in respect to local taxes committed to their charge. When they have finished their action, taken, as it must be assumed to have been, in conscientious discharge of the duties assigned, from it by a simple mathematical calculation the average rate of taxation is determined. If the legislature should be convened after they

have finished their action and then prescribe the average rate thus mathematically deduced as the rate of railroad taxation, no question could be made of its validity. It would be obviously a legislative determination of the rate of taxation. Is it any the less a legislative determination that it assumes that the various local officials will discharge their duties honestly and fairly, with reference to local necessities, and, independently of the effect upon the railroad rate, and directs that the mathematical computation be made by a board of ministerial officers, and thus made shall become the railroad rate of taxation? Why is it necessary that the legislature be convened to add its formal approval of the integrity of the action of the local officers? May it not intrust the mathematical computation to the state board of assessors, and if so, may it not likewise act upon the assumption that the local assessors will discharge their duties with an eye single to those duties and irrespective of the effect upon the railroad rate? It is true there is a possibility that some local board may be actuated by other than a sense of duty to the community for which it is acting and have a thought of the ultimate effect upon the railroad rate. There is always a possibility of misconduct on the part of officials, but legislation would be seriously hindered if it may not proceed upon the assumption of a proper discharge of their duties by the varous officials. And it must be remembered that, in view of the vast multitude of local taxing boards (as stated in one of the briefs of counsel for appellant there are about 1,300 local assessment districts), the action of any single board could have but little influence upon the railroad rate. Beyond the assumption that these local officers will act from a sense of duty is the further fact that their action affects directly and principally the special communities for which they act, and that, generally speaking, is a sufficient guarantee. As said by Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 428:

"The only security against the abuse of this power, is found in the structure of the Government itself. In imposing a tax

the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."

And again, in *Providence Bank* v. *Billings*, 4 Pet. 514, 563:

"This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally."

Maine v. *Grand Trunk Railway Company*, 142 U. S. 217, is worthy of consideration on this question of legislative determination. The legislature of Maine graded the rate of an excise tax imposed upon railroads by the amount of their gross transportation receipts, and provided that when a railroad was partly within and partly without the State the gross receipts chargeable to the road within the State should be ascertained on the mileage basis. The court below held that as the Grand Trunk Railroad was partly within and partly without the State of Maine, the imposition of the tax was a regulation of commerce, and therefore in conflict with the exclusive power of Congress over interstate and foreign commerce; and rendered judgment for the company.

But this court, reversing that judgment, held that the reference to the receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a reasonable conclusion as to the amount of tax which should be levied, saying (p. 229):

"If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how

a reference to the results of any other year could affect its character."

See also *Home Insurance Company* v. *New York*, 134 U. S. 594, and cases cited in the opinion. Of course, a passenger on the Grand Trunk Railroad knew that the fare he was paying was increasing the gross receipts, and therefore indirectly affecting the amount of the tax collectible under the statute. But it was not to be assumed that he would travel and pay fare with that object in view. No more can it be assumed in the present case that the local taxing officers, although knowing that an increase of their local tax levy will increase the tax rate upon railroads, will be led by that knowledge to forget their single duty to the community for which they are acting. No one pays money for the mere sake of compelling others to pay. Some personal advantage must be intended. No more will local tax officers levy a tax upon their neighbors, those who have placed them in position, for the mere sake of increasing the tax burden upon railroads, especially when the local levy is not followed by an equal increase in the amount of the burden cast upon railroads and but a trifling fraction of that increase inures, either directly or indirectly, to the benefit of the taxpayers of the locality. The total value of other property in Michigan subject to ad valorem taxes was, according to the record, in the neighborhood of $1,500,000,000. A tax levy in the city of Detroit for local purposes of $1,500,000 would, therefore, increase the rate of taxation on railroad property only one mill, and that increase would profit Detroit but little, as the railroad tax is appropriated for state purposes only.

It may be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate.

Again, it seems more reasonable that the average rate should

be fixed by this mathematical computation from the other rates already established than for the legislature to prescribe in advance that which it may hope will be such rate. In the one case the exact average is determined; in the other an estimate is made, which may turn out to be more or less than the average.

While the peculiar method of ascertaining the average rate prescribed by this statute may be new, yet the application of an average rate to the taxation of railroads is not new, nor confined to Michigan. See § 1, chap. 64, Public Statutes and Session Laws of New Hampshire of January 1, 1901, section first enacted in 1878; Revised Laws of Mass. (1902) vol. 1, chap. 12, § 93, p. 227; chap. 14, §§ 37, 40, pp. 266, 268, incl., taken from laws of 1864, 1865 and 1880; Revised Statutes of Missouri (1899), vol. 2, pp. 2175, 2176, §§ 9363, 9364; Laws of Wisconsin (1903), chap. 315, §§ 7–14, incl., pp. 496–499; *Railroad* v. *The State*, 60 N. H. 87; *The State ex rel. Brown* v. *The Missouri Pacific Ry. Co.*, 92 Missouri, 137; *Chicago & Alton R. R. Co.* v. *Lamkin*, 97 Missouri, 496; *The State ex rel.* v. *Metropolitan Street Ry. Co.*, 161 Missouri, 188, 199.

We have thus far assumed that there was equity and justice in applying to railroad property the average rate of taxation imposed upon other property. But this assumption is challenged. For instance, the Chicago and Northwestern Railroad Company's property is situate in the Upper Peninsula of the State of Michigan—

"and yet the average rate of tax applied to its property depends upon, and increases with, the taxes raised on all the counties of the 'Lower Peninsula' or Michigan, and in all the cities, towns, villages and school districts of those counties, for purely local purposes. If Detroit spends $10,000,000 for local government, the Northwestern Railway Company has to pay proportionately more tax on its property in Northern Michigan than if Detroit's tax for local government were $5,000,000; and, beyond that, if Detroit spends $1,000,000 or $5,000,000 for purely domestic or private enterprises, such as

gas works, water works, street railways, parks, baths, libraries, etc., the Northwestern Railway's tax on its property (though wholly outside of Detroit—in the 'Upper Peninsula') is proportionately larger on that account.

* * * * * * * *

"It may well be that (as respects the immediate point) the unity of railroad property would justify a statute requiring a railroad to pay taxes to the State at a rate derived by averaging the taxes, state and local, paid by others in the same taxing jurisdiction; but the question before the court is whether it can be made to pay a tax directly dependent upon, and measured by, the local taxes of counties, cities, towns, villages and school districts where it has no part of its property and no office. Such a plan operates to tax the railroad because of the expenses (public and private) of local communities whose benefits it does not enjoy."

But these considerations appeal mainly to the discretion of the legislature, and do not make against its power. Unless there be some specific provisions in the state constitution compelling other action the State may treat its entire territory as composing but a single taxing district, and deal with all property as within the district and subject to taxation accordingly. There is no magic in county organization, no inherent necessity of dividing the State into small taxing districts. Frequently railroads are separated from other property, assessed by a state board, and the taxes collected therefrom applied to the general purposes of the State. Sometimes, it is true, a portion of the taxes thus collected is distributed *pro rata* to the counties along the lines of the roads, but the power of the State to apply the taxes from railroad property to only state purposes cannot be doubted, and is often exercised. If it may take all the taxes received from railroad property and apply it to general state purposes, and, to that extent, relieve counties in which there is no railroad property from their contribution to the support of the State, it has equal power to say that the average rate of taxation shall be determined, not by the rates upon other

property in the immediate localities in which the railroads are located, but by those upon all property wherever situated in the State. We do not mean to hold that cases may not arise in which enforcing this method of taxation works such injustice to a railroad as to call for judicial interference. But we do hold that the mere fact that all the property in the State is taken into account in determining the average rate does not carry with it such proof of injustice and inequality as to compel the courts in all cases to strike the latter down. From the cases that are before us involving this statute it appears that there are many railroad companies in the State, and we may fairly take judicial notice of the fact that the State is traversed in almost every direction by railroads. And while it is possible that there may be a county or two without one yet it is an exception, and to hold that for each railroad the average rate must be determined from the property in the localities immediately contiguous or through which its road passes might well introduce into the matter of taxation a confusion and inequality resulting in far greater injustice than the uniformity established by the present system.

Further, it must be borne in mind that the taxes collected from railroads in Michigan are, by sec. 16 of the act, applicable to state purposes, and while it is doubtless true that the appropriation of these taxes to state purposes diminishes the tax burden which will fall upon other property, yet the case presented is one in which the legislature, taking a class of property, imposes upon it through state authorities a state tax for strictly state purposes. That, so far as the restraints of the Federal Constitution are concerned, it is within the power of a State to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon other property, and apply the proceeds to state rather than to local purposes is not open to question. *Kentucky Railroad Tax Cases*, 115 U. S. 321, is directly in point. By the legislation of Kentucky railroad companies and their property were separated from other

property, subjected to different means and methods for purposes of taxation, and upon this the court said (p. 337):

"But there is nothing in the constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

See also *Pittsburgh &c. Railroad Company* v. *Backus,* 154 U. S. 421; *Florida Central &c. Railroad Company* v. *Reynolds,* 183 U. S. 471; *Coulter* v. *Louisville & Nashville Railroad,* 196 U. S. 599.

That no provision is made for a general equalization of railroad with other property in the State does not vitiate the assessment. See *Cummings* v. *National Bank,* 101 U. S. 153, in which the question was distinctly presented and determined, the court saying (p. 161):

"While it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid."

While there may be no provision for an equalization of railroad with other property, it will be perceived that the statute names the time and place for the sessions of the assessing board, gives to any person or company interested the right

to be heard, and also authorizes the board to correct the valuation. So that it cannot be objected that the railroad companies are precluded from a full hearing on the matter of valuation; and, as has heretofore been said by this court, one hearing is sufficient to constitute due process.

Other questions are discussed by counsel in their briefs, but in view of the exhaustive and well-considered opinion of the trial judge, with the general trend of which we concur, it is unnecessary to further extend this opinion. It is sufficient to refer to that opinion for a consideration of those questions. We have noticed those which seem to us paramount and controlling.

It is charged in the bill that there was a systematic undervaluation of other property in the State which resulted in denying to this plaintiff the equal protection of the law. The trial court found against this charge. It is enough to say that generally we accept the finding of a trial court upon a question of fact when the testimony respecting it is conflicting. It may also be said that a legislature is not bound to impose the same rate of tax upon one class of property that it does upon another. As it may exempt all of one class so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them.

Affirmed.

Mr. Justice Brewer: Cases on the docket, numbered from 462 to 487, inclusive, are suits brought by different railroad companies against this appellee, and are submitted on the same record. The same decree will be entered in each of them.[1]

[1]The numbers and docket titles of the cases referred to are as follows:

462. *Detroit & Mackinac Railway Company* v. *Powers.*
463. *Chicago & Northwestern Railway Company* v. *Same.*
464. *Toledo, Saginaw & Muskegon Railway Company* v. *Same.*
465. *St. Clair Tunnel Company* v. *Same.*
466. *Michigan Air Line Railway Company* v. *Same.*
467. *Grand Trunk Western Railway Company* v. *Same.*

DE LA RAMA *v.* DE LA RAMA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 102. Argued December 5, 6, 1905.—Decided April 2, 1906.

The general rule that courts of the United States have no jurisdiction upon the subject of divorce or for allowance of alimony, because diversity of citizenship does not exist and no pecuniary value is involved, has no application to territorial courts or to the appellate jurisdiction of this court over those courts.

The Territorial Practice Act of April 7, 1874, 18 Stat. 27, under which the jurisdiction of this court does not extend to reëxamining the facts but is limited to determining whether the findings support the judgment and to reviewing errors as to admission or rejection of testimony on exceptions duly taken, has no application to appeals from the Philippine Islands.

Under § 10 of the act of July 1, 1902, 32 Stat. 691, appeals are allowed from judgments of the Supreme Court of the Philippine Islands where the amount exceeds $25,000, in the same manner as from judgments of the Circuit Courts of the United States, and such appeals extend to an examination of the facts as well as the law, and where alimony or separation of conjugal property has been awarded by the decree of divorce amount-

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468. *Ann Arbor Railroad Company* v. *Same.*
469. *Cincinnati, Saginaw & Mackinaw Railroad Company* v. *Same.*
470. *Chicago, Detroit & Canada Grand Trunk Junction Railroad Company* v. *Same.*
471. *Munising Railway Company* v. *Same.*
472. *Lake Superior & Ishpeming Railway Company* v. *Same.*
473. *Marquette & Southeastern Railway Company* v. *Same.*
474. *Chicago, Milwaukee & St. Paul Railway Company* v. *Same.*
475. *Sault Ste. Marie Bridge Company* v. *Same.*
476. *Mineral Range Railroad Company* v. *Same.*
477. *Duluth, South Shore & Atlantic Railway Company* v. *Same.*
478. *Detroit, Grand Haven & Milwaukee Railway Company* v. *Same.*
479. *Pontiac, Oxford & Northern Railroad Company* v. *Same.*
480. *Minneapolis, St. Paul & Sault Ste. Marie Railway Company* v. *Same.*
481. *Copper Range Railroad Company* v. *Same.*
482. *Gogebic & Montreal River Railroad Company* v. *Same.*
483. *Manistee & Southeastern Railroad Company* v. *Same.*
484. *Escanaba & Lake Superior Railroad Company* v. *Same.*
485. *Grand Rapids & Indiana Railway Company* v. *Same.*
486. *Wisconsin & Michigan Railway Company* v. *Same.*
487. *Lake Shore & Michigan Southern Railway Company* v. *Same.*

ing to over $25,000 and this court takes jurisdiction of the appeal by reason of the amount involved it may, if necessary to determine whether the decree was right in that respect, pass upon the sufficiency of the testimony authorizing or refusing the divorce.

For the purposes of the jurisdiction of this court it makes no difference whether the amount claimed by the wife in a suit for divorce in the Philippine Islands be termed alimony or her share of community property.

Under § 10 of the Philippine Island Act of 1902 appeals are allowed in all cases where the amount in controversy exceeds $25,000 and this court has no power to create an exception not made in the statute; it would be judicial legislation.

The abandonment by the husband of his wife, excluding her from his house and forming open and illicit relations with other women who bear him children, is sufficient to bring his adultery within the rule of law in the Philippine Islands that adultery of the husband must be accompanied by public scandal and disgrace to the wife in order to entitle her to a divorce.

In this case the Court of First Instance, on uncontradicted evidence as to the husband's adultery and scandal ensuing therefrom, found that the wife was entitled to a divorce and that there was no adultery on her part; the Supreme Court of the Philippine Islands found that the wife had committed adultery, basing the finding on a letter written by her and construed to be in the nature of a confession, and for that reason alone reversed the judgment. On examining the record this court holds that such letter does not amount to a confession, and that there is insufficient evidence of her having committed adultery, and therefore reverses the Supreme Court of the Philippine Islands.

THIS was a suit brought in the Court of First Instance of the province of Iloilo by the appellant as plaintiff against her husband, the defendant, for a judicial separation or divorce *a mensa et thoro*, and equal separation of the property of the conjugal partnership, for an allowance to the plaintiff for her support during the pendency of the action, and for counsel fees, costs and general relief, upon the ground of the husband's adultery and the public scandal and disgrace thereby brought upon the plaintiff.

In his answer defendant alleged, by way of recrimination, adultery on the part of the wife, denied the existence of any community property, and prayed for a divorce without alimony.

Upon the trial, the court decreed a divorce to the plaintiff on account of her husband's adultery, as well as the payment

of $81,042.76, Mexican money, due her as her unpaid share of the property belonging to the conjugal partnership, as well as the sum of $3,200, Mexican money, as an allowance for her support since the date upon which the action was instituted, being at the rate of four hundred pesos a month for eight months, with costs.

After motion for a new trial had been made and overruled, defendant appealed to the Supreme Court, which reversed the decree of the court below, incorporated in its opinion certain findings of fact, and ordered judgment absolute that the complaint be dismissed.

Whereupon plaintiff appealed to this court under section 10 of the act of July 1, 1902, to provide a temporary civil government in the Philippine Islands, 32 Stat. 691, 695, a copy of which section is given in the margin.[1]

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury* for the appellant:

This case involves the jurisdictional amount and an appeal lies to this court. 32 U. S. Stat., p. 695. A money judgment, although an incident to a divorce suit, confers jurisdiction. *Simms* v. *Simms*, 175 U. S. 62. This court can and should review the facts as in appeals from the District of Columbia. Rev. Stat. § 705; 27 Stat. 434; *Beyer* v. *Lefevre*, 186 U. S. 114.

[1] "SEC. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes and proceedings now pending therein, or hereafter determined thereby, in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States."

An appeal, as distinguished from a writ of error, brings up the facts as well as the law, and even the concurrent findings of two courts below will be reversed, if clearly in conflict with the evidence. *Wiscart* v. *d'Auchy*, 3 Dall. 321; *Johnson* v. *Harmon*, 94 U. S. 371; *Stuart* v. *Hayden*, 169 U. S. 1; *The Carib Prince*, 170 U. S. 655; *Towson* v. *Moore*, 173 U. S. 17; *Illinois* v. *Ill. C. R. R. Co.*, 184 U. S. 77; *Shapirio* v. *Goldberg*, 192 U. S. 232. *Aliter*, in appeals from Territorial Courts, in which the evidence at large is not returned. 18 Stat. 27; *Idaho & Oreg. Land Co.* v. *Bradbury*, 132 U. S. 509.

The evidence in support of the allegation of plaintiff's adultery is full of contradictions and improbabilities, and indicates a conspiracy. The letter of March 6, 1899, is not a confession of guilt.

The parties cohabited matrimonially after the time when defendant claims to have discovered his wife's alleged adultery. This disproves the charges against plaintiff and also operates as a condonation of any prior offense. Condonation bars the defense of recrimination and restores the matrimonial union to its original status. The restored spouse may obtain a divorce from the other spouse subsequently guilty of adultery. Partidas VI, Tit. 9, Law 6; Sanchez De Sancto Matrimonii Sacramento, Lib. X, Disp. VII, n. 1, Disp. VI, n. 7, pp. 335, 336; *Anichini* v. *Anichini*, 2 Curt. Ec. 210; *Sellers* v. *Sellers*, 1 Swab. & Tr. 482; *Goode* v. *Goode*, 2 Swab. & Tr. 48; *Jones* v. *Jones*, 3 C. E. Green (N. J.), 33; *Morrell* v. *Morrell*, 1 Barb. (N. Y.) 318; Bishop on Marriage, Div. & Sep. vol. II, sec. 405; 9 Am. & Eng. Ency. of Law, 2d ed. 821. Section 106, Philippine Civil Code, merely establishes recrimination as a defense. Partidas VI, Tit. 2, Law 8, deals only with the marital relations of the parties pending a divorce suit. It is an elaboration of the provision of Instit. Lib. II, Tit. XVI, of the *Corpus Juris Canonici*, that during the suit separation *a thoro* is not necessarily required. See also Ballerini, Opus Theol. Mor. vol. VI, p. 380, n. 788; Gaspari, Con. Treat. on Mat. vol. II, p. 328, par. 1366; Evernz on Matrimony, vol. IV, p. 1069, n. 117,

The rule contended for is the only one to conserve morality. Under any other a husband who had once forgiven an erring wife would have a perpetual license to live in continuous adultery himself.

The findings of the Court of First Instance were not plainly and manifestly against the weight of evidence and the Philippine Supreme Court was not authorized to make new findings upon the facts and order judgment absolute against the plaintiff under Philippine Code Civ. Proc. sec. 497, subd. 3. The defendant's motion for a new trial was irregular and insufficient. The evidence was conflicting, and the question was chiefly of the credibility of witnesses. This was a question for the trial court, not for an appellate tribunal. *Davis* v. *Schwartz*, 155 U. S. 631; *Crawford* v. *Neal*, 144 U. S. 585; *Kimberly* v. *Arms*, 129 U. S. 512; *Tilghman* v. *Proctor*, 125 U. S. 136. It cannot have been the intention of the statute to empower the Appellate Court to order judgment absolute in such cases.

There was no appearance for the appellee.

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

An important question of jurisdiction is presented by the record in this case. It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value. *Barber* v. *Barber*, 21 How. 582, and the analogous cases of *Kurtz* v. *Moffitt*, 115 U. S. 487; *Durham* v. *Seymour*, 161 U. S. 235, and *Perrine* v. *Slack*, 164 U. S. 452,

But the general rule above stated has no application to the jurisdiction of the territorial courts, or of the appellate jurisdiction of this court over those courts. Hence, we held in *Simms* v. *Simms*, 175 U. S. 162, that an appeal lies from a decree of the Supreme Court of a Territory dismissing the suit of a husband for a divorce and awarding to a wife alimony and counsel fees, amounting in all to more than $5,000, so far as the decree fixes the alimony. This was an appeal from the Supreme Court of Arizona, and the court held that the above considerations expressed in *Barber* v. *Barber*, 21 How. 582, had no application to the appellate jurisdiction of this court over the courts of a Territory; that Congress, having entire dominion and sovereignty over Territories, "has full legislative power over all subjects upon which the legislature of the State might legislate within the State; and may, at its discretion, entrust that power to the legislative assembly of a Territory," citing *Cope* v. *Cope*, 137 U. S. 682. It was further held that so far as the question of divorce was concerned, the decree could not be reviewed by this court, "both because that was a matter the value of which could not be estimated in money; and because the refusal of the divorce involved no matter of law, but mere questions of fact depending on the evidence, and which this court is not authorized to reëxamine." It was further said "the decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal." The appeal in that case did not involve the merits.

The intimation that this court could not review the refusal of the divorce because it could not reëxamine questions of fact was undoubtedly thrown out in view of the Territorial Practice Act of April 7, 1874, 18 Stat. 27, providing that "on appeal" (from a territorial court) "instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or

rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

Since that act was passed we have always held that the jurisdiction of this court on an appeal from the Supreme Court of a Territory did not extend to a reëxamination of the facts, but was limited to determining whether the findings of fact supported the judgment, and to reviewing errors in the admission or rejection of testimony, when exceptions have been duly taken to the action of the court in this particular. *Stringfellow* v. *Cain*, 99 U. S. 610; *Eilers* v. *Boatman*, 111 U. S. 356; *Idaho &c. Land Co.* v. *Bradbury*, 132 U. S. 509; *Mammoth Mining Company* v. *Salt Lake Machine Co.*, 151 U. S. 447; *Young* v. *Amy*, 171 U. S. 179.

This act, however, has no application to the Philippine Islands, appeals from the Supreme Court of which are regulated by section 10 of the act of July 1, 1902, 32 Stat. 691, wherein it is declared that appeals from the Supreme Court of the Philippine Islands shall extend to all actions, cases, causes and proceedings "in which the value in controversy exceeds $25,000." These are reviewable on appeal or writ of error by the party aggrieved, in the same manner as the final judgments and decrees of the Circuit Courts of the United States. There is no requirement that the facts shall be found. Appeals from the final decrees in these (Circuit) courts extend to an examination of the facts as well as the law. While upon such review this court will generally accept the concurrent conclusions of the trial and appellate courts, yet, as was said by Mr. Justice Brewer in *Beyer* v. *LeFevre*, 186 U. S. 114, 119: "There has always been recognized the right and duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony it will set the verdict or report aside and direct a reëxamination."

In this case there was no finding of facts either by the Court of First Instance, or by the Supreme Court of the Islands, ex-

cept as they appear in the opinion. It is doubtful whether this is a finding of facts within the statute, *Lehnen* v. *Dickson*, 148 U. S. 71; *British Queen Mining Co.* v. *Baker Silver Mining Co.*, 139 U. S. 222; *Dickinson* v. *Planters' Bank*, 16 Wall. 250; *Saltonstall* v. *Birtwell*, 150 U. S. 417; *Stone* v. *United States*, 164 U. S. 380, but in any event it is not binding upon us in the absence of an authority to make it.

While, as indicated in *Simms* v. *Simms*, the decree for alimony, although in one sense an incident to the suit for divorce, is a distinct and final judgment for a sum of money, and is therefore a good ground for appeal from that part of the decree; yet, where the appeal is from the whole decree (as in this case), or even from a part of the decree, and the denial of alimony or separation of the conjugal property depends upon the evidence which bears upon the right to a divorce, we cannot determine that question without passing upon the sufficiency of the testimony authorizing or refusing the divorce. An appeal from the decree for alimony or other property right would be of no value whatever, unless the facts connected with the allowance or refusal of such right were open to review in the appellate court. Although an appeal from a part of a decree does not bring up the part not appealed from, yet, if the whole decree must be reviewed in order to decide the appeal, such appeal brings up the entire record. *Kelsey* v. *Western*, 2 N. Y. 500; *Union Trust Company* v. *Trumbull*, 137 Illinois, 146, 159; *Walker* v. *Pritchard*, 121 Illinois, 221, 227. The case is even stronger where the appeal is taken from the whole decree.

The hardship of denying an appeal in this case, as well as review of the testimony upon the subject of divorce, is apparent when the peculiar provisions of the Philippine Code are considered.

By article 1315: "Persons who may be joined in matrimony may, before celebrating it, execute contracts, etc. In the absence of contracts relating to property, it shall be understood that the marriage has been contracted under the system of legal conjugal partnership."

Article 1401: "To the conjugal partnership shall belong:

"1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only.

"2. That obtained by the industries, salaries, or work of the spouses or of either of them;

"3. The fruits, income, or interest, collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses."

Article 1392: "By virtue of the conjugal partnership the earnings or profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and wife, share and share alike, upon the dissolution of the marriage."

Article 1407: "All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife."

Article 73: "A decree of divorce shall produce the following effects:

"Sub. 3. The guilty spouse shall lose all that has been given or promised him or her by the innocent one or by any other person in consideration for the latter; and the innocent spouse shall keep all that he or she has received from the guilty one, being permitted, besides, to claim forthwith all that may have been promised by the same."

In the opinion of the Court of First Instance it is stated that the plaintiff received from her mother two thousand pesos, which, with interest amounting to three hundred and forty-five pesos, must be regarded as the portion contributed by the wife to the conjugal partnership. For the purposes of jurisdiction it make no difference whether the amount claimed be termed alimony or the wife's share of the community property. It is sufficient that she claimed to be entitled to an amount exceeding twenty-five thousand dollars, and that the claim was not baseless is shown by the decree of the Court of First Instance

allowing it. By the decree of the Supreme Court she was denied all recovery of any description, upon the ground of her adultery. If upon a review of the testimony it were found that she was not guilty of adultery, she would unquestionably be entitled to one-half of the conjugal property.

As section 10 of the Philippine statute above cited allows an appeal to this court from "judgments and decrees of the Supreme Court of the Philippine Islands in *all* actions, cases, causes and proceedings . . . in which the value in controversy exceeds twenty-five thousand dollars," we know of no power in this court to create an exception where the statute has made none. Such a decision would be a plain case of judicial legislation.

Our conclusion upon this branch of the case is that the appeal was properly taken, and that it calls for a reëxamination of the grounds upon which the petition for a separation of the conjugal property and alimony *pendente lite* was denied.

2. In her complaint the plaintiff charges abandonment by her husband without cause, and also adultery with three women, by each of whom he had children, and which resulted in public scandal and the disgrace of the plaintiff. In his answer defendant denies that he abandoned the plaintiff without sufficient cause, and avers that "he ejected her from his house on account of indignation," created by her adultery with a Spanish corporal; he denies the various allegations of adultery charged against him, and says that even if they are true, they are nothing more than the "necessary consequences of the indescribable conduct of the plaintiff."

The parties were married in July, 1891, she being fourteen years of age and he twenty-three, and lived happily together for about thirteen months, when in August, 1892, a separation ensued.

Upon the trial the defendant made no denial of his adulteries, but simply declined to answer any questions on the subject. His adultery, however, with three separate women and the birth of a child by each was proven to the satisfaction of both

courts below, and was not attempted to be disproved by evidence on the part of the defendant. Under the Spanish law the adultery of the husband, to be a good ground for separation, must be accompanied by public scandal and disgrace of the wife. Although there is no evidence that the husband "ejected her from his house on account of indignation," as set up in his answer, the fact that he abandoned his wife, excluded her from his house, and formed open and illicit relations with three other women who bore him a family of children, is quite sufficient evidence that his adultery was accompanied by public scandal and disgrace to the wife.

There was a difference of opinion between the trial court and the Supreme Court as to the adultery of the plaintiff. This is the principal contested fact in the case. The question really is, whether the finding of the Court of First Instance, that the plaintiff had not committed adultery, was so manifestly against the weight of evidence that the Supreme Court was justified in reversing it.

By section 497 of the Code of Civil Procedure it is enacted that "the Supreme Court shall not review the evidence taken in the court below, nor retry the questions of fact, except, . . . 3. If the excepting party filed a motion in the Court of First Instance for a new trial, upon the ground that the *findings of fact were plainly and manifestly against the weight of evidence,* and the judge overruled said motion, and due exception was taken to his overruling the same, the Supreme Court may review the evidence," etc.

The defendant did move for a new trial in the Court of First Instance on the ground that the "conclusions which in said decision have been deducted from the facts are contradictory to what the evidence filed in this case have shown."

This is not a literal compliance with section 497, above cited, as it is not stated that the findings of fact are plainly and manifestly against the weight of the evidence. It seems rather to fall within the terms of section 145 of the Code of Civil Procedure, by the terms of which the Court of First Instance may, at

any time during the term at which the action has been tried, set aside the judgment and grant a new trial on the ground that "the evidence was insufficient to justify the decision, or that it is against the law." But in this connection it is also provided by section 146 that the "overruling or granting of a motion for a new trial shall not be a ground of exception, but shall be deemed to have been an act of discretion on the part of the judge."

Defendant also prepared a bill of exceptions containing the evidence upon which the hearing was had in the Supreme Court.

Under the circumstances, and waiving the question whether there was such a motion for a new trial, as is contemplated by section 497, we are of the opinion that the judgment of the Court of First Instance should not have been reversed, unless the findings of that court were plainly and manifestly against the weight of the evidence.

The adultery charged upon the plaintiff is said to have been committed with one Corporal Zabal of the Civil Guard at Talisay, where the parties then lived. The principal testimony establishing that fact is that of Apolonia Aurelio, a confidential servant, who swears she entered the services of the plaintiff in *1891;* that the corporal used to frequent the plaintiff's house during the absence of the husband, who was wont to leave home to inspect his haciendas; that plaintiff habitually visited the quarters of the Civil Guard for the purpose of meeting Zabal, and that Zabal was also in the habit of going to the plaintiff's house at ten o'clock at night and remaining until morning; that defendant became acquainted with these facts from a letter written by plaintiff to be sent to Zabal at the quarters of the Civil Guard, but purloined by the witness and given to defendant. This letter, which upon the theory of the defendant would have furnished conclusive evidence of the plaintiff's adultery, was destroyed. The letter, if written at all, was written in May, yet her husband continued to live with her until August, when he carried her to her parents in the town of Vallodolid, apparently for a visit, cohabited with her there,

and then abandoned her. His version is that he took her to her mother on the same or the next day after he discovered the letter, and that he did not cohabit with her there, although he occupied the same room, in which there was but one bed. Little reliance was placed upon the testimony of Apolonia by either of the courts below, as it appeared that she did not enter the service of the plaintiff until the year *1893*, after the couple had separated, and that she was then sent by the husband to the wife as a servant. She also told a most improbable story of always sleeping in the room of the plaintiff during her husband's absence, and even while the corporal was there. The Court of First Instance found that the attitude of the witness was apparently hostile to the plaintiff by reason of the fact that Apolonia was about to marry a man whom the plaintiff disliked, and the plaintiff had punished her.

Upon the other hand, the Court of First Instance did not hesitate to say that the attitude of the plaintiff during the trial of the case was such as to impress the court very favorably in her behalf. "Her entire bearing was that of a modest, retiring, self-respecting and conscientious woman." There was testimony tending to show that Apolonia did not want to testify, but was given two packages of paper money in order to induce her to do so, and that another witness was also paid for his testimony. The testimony of Apolonia is to a certain extent bolstered up by that of three or four men, whose intelligence was evidently of such a low order that they can scarcely deserve to be called corroborating witnesses. The judge of the court came to the conclusion that "the testimony of this woman is too uncertain and too suspicious to justify any court in declaring the plaintiff guilty of adultery, especially when the worthlessness and the dubious character of the testimony of the other witnesses for the defendant on this subject increase the probability of the existence of something in the nature of a conspiracy to destroy the case of the plaintiff, and to support that of the defendant in the present action."

As already stated, these parties were married in July, 1891,

the plaintiff then being but fourteen years of age. The intrigue with Zabal, if it occurred at all, took place within thirteen months thereafter, as the parties separated in August, 1892. The story that a bride of fourteen, happily married and living in comfort if not in luxury, should immediately after her marriage enter into a liaison with a common soldier, should receive him at her house in the presence of her servants, without an attempt at concealment, spend the night with him with her confidential maid apparently sleeping in the same room, should openly visit his quarters at night, taking her maid with her, is so improbable that it should only be accepted upon evidence leaving no other legitimate conclusion to be drawn from it except that of adultery. The inference that this testimony was fabricated was so strong that the courts below were fully justified in disregarding it. The Court of First Instance discarded it entirely. The Supreme Court evidently placed no reliance upon it, but found conclusive evidence of adultery in a letter written in March, 1899, by the plaintiff to her husband.

This letter, which was written seven years after their separation, is printed in the margin.[1] We do not regard it as by any

[1] The letter of March 6, 1899, addressed by the plaintiff to the defendant reads as follows:

"My respected and unforgetable Esteban:

"Pardon that I disturb your tranquility, E., that in the midst of a profound sentiment that afflicts me I find consolation for my profound grief in addressing the man who loved me in the time of my good fortune, and who led me to the altar before the eyes of the being whom we most love, God. Remember me; let fall a drop of compassion from your soul; look at me back again with your cheerful eyes at the woman who is watching for you. I know well that you are very disgusted with me, and for just reason—for having claimed my pension. Be calm, quiet yourself, reflect a moment for my situation, which I will explain to you.

"When you went to Europe, mother went to see you to explain our situation to you, and you answered that it had nothing to do with you. She insulted you, Esteban; you had reason to be offended.

"Now, regarding my having demanded my pension, you are also in the right, but pardon my impudence in stating what I have to say:

"I swear to you, E., and call God to witness, that when you went to Spain, my pain was unbearable thinking of my fatal misfortune. I had become completely desperate, and Orozco wrote and advised me to de-

means conclusive. While it is perhaps susceptible of the construction put upon it by the husband, it is entirely consistent with the theory that she had been abandoned by her husband without cause; was left in a desperate state of mind, was anxious to regain his favor, and to make any sacrifice to induce him to take her back and resume their former relations. She hints at no misconduct of her own, but intimates that he is disgusted with her, and for just reason, for having claimed her pension. She says that when he went to Spain her pain was unbearable; that she had become completely desperate, and was advised to demand her pension because of the fact that he was going to reside abroad permanently, and she finally commenced proceedings in view of her desperate situation. So far from confessing adultery, she says that if those who wished her ill "have told you more, they have made a mistake, for the truth about my comportment is that it cannot be complained of." There is nothing indicating that after their separation her conduct had not been irreproachable.

The paragraph much relied upon is as follows: "I keep yet on my face the shame of what has happened, notwithstanding that it has been already many years since we parted.

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mand my pension in view of the fact that you were going to reside permanently in Spain; then I finally did commence proceedings in view of my desperate situation, and nothing further came of the matter during your absence.

"If the Lacsons, who wish me ill, have told you more, they have made a mistake, for the truth about my comportment is that it cannot be complained of; you can secure information regarding my conduct during our separation here in Valladolid.

"I keep yet on my face the shame of what has happened, notwithstanding that it has been already many years since we parted. Therefore, my husband, forgive me; erase what has happened, remember me for God's love; behold our dark fate. In you I trust my future.

"E., I have heard that you have had some misfortunes. I send my sympathy, although I am unworthy of your presence.

"I also learn from Modesto that you do not wish to have my pension sent. Do as you wish.

"Good-bye, E., take good care of yourself, and command,

"Your faithful servant Q. B. S. P.,

"March 6, 1899. AGUEDA BENEDICTO."

Therefore, my husband, forgive me; erase what has happened; remember me for God's love; behold our dark fate. In you I trust my future." This is by no means necessarily a confession of guilt.

The letter is that of a broken-hearted woman, who is willing to make any sacrifice necessary to be restored to her husband's favor and to submit to any humiliation necessary to regain his affection. She makes no confession of adultery, points to her "comportment" since their separation as showing nothing that could be complained of, but in her frequent repetition of the claim she had made for her pension points to that as the source of her husband's disgust. Bearing in mind that her husband had seduced her when she was only thirteen years of age, and that since their separation, and for nearly a decade, he had not only repudiated her, but had maintained unlawful relations with at least three other women, all of whom had borne him children, we think that, even if two constructions were possible, the Court of First Instance was right in putting that construction upon the letter which was most favorable to the plaintiff.

We have reached the conclusion that there is no such preponderance of evidence in favor of the theory of plaintiff's guilt, as authorized the Supreme Court to set aside the conclusions of the court below upon the ground that these findings were plainly and manifestly against the weight of the evidence. In this connection it is proper to bear in mind that the trial judge had all these witnesses before him, and doubtless formed his conclusions largely from their appearance on the stand, their manner of giving testimony and their apparent credibility. Under the circumstances we think the Supreme Court should have affirmed rather than reversed the action of the lower court.

While the right of the plaintiff to her proportion of the conjugal property, to alimony pending suit and to other allowances claimed is the basis of our jurisdiction, the decree of the Supreme Court in dismissing plaintiff's petition renders it unnecessary to review the action of the Court of First Instance in fixing the amount that it held plaintiff was entitled to recover.

We are therefore of opinion that the decree of the Supreme Court dismissing the petition must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE WHITE, MR. JUSTICE PECKHAM, MR. JUSTICE HOLMES and MR. JUSTICE DAY dissented upon the question of jurisdiction.

KEEN *v.* KEEN.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 188. Argued March 7, 8, 1906.—Decided April 2, 1906.

Where the only assignment of error does not involve any Federal question the mere statement in the motion for new trial that the judgment deprives plaintiff in error of his property without due process of law, denies him equal protection of the laws, and is contrary to the Fourteenth Amendment, without any allegation as to why the judgment has this effect, no notice of which is taken by the state court in denying the motion does not properly raise a Federal question so as to give this court jurisdiction to review under § 709, Rev. Stat., even though the writ be allowed by the presiding judge of the state court.

What facts constitute a common-law marriage in a State is purely a local, and not a Federal, question.

THIS was an action of ejectment begun by Sophronia K. Keen in the Circuit Court of St. Charles County against Ellis Keen, to recover a tract of land in that county to which plaintiff averred she was lawfully entitled. The petition was in the usual form of a declaration in ejectment, and the answer a general denial.

Eli Keen was the common source of title, plaintiff claiming one-half of the land, subject to the payment of debts, under section 2939 of the Revised Statutes of Missouri, upon the ground that she was the widow of Eli Keen, who died in

1901, leaving, as plaintiff alleged, no children capable of inheriting.

Defendant claimed to be the legitimate child of an alleged common-law marriage between Eli Keen, a white man, and Phoebe, a negro woman.

There was judgment below for the plaintiff, which was affirmed by the Supreme Court. 184 Missouri, 358.

Mr. David P. Dyer for plaintiff in error.

Mr. C. W. Bates, with whom *Mr. John F. McGinnis* and *Mr. C. W. Wilson* were on the brief, for defendant in error, submitted.

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

The court deduced, as a conclusion of law from certain facts found, that no marriage at common law had ever existed between Eli Keen and Phoebe, a former slave of Eli's father, and that the former died without leaving any child or children or other descendants capable of inheriting from him, and hence that plaintiff was entitled to recover possession of an undivided half of the lands as his wife. No ceremonial marriage was claimed.

It is difficult to see any facts upon which to found our jurisdiction of the case. No Federal question appears in the pleadings or in the testimony, a transcript of which is contained in the record. The first glimmer of one appears in the motion for a new trial in the Circuit Court, in which it is charged that the judgment deprived the defendant of his property without due process of law, and also denied him the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution. But no allegation is made as to why the judgment had this effect. No notice was taken of the constitutional point in the opinion of the Supreme Court, although the writ of error from this court was allowed by the presiding

judge. In the assignment of errors filed in this court the only error charged is that, although the court below found there was no common-law marriage between Eli Keen and Phoebe, yet in its special findings, it found all the facts required to establish such common-law marriage between them, and that from the facts so found the law presumed a null and void marriage between said Eli Keen and Phoebe Keen, the issue of which was capable of inheriting under the statutes of Missouri. Revised Statutes, § 2918. No reference is made to the Constitution of the United States in this connection. In addition to this, the question what facts constitute a common-law marriage is purely a local one. We have searched the record for a Federal question, but have found none. The writ of error is, therefore,

Dismissed.

HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY v. MAYES.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD DISTRICT OF THE STATE OF TEXAS.

No. 198. Argued March 8, 1906.—Decided April 2, 1906.

An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day, to transport merchandise to another State, regardless of every other consideration except strikes and other public calamities, transcends the police power of the States and amounts to a burden upon interstate commerce; and articles 4497–5000, Rev. Stat. Texas, being such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the Federal Constitution.

Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the State.

THIS was an action begun by Mayes in the District Court of Llano County, Texas, against the Houston and Texas Central Railroad Company to recover a penalty of $475, by reason of defendant's failure to furnish seventeen stock cars, applied for in

writing by the plaintiff under the provisions of certain statutes of Texas hereinafter referred to, for the purpose of shipping plaintiff's cattle from Llano, Texas, to Red Rock, Oklahoma, and for damages occasioned by defendant's negligence.

The petitioner alleged that the defendant company formed with two other railroad companies a continuous line from Llano to Red Rock, and were engaged as common carriers in the business of shipping live stock and other freight; that on April 9, 1903, plaintiff, being the owner of six hundred and twenty-five head of cattle, made application in writing to the local agent of the road for seventeen stock cars to be delivered on April 20, and deposited with the agent one-fourth of the freight on the same, namely, $268.82, promising to pay the remainder on demand, and that he afterwards paid the same; that upon the day named, April 20, he had cattle sufficient to load the cars, delivered them to the defendant at its stock pens at Llano for shipment, but the defendant failed to furnish the cars, and did not furnish the same until the afternoon of the twenty-first of April, 1903.

The trial resulted in a judgment in favor of the plaintiff for $425 penalty for delay, and $500 damages to the stock while in the pens at Llano. This judgment was affirmed by the Court of Civil Appeals, and an application for a writ of error to the Supreme Court of the State was overruled.

Mr. Maxwell Evarts, with whom *Mr. Robert S. Lovett*, *Mr. James A. Baker* and *Mr. Gordon M. Buck*, were on the brief, for plaintiffs in error:

The Texas statutes as construed by the highest courts of that State impose upon a railroad company engaged in interstate commerce the burden of furnishing, upon demand, cars for interstate transportation, in unlimited numbers, within a time arbitrarily fixed by the statutes without regard to the circumstances or facilities of the company; and upon failure, from inability or other cause, to furnish the cars within the prescribed period, the company is subjected to severe penalties for failure

or mere delay in complying with the statutory requirements. This is a direct burden upon interstate commerce, and is such a regulation of commerce between the States as is vested in Congress.

The statutes should have been construed as intended to apply only to intrastate shipments, but the state courts declined to so limit them; and of course this court is bound by the interpretation of the statutes by the state court and must consider them as having been intended by the legislature to apply to interstate commerce.

The power of Congress to regulate commerce among the States is exclusive. *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Cook* v. *Pennsylvania*, 97 U. S. 574. Interstate transportation is interstate commerce. *State Freight Tax Case*, 15 Wall. 275; *United States* v. *Freight Association*, 166 U. S. 312.

The intention of the Constitution was to confer the power to regulate interstate commerce exclusively upon Congress and not to divide the power between the state legislatures and Congress. One of the chief objects of the Constitution was to rid commerce of the conflicting, vexatious and burdensome restrictions, which, under the Articles of Confederation, had been imposed by the various States. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 383; *State Freight Tax Case*, 15 Wall. 279; *Hall* v. *DeCuir*, 95 U. S. 485; *Wabash R. R. Co.* v. *Illinois*, 118 U. S. 557; *Pickard* v. *Pullman Co.*, 117 U. S. 34, 46; *Fargo* v. *Michigan*, 121 U. S. 238, 240; *Leloup* v. *Mobile*, 127 U. S. 640; *Almy* v. *California*, 24 How. 169; *Woodruff* v. *Parham*, 8 Wall. 123; *American Express Co.* v. *Iowa*, 196 U. S. 133.

The matter sought to be regulated is in no sense local but is national in character and importance and obviously admits of national regulation. From the first, certain state laws relating to pilotage, quarantine, etc., were sustained notwithstanding an incidental effect upon interstate and foreign commerce. *Hall* v. *DeCuir*, 95 U. S. 485, 487; *Cooley* v. *Board of Wardens*, 12 How. 299; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209. See also *Wilton* v. *State*, 91 U. S. 275; *Robbins*

v. *Shelby Taxing District*, 120 U. S. 489; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Louisville & Nashville Ry.* v. *Eubank*, 184 U. S. 27; *Illinois Central Ry.* v. *Illinois*, 163 U. S. 142; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514.

If the State ever possessed such power it was only until Congress should act, and Congress having assumed it the State is no longer entitled to exercise it. Since Congress has acted and has provided a system of laws regulating railroads as instruments of interstate commerce in great detail, it has excluded the power of the States to act upon the subject. *Bowman* v. *Chicago &c. Ry.*, 125 U. S. 465; *Sinnot* v. *Davenport*, 22 How. 227.

The defense of state legislation in violation of the Federal Constitution that it is within the police power is untenable in this case. *Railroad Co.* v. *Husen*, 95 U. S. 465; *License Cases*, 5 How. 504, 599; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Robbins* v. *Shelby County District*, 120 U. S. 489.

The Texas statutes as applied in this case plainly regulate interstate commerce and are therefore void. See *Central of Georgia Ry.* v. *Murphy*, 196 U. S. 194.

Nor can it be said, as was said by the court, in *Western Union Tel. Co.* v. *James*, 162 U. S. 650, that the statute merely provides a penalty for enforcing more completely a duty which exists at common law.

The plaintiff in error did not owe any duty to furnish cars to be carried to a destination beyond its own line, nor did it owe a duty to furnish cars at a certain hour of a certain day or otherwise than within a reasonable time.

In compelling the railroad company to furnish cars to go beyond its own line and out of its possession into a distant State, with no provision for their return or for compensation, the State deprives the railroad company of property without due process of law, contrary to the Fourteenth Amendment.

Coles v. *Railroad Co.* (Ga.), 45 Am. & Eng. Railroad Cases, 330; *Atchison &c. Co.* v. *Denver &c. Co.*, 110 U. S. 667, 680; *Gulf &c. Ry. Co.* v. *Miami &c. Co.*, 86 Fed. Rep. 419; *Post* v. *Southern Ry. Co.*, 103 Tennessee, 203; *Pittsburg &c. R. Co.* v. *Morton*, 61 Indiana, 573; *Chicago &c. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Burlington, C. R. & N. Ry.* v. *Dey*, 82 Iowa, 312, distinguished; see *S. C.*, 89 Iowa, 13, at p. 25.

Mr. T. W. Gregory, for defendant in error, submitted:

The statutes complained of by plaintiffs in error, as applied to interstate shipments, do not attempt any unlawful regulation of interstate commerce, but are a proper exercise of the police power of the State and are valid.

The cattle in this case did not become the subject of interstate commerce until they were delivered to and received by the carrier for transportation on the journey. *Coe* v. *Erroll*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 557; *Ex parte Koehler*, 30 Fed. Rep. 867; *In re Greene*, 52 Fed. Rep. 113; *Railway Co.* v. *Sherwood*, 84 Texas, 125. By analogy to the rule announced in these cases it has been held, that a train consisting of empty freight cars being prepared and taken to a point without the State for the purpose of transporting coal within the State is not engaged in interstate commerce. *Norfolk &c. R. R. Co.* v. *Commonwealth*, 93 Virginia, 57.

The plaintiff in error was conducting its business as a common carrier in the State, subject necessarily to the condition that it would conform to such reasonable regulations as the State might from time to time establish, that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one complained of in this case was in itself a regulation of interstate commerce. It was for the State to take into consideration all the transactions affecting freight traffic within its limits, and as far as practicable, make such regulations as were just to all who might have occasion to ship over the road. It was entitled, of course, to provide for

the convenience of shippers desiring to have freight transported on domestic trains, and this the statutes in question undertook to do, by requiring carriers to furnish cars promptly upon proper demand. But the State was not bound to ignore the convenience of those who desired to have freight transported to points beyond the limits of the State. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641.

These regulations ought to be regarded as rather in aid of interstate commerce and a rightful exercise of the police powers of the State. *Chicago, M. & St. P. R. Co.* v. *Solan*, 169 U. S. 133; *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *N. Y., N. H. & H. R. Co.* v. *New York*, 165 U. S. 628; *Richmond & A. R. Co.* v. *Patterson Tob. Co.*, 169 U. S. 311; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678; *M., K. & T. R. Co.* v. *McCann*, 174 U. S. 580.

The statutes are not in violation of the Fourteenth Amendment; they do not prescribe rates or interfere in any manner with the carrier's freedom of contract.

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

This case involves the constitutionality of certain articles of the Revised Statutes of Texas, set forth in the margin,[1] the

[1] "ART. 4497. When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent or other person in charge of transportation, to any railway company, receiver or trustee operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee or other person in charge thereof, to supply the number of cars so required, at the point indicated in the application, within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made, without giving preference to any person; provided, if the application be for ten cars or less, the same shall be furnished in three days; and provided further, that if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars. (As amended by the act of 1899, page 67.)

"ART. 4498. Said application shall state the number of cars desired, the

material requirement of which is that when the shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and shall deposit one-fourth of the freight with the agent of the company, the company failing to furnish them shall forfeit $25 per day for each car failed to be furnished, the only proviso being that the law "shall not apply in cases of strikes or other public calamity."

The defense was that this statute was not applicable to demands made for cars to be sent out of the State and to be used in interstate commerce; and as the shipment was intended for Oklahoma, the act did not apply, and the defendant was not liable. The question is whether the statute, applied as it is

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place at which they are desired and the time they are desired; provided, that the place designated shall be at some station or switch on the railroad.

"ART. 4499. When cars are applied for under the provisions of this chapter, if they are not furnished, the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of twenty-five dollars per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain.

"ART. 4500. Such applicant shall, at the time of applying for such car or cars, deposit with the agent of such company one-fourth of the amount of the freight charge for the use of such cars, unless the said road shall agree to deliver said cars without such deposit. And such applicant shall, within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same, and upon failure to do so, he shall forfeit and pay to the company the sum of twenty-five dollars for each car not used; provided, that where applications are made on several days, all of which are filled upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars." (As amended by the act of 1899, page 67.)

Art. 4502 contains the following proviso: "that the provisions of this law shall not apply in cases of strikes or other public calamity."

by the Texas court to interstate shipments, is an infringement upon the power of Congress to regulate interstate commerce.

That, notwithstanding the exclusive nature of this power, the States may, in the exercise of their police power, make reasonable rules with regard to the methods of carrying on interstate business; the precautions that shall be used to avoid danger, the facilities for the comfort of passengers and the safety of freight carried, and, to a certain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this court. Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the legislatures may annex such conditions as they please with regard to *intra*state transportation, and such other rules regarding *inter*state commerce as are not inconsistent with the general right of such commerce to be free and unobstructed.

The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether in the particular case the rule be reasonable or otherwise.

That States may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the State of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authorities is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employés, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized. An analysis of all the prior important cases upon this point will be found in the opinion of the court in *Cleveland &c. R. R. Co.* v.

Illinois, 177 U. S. 514, wherein a requirement that express trains intended only for through passengers should stop at every county seat, when ample accommodations were provided by local trains, was held to be an unreasonable burden. Other similar cases regulating the stoppage of trains are *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142; *Gladson* v. *Minnesota*, 166 U. S. 427; *Lake Shore &c. Ry. Co.* v. *Ohio*, 173 U. S. 285. In the same line is the more recent case of *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287.

While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather.

A dereliction of the road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but in addition thereto by an arbitrary penalty of $25 per car for each day of detention. The penalty which was assessed in this case, though the detention was only for one day, amounted to nearly as much as the damages, and might in another case amount to far more.

While perhaps the road may have no right to complain of that portion of the statute which assumes to provide for its own protection, it is illustrative of its general spirit that, if the shipper does not fully load his cars within forty-eight hours after their arrival, he shall forfeit $25 for each car, or if the consignee shall fail to unload them within forty-eight hours after their delivery, at the place of consignment, which in the case of interstate shipments would be in another State, he shall also forfeit $25 per day for each car unloaded.

In this connection the recent case of *Central &c. R. R. Co.* v. *Murphey*, 196 U. S. 194, is instructive. In that case we held that the imposition by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where or how, and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and an act of the legislature of Georgia imposing such a duty on common carriers was held void as to shipments made from points in Georgia to other States.

Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damages could actually have resulted to the shippers.

It should be borne in mind that the act does not apply to cattle alone, but to all cases "when the owner, manager or shipper *of any freight of any kind* shall make application in writing," etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of

no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of $25 for each car, though the detention of the cotton involved no expense to the owner, or may even have resulted in a benefit to him through a rise in the market.

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature.

The judgment of the Court of Civil Appeals is, therefore, reversed, and the cause remanded to that court for further proceedings.

MR. JUSTICE WHITE, not having heard the argument, took no part in the decision of this case.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissented.

JOY *v.* CITY OF ST. LOUIS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 204. Argued March 9, 1906.—Decided April 2, 1906.

Where diversity of citizenship does not exist, plaintiff cannot make out a case as arising under the Constitution and laws of the United States so as to give the Circuit Court jurisdiction, unless it necessarily appears by his complaint in stating his own claim, and it cannot be made to appear by an assertion in plaintiff's pleading, that the defense raises a Federal question.

The mere fact that plaintiff's title comes from a patent or under an act of Congress does not necessarily involve a Federal question; there must be an actual dispute as to the construction of the patent or act.

While the Federal court construes Government grants without reference to the construction adopted by the States for their grants, the incidents attached to ownership of property conveyed by the United States bordering on a navigable stream are to be determined by the State in which it is situated subject to the limitation that its rules do not impair the efficacy of the grant or its use by the grantee.

Whether land contained in an original patent reached to a river under the distances called for is a question of fact, and whether the patentee is entitled to accretion is a question of local and not Federal law, and ejectment for the land made by accretion cannot, where diversity of citizenship does not exist, be maintained in the Circuit Court as a case arising under the laws of the United States.

Although a case may not be one on plaintiff's statement of which the Circuit Court has jurisdiction as arising under the Constitution and laws of the United States, if the case is brought in the state court questions of a Federal nature may arise during the trial, and the party who specially sets up a Federal right which is denied may have the same reviewed by this court by writ of error under § 709, Rev. Stat.

THIS is an action of ejectment to recover certain lands in the City of St. Louis, State of Missouri, described in the petition, which was filed in the Circuit Court of the United States for the Eastern District of Missouri. The petition was dismissed by

the court solely upon the ground that the court was without jurisdiction, and the trial judge so certified the fact. The plaintiff sued out a writ of error and brought the case directly here for review under the fifth section of the act of 1891. 1 Comp. Stat. 549.

The petition sets forth in detail the title of the plaintiff in error to the premises which he seeks to recover in this action. It is therein stated that a confirmation of a concession was made by the commissioners appointed pursuant to an act of Congress, approved March 2, 1805, entitled "An act for the ascertaining and adjusting the titles and claims to land, within the Territory of Orleans, and the District of Louisiana," such concession having been made to one Louis Labeaume, of 360 arpents of land, by the lieutenant governor of the Spanish Province of Upper Louisiana, on February 15, 1799, and it was duly surveyed and certified April 10, 1799. The land remained an outlot, adjoining and belonging to the former town or village (now city) of St. Louis, and said outlot was owned, claimed, inhabited, cultivated and possessed by Labeaume prior to the twentieth day of December, 1803. By virtue of the first section of an act of Congress, approved June 13, 1812, entitled "An act making further provision for settling the claims to land in the Territory of Missouri," the title in fee simple to said concession, survey, confirmation and outlot was confirmed and granted to Labeaume.

Pursuant to an act of Congress, approved March 3, 1807, letters patent of the United States were issued to Labeaume, bearing date the twenty-fifth day of March, 1852, which letters purported and were sufficient to grant to Labeaume, or his legal representatives, the premises mentioned in the patent. On the sixth day of June, 1874, those from and under whom plaintiff derives title to the real estate sued for were the owners of the concession, and by an act of Congress, entitled "An act obviating the necessity of issuing patents for certain private land claims in the State of Missouri, and for other purposes," approved June 6, 1874, it is provided that the right, title and

interest of the United States in and to all of the lands in the State of Missouri, which had been confirmed by Congress, or officers acting under and by authority of Congress, were granted, released and relinquished by the United States, in fee simple, to the respective owners of the equitable titles thereto, their heirs and assigns, forever, as fully and completely in every respect whatever as could be done by patents issued therefor according to law.

By virtue of these matters and by mesne conveyances from Labeaume it was averred that plaintiff became the owner of the land in question, and that a controversy had arisen between the plaintiff and the defendants herein as to the proper construction and legal effect of the letters patent and the acts of Congress, approved June 13, 1812, and June 6, 1874, and the plaintiff herein averred in his petition—

"that under and by virtue of said confirmation, act of Congress approved June 13th, 1812, letters patent and act of Congress approved June 6th, 1874, said river (Mississippi) is the western boundary of said outlot, confirmation to Louis Labeaume, and said Soulard survey and survey number 3333, and that the said Louis Labeaume or his legal representatives were thereby granted all of the land lying on said west bank of said river, between the northern and southern boundary lines of said outlot, confirmation, Soulard's survey and United States survey number 3333, to said river, and that they were thereby constituted riparian proprietors and owners of all the land along said river bank between said north and south lines of said outlot, confirmation, and surveys, and were thereby vested with the title to, and ownership of, all land thereafter formed by accretions or gradual deposits from the said river along said west bank thereof, between said north and south lines of said outlot, confirmation and surveys, where a large body of land was formed by accretions to said outlot, confirmation and surveys.

"That said claim of plaintiff as to the proper construction and legal effect of said confirmation, acts of Congress approved

June 13th, 1812, and June 6th, 1874, respectively, and patent, is disputed by defendants, and contested by them in regard to the title of the land hereinafter described, and which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, between said north and south lines of said outlot, confirmation and surveys, and which thereby became a portion of the land granted by said letters patent and acts of Congress approved June 13th, 1812, and June 6th, 1874, respectively, and is the land herein sued for."

It is then averred that the proper construction and legal effect of the confirmation, acts of Congress and letters patent constitute the controlling question in the case, upon the correct decision of which plaintiff's title to the premises sought to be recovered herein depends, and he "therefore avers that this suit arises under the law of the United States, and said confirmation made and letters patent issued in pursuance thereof, and said acts of Congress, approved June 13, 1812, and June 6, 1874, respectively."

"He further states that as such legal owner of the premises he was entitled to the possession of the same under and by virtue of said confirmation, letters patent and acts of Congress, approved June 13, 1812, and June 6, 1874, respectively, on the 16th day of June, 1896, which are described as follows: " The plaintiff then gives a description of the land in controversy, which he alleges to be a portion of the accretions of the outlot, confirmation and surveys already mentioned.

It was also alleged that the defendants entered upon the premises on the sixteenth of June, 1896, claiming to own the same as a wharf, under and by virtue of section 9 of an act of Congress approved June 12, 1866, entitled "An act authorizing documentary evidence of title to be furnished to the owners of certain lands in the City of St. Louis."

Plaintiff then demanded judgment for the recovery of the premises, and five thousand dollars for the unlawful withholding of the same, and one hundred dollars for monthly rents and

profits, from the rendition of judgment until the possession of the premises is delivered to plaintiff.

The manufacturing company defendant filed an answer, denying each and every allegation of the petition. It also set up that it held the premises under the City of St. Louis and that the city (and the defendant holding under it) has had open, continuous, notorious and adverse possession of the premises, under claim and color of title, for more than ten years next before the filing of said petition.

The City of St. Louis filed a separate plea to the jurisdiction of the court, and asserted that it had no jurisdiction to try and determine the cause, because no Federal question or question of any kind giving jurisdiction to the court under the statutes and laws of the United States is involved in the issues in this cause. It further set up the facts in relation to the case of *Sweringen* v. *St. Louis*, in which the plaintiff therein claimed title to and possession of the property next immediately north of the premises herein claimed by plaintiff, under the same patent of the United States as that under which the plaintiff herein claims, and the history of the litigation is given, and the decision of the case in this court is referred to, which is to be found reported in 185 U. S. 38.

Mr. E. P. Johnson for plaintiff in error:

The petition is a statutory one in ejectment and sets out in detail and with great particularity the claims of plaintiff in error. It follows and elaborates the petition in form and substance, epitomized in the case of *Cooke* v. *Avery*, in stating the claims of plaintiff in error under said acts of Congress, the dispute and denial of said claims by defendants in error, and that said claims constitute the controlling question in the case and upon the proper construction and legal effect of which his rights depend, and it sufficiently states a Federal question. *Cooke* v. *Avery*, 147 U. S. 375; *Carondelet* v. *St. Louis*, 1 Black, 180; *Lake Superior &c. Co.* v. *Cunningham*, 155 U. S. 354; *Wisconsin Central Railway Co.* v. *Forsythe*, 159 U. S. 46; *Spo-*

kane Falls and Northern Railway Co. v. *Ziegler*, 167 U. S. 65; *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S. 526; *Doolan* v. *Carr*, 125 U. S. 618, 620.

There is a sufficient statement to show that the construction and legal effect of the acts of Congress and patent as to the right to alluvion and the extent to which land was, or might have been, conveyed by them was required, and therefore presented a Federal question. *Security Land & Exploration Co.* v. *Burns*, 193 U. S. 167, 171; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 182; *Packer* v. *Bird*, 137 U. S. 661, 662. This conflict of grants, the allegation of an entry by a claimant claiming to own the land under one of them, having been made to identify the premises with the conflicting grants, presents a Federal question and it has been the source of much litigation. *Ross* v. *Doe*, 1 Pet. 655, 664; *Baldwin* v. *Stark*, 107 U. S. 463, 464; *Shively* v. *Bowlby*, 152 U. S. 1, 9; *Hussman* v. *Durham*, 165 U. S. 144, 147; *Pickering* v. *Lomax*, 145 U. S. 310, 313; *Glasgow* v. *Baker*, 128 U. S. 560, 571; *Wallace* v. *Parker*, 6 Pet. 680, 686; *Neilson* v. *Lagow*, 7 How. 772, 775; *Bell* v. *Hearne*, 19 How. 252, 263; *Cousin* v. *Labatut*, 19 How. 202, 207; *Berthold* v. *McDonald*, 22 How. 334, 338; *Little* v. *Arkansas*, 22 How. 193, 202; *Magwire* v. *Tyler*, 1 Black, 195, 202; *Reichart* v. *Felps*, 6 Wall. 160, 165; *Silver* v. *Ladd*, 6 Wall. 440; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 54; *Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479, 482; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452, 458; *Lavagnino* v. *Uhlig*, 198 U. S. 443, 450; *Gleason* v. *White*, 199 U. S. 54.

If plaintiff in error on a trial in the court below should fail to produce sufficient evidence to vest a legal title in Labeaume, under act of June 13, 1812, then the only question would be whether the patent or the first section of the act of Congress of June 6, 1874, 18 Stat. 62, vested it in him, and in the event of a contest between them in regard to the title, it would present a Federal question. *Campbell* v. *Laclede Gas Light Co.*, 119 U. S. 445, 446. *Sweringen* v. *St. Louis*, 185 U. S.

38, has no bearing on this case. See *Sutton* v. *Dameron*, 100 Missouri, 141, 149.

Mr. Charles Claflin Allen, with whom *Mr. Charles W. Bates* and *Mr. Henry W. Allen* were on the brief, for defendants in error:

There being no allegation of diversity of citizenship, the only question involved is, whether the petition discloses a cause of action arising under the laws of the United States so as to give the court below jurisdiction of the cause. The jurisdiction of that court is defined by act of August 13, 1888, 25 Stat. 433.

In order to give the lower court jurisdiction the necessary facts to confer jurisdiction must be stated in the petition itself, and, unless the jurisdictional facts affirmatively appear from the record, the presumption upon writ of error or appeal, is that the court below was without jurisdiction. *King Iron Bridge & Mfg. Co.* v. *Otoe County*, 120 U. S. 225; *Third Street & Suburban Ry. Co.* v. *Lewis*, 173 U. S. 457; *Florida Central Ry. Co.* v. *Bell*, 176 U. S. 321; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48.

No jurisdiction is shown by the record in this case. It does not appear on the face of the record that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction. *Starin* v. *New York*, 115 U. S. 257; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473; *Cooke* v. *Avery*, 147 U. S. 375.

Jurisdiction cannot be conferred by alleging that defendant intends to dispute the validity of some law of the United States or to assert a defense based on some such law. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Florida Central R. R. Co.* v. *Bell*, 176 U. S. 321; *Chappell* v. *Waterworth*, 155 U. S. 102; *Walker* v. *Collins*, 167 U. S. 57; *Sawyer* v. *Kochersperger*, 170 U. S. 303; *Arkansas* v. *Coal Co.*, 183 U. S. 185; *Little York Gold Washing Water Co.* v. *Keyes*, 96 U. S. 199.

In an action of ejectment the plaintiff must recover, if at all,

upon the strength of his own title. The weakness of his adversary's cannot avail him. *McNitt* v. *Turner*, 16 Wall. 352. The plaintiff cannot confer Federal jurisdiction by anticipating the defendant's claims of title, which the court may never be called upon to consider, or by raising fictitious disputes with himself. *McGuire* v. *Blount*, 199 U. S. 142; *Watts* v. *Lindsey*, 7 Wheat. 158. The law concerning ejectment is the same in Missouri as in the United States courts. *Hunt* v. *Searcy*, 167 Missouri, 158.

The original jurisdiction of the Circuit Courts of the United States under the act of August 13, 1888, 25 Stat. 433, is quite different from the appellate jurisdiction of the Supreme Court under § 709 of the Revised Statutes. Cases, therefore, in which the Supreme Court has jurisdiction on writ of error to a state Supreme Court are not authorities on the questions of jurisdiction here involved. *Carson* v. *Dunham*, 121 U. S. 421.

The fact that one of the parties has derived his title directly under an act of Congress does not, for that reason alone, present a Federal question. *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; see also *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505.

The fact that the language of a grant from the United States may have to be construed in the usual and ordinary way applicable to instruments conveying title in order to determine the correct measurements of the land conveyed does not raise a Federal question. *Sweringen* v. *St. Louis*, 185 U. S. 38.

The many cases cited by plaintiff in error, in which this court passed the question of jurisdiction *sub silentio*, are no authority in the case at bar. *New* v. *Oklahoma*, 195 U. S. 252; *United States* v. *More*, 3 Cranch, 159.

Plaintiff, in setting up the various acts of Congress and claiming that differences may exist between them is disputing with himself—not with the defendants. They resulted in a patent from the United States, the validity of which is not disputed. All plaintiff needs to show is one title, good in him, to make out a *prima facie* case and he cannot rely upon possible defects in that title in order to raise a Federal question. *Langdeau* v.

Hanes, 21 Wall. 521; *Morrow* v. *Whitney*, 95 U. S. 551; *Wright* v. *Roseberry*, 121 U. S. 488.

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

There is no diversity of citizenship in this case, and the only ground of jurisdiction claimed is that the action arises under the laws of the United States. The case is a pure action of ejectment, and the general rule in such actions, as to the complaint, is that the only facts necessary to be stated therein are, that plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully withholds such possession, to plaintiff's damage in an amount stated. Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a claim that the title comes from the United States does not, for that reason merely, raise a Federal question.

It is a long-settled rule, evidenced by many decisions of this court, that the plaintiff cannot make out a case as arising under the Constitution or the laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action. In *Gold-Washing Co.* v. *Keyes*, 96 U. S. 199, 203, it was said that before the Circuit Court can be required to retain a cause under its jurisdiction, under section 5, act of 1875, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy, as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. That was a case of a petition for a removal of a suit from the state to the Federal court. But it has been held that whether there is a right of removal in such cases depends upon whether the Circuit Court could have exercised original jurisdiction. *Third Street &c. Co.* v. *Lewis*, 173 U. S. 457; *Arkansas* v. *Coal Co.*,

183 U. S. 185; *Boston &c. Mining Co.* v. *Montana &c. Co.*, 188 U. S. 632, 640. This original jurisdiction, it has been frequently held, must appear by the plaintiff's statement of his own claim, and it cannot be made to appear by the assertion in the plaintiff's pleading that the defense raises or will raise a Federal question. As has been stated, the rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of his cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action, imposing upon the defendant the burden of proving such defense. This principle was given effect to in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430; *Third Street &c. Co.* v. *Lewis*, 173 U. S. 457; *Arkansas* v. *Coal Co.*, 183 U. S. *supra; Filhiol* v. *Maurice*, 185 U. S. 108; *Boston &c. Co.* v. *Montana &c. Co.*, 188 U. S. *supra.*

The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises. It was said in *Blackburn* v. *Portland &c. Co.*, 175 U. S. 571, that "this court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question." The same principle was held in *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, and also in *De Lamar's Gold Mining Co.* v. *Nesbitt*, 177 U. S. 523.

To say that there is a dispute between the parties as to the construction of the patent or of the several acts of Congress referred to, does not raise a Federal question, because a statement that there is such dispute is entirely unnecessary in averring or proving plaintiff's cause of action. His source of title, as set forth in the petition, might not be disputed, and the defense might rest upon the defense of adverse possession, as set up in the answer. If defendants contented themselves on the trial with proof of such defense, then no question of a Federal nature would have been tried or decided.

In those cases where the dispute necessarily appears in the course of properly alleging and proving the plaintiff's cause of action, the situation is entirely different. In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed. There is no dispute as to the terms of the patent or of the acts of Congress. The language of the averment in the petition (which is set out in full in the foregoing statement of facts) shows that the controversy in dispute is not at all in regard to the land covered by the letters patent or by the acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, "which land is a portion of the land formed by accretions or gradual deposits from said river, along said west bank thereof, between said north and south lines of said outlot, confirmation and surveys, and which thereby became a portion of the land granted by said letters patent and acts of Congress approved June 13, 1812, and June 6, 1874, respectively."

Now, whether the land contained in the original patent reached to the Mississippi river as its eastern boundary, under the distances called for by the patent, would be a question of fact, as was stated in *Sweringen* v. *St. Louis*, 185 U. S. 38, and whether the plaintiff is, upon the facts set forth, entitled to the accretion, is a question of local or state law, and is not one of a Federal nature. *St. Anthony Falls &c. Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 359, and cases cited. In *Packer* v. *Bird*, 137 U. S. 661, it was held that while the Federal court would construe grants of the General Government without reference to the rules of construction adopted by the States for grants by them, *yet whatever incidents or rights attached to the ownership of the property conveyed by the United States bordering on a navigable stream* would be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. To the same effect is

Shively v. *Bowlby*, 152 U. S. 1. In the opinion in that case, at page 57, it is said: "By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case."

As this land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States.

The question before us is wholly different from the case of a writ of error to a state court founded upon section 709 of the Revised Statutes of the United States. A Federal question may appear in the course of the trial, and some right specially claimed or set up under a Federal statute may have been denied, and the party against whom the decision was made can have the question reviewed by this court under that section.

In *Cooke* v. *Avery*, 147 U. S. 375, this question was not decided. It was not referred to in the course of the opinion, and it is no authority for the plaintiff's contention herein. It was simply held that there was an issue between the parties which depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved.

In any aspect in which this case may be viewed, we think it was not one over which the Circuit Court had jurisdiction, and for that reason its order dismissing the petition is

Affirmed.

YORK MANUFACTURING COMPANY *v.* CASSELL.

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

No. 208. Argued March 14, 1906.—Decided April 2, 1906.

A mortgage containing no clause covering after-acquired property is not a lien on machinery placed on the land after the execution of the mortgage, and the title to which is reserved in the vendor until payment therefor.

The trustee in bankruptcy is vested with no better right or title to the property than the bankrupt had when the trustee's title accrued; and where, as in the State of Ohio, a conditional sale contract is good as between the parties themselves although not filed, the vendor of machinery, sold and delivered under such a contract and payment for which had not been made, may remove the same as against all creditors of the bankrupt who have not fastened upon it by some specific lien.

THE York Manufacturing Company has appealed from a judgment of the Circuit Court of Appeals, which held that the company had no lien upon or right to remove certain machinery, as against creditors of the Mount Vernon Ice, Coal and Milling Company, a bankrupt corporation. The facts upon which the question arises are as follows:

The corporation above named was organized under the laws of the State of Ohio, and was doing business at Mount Vernon, in that State. The company desired to enlarge its plant for the purpose of making ice, and to that end it was necessary to secure the proper machinery. It therefore entered into a contract, which was concluded October 27, 1902, with the appellant, the York Manufacturing Company, to supply that machinery for the sum of $7,375, to be paid in installments as stated in the contract. The contract also contained a stipulation "that the title to and ownership of the machinery, apparatus or plant herein contracted for shall remain in the York Manufacturing Company until the entire purchase price herein agreed to be paid . . . shall be actually paid in cash." The vendor

was given the right to enter the premises of vendee and remove the property in case of default. Twenty-five per cent only of the price of the machinery was ever paid. This contract was never filed, as required by the statute of Ohio relating to conditional sales. See Sec. 4155, which is set forth in the margin.[1]

The corporation being short of funds for the purpose of building, desired to obtain them by the execution of a mortgage on the lot on which the building was to be erected. One William Mild was the president of the corporation and was the owner of and had the legal title to the real estate upon which its plant was being constructed. Mild applied to Messrs. Waight & Ames to assist in raising money, by lending their credit as sureties on notes to be given for loans to the corporation up to the sum of $10,000, by such persons or banks as loans could be

[1] Section 4155, Revised Statutes of Ohio, provides as follows:

"In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer or deliverer of the same, until such sum or the value of such property or any part thereof shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless such conditions shall be evidenced by writing, signed by the purchasers, lessor, renter, hirer or receiver of the same, and also a statement thereon, under oath, made by the person so selling, leasing or delivering any property as herein provided, his agent or attorney of the amount of the claim or a true copy thereof, with an affidavit that the same is a copy, deposited with the clerk of the township where the person signing the instrument resides at the time of the execution thereof, if a resident of the State, and if not such resident, then with the clerk of the township in which such property is sold, leased, rented, hired, or delivered is situated at the time of the execution of the instrument; but when the person executing the instrument is a resident of a township in which the office of county recorder is kept, or when he is a non-resident of the State, and the property is within such township, the instrument shall be filed with the county recorder; and the officer receiving any such instrument shall proceed with the same in all respects as he is required to do by section four thousand one hundred and fifty-two of the Revised Statutes of Ohio, and shall receive the same fees as are allowed by law for similar services in other cases."

obtained from. Waight & Ames agreed to become such sureties, and the parties then entered into an agreement for that purpose, the particulars of which it is not necessary here to deal with.

At the date of the Waight & Ames agreement, November 1, 1902, no part of the machinery had come to the possession of the company, but it began to arrive in January, 1903, and was finally installed in the plant three or four months later.

On the same date that the agreement was executed a mortgage, without date, was also executed by William Mild, in whom the title was, to Waight & Ames, conditioned for their indemnification for becoming sureties, as contemplated by their agreement. This mortgage was not recorded until July 16, 1903, and on the next day the corporation made a general assignment for the benefit of its creditors. On July 22, 1903, a petition by creditors of the corporation was filed for an adjudication of bankruptcy against it, and on December 11, 1903, the adjudication was made.

Soon after the adjudication the York Manufacturing Company filed an intervening petition, which set forth the contract under which they sold the machinery to the bankrupt, and alleged default in payment and prayed that the company might be allowed to enter the premises and remove the machinery therefrom. This petition was resisted by the creditors.

A short time thereafter Waight & Ames filed their intervening petition, setting up their mortgage, and alleging that they had no knowledge of the contract with the York Manufacturing Company at the time of taking their mortgage, and prayed that they might be given precedence over that company. It appears they did raise for Mild the sum of $10,000, by indorsing for him to that extent, and a portion of it they have since been compelled to pay, and they are liable for the balance.

The referee in bankruptcy, before whom the question came, held that the mortgage of Waight & Ames was a valid lien on all the bankrupt's property, including the machinery furnished by the York Manufacturing Company, subject, however, to a

purchase money mortgage on the lot for $1,000. He also held that the York Manufacturing Company had no lien on the machinery, but was a general creditor only.

The District Court, on a petition for review, reversed this ruling, and held that the mortgage of Waight & Ames did not cover the machinery supplied by the York Manufacturing Company, but that the latter had no lien thereon as against general creditors; that the mortgage of Waight & Ames was a valid lien on the rest of the property, subject to the purchase money mortgage on the lot; that they were not creditors of the bankrupt corporation, except as to the sum of $1,500 they had charged for becoming sureties under the contract above mentioned, but the court held that they might prove the debts of the creditors who held the notes on which they were sureties, if the creditors failed to do so, and that they might be subrogated to the rights of the creditors to the extent they had paid or might pay any balance due on said notes remaining after applying thereon the surplus of the proceeds of the sale of the real estate, after the purchase money mortgage had been paid, and that the entire $10,000 of the notes, which were mentioned in the contract between Waight & Ames and the company, and for which they were to be sureties, might be included in this right of subrogation. This of course did not include a note for $1,000, which had been paid five months before the proceedings in bankruptcy. The District Court held that the mortgage of Waight & Ames was subordinate to the lien of the York Manufacturing Company, because no part of it had been placed on the ground of the bankrupt until two months after the making of the mortgage to Waight & Ames. The court, however, held that the general creditors were entitled to have the plant of the York Manufacturing Company sold for the payment of their claims because of the failure of that company to file the conditional sale contract, as required by the Ohio statute, and such failure rendered the contract void as to the creditors. Waight & Ames did not appeal from the District Court's decree.

The Circuit Court of Appeals, upon appeal by the York Manufacturing Company, affirmed the District Court, 135 Fed. Rep. 52, and that company has appealed here.

Mr. Constant Southworth, with whom *Mr. John L. Lott* and *Mr. Louis J. Dolle* were on the brief, for appellant:

Unrecorded conditional sale of chattels is superior to lien of prior realty mortgage. *Fosdick* v. *Schall*, 99 U. S. 235; *Manhattan Trust Co.* v. *Sioux City Ry. Co.*, 76 Fed. Rep. 658; *Meyer* v. *Car Co.*, 102 U. S. 1; *Cumberland* v. *Maryport* (1892), 1 Chan. 415; *Mott Iron Works* v. *Middle States L. B. & C. Co.*, 17 App. D. C. 584; *Duntz* v. *Granger Brewing Co.*, 83 N. Y. Supp. 957. Other cases of conditional sales are: *Ins. Co.* v. *George*, 77 Minnesota, 319; *Adams Mach. Co.* v. *Association*, 119 Alabama, 97; *Warren* v. *Liddel*, 110 Alabama, 232; *Lansing &c. Works* v. *Wilbur*, 111 Michigan, 413; *Harris* v. *Hackley*, 127 Michigan, 46; *German* v. *Weber*, 16 Washington, 95; *Page* v. *Edwards*, 64 Vermont, 124. See also *Campbell* v. *Roddy*, 44 N. J. Eq. 244; *Hine* v. *Morris*, 3 Bull. 515 (Ohio Dist. Ct.); *Tifft* v. *Horton*, 53 N. Y. 377; *Blinkley* v. *Forkner*, 117 Indiana, 176; *Wheeler* v. *Bedell*, 40 Michigan, 693.

Whether personalty attached to realty becomes realty is a question of intention between the parties. *Tifft* v. *Horton*, *supra; Aldine Mfg. Co.* v. *Barnard*, 84 Michigan, 632.

The word "creditors" in the Ohio conditional sales law includes only judgment creditors. A judgment is requisite in order to enable a creditor to attack a previous conveyance by his debtor. This is because the existence of his debt must be in some way ascertained and must be fastened upon the land. *Martin* v. *Bowen*, 51 N. J. Eq. 452.

It is as well settled in statutes as to conditional sales, as in statutes in regard to chattel mortgages, that the word "creditor" refers solely to creditors who hold some additional lien. The reason for this is that the fact that the conditional vendor, or the mortgagee, under instruments not properly filed, has no less rights than formerly, and such failure to record does not

give to the mere creditor any specific right in the property conditionally sold. It merely leaves the property in such a condition that the general creditor by diligence may acquire a prior lien thereon. Jones on Chattel Mortgages, 4th ed., § 245; *In re Cassie L. Chadwick*, 50 Wkly. Law Bull. (Ohio) 413; *Jones* v. *Graham*, 77 N. Y. 628; *Sheldon* v. *Wickham*, 161 N. Y. 500; *Stephens* v. *Meriden Brittania Co.*, 160 N. Y. 178; *Meyer Bros. Drug Co.* v. *Pipkin Drug Co.*, 136 Fed. Rep. 396; *Stewart* v. *Beale*, 7 Hun, 405; *Hall* v. *Keating Implement Co.*, 33 Tex. Civ. App. 526; *Bowen* v. *Wagon Works*, 91 Texas, 385.

The statute protects only subsequent creditors and mortgagees and not prior creditors. *In re Sewell*, 111 Fed. Rep. 791; *In re Ducker*, 133 Fed. Rep. 771; *S. C.*, aff'd, 134 Fed. Rep. 43; *Baldwin &c. Co.* v. *Crow*, 86 Kentucky, 679; *Wicks* v. *McConnell*, 20 Ky. L. R. 84; *Brown* v. *Brabb*, 67 Michigan, 17; *First National Bank of Corning* v. *Reid*, 122 Iowa, 280; *In re Cannon*, 10 Am. B. Rep. 64; *Harrison* v. *South Carthage Mining Co.*, 106 Mo. App. 32. The date from which to reckon who are prior creditors is the date of delivery of the machinery. *In re Gosch*, 126 Fed. Rep. 627.

The trustee in bankruptcy takes no greater title than the bankrupt and the bankruptcy proceedings do not operate as a judicial seizure, conferring new and greater rights on the creditors of the bankrupt. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Sheldon* v. *Wickham*, 161 N. Y. 500; Collier on Bankruptcy, 5th ed., 553; *Gibson* v. *Warden*, 14 Wall. 244; *Douglas* v. *Vogeler*, 6 Fed. Rep. 53; *Donaldson* v. *Farwell*, 93 U. S. 631; *Winsor* v. *McLellan*, 2 Story, 492; *Mannix* v. *Purcell*, 46 Ohio St. 102; *Shaw* v. *Glen*, 37 N. J. Eq. 32; *Van Heusen* v. *Radcliff*, 17 N. Y. 580; *Nebraska Plow Co.* v. *Blackburn*, 104 N. W. Rep. 178; *Cincinnati Warehouse Co.* v. *Combs*, 109 Kentucky, 21; *In re Wise*, 121 Iowa, 359; *Ryder* v. *Ryder*, 19 R. I. 188.

It would be unconstitutional for Congress to attempt to give the mere filing of the petition, or the adjudication, the

effect of rendering judgment in favor of all the creditors. The proceedings have none of the characteristics of a recovery of a judgment. The debts are not adjudicated. The mere filing of the petition could not have that effect. The adjudication could not have that effect, because at most the claims of only the petitioning creditors are passed upon.

If the equities of the York Manufacturing Company and the creditors are equal, the former must prevail, as being prior in time. *Cincinnati Warehouse Co.* v. *Combs, supra.*

As to the creditors having actual knowledge of the reservation of title to appellant, their claims are entitled to no priority.

The sole object and purpose of the recording act is to give notice. If there is actual notice the object of the act is accomplished. Hence, it has been uniformly held, that notice is equivalent to record. There is an exception in Ohio as to mortgages of land. This is because of the peculiar wording of the statute. That notice is equal to record has been the law ever since the leading case of *Le Neve* v. *Le Neve,* 2 White & Tudor Leading Cases in Equity, 109. *Batchelder* v. *Sanborn,* 66 N. H. 192; *Frick* v. *Fritz,* 115 Iowa, 438; *Aultman* v. *Kennedy,* 114 Iowa, 444; *Dyer* v. *Thorstad,* 35 Minnesota, 534; *Smith & Nixon* v. *Simper & White,* 15 Ohio Cir. Ct. 375.

There was no appearance for appellee.

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

The question is simply whether the York Manufacturing Company has a right under its conditional sale of the machinery to the bankrupt corporation to take the machinery out of the premises where it was placed as against all except judgment, or other, creditors, by some specific lien. There are no judgment creditors in the case and no attachment has been levied, and the question is simply whether the adjudication in bankruptcy is equivalent to a judgment or an attach-

ment on the property, so as to prevent the York Manufacturing Company from asserting its right to remove the machinery by virtue of the reservation of title contained in its contract.

In *Wilson* v. *Leslie*, 20 Ohio, 161, the court was construing the language of the statute relating to chattel mortgages, which declared a mortgage absolutely void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof should be deposited forthwith, as directed in the act. The court held that the mortgage was not void for lack of filing, as between the parties thereto, but that the statute only avoided the instrument as to those creditors who, between the time of the execution of the mortgage and the filing thereof, had taken steps to "fasten upon the property for the payment of their debts." As against such as had in the interim secured liens by attachment, execution or otherwise, the mortgage would be void. When filed with the recorder the instrument became valid as against all persons, except those whose rights had attached upon the property before the recording of the instrument. See to the same effect *In re Shirley*, 112 Fed. Rep. 301.

We have not been referred to any decision of the Supreme Court of Ohio as to the meaning of the statute requiring the filing of contracts of conditional sales, but we concur with the Circuit Court of Appeals in this case, that the statute would render the unfiled contract void as to the same class of creditors mentioned in the chattel mortgage statute. Therefore the contract would be void as to creditors who before its filing had "fastened upon the property" by some specific liens. As to creditors who had no such lien, being general creditors only, the statute does not avoid the sale, which is good between the parties to the contract.

The mortgage of Waight & Ames cannot be a lien on the machinery sold by the York Manufacturing Company, because the mortgage was prior to the time when any portion of such machinery was placed upon the land. There was no clause in

the mortgage covering after-acquired property, and in any event the mortgage would not cover property so acquired, the title to which, as in this case, was reserved to the vendor. This was the ruling of the District Court, and no appeal was taken therefrom by the mortgagees. There are no creditors with any specific liens, nor is there any other mortgage, and there is no attachment.

We come then to the question whether the adjudication in bankrutpcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate.

We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt. This is held in *Hewit* v. *Berlin Machine Works*, 194 U. S. 296. The same view was taken in *Thompson* v. *Fairbanks*, 196 U. S. 516. It was there stated that "under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt." See *Yeatman* v. *Savings Institution*, 95 U. S. 764; *Stewart* v. *Platt*, 101 U. S. 731; *Hauselt* v. *Harrison*, 105 U. S. 401. The same doctrine was reaffirmed in *Humphrey* v. *Tatman*, 198 U. S. 91. The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such a

case the trustee in bankruptcy takes only the rights of the bankrupt, where there are no specific liens, as already stated.

The remark made in *Mueller* v. *Nugent*, 184 U. S. 1, "that the filing of the petition [in bankruptcy] is a *caveat* to all the world, and in effect an attachment and injunction," was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt, under such facts as are above stated. The dispute in the *Mueller* case was whether the court in bankruptcy had power to compel, in a summary way, the surrender of money or other property of the bankrupt in the possession of the bankrupt, or of some one for him, without resorting to a suit for that purpose. This court held, as stated by the Chief Justice in delivering its opinion: "The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law." It was held that the trustee was not thus bound, but had the right, under the facts in that case, to proceed under the bankrupt law itself and take the property out of the hands of the bankrupt or any one holding it for him.

In this case, under the authorities already cited, the York Manufacturing Company had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and the adjudication in bankruptcy did not operate as a lien upon this machinery in favor of the trustee as against the York Manufacturing Company.

The decree of the Circuit Court of Appeals is reversed and the case remanded to the District Court, with directions to enter a decree in conformity with this opinion.

Reversed.

UNITED STATES *v.* DOWNING.

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

No. 104. Argued March 2, 1906.—Decided April 2, 1906.

Carbon sticks from twelve to twenty inches in length and which require only a slight and inexpensive process to adapt them for use in electric lighting are manufactured articles similar in material, quality, texture and use to carbons for electric lighting enumerated in paragraph 98 of the Tariff Act of 1897, 30 Stat. 156, 205, and therefore under § 7 of that act are subject to the same duty.

THE facts are stated in the opinion.

Mr. James C. McReynolds, Assistant Attorney General, for the United States:

Under sundry provisions of the tariff law use is made the test of classification, and it is necessary to determine whether in order to be included therein the enumerated articles must be completely prepared for the ultimate use specified or whether it suffices to show that as imported they can have no useful purpose except the one named notwithstanding something further may be required for their perfection. See *Dingelstedt* v. *United States,* 87 Fed. Rep. 190; *S. C.,* 91 Fed. Rep. 112; *United States* v. *Gabriel,* 99 Fed. Rep. 716; *United States* v. *Waddell,* 113 Fed. Rep. 1021.

The descriptive words in the act are not "carbons for electric lamps"—the style and capacity of which might change from time to time—nor "carbons for electric lights," but "carbons for electric lighting"; and the stipulation shows the process of manufacture had advanced so far that the sole use to which the articles could be put was for such lighting. See *Magone* v. *Heller,* 150 U. S. 70, 74; *Elgin Watch Co.* v. *Spaulding,* 19 Fed. Rep. 411; *Worthington* v. *Robbins,* 139 U. S. 337; *Hart-*

ranft v. *Meyer*, 149 U. S. 544; *Robinson* v. *United States*, 122 Fed. Rep. 970.

If not specifically enumerated as carbons for electric lighting in paragraph 98 the imports were similar thereto and chargeable with the same duty, under sec. 7 of the act. The articles were manifestly similar in material, quality and use to finally completed carbons for electric lighting. Similarity in one of the particulars mentioned is sufficient to subject an unenumerated article to the duty levied on an enumerated one. *Pickhardt* v. *Merritt*, 132 U. S. 252, 258.

Mr. J. Stuart Tompkins for respondents:

The unfinished carbon sticks in question are not dutiable directly under paragraph 98 at ninety cents per hundred as carbons for electric lighting

As showing the nicety and exactness of language which has always been required and deemed essential in tariff laws, see *United States* v. *Nichols*, 186 U. S. 298; *United States* v. *Austin Nichols & Co.*, 121 Fed. Rep. 729.

About one-twelfth the foreign market value of the carbons must be expended in labor performed in this country. The case is very similar to the pearl disks complete for use as buttons except for the piercing of the holes, involved in *United States* v. *Blumenthal*, 51 Fed. Rep. 76; *S. C.*, aff'd, 1 U. S. App. 680. See also *United States* v. *Simon*, 84 Fed. Rep. 154; *Hunter* v. *United States*, 126 Fed. Rep. 894; *United States* v. *Merck*, 66 Fed. Rep. 251; *Cowl* v. *United States*, 124 Fed. Rep. 475; *In re Maltby Lumber Co.*, T. D. 25,407; *Vanacker* v. *Spaulding*, 24 Fed. Rep. 88.

These sticks are "carbons" as defined by the dictionaries. See Standard and Century dictionaries.

This court has sanctioned reference to dictionary definitions as an aid to the memory and understanding of the court in determining the usual and ordinary meaning of words in tariff laws. *Nix* v. *Hedden*, 149 U. S. 304; *Marvel* v. *Merritt*, 116 U. S. 11, 12.

There being no evidence that the word "carbons" has a special meaning in trade and commerce different from its common and ordinary signification, the latter or common meaning, as understood in everyday speech, must be taken as the criterion in determining whether or not these imported sticks are "carbons" for electric lighting within the purview of that term as used in paragraph 98. *Sonn* v. *Magone,* 159 U. S. 417.

The language of the statute is plain and unambiguous, and it is the duty of the court to enforce it according to the obvious meaning of the words, without attempting to change it by adopting a different construction, based upon some supposed policy of Congress in regard to the subject of legislation. *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1; *Gardner* v. *Collins,* 2 Pet. 58, 93.

The dutiable classification of this merchandise must be determined according to the condition in which it was imported, not according to its condition when further manipulated or manufactured, after arrival. *United States* v. *Schoverling,* 146 U. S. 76, 82.

That the defendants imported their merchandise in its unfinished condition "for tariff purposes" is in no way prejudicial to them. *Merritt* v. *Welsh,* 104 U. S. 694; *Magone* v. *Luckemeyer,* 139 U. S. 612; *United States* v. *Schoverling,* 146 U. S. 81.

Mr. Justice McKenna delivered the opinion of the court.

This case involves the rate of duty under the Tariff Act of 1897, 30 Stat. 151, 156, 205, upon certain sticks of carbon used for electric lighting. The collector of customs of the port of New York held them to be dutiable at ninety cents per one hundred sticks, under paragraph 98 of the act of 1897, which provides as follows:

"Gas retorts, three dollars each; lava tips for burners, ten cents per gross and fifteen per centum ad valorem; carbons for electric lighting, ninety cents per hundred; filter tubes,

forty-five per centum ad valorem; porous carbon pots for electric batteries without metallic connections, twenty per centum ad valorem."

On protest and review by the board of appraisers the decision of the collector was affirmed. The board of appraisers, however, held that the sticks were not within the terms of paragraph 98, basing the ruling on *United States* v. *Reisinger*, 94 Fed. Rep. 1002, nor within paragraph 97, under the rule in the *Gabriel* case, 99 Fed. Rep. 716. And held further, that while the articles in question were not enumerated in the act of 1897, they were "similar in material, texture and use to carbons for electric lighting," and dutiable under paragraph 98 by virtue of the similitude clause (sec. 7) of the act of 1897. The Circuit Court for the Southern District of New York held that the articles were dutiable under paragraph 97 and reversed the ruling of the board of appraisers upon the authority of *United States* v. *Reisinger, supra,* and the Circuit Court of Appeals affirmed the Circuit Court.

It appears from the evidence that the carbon sticks are from twelve and a half to twenty inches in length, and to render them ready for use one-half inch must be cut off from the shorter ones and their ends burnished or smoothed, the process costing about one-tenth of one per cent. The longer sticks must be cut in two and sharpened at both ends, and it is stipulated that those steps for their completion being done the only use for the sticks "is as carbons for electric lighting." They are undoubtedly "carbons" and their use is "for electric lighting." In a general sense they come within the description of paragraph 98. It is contended, however, that they are not covered by that paragraph, because they must undergo a process of manufacture, though slight that process need be. The contention virtually is that the articles imported are not "carbons," either in the trade or popular sense, and do not become such until fit for use in lamps. In other words, it is the finished stick that constitutes the entity contemplated and made dutiable at ninety cents per hundred under paragraph 98,

and that the articles imported are accurately described and enumerated only in paragraph 97, as articles composed of carbon, not specially provided for. Paragraph 97 is as follows:

"Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem."

There is much to justify the contention of respondents as to paragraph 98. The act of 1897 recognizes in many places the difference between finished and unfinished articles of manufacture, but it also recognizes in many places use as determining the duty. The words "electric lighting" are very general and it is the effect of the stipulation of the parties that the imported articles have no useful purpose except for electric lighting, though something further may be required for exact adaptation. However, we may put our decision on another ground, which will be best developed in considering the contention of respondents under paragraph 97.

The contention encounters a serious difficulty. As was decided in *Dingelstedt* v. *United States*, 91 Fed. Rep. 112, the paragraph covers articles which are susceptible of decoration and not, as contended by respondent, articles decorated or not decorated, irrespective of their capability of being decorated. If the articles in question do not fall within paragraph 98, because not finished, and do not fall within paragraph 97, because not susceptible of decoration, where do they fall? They would seem necessarily to fall under that part of section 6, which provides that "on all articles manufactured, in whole or in part, not provided for," and subject to a duty of twenty per cent ad valorem. But there is a circumstance to be considered that arrests this effect. Section 7 provides "that each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which

is levied on the enumerated article which it most resembles in any of the particulars before mentioned; . . ."

The imported merchandise are undoubtedly manufactured articles and do not miss by a great deal being identical with "carbons for electric lighting" in the most restricted sense of that description. They have, therefore, similarity in all the particulars mentioned in section 7 to such carbons.

The judgments of the Circuit Court of Appeals and of the Circuit Court are reversed and the case remanded to the Circuit Court with directions to sustain the decision of the Board of General Appraisers.

SOPER *v.* LAWRENCE BROTHERS COMPANY.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

No. 206. Argued March 9, 12, 13, 1906.—Decided April 2, 1906.

The distinction between trespass and disseisin may be modified by statute as properly as it may be established by common law. Nothing in the Fourteenth Amendment hinders a State from enacting that in future the doing of such overt acts of ownership as are possible on wild lands, under a recorded deed showing that the actor claims title coupled with the payment of taxes, the owner not paying any meanwhile or doing any act indicative of ownership, shall constitute a disseisin which if continued long enough shall bar an action for the land; nor is such an act unconstitutional because it fixes the period at twenty years and allows it to become operative as to suits commenced five years after its enactment as it would be within the power of the legislature to fix the entire period of limitation at five years, and the owner would have an opportunity to defeat the disseisin by asserting ownership within that time; such a statute would not be construed as permitting suit to be barred by a period of twenty years' inactivity prior to the enactment of the statute, if acts of ownership were exercised thereafter.

If a state statute, as construed by the state court, is constitutional, this court follows that construction.

THE facts are stated in the opinion.

Mr. William Frye White, with whom *Mr. Taber D. Bailey* and *Mr. John B. Cotton* were on the brief, for plaintiff in error:

Chapter 162 of the Public Laws of Maine, 1895, was a limitation law and the state court in its construction of it deprived petitioner of property without due process of law.

The title of this act is "An act to make state tax sales more effectual," yet it is brought into this case, as a perfect defense, where state tax sales are not mentioned or referred to. There can be no constitutional objection to a limitation law, pure and simple, because it affects the remedy. When remedies are tampered with to the detriment of existing substantial rights, the remedial character of such statutes alone would not suffice to render them unobnoxious to the objection successfully urged against other retroactive laws. Wade on Retroactive Laws, § 224.

Calling a statute a limitation law does not make it so unless that is its effect. A court can construe a statute most obnoxious to constitutional guaranties as a limitation law, but if its effect is to impair and destroy vested rights, such construction should not stand.

A state statute which obliges a person in the constructive possession of land, which from its nature and character is capable of no other possession, to bring suit to recover the land, therefore compelling a resort to legal proceedings by one who is in the complete enjoyment of all he claims deprives him of property without due process of law.

The word "wild" used in the statute precludes the idea of any actual occupation. There is no actual possession because as soon as a settler or inhabitant has reduced it to possession, it ceases to be wild, and this statute does not apply. The court below found that this statute did apply and therefore settled the fact that this was wild land.

Where there is no actual possession, constructive possession follows the legal title. Where one has the legal estate in fee of lands, he has the constructive possession unless there is an

actual possession in someone else. 28 Am. & Eng. Ency. of Law, 239.

The plaintiff had the legal title on the date of the enactment of this act, and it being wild land there could be no adverse possession sufficient to divest him of his title.

Cuttings and partial clearings under claim of ownership during twenty or more years, incident to casual lumber operations, are ineffectual to establish any title by disseizin of the true owner; especially when such owners stood in the relation of cotenants with the persons in possession. *Fleming* v. *Paper Co.*, 93 Maine, 110; *Millet* v. *Mullen*, 95 Maine, 421; *Slater* v. *Jephson*, 6 Cush. 129; *Cook* v. *Babcock*, 11 Cush. 129. The payment of taxes on land is not an act of possession, especially of wild land, *Hudson* v. *Coe*, 79 Maine, 83.

The payment of taxes by the actual occupant of land is evidence of the adverse character of the occupancy, but is not evidence that the taxpayer is in fact occupying the land. *Millet* v. *Mullen*, 95 Maine, 401; *Little* v. *Megquier*, 2 Maine, 176.

The registry of a deed of land executed and acknowledged by a grantor who had no right to the granted premises is not constructive notice to the true owner that such conveyance had been made. The registry of a deed is constructive notice only to future purchasers under the same grantors. *Bates* v. *Norcross*, 14 Pick. 224. The mere entry by the grantee under a recorded deed without an open, exclusive occupation manifested by fencing or otherwise, does not amount to a disseizin against the will of the true owner. *Bates* v. *Norcross*, *supra*.

This statute seeks first to make acts of trespass acts of disseizin, and then it seeks to compel the owner of the land because he has suffered these trespasses to be committed, which could not under the then existing laws affect the title to his land, bring suit to recover his land. In express terms it cuts off the owner of wild lands from the use and enjoyment of his property and only leaves him a right to bring suit to recover what he already owns. Where before he was seized

of his land and had a right of entry in it, by a mere act of the legislature he is disseized for he must become disseized to bring a real action to recover his land. Stearns on Real Actions, 215, 216.

All the incidents and rights of the ownership of wild lands are transferred by legislative authority alone, from one private person to another, and that without compensation, and the owner is forced out of the constructive possession and enjoyment of his property, and made to enter upon expensive litigation to regain it. No acts of ownership however strong during the five years of grace will save him, but he must bring suit or lose his land.

One who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified, to test the validity of a claim which the latter asserts, but takes no steps to legally enforce. *Grossbeck* v. *Seeley*, 13 Michigan, 329; Cooley, Const. Lim., 6th ed., 449; *Baker* v. *Kelley*, 11 Minnesota, 358; *Elbridge* v. *Kuehl*, 27 Iowa, 160, 173; *Monk* v. *Carbin*, 58 Iowa, 503; *Wahn* v. *Shearman*, 8 Serg. & R. 357; *Farrar* v. *Clark*, 85 Indiana, 449.

Hill v. *Kricke*, 11 Wisconsin, 442; *Leffingwell* v. *Warren*, 2 Black, 599, distinguished as relating to a wholly prospective statute, while under this statute the owner in constructive possession is compelled to bring suit to retain his land, and also prior to the Fourteenth Amendment the court followed the Wisconsin rule.

A state statute which changes the law of disseizin in respect to titles existing when it was passed and on account of such retroactive legislation, creates new obligations and imposes new duties, by converting an estate in possession into a mere right of action and deprives the owner of property without due process of law.

Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to

transactions or considerations already past must be deemed retrospective. *Society &c.* v. *Wheeler*, 2 Gall. 105; *Proprietors &c.* v. *Laboree*, 2 Greenl. 286; *Coffin* v. *Rich*, 45 Maine, 515; *Sturges* v. *Carter*, 114 U. S. 512.

In the earlier cases where such retroactive laws were attacked for their supposed conflict with the National Constitution, the Supreme Court of the United States refused to pass adversely to the validity of such as had been sustained by the courts of last resort in the States where they were enacted. This was before the passage of the Fourteenth Amendment. *Satterlee* v. *Mathewson*, 2 Pet. 380, 413; *Watson* v. *Mercer*, 8 Pet. 88. Since the passage of that Amendment, the taking of property from one by means of a statute retroacting upon rights previously acquired is not by due process of law, or the law of the land. *Missouri Pacific R. Co.* v. *Nebraska*, 164 U. S. 404; *Davidson* v. *New Orleans*, 96 U. S. 97.

The constitution of the State has secured to every citizen the right of "acquiring, possessing and enjoying property," and property cannot by a mere act of the legislature be taken from one man and vested in another directly, nor can it by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect. *Webster* v. *Cooper*, 14 How. 488, commenting on the *Laboree* case, *supra*. See also *Lewis et al.* v. *Webb*, 3 Greenl. 335; *Given* v. *Marr*, 27 Maine, 220; *Austin* v. *Stevens*, 24 Maine, 520; *Coffin* v. *Rich*, 45 Maine, 515; *Atkinson* v. *Dunlap*, 50 Maine, 117; *Adams* v. *Palmer*, 51 Maine, 493. And see *Thistle* v. *Frostburg Coal Co.*, 10 Maryland, 147.

Where, before the true owner was obliged to incur no expense to retain his property, this statute creates a personal liability to put out money which he may never recover back, and compels him to run the risk of losing his land by a lawsuit. There has been a confiscation of that money required to be paid out, which he does not recover back, without any

hearing whatever. *Dunn* v. *Snell*, 74 Maine, 27; *Bennett* v. *Davis*, 90 Maine, 102.

Mr. Orville Dewey Baker, with whom *Mr. Amos K. Butler* was on the brief, for defendant in error:

The statute of 1895 has received a judicial construction from the court of last resort in Maine. As construed it is not in conflict with the due process clause of the Fourteenth Amendment.

A construction so given to a statute by the highest court of a State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States. *Railway Co.* v. *Nebraska*, 164 U. S. 414; *Railway* v. *Minnesota*, 134 U. S. 418, 456; *Railway* v. *Illinois*, 163 U. S. 142, 152; *Tullis* v. *Railway*, 175 U. S. 353.

The Supreme Court of Maine having construed the statute as one of limitations and as having only a prospective operation, it is not repugnant to the due process clause of the Fourteenth Amendment. A statute will not be held invalid on the objection of a party whose interests are not affected by it in the manner which the Constitution forbids. Cooley, Const. Lim., 180, 181.

But plaintiff is still further limited. He must show that there was manifest error in the state court in some one of the very respects specially set up by him in the specifications of error. The plaintiff must also show that the errors relied on appear in the record of the state court, and not merely and solely in the final opinion of that court.

The errors assigned do not appear "in the record" of the state court and the constitutionality of the state law was not properly raised or pleaded, or in any way drawn in question by the plaintiff in the state court. *Murdock* v. *Memphis*, 20 Wall. 634; *Moore* v. *Mississippi*, 21 Wall. 639; *Railroad* v. *Hewes*, 183 U. S. 68; *Powell* v. *Brunswick Co.*, 150 U. S. 439; *Railroad* v. *Louisville*, 166 U. S. 715.

The plaintiff asks this court to reverse the construction put

upon a Maine statute by the Maine court and reopen and reverse what is *res adjudicata*. This the court will not do. *Railway* v. *Minnesota*, 134 U. S. 418, 456; *Railway* v. *Illinois*, 163 U. S. 142, 152; *Railway* v. *McCann*, 174 U. S. 580, 586.

The statute of 1821 under review in the *Laboree* case was by its express terms retroactive and was held invalid on that ground.

The principle upon which the act of 1895 is based is not novel. It has been repeatedly passed upon in other States under similar statutes. See *Newland* v. *Marsh*, 19 Illinois, 376, 380; *Stearns* v. *Gittings*, 23 Illinois, 387; *Lawrence* v. *Kenney*, 32 Wisconsin, 293; *Knox* v. *Cleveland*, 13 Wisconsin, 274; *Hill* v. *Kricke*, 11 Wisconsin, 442, approved in *Leffingwell* v. *Warren*, 2 Black, 599; *Waler* v. *Sherman*, 8 S. & R. 357; *Eldridge* v. *Kenkl*, 27 Iowa, 175; *Farrah* v. *Clark*, 85 Indiana, 453.

Mr. Justice Holmes delivered the opinion of the court.

This is an action of trover for logs, brought by the plaintiff in error in the Supreme Judicial Court of Maine. The defendant admitted carrying off the logs, but set up title to the land on which they were cut, one-half in itself and one-half in its licensors. At the trial the plaintiff proved a *prima facie* title to an undivided interest in the land. The defendant relied upon the Maine Public Laws of 1895, c. 162, § 1. With regard to that, the Chief Justice, presiding, instructed the jury that if the defendant and its licensors, respectively, had satisfied the conditions of § 1, it was entitled to a verdict. A verdict was found for the defendant on that ground. The ruling was taken to the full court on exceptions and a motion for a new trial. At the argument there it was urged that the statute, if applicable to the plaintiff, was contrary to the Fourteenth Amendment and void. But the court, adverting to the question, decided the contrary, and the defendant had

judgment. 98 Maine, 268. The case then was brought to this court.

The material sections of the act of 1895 are as follows:

"SEC. 1. When the State has taxed wild land, and the state treasurer has deeded it, or part of it, for non-payment of tax, by deed purporting to convey the interest of the State by forfeiture for such non-payment and his records show that the grantee, his heirs or assigns, has paid the State and county taxes thereon, or on his acres or interest therein as stated in the deed, continuously for the twenty years subsequent to such deed; and when a person claims under a recorded deed describing wild lands taxed by the State, and the state treasurer's record shows that he has, by himself or by his predecessors under such deed, paid the state and county taxes thereon, or on his acres or interest therein as stated in the deed, continuously for twenty years subsequent to recording such deed; and whenever, in either case, it appears that the person claiming under such a deed, and those under whom he claims, have, during such period, held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine, and it further appears that during such period, no former owner, or person claiming under him, has paid any such tax, or any assessment by the county commissioners, or done any other act indicative of ownership, no action shall be maintained by a former owner, or those claiming under him, to recover such land, or to avoid such deed, unless commenced within said twenty years, or before January one, nineteen hundred. Such payment shall give such grantee or person claiming as aforesaid, his heirs or assigns, a right of entry and seizin in the whole, or such part, in common and undivided, of the whole tract as the deed states, or as the number of acres in the deed is to the number of acres assessed.

"SEC. 4. This act shall not apply to actions between cotenants, nor to actions now pending in court, nor to those commenced before January one, nineteen hundred."

The defendant and its licensors claimed under the second branch of the statute. They held under recorded warranty deeds describing wild lands taxed by the State, running back for more than twenty years, and, although it must be taken that the first deed of the series was executed by owners of a part interest only, that deed naturally was held by the state courts to be a repudiation of the tenancy in common and to lay a foundation for the working of the act. With that question we have nothing to do. The state treasurer's record showed that the defendant, its licensors and those under whom they claim, had paid the taxes thereon continuously down to the bringing of this suit. The same persons had held such exclusive, peaceable, continuous and adverse possession of the land as comports with the ordinary management of wild lands in Maine, and during the same period no former owner had paid any tax or done any other act indicative of ownership. These facts are admitted or must be assumed to be established by the verdict. This action was brought in 1902 for acts done from 1900 to 1902, after the time allowed by § 4 had run. The question is whether the statute is constitutional as applied to such a case.

Before considering the construction of the statute we will deal with an objection which seems to be made to it, even if solely prospective as we subsequently shall explain. Suppose that the law gives no effect whatever to acts done before its passage, still it is suggested that when it went into operation the plaintiff but for its provision would have been in constructive possession, and the statute purported at once to disseize him and to put him to an action to recover the land. But so far as the statute is prospective it merely enacts, subject to the qualification in § 4, of which we shall speak in a moment, that certain acts, if done in the future, shall constitute a disseizin, and that the disseizin if continued for the due time shall ripen into title. The distinction between trespass and disseizin may be modified by statute as properly as it may be established by common law. Also statutes of limitation

may be passed where formerly there were none. So far as the Fourteenth Amendment is concerned there is nothing to hinder a State from enacting that in future the doing of such overt acts of ownership as are possible on wild land, under a recorded deed which shows that the actor claims title, coupled with payment of the taxes, the owner meantime not paying them, and doing no act indicative of ownership, shall constitute a disseizin, or that such disseizin if continued long enough shall bar an action for the land. We think it unnecessary to cite the state decisions on similar statutes or to argue that proposition at greater length. See *Leffingwell* v. *Warren*, 2 Black, 599.

The main argument for the plaintiff is that if, as was the fact, the defendant had maintained the statutory occupation for the twenty years before the passage of the act, the statute purported retrospectively to give it the title, or, if the statute did not go to that length, that at least it counted the fifteen years preceding the enactment with the five following it to January 1, 1900, in order to make up the twenty years required by § 1, in any suit brought after that date. The former, more extreme suggestion, is answered by § 4. By the words of that section the statute did not apply to actions brought before January 1, 1900. Therefore, if but for the statute, the plaintiff would have had a constructive seizin and might have declared in trespass, he still had it during five years, and might have declared in the same way.

The only matter requiring analysis is the question of the former owner's position after January 1, 1900, when the act applied. The action then required to be brought by the former owner is an action "to recover such land, or to avoid such deed." An action to recover the land presupposes that the former owner still is out by a continuance, up to the time when the suit is brought, of the acts and omissions of the parties concerned respectively which are made to constitute a disseizin. The requirement that the statutory disseizin should continue until the action was brought is further shown by

the word "said" in the phrase "unless commenced within said twenty years," to which "or before January one, nineteen hundred," is the alternative. Said twenty years are the years during which the disseizor has been paying taxes and holding possession. If between 1895 and 1900 the former owner had been paying the taxes and doing acts indicative of ownership he would be seized by the very terms of the statute. He would have no occasion to sue, and we hardly understand it to be suggested that he could be sued on the strength of a disseizin satisfying the statute during the twenty years before it was passed, but ending in 1895. If such a suggestion should be made it would be disposed of by recalling again that for five years after the enactment, for purposes of suit at least, he stood constructively seized by force of § 4, whenever apart from the statute he would not have been disseized. Of course therefore he was not disseized retrospectively before the date of the act. It is still more absurd to suppose that the act meant that if he had paid the taxes and done acts of ownership, so that he was not merely constructively but actually seized during the five years, his title was to vanish when that time had elapsed.

The discussion is narrowed, then, to the consideration of an action begun, as this was, after January 1, 1900, when the defendant has held that statutory possession for the five years following the act and for fifteen years before. If the plaintiff had brought a real action instead of the present suit, he would have been barred if the statute is good. The plaintiff says that the counting of the fifteen years before the enactment makes the statute bad. But suppose that the statute had enacted simply that if the conditions of § 1 should be maintained from the date of the act until January 1, 1900, and no action brought, the former owner should be barred, there can be no question that it would have been valid. It was not and could not be argued that a statute of limitations allowing nearly five years would be unreasonably short. *Turner* v. *New York*, 168 U. S. 90; *Terry* v. *Anderson*, 95 U. S. 628.

But, if such a statute would be constitutional, the requirement of a continuance of similar conditions for a time before the statute long enough to make twenty continuous years when taken with the five years following it was a pure advantage to the plaintiff, a further condition which did him only good. It was not argued that the statute was invalid because a less time was allowed to persons in the plaintiff's position than to those whose twenty years should begin to run after the statute went into effect. Similar provisions are common and seem to have been before the court in *Terry* v. *Anderson* and *Turner* v. *New York, supra,* and in *Koshkonong* v. *Burton,* 104 U. S. 668.

Some objection was made to the effect given to a tax deed in the first part of the section. But that is not before us. We see nothing to indicate an intent to go beyond the law. *Marx* v. *Hanthorn,* 148 U. S. 172. As to the possibility that the taxes may have been assessed unlawfully, or the recorded deed under which the defendant claims forged, it is admitted that such matters might be proved. As they are public facts, give color to the overt acts done upon the land and must be accompanied by a necessarily conscious omission of the plaintiff to pay taxes or do any acts of ownership, we see nothing to hinder the legislature making them sufficient, *prima facie* at least, to set the statute running and to put the former owners to a suit.

The act as we construe it does not infringe the Fourteenth Amendment. We understand our construction to agree with that adopted by the Supreme Judicial Court of the State. That court says of the statute, "it is not only not retrospective, but is distinctly made prospective only in its operation, and the reasonable period of five years after the date of the enactment is allowed during which all controversies respecting such titles might be adjusted according to 'the principles and the nature of those facts by means of which those titles had existed' before the passage of the act." Of course if the statute as construed by the state court is constitutional we follow its

construction. *Tampa Water Works Co.* v. *Tampa,* 199 U. S. 241, 243. We have made some little analysis of the words simply because the state court went into no detail.

Judgment affirmed.

RODRIGUEZ *v.* VIVONI.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

No. 209. Argued March 14, 1906.—Decided April 2, 1906.

Remote explanations as to the use and meaning of a word will be rejected when the will offers upon its face a different and more obvious one.
The words *sucesion legitima* in the will of a Porto Rican held to mean "issue," and not "lawful heirs."
This court will not consider a claim which was not set up in the bill or in the court below, nor suggested until after the argument in this court.

THE facts are stated in the opinion.

Mr. Fritz v. Briesen, with whom were *Mr. Charles M. Boerman* and *Mr. Stephen M. Hoye* on the brief, for appellant:

The real point in issue, in determining the proper construction of the will, is whether the words "sucesion legitima" used in the thirteenth, the residuary clause of the will, mean "legal issue" or "legal heirs." If the former, this appeal must fail; if the latter, the complainant is entitled to take as the legal heir of her daughter, Felipa Benecia.

The primary and technical meaning of the words "sucesion legitima" is "legal heirs."

As used in the Spanish Codes and law dictionaries the words "sucesion legitima" have a meaning which may be most nearly expressed by the English words "intestate succession." Escriche, Diccionario Razonado de Legislacion y Jurisprudencia, Paris, 1852, tit. "Sucesion legitima;" Pothier, 8 Œuvres (Edited by Bugnet), Paris, 1890, Traité des Succesions, 1;

Code of Civil Procedure of 1889 (War Dept. Translation), Art. 912.

See also Civil Code of Porto Rico, 1902 (in Revised Statutes of Porto Rico), §§ 664–666, 886. This Code makes a distinction between legitimate succession, which is that which the law has established in favor of the nearest relatives of the deceased (§ 666 v.) and irregular succession which is that established in favor of certain persons or of the people of Porto Rico in the absence of legal heirs or those instituted by will.

See also Code of Louisiana, New Orleans, 1861, Arts. 871-875, where the same distinction is drawn.

It is a peculiar provision of the civil law that, in view of the fact that an heir is liable for all or a share of the debts of the deceased, he may refuse the inheritance altogether. In such a case, he is considered as not being an heir, and as never having been an heir.

Thus by collocation of ideas the words "sucesion legitima" are used to designate those of the nearest relatives who take the inheritance. See Resolution of June 25, 1895, in Alcubilla, Diccionario de la Administration Española, Madrid, Appendix Volume for 1895, page 795, Tit. "Jurisprudencia Hipotecaria y Notarial." The case is also printed in full in Scaevola, 3 Jurisprudencia del Codigo Civil, Madrid, 1901, page 213. See also Century Dictionary, "Succession."

The words "sucesion legitima" are never used in the Code to designate legitimate issue, except in so far as the "sucesion legitima" goes first to the descendants (Art. 930), and, in the absence of descendants, or of their refusal to take, to the ascendants, and in their absence or refusal to take, to the collateral relatives. If, therefore, a deed or will provides that the property is to go to the "sucesion legitima," then, if there are children, it necessarily means the children. But, if there be no children, it means ascendants; and if there be no ascendants, then it means the collateral relatives.

We have an analogous use of the word "heirs" in our law.

See *Ide* v. *Ide*, 5 Massachusetts, 500; *Gifford* v. *Choate*, 100 Massachusetts, 345; *Heath* v. *Hewitt*, 127 N. Y. 166.

It is the general rule of the Spanish law that wills are to be construed exactly as they read, unless such construction be a ridiculous one. Law 5, Title 33, Partida 7, of the Laws of Las Siete Partidas. This law has been reënacted in the Civil Code, Art. 675.

The law has been construed in a number of decisions of the Supreme Court of Spain, reported in the Jurisprudencia Civil. Sentence of December 20, 1862, vol. 7, No. 315, p. 787; Sentence of December 11, 1865, vol. 12, No. 439, p. 461; Decision of June 21, 1872, vol. 26, No. 204, pp. 15, 16; Sentence of March 3, 1873, vol. 27, No. 108, p. 395.

The same provisions are found in our law of the construction of wills. The plain meaning of the words used in a will is always presumed to be their meaning, and the burden of proof that they are used in another sense is upon the party claiming so. See *Aspden's Estate*, Fed. Cas. No. 589; *Daley* v. *James*, 8 Wheat. 534; *Osborne* v. *Shrieve*, 3 Mason, 391.

It is also invariably so held in the States where the civil law similar to that of Porto Rico is in force, as, for example, in Louisiana and California. *Norris* v. *Hensley*, 27 California, 439, 450; *Sharpe* v. *Kleinberter*, 7 La. Ann. 264.

In construing a will, the words are to be construed according to their natural import, unless the context evidently points out that in the particular instance there should be some other construction. *Sheriff* v. *Brown*, 5 Mackey, 172; *In re Hallet*, 8 Paige, 378; *Puryear* v. *Edmonson*, 4 Heisk, 51. A testator must be presumed to have used words in their ordinary primary sense or meaning. *In re Woodward*, 117 N. Y. 522. All doubts are to be resolved in favor of the testator's having said exactly what he meant. *Cady* v. *Bunn*, 46 N. J. Eq. 131. Where the provisions of the will are clear and simple, no reason exists for taking the testator's words in any other than their natural sense. *Wiley* v. *Lockwood*, 86 N. Y. 301; *Lovett* v. *Buloid*, 3 Barb. Ch. 137. The question in expounding a

will is, not what the testator meant, but what is the meaning of the words used by him. *Barrow's Appeal* (Pa.), 8 Cent. Rep. 132; *Bates* v. *Woodruff*, 123 Illinois, 205.

Provisions relating to fideicommissary substitutions are to be liberally construed, so as to prevent the taking place of the substitution. Pothier, "Traité des Substitution," Works, Paris, 1890, edited by Bugnet, vol. 8, p. 477.

The construction of the words "sucesion legitima" as legal heirs is the one intended by the testator. The will was drawn by a notary public, an officer held in high respect in Porto Rico and appointed for his knowledge of the law of conveyancing and drafting of wills. The words were therefore used in their technical legal sense.

Mr. N. B. K. Pettingill, for appellees, submitted:

Under both the Spanish and American systems the courts will so construe wills, irrespective of the technical meanings of the words used, as to determine and carry out the real intention of a testator. The rule in our own law is firmly fixed. *Robinson* v. *Portland Asylum*, 123 U. S. 707; *Kenaday* v. *Sinnott*, 179 U. S. 616.

There are numerous decisions of the Supreme Court of Spain in which almost the same language is used. *Cayetano Codina* v. *Felipe Codina*, Sentence of June 30, 1866, Jurisprudencia Civil, vol. 14, p. 237; *Romero* v. *Romero*, Sentence of Dec. 10, 1866, Juris. Civ., vol. 14, p. 793.

For meaning of "sucesion legitima" see Dictionary Royal Spanish Academy, p. 932; Lopez, Spanish–English Dictionary, p. 577; Sentence, vol. 61, p. 10, Juris Civ.; Sentence, vol. 51, p. 422, Juris. Civ.

See the American decisions which hold that where the word "heirs" is used by a testator it often is shown by the context to mean "issue" or "descendants." *Randolph* v. *Randolph*, 40 N. J. Eq. 77; *Canfield* v. *Canfield*, 118 Fed. Rep. 1 (C. C. A.); *Abbott* v. *Essex Co.*, 18 How. 202; *Barber* v. *Pittsburg Ry. Co.*, 166 U. S. 83.

To hold that the devise was to each of the eight persons and their "heirs" would destroy the express provision of "fideicomiso" or trust and leave the phrase "con calidad de fideicomiso" useless and ineffective.

It would also leave without meaning the further provision for the mutual benefit of the eight, because a person very seldom dies without "heirs" in the broad sense, and even in that event the Civil Code of Porto Rico, then in force, provided that in default of other heirs the State would inherit. War Department translation, arts. 956, 958.

It would not give due weight and meaning to the use by the testator of the word "legitimate" in connection with the word "sucesion," because in the paragraph in question the word "legitimate" would be superfluous as modifying the general term "heirs," while it becomes important as a limiting word if it modifies "issue."

That these trust provisions under the term "fideicomiso" were common in the Spanish law were recognized as valid when not creating a perpetuity and their meaning and construction well determined, see the Sentencia of the Supreme Court of Spain in *Moya* v. *Moya*, April 22, 1865, Juris. Civ., vol. 11, p. 534.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill for the partition of real estate in which the female plaintiff claims one undivided eighth as heir to her daughter Felipa Benicia, who died an infant without issue. This daughter got her title under the will of Thomas José Ramirez, and the question is whether, in the event which happened, her share went to her mother by descent or to her fellow devisees by the terms of the will. The other devisees all were living at her death. The case was heard upon a plea setting up the foregoing facts, together with the will, and the bill was dismissed. Thereupon the plaintiffs appealed to this court.

The material clause of the will is as follows: "Trece.—Et remanente de mis bienes, derechos y acciones lo lego con calidad de fideicomiso y que acrezcan las demas, caso de fallecimiento sin sucesion legitima, por iguales partes, a mis sobrinas Doña Cornelia y Doña Antonia Martinez, Doña Monserrate, Doña Obdulia, Doña Encarnacion, Doña Angela y Doña Concesion Ramirez de Arellano y Felipa Benicia mi hija de crianza," etc. We vary slightly the translation in the record. "The remainder of my goods, rights and actions I bequeath in the character of fideicommissum and that the other [shares] may [profit by] accretion, in case of death without *sucesion legitima*, by equal parts to my nieces [named] and Felipa Benicia my foster child, who shall adopt my surname," with appointment of a guardian for the last, a provision for her education, and a request that when that is finished she return to live with the said nieces.

It is agreed that it is possible for "sucesion legitima" to mean either issue or lawful heirs. If it means the latter, the mother inherited, as she was the lawful heir. If it means the former, then, by the terms of the will, Felipa Benicia's share went to the testator's nieces when she died. It seems to us too plain to need extended elucidation that "sucesion legitima" here means issue. The argument on the other side that the purpose is merely to prevent an escheat by making the nieces and Filipa Benicia reciprocal successors, to impose a fetter on free alienation and to enhance the dowry of the nieces, strikes us as fanciful. The natural object of this fideicommissary substitution is that which is said to be its object, to secure accretion among the shares. But that purpose would pretty nearly vanish into thin air if death without heirs were the event in view. For each of the nieces being heir to all the others, accretion among them would be excluded. It is argued, to be sure, that they might repudiate the inheritance and then claim under the will, if any of the nieces died heavily in debt. Whether this would be true by Spanish law we need not inquire. For such remote explanations must be rejected when

the will offers a different and more obvious one upon its face. And while it is pressed that substitutions are strictly construed in favor of the first taker, we do not understand that or any other rule of construction to require a perversion of language, or to govern a case where the second taker stands on an equal footing with the first in the testator's mind, with equal mutual chances, and when the plainly expressed purpose is to create an artificial class, with cross limitations in case of death without a child.

A suggestion is made by an afterthought, in a brief filed since the argument, that the testator could not exclude the mother of Felipa from her right, as necessary or forced heir, to two-thirds of Felipa's share. The suggestion comes too late. No such claim was set up in the bill, or, so far as appears, in the court below. Therefore we shall not consider at length whether, in case of a pure gratuity to one to whom the testator was under no legal obligation, the Spanish law entitled a forced heir to claim against the words of a gift like this. The texts cited are not sufficient to establish the proposition, and the contrary seems to be shown by Ley 10, Tit. 4, Part. 6, and note 13, Madrid ed. 1848. See also 4 Escriche, 1051, 1052, sub. v. Substitucion Fideicomisaria, ad fin. On the whole case the plaintiffs must abide by the construction and the law in which, it would seem from the bill, they have acquiesced for thirty years.

Decree affirmed.

THE WILDCROFT.[1]

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

No. 127. Argued December 12, 13, 1905.—Decided April 2, 1906.

The relief afforded by § 3 of the Harter act, 27 Stat. 445, to shipowners is purely statutory and in order for a shipowner to avail of the exemptions from liability for errors of management or navigation the burden is on him to prove affirmatively, in all cases, and not only in those where there is conflicting testimony, that the vessel was seaworthy at the beginning of the voyage or that due diligence had been used to make her so. The discharge of the duty of the shipowner in this respect is not left in the absence of proof to any presumption.

Findings of fact by both the District Court and the Circuit Court of Appeals as to seaworthiness of a vessel at, and due diligence used prior to, the commencement of the voyage will not ordinarily be disturbed by this court and so held in this case.

THE facts are stated in the opinion.

Mr. Horace L. Cheyney, with whom *Mr. John F. Lewis* was on the brief, for petitioner:

Prior to the passage of the Harter act the law was firmly established that the burden was upon the carrier to show affirmatively that the damage was occasioned by one of the perils from which he was validly exempted by the bill of lading. *Clark* v. *Barnwell*, 12 How. 272; Hutchinson on Carriers, 2d ed., § 765.

The Harter act has made no change in this rule. The claimant is exempted from liability for loss occurring by "perils of the sea," both by the provisions of the Harter act, and those of the bill of lading. Of course, the burden of proof is the same as to such perils, whether he defends on the ground of the exemption in the bill of lading or under the Harter act. The rule is likewise applicable to the other statutory exemp-

[1] Docket Title *W. J. McCahan Sugar Refining Company* v. *Steamship Wildcroft.*

tions in the Harter act. The purpose of that act was not to change in any way the burden of proof, but to specifically define what contractual exceptions might be made lawfully and to provide certain additional statutory ones.

The burden of proof as to the exercise of due diligence by the shipowner to make the ship in all respects seaworthy rests on the owner claiming exemption and this rule is unchanged by the Harter act. *The Silvia*, 171 U. S. 462; *The Southwark*, 191 U. S. 1; *The Manitou*, 127 Fed. Rep. 554; *The Edwin I. Morrison*, 153 U. S. 199; *Farr & Bailey Mfg. Co.* v. *International Navigation Co.*, 181 U. S. 218.

This court in *Farr* v. *Int. Nav. Co., supra*, and *The Southwark, supra*, did not find that the burden of proof on the shipowner to show due diligence on his part to make the ship seaworthy was met by this presumption of seaworthiness, but held the ships liable in each case because their owners did not meet the burden of proof by affirmative evidence showing that they had used due diligence to make the vessels seaworthy. *The Chattahoochee*, 173 U. S. 540, distinguished. That was a collision case, in which the injury resulted solely from faults or errors of navigation, and the question of the seaworthiness of the vessel was not in issue and was in no wise connected with the collision.

There was no evidence whatever proving that the valves were open or that the accident was caused by an error or fault of navigation. The claimants' witnesses were not asked directly as to their personal knowledge. Their evidence therefore is merely indirect and does not fall in the class of circumstantial evidence and is entitled to no weight and raises the presumption that the facts, if brought out, would have been prejudicial. 2 Evans' Pothier, 149, quoted in *Clifton* v. *United States*, 4 How. 240; *Kirby* v. *Tallmadge*, 160 U. S. 379. As to the value of testimony as to inspections by ship's officers, see *The Manitou*, 116 Fed. Rep. 160; *The Aggi*, 93 Fed. Rep. 484.

Section 3 of the Harter act should be liberally construed

in favor of the cargo owner. *The Delaware,* 161 U. S. 471; *The Southwark,* 191 U. S. 1; *The Manitou,* 127 Fed. Rep. 554.

Mr. J. Parker Kirlin, with whom *Mr. Charles R. Hickox* was on the brief, for respondent:

The damage to the cargo was due to perils of the sea and river, and to an accident of navigation within the exception contained in the bills of lading. The damage by salt water to the bags of sugar at the top of No. 3 hold was concededly caused by perils of the sea. The damage to the cargo at the bottom of Nos. 3 and 4 holds was apparently caused by fresh water. This damage was due to a peril of the river within the meaning of the bills of lading.

The question of negligence in the operation of the valves would be important only in determining whether or not the benefit of the exception should be given to the shipowner. Negligence would not be important in determining whether the damage done by river water was in fact, due to a peril of the sea. *Blackburn* v. *Liverpool, Brazil & River Plate Steam Navigation Co.,* 1902, 1 K. B. 290; *The Xantho,* 12 App. Cas. 503, 513; *Hamilton* v. *Pandorf,* 12 App. Cas. 518, 522.

In fact there is no distinction in the meaning of the term perils of the sea as used in a bill of lading and in a policy of insurance. *The G. R. Booth,* 171 U. S. 450, 459; *Carruthers* v. *Sydebotham,* 4 Maule & S. 77.

The adventitious presence of an extraneous substance under the non-return valve in the bilge distribution box, a condition which must have existed, was not an independent intervening cause to deprive the inroad of the water upon the cargo of its character of a peril of the river.

The fact that the non-return valve was wedged open was not due to negligence. It could have occurred only by the working of the pumps on the suction pipe to the hold. It was, therefore, properly an accident from machinery or steam

navigation within the exception of the bill of lading. *The Prussia,* 88 Fed. Rep. 531, 536; *The Curlew,* 55 Fed. Rep. 1003; *Adams* v. *Morris,* 18 Sess. Cas. (4th series) 153; *The Southgate* (1893), Prob. 329.

If it has been demonstrated that the damage to the cargo was caused by a peril of the river or navigation as excepted in the bills of lading, it is a settled principle of law that the burden of showing that negligence of the carrier contributed to the damage, rests on the libellant. *Clark* v. *Barnwell,* 12 How. 272, 280; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 432.

The vessel is relieved from liability for the damage under the provisions of the Harter act. The damage was due to a fault in the management of the vessel. Apparently, it could have been ascertained whether the cocks and valves on the branch connection to the tank filling pipe were open or closed before the sea-cock was opened.

Failure to exercise such care in order to protect the cargo against a known possible danger from water which was about to be taken into the pipe line from the sea, would clearly be negligence in management on the part of those charged with the duty. *The Silvia,* 171 U. S. 426; *The Mexican Prince,* 82 Fed. Rep. 484; *S. C.,* 91 Fed. Rep. 1003; *S. C.,* 174 U. S. 801. Equally clearly would such negligence seem to constitute a fault or error in navigation or in the management of the vessel within the language and meaning of the third section of the Harter act. *The Silvia,* 171 U. S. 462; *The Southgate* (1893), Prob. 329; *Good* v. *London &c. Association,* L. R. 6 C. P. 563; *The Warkworth,* 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool &c. Association,* 19 Q. B. Div. 242; *Canada Shipping Co.* v. *British &c. Association,* 23 Q. D. Div. 342.

It is not necessary to contend that this fault or error was in the navigation of the vessel, although it is believed that the term "navigation" might properly be construed as broad enough to cover this state of facts. *The Warkworth,* 9 Prob. Div. 20, 145. See also *The Glenochil* (1896), Prob. 10; *The*

Carron Park (1890), 15 Prob. 203; *The Rodney* (1900), Prob. 112.

The act of negligence need not involve the safety of the ship. The negligence is within the protection of the Harter act if it concerns only the safe carriage of cargo. *Rowson* v. *Atlantic Transport Co.* (1903), 2 K. B. 666. This view of the act taken by the Court of Appeals in England is in accord with the interpretation put on that section by this court. *The Southwark*, 191 U. S. 1, 7.

The failure to make proper use of a vessel's pumping connections, between the engine-room and her holds, in order to get water out, has been construed to be a fault in management, in *The Mexican Prince, supra; The Sandfield*, 79 Fed. Rep. 371; *S. C.*, 92 Fed. Rep. 663; *The British King*, 89 Fed. Rep. 872; *S. C.*, 92 Fed. Rep. 1018; and *The Ontario*, 106 Fed. Rep. 324; *S. C.*, 115 Fed. Rep. 769. Failure to use them properly so as to prevent water from going in must be viewed as a fault of the same nature. *The Cressington* (1891), Prob. 152, 160; *The Silvia*, 171 U. S. 462.

The question remaining to be determined on this branch of the case is whether or not the shipowner has satisfactorily established the seaworthiness of the vessel on sailing, or the due diligence to accomplish that result. The Supreme Court has determined that "in the absence of proof to the contrary, a vessel will be presumed to be seaworthy" for the purpose of this statute. *The Chattahoochee*, 173 U. S. 540, 550.

This presumption of fact had been declared long before the statute took effect. *Pyman* v. *Von Singen*, 3 Fed. Rep. 802; *Bullard* v. *Roger Williams Ins. Co.*, 1 Curtis, 148; *Lunt* v. *Boston Ins. Co.*, 6 Fed. Rep. 562, 566, 567; *Pickup* v. *Thames & Mersey Mar. Ins. Co.*, 3 Q. B. Div. 594; *Guy* v. *Citizens' Mut. Ins. Co.*, 30 Fed. Rep. 695; *Baltimore &c. Ry.* v. *Landrigan*, 191 U. S. 461, 471, 472. See also *The Joinville* in the Admiralty Division of the High Court of Justice in England, reported in the Shipping Gazette of December 13, 1904. The

statement of a presumption of seaworthiness in a vessel is not in conflict with the previous holdings of this court. *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 226.

Where evidence has been produced tending to show that the damage complained of was caused by unseaworthiness the burden at the end of the case may very well be on the shipowner who claims, as affirmative defense, the protection of the act to establish that the circumstances exist that are required by the act as a prerequisite to the granting of the exemption. Thayer, Preliminary Treatise on Evidence at the Common Law, 355.

Notwithstanding, however, that the shipowner may have in a given case, the burden of establishing the exercise, on his part, of due diligence to make the vessel seaworthy, yet he may start with the presumption that the vessel was, in fact, seaworthy at the commencement of the voyage. Actual seaworthiness would necessarily assume that the diligence to secure it that is required by the act had been exercised. If any evidence has been given to the contrary, there will then be cast on the libellant the duty of going forward and producing evidence to combat the effect of the presumption. Thayer, Preliminary Treatise on Evidence, 365. The existence of the presumption of seaworthiness does not shift the burden of proof on that issue from the shipowner to the libellant but it does shift the duty of going forward with evidence from the shipowner who advances the proposition to the libellant who opposes it. Thayer, Preliminary Treatise on Evidence, 336; *Kidder* v. *Stevens*, 60 California, 414, 419; *Keeley* v. *Moore* 191 U. S. 38, 46, 47. The presumption is to be weighed like any evidentiary circumstance. *Hickory* v. *United States*, 160 U. S. 408, 421.

Both courts below are clearly right in saying there was a presumption of fact that the vessel was reasonably fit at the outset of the voyage to carry the cargo she had undertaken to transport. There is not any evidence in the case from

which it can reasonably be inferred that the vessel was unseaworthy at any time prior to the day when the damage occurred. The findings of the courts below did not lay down a rule concerning the burden of proof inconsistent with that announced in this court in *The Southwark*, 191 U. S. 1.

Practical tests of a similar nature to those employed in this case have been held in other cases sufficient to establish the point at issue. *American Sugar Ref. Co.* v. *Rickinson Sons & Co.*, 124 Fed. Rep. 188; *The Ontario*, 106 Fed. Rep. 324; *S. C.*, aff'd, 115 Fed. Rep. 769; *The British King*, 89 Fed. Rep. 872; *S. C.*, aff'd, 92 Fed. Rep. 1018; *The Sandfield*, 79 Fed. Rep. 371; *S. C.*, aff'd, 92 Fed. Rep. 663; *The Marechal Suchet*, 12 Fed. Rep. 440, 441, and cases there cited.

The valve could and should have been closed before the sea valve was opened. The situation would come within the reasoning of the *Mexican Prince*, 82 Fed. Rep. 484, 488; *S. C.*, 91 Fed. Rep. 1003; *The Silvia*, 64 Fed. Rep. 607; *S. C.*, 68 Fed. Rep. 230; *S. C.*, 171 U. S. 462.

Mr. Justice Day delivered the opinion of the court.

The original action was begun by the filing of a libel in the District Court of the United States for the Eastern District of Pennsylvania, to recover damages alleged to have been sustained by the petitioner, with respect to a cargo of sugar of which it was the consignee, shipped upon the steamship "Wildcroft" from ports in Cuba to Philadelphia. The evidence showed that in the month of April, 1901, the "Wildcroft," having discharged a cargo of coal at the port of Havana, proceeded to Cardenas and Matanzas, where she took on the load of sugar, to be delivered to the petitioner in Philadelphia. This sugar was stored in bags in holds Nos. 1, 2, 3 and 4 of the ship. On the voyage a severe storm was encountered and some damage was done by salt water finding its way into hold No. 3 because of the tearing away of the tarpaulins over the hatches and the washing off of the starboard ventilator cover. At the

hearing in the District Court the claim for damage, because of injury alleged to have been caused to the sugar in holds Nos. 1 and 2, was held to be waived by the libellant, who disclaimed damage on that account. And, the district judge added, we think correctly, as to the surface damage in hold No. 3, "this damage was concededly caused by a peril of the seas." There is nothing in the testimony to show that the injury to the cargo of sugar in holds Nos. 3 and 4 of the vessel by means of fresh water was occasioned until the ship arrived at Philadelphia.

A more distinct understanding of the construction of the vessel and the manner in which fresh water could be communicated to hold No. 3, and from thence into hold No. 4, may be had by a perusal of the full finding of the facts made in the case in the District Court, 124 Fed. Rep. 631; *S. C.*, 126 Fed. Rep. 229, approved by the Circuit Court of Appeals, 130 Fed. Rep. 521, which findings fully explain the situation and the method by which the injury was inflicted. It is enough for us to say that both courts unite in the conclusion that the cargo was injured on Monday, April 29, after the ship arrived at the dock in Philadelphia, when, because of the letting in of fresh water for the purpose of filling the engine-room tank, which was accomplished by opening a valve on the ship's side which admits water from the river, and because of an open cock to a valve in the connection from the tank-filling pipe to the service or feed donkey, connecting with the distribution box, water was permitted to flow from the tank-filling pipe through this open cock to the distribution chest and down a pipe and through a valve, which must have also been held open in some way so that water flowed into this suction pipe leading into No. 3 hold, and flowing thence into No. 4 hold, damaged the cargo of sugar therein contained. It is evident from the testimony that if these cocks, and more particularly the one marked "D," had been properly closed, the water could not have found its way into the holds and inflicted the damage. Of these findings the Circuit Court of

Appeals, adopting the conclusions of the court below, said: "All of the testimony in this respect is uncontradicted, and no facts are shown from which any other conclusion can be drawn, than that the water which came into the bottom of these holds, to the depth of several feet, doing the damage in question, came in after the early morning of the twenty-ninth of April, and before the close of that day, while the cargo was being discharged at the wharf in Philadelphia. It is not disputed that the water was fresh water, such as was the water in the Delaware river, in which she was lying. In connection with these facts, it was shown by the testimony that the sea-cock for filling the engine room tank was open at ten o'clock that morning, and kept open for a period of three hours, and that if two certain cocks, fully described in the evidence and pointed out by the learned judge of the court below, were left open by accident or design, there would be a free flow of water from the open sea-cock into the bilges of hold No. 3. Directly after the filling of the tank and the closing of the sea-cock, water to a considerable depth was reported in holds No. 3 and No. 4. This sea-cock had not been open from the time the cargo was put on board in Cuba until, as just stated, on the morning of the twenty-ninth of April, at Philadelphia. We think the court below was fully justified in its finding, that the damage here in question was due to 'the water that flowed into the hold through the pipe line on April twenty-ninth, in the manner just described,' and that 'it is impossible that the damage could have occurred in any other way.' "

In order to have the benefit of the exemptions provided in the Harter act, 27 Stat. 445, against errors of management or navigation by reason of the third section, which was relied upon in the case, it was incumbent upon the shipowner to prove that the vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so. *International Navigation Company* v. *Farr & Bailey Manufacturing Company*, 181 U. S. 218; *The Southwark*, 191

U. S. 1. It, therefore, became incumbent upon the shipowner to show that a due and proper inspection had been had and the vessel ascertained to be in all respects seaworthy and fit to carry the cargo which she had undertaken to transport, or that due diligence to that end had been used. As we understand the findings of both the District Court and the Court of Appeals, the testimony in this regard introduced by the shipowner was sufficient, in the judgment of those courts, to establish that the vessel was seaworthy in the respects involved, and that an inspection had been had, and the valves and connections, the negligent use of which was productive of this injury, found in due order at the beginning of the voyage. This finding of two courts will ordinarily not be disturbed, and is usually accepted by this court as conclusive. *The Carib Prince*, 170 U. S. 655, 658. The only testimony directly upon the subject at the hearing was that of the master and the engineer, taken upon deposition in England, upon interrogatories filed. The charge in the libel was very broad and general, and the interrogatories were not as specific as they might have been, and no cross-interrogatories were filed. While the testimony is not as specific as it might be, we still think it was sufficient to show that an inspection was had, and everything found in order at the beginning as well as during the voyage, and from the record we reach the conclusion, sustained by the findings of the courts below, that the ship was seaworthy in all respects at the beginning of the voyage, and it was a careless and recent opening of the valve or valves, shortly before the fresh water was let it, which resulted in the damage complained of. We are very clear that this is not a case where the findings of the court below can be disturbed, as was our conclusion in the case of *The Southwark*, *supra*, relied upon by the petitioner, where it was shown that the damage inflicted was the result of unseaworthiness in respect to a condition which a proper inspection of the vessel at the beginning of the voyage would have discovered and remedied. We, therefore, reach the conclusion that the decree of the

Circuit Court of Appeals should be affirmed, and but for its construction of the rule of evidence in cases of this kind this opinion might well end here. But we are unable to agree with the views expressed in the opinion of the learned Circuit Court of Appeals to the effect that where a shipowner seeks the protection of the immunity afforded by the Harter act under section 3, reliance may he had upon the presumption of law that the vessel was seaworthy at the beginning of the voyage, and that it is only in cases of conflicting proof that the burden is imposed upon the shipowner, of establishing by testimony the seaworthiness of the vessel, or due diligence in that behalf, in order to have the benefit of the act. We think this construction of the law is opposed to the terms and policy of the act and contrary to the decisions of this court heretofore announced, from which we see no occasion to depart. The relief afforded by the third section of the Harter act to the owner of a vessel, transporting property, is purely statutory. In the case at bar there could be no question as to the liability of the vessel owner from the established facts of the case, but for the immunity afforded by that act. To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage. Whether he has done so is a matter

peculiarly within his own knowledge. The inspection which he can give, but which the shipper cannot give for lack of opportunity, will establish whether this duty has been complied with. The whole matter is in the control of the owner. The law says, in substance, that when the owner can show that he has discharged this duty he shall be relieved from errors of navigation and management on the voyage, over which he has not such direct control. It is not a case where there is either the necessity or propriety of resorting to presumptions. It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end, that the law relieves him of the liability which he would otherwise incur. This construction of the statute has been more than once announced in the decisions of this court; recently in *International Navigation Company* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 226, in which this court, speaking through Mr. Chief Justice Fuller, said: "We repeat that even if the loss occurred through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions." This case was quoted and followed in the still later case of *The Southwark*, 191 U. S. 1, in which it was reiterated that the burden was upon the vessel owner to show by reasonable and proper tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and that, if, by failure to adopt such tests and furnish the required proof, the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel.

While we, therefore, accept the decision of the learned Circuit Court of Appeals as to the facts in this case, we do not

wish to be regarded as sanctioning any relaxation of the rule above stated, already laid down in the prior decisions of this court.

Decree affirmed.

MR. JUSTICE BROWN concurs in the result.

UNITED STATES *v.* WICKERSHAM.

APPEAL FROM THE COURT OF CLAIMS.

No. 185. Submitted February 28, 1906.—Decided April 2, 1906.

The provisions of the Civil Service Act of January 16, 1883, are broad and comprehensive; under it, the Executive order of May 16, 1896, Rule III, and the order and list of the Secretary of the Interior of June 9 and September 26, 1896, based thereon, stenographers receiving the specified salaries employed in offices of surveyors-general were brought within the protection of the law and can only be removed—at least by a subordinate officer of the Department—for just cause and upon written charges on notice with opportunity to defend; and until removed in accordance with the law and rules thereunder, and so long as he remains ready and willing to discharge the duties of his place, he cannot be deprived of the compensation legally belonging to one entitled to hold the position notwithstanding the surveyor-general in whose office he is employed attempts to discharge him and excludes him from the office.

THE facts are stated in the opinion.

Mr. Louis A. Pradt, Assistant Attorney General, and *Mr. Felix Brannigan,* Assistant Attorney, for the United States:

It is unnecessary to present any argument as to whether or not Wickersham was or was not in the classified civil service

of the United States within the intention of the act approved January 16, 1883. 22 Stat. 403. The act and the orders or regulations prescribed under it did not place Wickersham in the position of a salaried officer of the United States holding an office with unlimited tenure; and therefore that, whether he was rightfully or wrongfully dismissed (suspended)—that is to say, refused to be continued in employment by the surveyor-general for Idaho—he was not entitled to a judgment for any salary or compensation after November 1, 1897.

The civil service law is not in conflict with the principles of the law of master and servant. Under the latter law no dismissed employé could recover a valid judgment against his employer under the circumstances of the present case. The civil service law does not contemplate that such an employé as Wickersham shall be permanently employed, nor that he shall not be dismissed (suspended) from employment at any time by the officer who had the authority to employ him, even when that officer erroneously assumed that he did not need the services of the employé.

No person can be appointed to an office in the service of the United States except by the President, or the head of a Department, or a court, and the "salary" of the office must be fixed by law or by a regulation authorized by law. There is nothing in the record showing that appellee was ever employed or hired by any surveyor-general for any definite time, or that he ever held an office of the United States, or was ever entitled to the salary of such an office.

Mr. William R. Andrews and *Mr. Samuel D. Luckett*, for appellee:

The power to remove does not include the power to suspend an officer. Meechem's Public Officers, § 453; Throop on Public Officers, §§ 402, 404; *State* v. *Jersey City*, 25 N. J. L. 536; *Gregory* v. *Mayor*, 113 N. Y. 416; *Bovee* v. *Herron*, 24 La. Ann. 595.

The rules of the civil service declared upon what grounds

and in what mode the appellee might be removed, and it was beyond the power of any superior officer to remove or suspend him for any other reason or in any other mode. *Keech* v. *Thompson*, 94 N. Y. 459; *Commonwealth* v. *Shaver*, 3 W. & S. 344; *Lowe* v. *Commonwealth*, 3 Met. (Ky.) 241. See also *Auditor* v. *Hardin*, 8 B. Monroe, 672; *Dennison* v. *St. Louis*, 90 Missouri, 22; *Field* v. *Commonwealth*, 32 Pa. St. 483; *Foster* v. *Kansas*, 112 U. S. 205; *Kennard* v. *Morgan*, 92 U. S. 483; *Kennedy* v. *McGarry*, 21 Wisconsin, 497; Throop on Public Officers, § 364; *Willard's Appeal*, 4 R. I. 595; *Gorman* v. *Board of Police*, 3 Abbott, 488; *Perkins* v. *United States*, 20 C. Cl. 443.

The appellee having been illegally suspended, and the officer having jurisdiction of him as an employé having annulled such suspension, he is entitled to his salary during the time of such suspension. Throop on Public Officers; *State* v. *Carr*, 3 Mo. App. 6; *Fitzsimmons* v. *Brooklyn*, 102 N. Y. 536; *Andrews* v. *Portland*, 79 Maine, 484; *Bailey* v. *State*, 56 Mississippi, 637; *Mayor* v. *Woodward*, 12 Heisk. (Tenn.) 499; *People* v. *Brennan*, 30 How. Pr. (N. Y.) 417; *Dorsey* v. *Smith*, 28 California, 21.

Appellee having been suspended—not removed, is entitled to his salary, irrespective of the legality of his suspension. *Sleigh* v. *United States*, 9 C. Cl. 375. See also *Chisolm* v. *United States*, 27 C. Cl. 97; Throop on Public Officers, § 500; *Emmitt* v. *The Mayor, etc., supra.*

Where an officer has been prevented from performing the duties of his office he is entitled to his salary. *Fitzsimmons* v. *Brooklyn*, 102 N. Y. 536; *Adams* v. *Justices*, 21 Georgia, 206; *Savage et al.* v. *Pickard*, 82 Tennessee, 46.

Mr. Justice Day delivered the opinion of the court.

The appellee brought suit in the Court of Claims to recover upon an alleged claim for compensation at the rate of $1,100 per annum, from November 1, 1897, to July 1, 1902, and averred that he was a clerk in the office of the United States

surveyor-general in Boise, Idaho, in the classified civil service, from which employment on said first-mentioned date, he was suspended, without fault of his own or just cause. He stated his readiness to discharge the duties of the office and set forth in detail what he claimed amounted to a wrongful suspension therefrom by the United States surveyor-general of the State of Idaho. The finding of facts is quite voluminous, and it is unnecessary to set it all out in detail. The facts pertinent to the decision of this case may be summarized as follows: Several years prior to May 6, 1896, claimant was employed as a clerk, stenographer and typewriter in the office of the surveyor-general of the United States for the State of Idaho, at a salary of $1,100 per annum. On that date the President of the United States made and promulgated an order relating to the civil service, which provided, among other things:

"Rule III.

"1. All that part of the executive civil service of the United States which has been, or may hereafter be, classified under the civil service act shall be arranged as follows: The Departmental Service. . . .

"2. The Departmental Service shall include officers and employés as follows:

* * * * * * * *

"(*b*) All executive officers and employés outside of the District of Columbia not covered in (*a*), of whatever designation, whether compensated by fixed salary or otherwise—

"Who are serving in a clerical capacity, or whose duties are in whole or in part of a clerical nature."

On June 9, 1896, the Secretary of the Interior issued the following order:

"Civil Service Classification of Officers and Employés.

"Department of the Interior,

"Washington, June 9, 1896.

"By direction of the President of the United States, and in accordance with the third clause of section 6 of the act entitled

'An act to regulate and improve the civil service of the United States,' approved January 16, 1883:

"It is ordered, That the officers and employés in or under this Department included within the provisions of the civil service law and rules be, and they are hereby, arranged in the following classes:

"Class E, all persons receiving an annual salary of $1,000 or more, or a compensation at the rate of $1,000 or more, but less than $1,200 per annum. . . ."

On September 22, 1896, the Acting Secretary of the Interior communicated to the Civil Service Commission the names of the incumbents, with their legal residences, and the dates of appointment, added to the classified departmental service by the extension of May 6, 1896, also inclosing a similar list of such positions and employés in the offices of the surveyor-general, which contained the name of the appellee with his title, "stenographer and typewriter," date of appointment, salary, residence and class. The appellee was verbally informed by the surveyor-general of his selection, and, after executing the prescribed oath, entered upon his duties. At the time of his employment the custom was to allow the surveyor-general to select the clerical force of his office. Appellee was continuously employed as such stenographer and typewriter until November 1, 1897, on which date he was suspended from service by the surveyor-general. No charges in writing or orally were preferred against him, the surveyor-general basing the suspension on the ground that appellee's services were not needed on account of lack of work to be done. On November 15, 1897, the surveyor-general reported to the Commissioner of the General Land Office an accumulation of mineral work, the employment of certain clerks by himself, with the request for additional clerical force. On November 22, 1897, the Commissioner of the General Land Office advised the surveyor-general that the ground taken that certain persons were dismissed because there was no further occasion for their services and the appointment of other persons in their places could not

be sustained. On February 24, 1898, the Commissioner of the General Land Office, in reply to a letter from the surveyor-general under date of February 21, 1898, in which he had asked authority to employ two additional draftsmen and four transcribing clerks, to be paid from the funds reported as available, said: "No authority can be given you to employ the additional force desired, except as provided under the civil service rules. I am constrained to say that but for your summary action in dispensing with so many of your employés, in violation of the law governing such matters, the difficulties in dispatching the work of your office would not have prevailed to such an extent." On May 14, 1898, the Commissioner advised the Civil Service Commission as follows: "Referring to my request of the 20th ult., for a certificate of a list of eligibles for appointment as stenographer and typewriter, at $900, in the office of the surveyor-general of Idaho, I have been informed that an examination was recently held by your Commission in said State for persons possessing the required qualifications, and it is urgently requested that as soon as possible this office may be furnished with a certificate from those citizens of Idaho who are eligible for the place desired to be filled under my call of the 20th ult., as the surveyor-general reports that his work is much impeded and embarrassed for the lack of a competent stenographer." On June 15, 1898, the President of the Civil Service Commission addressed a communication to the Secretary of the Interior, in which he said: "In this connection the Commission invites your attention to the fact that although surveyor-general Perrault suspended the above-named employés (Lellman and Wickersham) and three others (D. J. Cohen, Joseph P. Chinn and Alice S. Howey) over seven months ago, on the alleged ground of lack of work (which has been effectually disproved), these persons still remain separated from the service, while others occupy the positions to which they are properly entitled." Since November 1, 1897, claimant has not been permitted to perform the duties of stenographer and typewriter in said office, although after

said date he stood ready and willing to discharge the duties thereof, and he has received no compensation from the United States since October 31, 1897. On November 5, 1897, he protested against his suspension, and on December 28, 1897, he demanded his salary. On January 1, 1899, he assumed office as district clerk of Ada County, Idaho, and served for one year. On April 9, 1898, the Commissioner of the General Land Office directed the reinstatement of the clerks whose places had not been permanently filled, among others naming the appellee, and directed the surveyor-general to prefer formal charges against such persons as he had reported for inefficiency, etc., and to hand a copy of the charges and a copy of the order to each of the clerks and give them three days within which to make a response. In pursuance of this instruction the surveyor-general on April 16, 1898, preferred charges against the appellee, and on the same day reinstated him. On May 10, 1898, the Commissioner of the General Land Office advised the surveyor-general that the appellee would be reinstated in the service of the bureau, as his continuance in the surveyor-general's office would not be harmonious and in the best interests of the public service. On the same day he was offered a position in Washington at $1,000 per annum, without transportation, which he declined. He was offered the alternative of accepting a position in the General Land Office in Washington at a reduced salary, or to await the occurrence of a vacancy elsewhere, but he has not since been offered a position elsewhere in the service. On August 8, 1898, the Commissioner of the General Land Office made appellee's suspension permanent. The Court of Claims rendered a judgment in favor of the appellee for the amount of his compensation from the first of November, 1897, from which date, it was found, he was wrongfully suspended, until May 10, 1898, when his services in the office of the surveyor-general were discontinued and he was offered a position in the bureau at Washington, which he declined.

It is the contention of the Government that Wickersham was not an official appointee of the President or the head of

a Department, but was merely an appointee of the surveyor-general, without definite employment and subject to removal at the will of that officer. The employment of the appellee is alleged to be no different than the ordinary engagement of master and servant, and it is urged that the attempted suspension by the surveyor-general was tantamount to dismissal by an employer of one who was engaged without definite term and subject to dismissal at any time.

The provisions of the act of Congress of January 16, 1883, to regulate and improve the civil service of the United States, 1 Supp. Rev. Stat. 392, are broad and comprehensive. By section 6 of the act the power is conferred upon the President of the United States to require the heads of Executive Departments to classify for the purposes of the act and the examination therein provided for, and to include in one or more of said classes, so far as practicable, subordinate places, clerks and officers in the public service pertaining to their respective departments, not before classified for examination. The order of the President of May 6, 1896, Rule III, provides that the departmental service classified under the act should include officers and employés, among others, "All executive officers and employés outside the District of Columbia . . . of whatever designation, whether compensated by fixed salary or otherwise, who are serving in a clerical capacity, or whose duties are in whole or in part of a clerical nature." In accordance with the statute and under the provisions of this order the Secretary of the Interior, on June 9, 1896, made an order classifying the officers and employés of his Department, Class E, including persons receiving $1,000 or more of salary, or compensation at the rate of $1,000 or more, but less than $1,200 per annum. On September 26, 1896, under the extension order referred to and the action of the Secretary of the Interior, the Acting Secretary of the Interior filed a list of positions and employés with the Civil Service Commission, which, among others, in the list of employés in the offices of surveyors-general, contained the name of the appellee as a stenographer

and typewriter, the date of his appointment, salary and residence, as stated in the findings of fact. By the action recited on the part of the President and the head of the Department of the Interior, Wickersham was brought within the protection of the law and the President's order afforded to persons duly entered in the classified civil service. While he may not technically have been an officer of the United States with a fixed term and compensation, he certainly was within the subordinate places provided for in the statute, and within the "employés outside the District of Columbia," covered by the President's order of May 6, 1896. That order expressly included officers and employés, whether compensated by a fixed salary or otherwise, serving in a clerical capacity or whose duties were in whole or in part of a clerical nature. The Secretary of the Interior certified the name of the claimant to the Civil Service Commission as an employé in the office of the surveyor-general, within the terms of the statute and the Executive order. He was, therefore, entitled to the protection of the President's order of July 27, 1897 (14 An. Rep. Civ. Serv. Comm. 133): "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense." If the contention of the Government be correct, and the attempted suspension by the surveyor-general was equivalent to a dismissal from office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor-general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect; nor can we find any authority, statutory or otherwise, authorizing the suspension in the manner undertaken in this case. The at-

tempted suspension was held to be without authority by the Commissioner of the General Land Office, and the surveyor-general was directed to reinstate the claimant and to proceed by regular charges against him. In the meantime the record shows that the claimant was ready and willing to discharge the duties of his position, and had received no compensation therefor during the time of his wrongful suspension. Whether he could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employé during his wrongful suspension by a subordinate officer is entitled to the compensation provided by law. We see no reason in such an attitude of the case, where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employé in the public service, protected by the statute and the orders of the President made in pursuance thereof, can be deprived of the benefit and emolument of his position by a wrongful and illegal suspension from his duties. We do not think such a contention can be sustained either by reason or authority. Where an officer is wrongfully suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension. Throop on Public Officers, § 407; *Emmitt* v. *Mayor &c. of New York*, 128 N. Y. 117. This was the view entertained by the Court of Claims in deciding *Lellmann's* case, 37 C. Cl. 128, on the authority of which the case at bar was decided by that court. We think the ruling was correct.

The case comes to this: The appellee, by his appointment, practically made by the Secretary of the Interior in entering his name in the classified list and designating him for the service required, was entitled to the privileges and emoluments of his position until he was legally disqualified by his own action or that of some duly authorized public authority. The at-

tempted suspension without authority of law, he remaining ready and willing to discharge the duties of the place, could not, during the period of such wrongful suspension, have the effect to deprive him of the compensation legally belonging to one entitled to hold the position.

Judgment affirmed.

BLAIR *v.* CITY OF CHICAGO.

NORTH CHICAGO CITY RAILWAY COMPANY *v.* BLAIR.

CITY OF CHICAGO *v.* FETZER.

BLAIR *v.* CITY OF CHICAGO.

CHICAGO WEST DIVISION RAILWAY COMPANY *v.* BLAIR.

CITY OF CHICAGO *v.* FETZER.

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

Nos. 331, 332, 333, 334. 335 and 336. Argued January 11, 12, 15, 1906.—Decision announced March 12, 1906.—Opinion filed April 2, 1906.

Where notes are made by a corporation payable to the order of its own treasurer, a citizen of the same State, as a matter of convenience and custom, and indorsed and delivered by him to a *bona fide* holder who, a citizen of a different State, furnishes the money represented by the note directly to the corporation, the treasurer is not in fact an assignee of the note within the meaning of the act of August 13, 1888, 25 Stat. 433, and suit may be brought by such holder in the Circuit Court of the United States having jurisdiction of the parties, notwithstanding such diversity does not exist as to the treasurer first indorsing the note. *Falk* v. *Moebs*, 127 U. S. 597; *Holmes* v. *Goldsmith*, 147 U. S. 150.

Where there is a proper cause of action and diverse citizenship, jurisdiction of the Federal courts exists, and the motive of the creditor who desires to litigate in that forum is immaterial, and does not affect the jurisdiction; nor is such jurisdiction if it actually exists, affected by the fact that a

receivership was in view when judgments were entered. *South Dakota* v. *North Carolina*, 192 U. S. 286.

Where, as in this case, the attitude and claims of the municipality cast a cloud upon the title to property consisting largely of franchises in the hands of receivers and to be administered under orders of the court, the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of claims of parties which cast a cloud upon such franchises and in such a case it is proper to grant an injunction until the rights of the parties can be determined.

Whether a corporation having a limited and definite capacity to purchase and hold real estate has exceeded those limits concerns only the State within whose jurisdiction the property is situated; the question cannot, unless the statute expressly or by necessary implication authorizes it, be raised collaterally by private persons. *Fritts* v. *Palmer*, 132 U. S. 282.

The generality of the title of a state statute does not invalidate it under a provision of the constitution of the State that private and local laws shall only embrace one subject which shall be expressed in the title, so long as the title is comprehensive enough to reasonably include within the general subject or the subordinate branches thereof, the several objects which the statute seeks to effect, and does not cover legislation incongruous in itself and which by no fair intendment can be included as having any necessary and proper connection. *Montclair* v. *Ramsdell*, 107 U. S. 147.

Although decisions of the highest court of a State are not binding on this court in determining whether a contract was made by legislative action of that State which is entitled to protection under the impairment of obligation clause of the Federal Constitution, it will consider decisions of that court on the point in question.

One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. Legislative grants of franchises which are in any way ambiguous as to whether granted for a longer or a shorter period are to be construed strictly against the grantee.

As a rule of construction a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended.

Although a corporation be organized under a charter for a limited period it may receive a grant inuring to the benefit of its lawful successors for a period beyond its corporate life, but the right granted must be construed with reference to the system of which it is a part and where that general system is for a limited period a single ordinance, not naming a specific term, will not be construed as granting a franchise in perpetuity.

A declaration in the title of state statutes that they concern horse railways, where it is apparent that these terms were intended to indicate street railways as distinguished from steam railways, will not, because of a constitutional provision that the object of the statute must be expressed in the title, prevent the city from exercising its powers under the statute in

such manner as to authorize the use of other power such as cable or electricity.

The repeal of a state statute authorizing every street railway to be operated by such animal, electric or other power as the municipal authorities may have granted would not destroy its effect to ratify contracts in existence when it was passed.

Where a state statute requires the consent of a municipal officer to authorize the extension of a street railway the abolition of that office does not authorize the extension without any official consent; and where the consent of municipal authorities is required for franchises relating to special localities by a statute, and subsequently a general act limits the time for which any such franchise can be granted in any city or village, the consent given will be presumed, in the absence of any period specified not to be in perpetuity, but for the period as so limited.

Under the law of Illinois municipal corporations have a fee simple in, and exclusive control over, the streets, and the municipal authorities may do anything with, or allow any use of, the streets not incompatible with the ends for which streets are established, and it is a legitimate use of a street to allow a street railroad track to be laid down in it.

Applying the foregoing principles to the construction and effect of the various acts of the legislature of the State of Illinois, and of the ordinances of the municipal authorities of the city of Chicago and adjacent towns, in regard to the franchises of the several street railway companies owned and controlled by the Chicago Union Traction Company, and the receivers thereof *held*, that [1]

1. The Circuit Court of the United States for the Northern District of Illinois had jurisdiction to render the judgments against the Chicago Union Traction Company, the North Chicago Street Railroad Company and the West Chicago Street Railroad Company set up in the bills afterwards filed for the appointment of receivers.

2. The proceedings for the appointment of receivers were not shown to be collusive and fraudulent, and the court had jurisdiction to entertain the bills and appoint the receivers and put them in possession of the property of the railway companies.

3. The ancillary bills filed by the receivers were maintainable in aid of the court's jurisdiction to settle controversies as to the property which was to be administered and disposed of under the orders and decree of the court.

4. The acts of 1859, 1861 and 1865 were not unconstitutional under the constitution of Illinois of 1848 in force when the same were passed.

5. The act of February 6, 1865, amending the act of February 14, 1859, had the effect to extend the corporate lives of the Chicago City Railway Company, the North Chicago City Railway Company and the Chicago West Division Railway Company, for the term of ninety-nine years. It

[1] The numbered paragraphs are as stated by MR. JUSTICE DAY in announcing the decision and judgment of the court.

affirmed the contracts with the city prescribing rights and privileges in the streets of Chicago in all respects as theretofore made, including time limitations as contained in the ordinances previously passed. It recognized and continued in force the right of the city and the companies to make contracts for the use of the streets upon terms and conditions, including the time of occupancy, as might be agreed upon between the council and the corporations.

6. Corporate privileges can only be held to be granted as against public rights, when conferred in plain and explicit terms. The ambiguous phrase in the act of 1865, "during the life hereof," did not operate to extend existing contracts for the term of ninety-nine years or limit the right of the city to make future contracts with the companies covering shorter periods.

7. The amending act of 1865 had reference to the North Chicago City Railway Company as well as the corporations specifically named in the first sections of the acts of 1859 and 1861.

8. The ordinances of May 23, 1859, granting rights and privileges in certain streets to the Chicago City Railway Company and the North Chicago City Railway Company, respectively, are radically different. The grant to the former company for the south and west divisions of the city is during all the term specified in the act of February 14, 1859, which act expressly ratified the ordinance of 1858, granting the right to use the streets therein named for the term of twenty-five years and until the city shall purchase and pay for the same as set forth in said ordinance. On the north side the term granted is for twenty-five years "and no longer." The privileges conferred upon the Chicago City Railway Company and its grantee were confirmed, as made, by the act of 1865, with the effect to continue the right of the companies to occupy the streets named in the ordinances of 1858, May 23, 1859, and similar ordinances, for the term of twenty-five years and until the city shall elect to purchase and pay for the property of said railway companies. On the north side, no such right exists to remain in the use of the streets until purchase by the city.

9. Whatever rights existed in the streets, were not lost to the companies by the acceptance of the ordinances granting a change from animal to cable or electric power in the operation of the railways.

10. The grants in the town of Jefferson, having been made after the acceptance of the Cities and Villages Act, are limited to the term of twenty years.

11. The grants by the supervisor of Lake View are not in perpetuity, as the Lake View road was but an extension of the North Side system, which was expressly limited in the duration of its grants to the term of twenty-five years. No intention will be presumed to make an extension of this part beyond the life of the grant to the main lines of the North Side road.

12. The grants by the trustees of Lake View will not extend beyond the life of the corporation making them and upon the annexation of the town of Lake View to Chicago, the further right to use the streets must be de-

rived from grants by the council of that city under power conferred by the Cities and Villages Act.

The decree is reversed and cause remanded for further proceedings in accordance with the views herein expressed.

THESE are appeals from two decrees of the Circuit Court of the United States for the Northern District of Illinois. The origin of the cases dates from April 22, 1903, when the Guaranty Trust Company of New York, a corporation and citizen of that State, filed three suits in the Circuit Court of the United States for the Northern District of Illinois against the Chicago Union Traction Company, the North Chicago Street Railroad Company, and the West Chicago Street Railroad Company, corporations and citizens of the State of Illinois. On the day the declaration was filed the general issue was joined, the jury waived, and upon trial judgment was rendered against the respective defendants for $318,690.66, $565,052.66, and $270,440. Executions having been awarded and returned no property found, bills were filed by the Guaranty Trust Company, and receivers appointed for the property of each and all of those companies. Under the order of the court of July 18, 1903, the receivers filed two ancillary bills, one against the City of Chicago, the Chicago West Division Railway Company, the Chicago Union Traction Company and the West Chicago Street Railroad Company; the other, against the City of Chicago, the Chicago Union Traction Company, the North Chicago Street Railroad Company and the North Chicago City Railway Company. They were afterwards amended by leave of the court. These bills state, among other things (having reference now to the West Side case), that, as receivers and under the order of the court, the complainants were in possession of the system of street railroads; that the property included the rights, privileges and franchises originally granted to the Chicago West Division Railway Company by the State of Illinois; that on October 20, 1887, the Chicago West Division Railway Company leased the property to the West Chicago Street Railroad Company for the full term of nine

hundred and ninety-nine years; that on June 1, 1889, that company transferred and conveyed to the Chicago Union Traction Company all its property, franchises and rights, which were taken possession of by that company and were possessed and enjoyed by it with the consent of the city council, until the appointment of complainants as receivers; that since the appointment they have been directed by the court to make expenditures of about $580,000 in procuring new equipment; for that purpose it was necessary to issue receivers' certificates to borrow money, which they alleged they were unable to do, because of the hostile acts of the city of Chicago, its mayor, its council committees and representatives, which amounted to an impairment of the contract rights and franchises secured to the complainants and granted by the acts of the general assembly of Illinois, passed February 14, 1859, and February 6, 1865. They received a notice from the superintendent of streets, dated July 16, 1903, addressed to them as receivers, and stating that all permits issued to the Chicago Union Traction Company to do work and make repairs upon the streets, alleys or public places in the city of Chicago were to be revoked on July 30, 1903. The bill sets out a large number of ordinances of the city and acts of the State of Illinois, under which acts, it was alleged, privileges and franchises were granted on fifty-six of the streets of the city, for the period of ninety-nine years from February 14, 1859.

It was averred that the city denies any contract right with the complainants under and by virtue of the said laws and ordinances, and, for the purpose of coercing the railroad companies to surrender their franchises, received from the State, asserts and claims that the act of 1865 is unconstitutional and void; that if valid, it only operates to the extent of such lines as were authorized and consented to before its passage; that if valid, the railroads could only operate their lines by animal power; that by force of the ordinance of July 30, 1883, the right to operate lines constructed prior thereto was absolutely limited to July 30, 1903, and that thereafter the railroad com-

pany would be a trespasser upon the streets of the city; that, by messages and official declarations of the mayor and council of the defendant city, it was given out that, unless the railroad company would surrender its franchises and rights to occupy the streets of the city, the city would oust the railroad company therefrom and pass an ordinance granting the right to operate street railways upon the streets, now occupied by the railroad company, to other persons or corporations. That unless an injunction is granted, the city will, after July 30, 1903, proceed by declaration of forfeiture or otherwise to interfere with and prevent the occupation and enjoyment of the fifty-six railway routes described in the bill. That as to the street railroads where ordinances provided for possession until the city shall purchase the lines, the city has never made an offer to purchase and seeks to force a surrender of the franchises and privileges, and to compel the railroad company to accept a twenty years' license, at an oppressive and ruinous annual rental. That if the claim and contentions of the city are sustained, the entire system of the railroad company will be destroyed and its charter rights illegally confiscated.

The prayer for relief is that the Chicago West Division Railway Company be decreed to be vested by the State of Illinois with the franchises and right to own, maintain and operate fifty-six street railway routes, described in the bill, until 1960 and until such time thereafter as the city shall purchase the lines and pay for them in cash at their then appraised value, according to the terms of the ordinance contract; that it be decreed that the claim of the city of Chicago that the rights of the companies will expire on July 30, 1903, impairs the obligation of the charter subsisting between the State of Illinois and the said companies, and constitutes an unlawful taking of the rights and property of the company without compensation, and an unlawful interference with the property in the custody of the court; that the charter rights of the companies to maintain, operate and enjoy the lines described in the bill until the

year 1960, and thereafter until the city purchases the same, be established and quieted as against the hostile claims of the city, and that such claims be declared and decreed unconstitutional, contrary to law and exist as clouds upon the title of the company, and for a perpetual injunction against the city from asserting the claims aforesaid or interfering with the possession, occupation and enjoyment of the railroad's property, except in the proper exercise of its police power, until the lawful determination of the charter rights.

The bill in the North Chicago case is substantially the same. It avers that the property vested in the receivers in the North Division of the city is about one hundred miles of street railroad and the franchises and privileges thereunto belonging; that on May 24, 1886, the North Chicago City Railway Company leased to the North Chicago Street Railroad Company for the term of nine hundred and ninety-nine years all its property, franchises and rights, except the right to exist as a corporation. That on June 1, 1899, the North Chicago Street Railroad Company leased and conveyed the property, for the full life of the lessor corporation, to the Chicago Union Traction Company; that the traction company entered into possession of the property and continued to use the same until the appointment of the receivers named therein.

The city answered and set up among other things that the suits wherein the receivers were appointed were collusive and in pursuance of a scheme concocted by the West Chicago Street Railroad Company, the North Chicago Street Railroad Company, the Chicago Union Traction Company and the Guaranty Trust Company of New York for the purpose of conferring jurisdiction upon the Circuit Court of the United States on the ground of diverse citizenship; that the Guaranty Trust Company was not a *bona fide* owner of the judgment upon which the suits were brought; and that the evidences of indebtedness upon which that company brought suit and obtained judgment as a colorable basis for the allowance of creditors' bills and appointment of receivers were not in fact owned by the Guar-

anty Trust Company, but were owned by divers persons and corporations of the State of Illinois.

The city denies that the city council passed any ordinances or resolutions that constitute an impairment of the contract rights of the complainants, granted under the acts of the general assembly of the State of Illinois, February 14, 1859, and February 6, 1865, or the ordinances of the city, and denies that it has ever threatened interference with any lawful rights, franchises or privileges held by the complainants. It admits that its superintendent of streets sent a written notice to the complainants as alleged in the bill but without authority from the defendant, and that on July 21, 1903, the same was rescinded and recalled.

The answer then sets up the claims of the city, concerning the legislative acts and ordinances pleaded in the bill, admits the passage or attempted passage thereof, but denies that the same has resulted in investing the railroad companies with a franchise from the State, to maintain and operate the system of railroads for ninety-nine years, and avers that the rights under certain of the ordinances set up in the bill expire on July 30, 1903. Defendant denies that it unlawfully or oppressively injured the lawful rights of the company; admits that it has contended and now contends that the alleged act of 1865 is unconstitutional and void as construed by the company; that the said act, when properly construed, did not operate to extend the duration of time beyond that fixed in various ordinances respectively relating to said lines; that the said companies have no right to operate street railway lines by other than animal power; and that the time for operation of certain of the lines existing under ordinances passed prior to July 30, 1883, expired on July 30, 1903, by reason of the time limits prescribed in said ordinances, as extended by the ordinance of July 30, 1883, and by reason of the limitation in the power of the city by the City and Village Law of the State of Illinois, in force July 1, 1872. It avers that it has never claimed or asserted that the time for the operation of lines constructed

under ordinances passed prior to July 30, 1883, absolutely ceased and determined, but on the contrary has recognized and conceded the existence of the purchase clause contained in certain of said ordinances as affecting the time limitations therein, and has endeavored to procure proper fiscal legislation by the general assembly of the State, which would enable the city to avail itself of said ordinance provisions with reference to purchase, and has frequently proposed and desired negotiations with the companies to provide new ordinances for the purchase by the defendant of the tangible property of said companies. The answer denies the allegations of the bill as to unlawful threats and compulsions, but admits that it does intend to enforce its rights in its streets against the unlawful claims of the companies, and admits that, unless restrained by injunction, it will proceed by every proper and lawful method to enforce its rights in its streets as set up in the answer, and to procure necessary street railway facilities for the citizens of Chicago, and to prevent the companies from unlawful usurpation of rights in the streets or from continuing to occupy the same after the right so to do has ceased and determined. It admits that as early as 1883 a serious difference as to the nature and extent of the legal and contract rights of the street railway companies in certain of the streets of the city arose between the companies and defendant. It sets up the messages of the mayor and copies of the various resolutions of the council with regard to opening negotiations with the companies for the ascertainment of their rights and those of the city.

The case having been tried, the Circuit Court rendered a decree holding that the legislative acts of 1859, 1861 and 1865 constituted a grant to the companies to use the streets of the city to be designated by the council, but that the franchise to use the streets was a grant from the State; that the acts of 1859, 1861, as amended in 1865, extended the franchises of the companies for ninety-nine years, the extended life of the corporation; that the constitution of Illinois of 1870 prohibited the further creation of corporations by special laws, and de-

creed that the general assembly should not grant the right to construct any street railways in the city without acquiring the consent of the local authorities then having control over the streets; that the Cities and Villages Act of 1872 empowered cities organized under that act to permit, regulate or prohibit the locating, laying or constructing of tracks of horse railroads in any street, alley or public place, but such permission was limited to a period not to exceed twenty years; that the acts of 1859, 1861, as amended in 1865, did not constitute a grant by the legislature of streets which were authorized to be used and occupied by the city after it adopted and elected to be governed by the City and Village Act, and that after date of May 3, 1875, as to such streets, the street railway companies' rights were regulated by the city ordinances affecting the same; that the act of 1859, under the tenth section of which the North Chicago City Railway Company was incorporated, amended by the act of February 21, 1865, extended the life of the corporation for ninety-nine years; and held that said amendment applied not only to the Chicago City Railway Company, but as well to the rights conferred by the act of 1859 on the North Chicago City Railway Company. The case is reported in 132 Fed. Rep. 848.

Pertinent parts of the ordinance of August 16, 1858, the acts of February 14, 1859, February 21, 1861, and February 6, 1865, are given in the margin.[1]

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[1] Ordinance of August 16, 1858.

An ordinance authorizing the construction and operation of certain horse railways in the streets of the city of Chicago (passed August 16, 1858).

Be it ordained by the common council of the city of Chicago:

SECTION 1. That there is hereby granted to Henry Fuller, Franklin Parmalee and Liberty Bigelow, and such other persons as may hereafter become associated with them, and to their executors, administrators and assigns, permission and authority and consent of the common council to lay a single or double track for a railway, with all necessary and convenient tracks for turn-outs, side tracks and switches, in and along the course of certain streets in the city of Chicago hereinafter mentioned, and to operate railway cars and carriages thereon in the manner and for the time and upon

Mr. Clarence S. Darrow, Mr. Glenn Edward Plumb and *Mr. Edgar B. Tolman*, with whom *Mr. James Hamilton Lewis* was on the brief, for the city of Chicago:

The Circuit Court had no jurisdiction to entertain the so-

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the conditions hereinafter prescribed; provided, that said tracks shall not be laid within twelve feet of the sidewalks upon any of the streets.

SEC. 2. That said parties are hereby authorized to lay a single or double track for a railway in and along the course of the following streets in said city, and extending the same as follows: Commencing on State street, at the south side of Lake street; thence south to the present city limits. Also, commencing on State street, at the junction of Ringgold place; thence on Ringgold place to Cottage Grove avenue, thence on Cottage Grove avenue to the present limits of the city of Chicago. . Also, commencing on State street, at the junction of the Archer road; thence along the said Archer road to the present limits of the city. Also, commencing on State street, at the intersection of Madison street, and extending west along said Madison street to the present city limits.

SEC. 3. The cars to be used upon said tracks shall be operated with animal power only; and said railways shall not connect with any other railroad on which other power is used, and no railway car or carriage used upon any other railroad in this State shall be used or passed upon said tracks.

SEC. 4. The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, and the cars or carriages used for that purpose shall be of the best style and class in use on such railways. The common council shall have power at all times to make such regulations as to the rate of speed and time of running said cars or carriages as the public safety and convenience may require.

SEC. 5. The tracks of said railways shall not be elevated above the surface of the street; shall be laid with modern improved rails, and shall be so laid that carriages and other vehicles can easily and freely cross said tracks at any and all points, and in any and all directions, without obstruction.

SEC. 6. The rate of fare for any distance shall not exceed five cents, except when cars or carriages shall be chartered for a specific purpose.

SEC. 7. The said parties, their associates and successors, shall pay one-third of the cost of grading, paving, macadamizing, filling or planking on the streets or parts of streets on which they shall construct their said railways, and in the respects last mentioned shall keep such portion of the respective streets as shall be occupied by their said railways, or either of them, in good repair and condition during the whole time that the privileges hereby granted to said parties shall extend, in accordance with whatever orders may be passed in that behalf by the common council of the said city of Chicago; and said parties shall be liable for all legal or consequential damages which may be sustained by any person by reason of the care-

called ancillary bills of complaint herein. The notes originally sued upon were payable to a citizen of Illinois and by him indorsed to the Guaranty Trust Company of New York and afforded the court no jurisdiction to enter the original judgments

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lessness, neglect or misconduct of any agent or servant of said parties, in the course of their employment in the construction or the use of the said tracks or railways, and said parties shall moveover pay to the property owners on any street so used by them as aforesaid for their said railways, which has since the first day of January, A. D. 1858, been paved, macadamized or planked, and at any time between said date last mentioned and the time of going into the occupation of either of said respective streets with the said railway by said parties, their associates or successors, may be paved, macadamized or planked, one-third of the reasonable cost and expense thereof so paid by said property owners, respectively.

SEC. 8. The rights and privileges granted to said parties by virtue of this ordinance shall be forfeited to the city of Chicago unless the construction of one of said railways shall be commenced on or before the first day of November, A. D. 1858; and unless the said railway commencing on the south side of Lake street and extending to Ringgold place shall be fully completed and ready for use on or before the fifteenth day of October, A. D. 1859; and the Madison street railway, commencing at the intersection of State street, and running on said Madison street to the city limits, completed and ready for use on or before the fifteenth day of October, A. D. 1860; and said railway from Ringgold place to Cottage Grove avenue, and along the same to the city limits, by the first day of January, A. D. 1861, and all the remaining railways hereinbefore mentioned, on or before the first day of January, A. D. 1863, the said railways, together with all improvements made upon the same, shall be forfeited to said city of Chicago, unless the common council of said city shall grant to said parties a further extension of time; provided, that if said parties are delayed by the order or injunction of any court, the time of such delay shall be excluded, and the same time, in addition to the periods above prescribed, shall be allowed for the completion of said railways as that during which they may be so delayed.

SEC. 9. If the said parties, their associates or successors, shall hereafter become incorporated, the rights and privileges granted to them by virtue of this ordinance shall extend to such corporation for the time and upon the conditions herein prescribed, and when such act of incorporation shall have been maintained, such corporation shall have all the rights and privileges hereby granted as the successors of said parties, without further action of the common council.

SEC. 10. The right to operate said railways shall extend to the full time of twenty-five years from the passage hereof, and at the expiration of said time the parties operating said railways shall be entitled to enjoy all of said privileges until the common council shall elect, by order for that pur-

on which all the proceedings were founded. Illinois Revised Statutes, ch. 98, §§ 3, 4, 5, 8; *Hately* v. *Pike*, 162 Illinois, 241; United States Revised Statutes, § 629; *Thompson* v. *Elton*, 100 Fed. Rep. 145; *Wilson* v. *Knox County*, 43 Fed. Rep.

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pose, to purchase said tracks of said railways, cars, carriages, station houses, station grounds, depot grounds, furniture and implements of every kind and description, used in the construction or operation of said railways, or any of the appurtenances in and about the same, and pay for the same in the manner hereinafter mentioned.

SEC. 11. Such order shall fix the time when said city of Chicago will take such railways and other property before mentioned, which shall not be less than six months after the passage of said order, and at the time of taking said railways and other property before mentioned the city of Chicago shall pay to the parties operating the same a sum of money to be ascertained by three commissioners, to be appointed for that purpose, as follows: One to be chosen from the disinterested freeholders of Cook County by the said common council, one in like manner by the said parties, their associates and successors, and the two persons so chosen to choose the third from said freeholders.

SEC. 12. All rights heretofore vested in the Board of Water Commissioners and Sewerage Commissioners, or other corporations, are not to be impaired or affected by this ordinance, but the rights and privileges hereby granted are subject thereto.

SEC. 13. The said Henry Fuller, Franklin Parmalee and Liberty Bigelow shall enter into a good and sufficient bond with the city of Chicago, in the penal sum of twenty-five thousand dollars, for the faithful performance of all the terms and conditions herein contained in this ordinance, and that said railways herein mentioned shall be completed at the times and manner herein stated, unless delayed by the order or injunction of some court having jurisdiction of such matters from so completing the same, and until such bond shall be so executed by said parties this ordinance shall have no force or effect whatever.

SEC. 14. All ordinances or parts of ordinances heretofore passed, respecting the subject matter of this ordinance (except to which this is an amendment), or in conflict with this ordinance or that to which the same is an amendment, are hereby repealed.

Act of February 14, 1859.

Act to promote the construction of horse railways in the city of Chicago.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That Franklin Parmalee, Liberty Bigelow, Henry Fuller and David A. Gage, and their successors, be and they are hereby created and constituted a body corporate and politic by the name of "The Chicago City Railway Company" for the term of twenty-five years, with

481; *Skinner* v. *Barr*, 77 Fed. Rep. 816; *City of New Orleans* v. *Benjamin*, 153 U. S. 411; *Utah, Nevada Co.* v. *Delamar*, 133 Fed. Rep. 113; *Mexican Nat'l R. R. Co.* v. *Davidson*, 157 U. S. 201, 208; *King's Bridge Co.* v. *Otoe Co.*, 120 U. S. 225; *Parker*

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all the powers and authority incident to corporations, for the purposes hereinafter mentioned.

SEC. 2. The said corporation is hereby authorized and empowered to construct, maintain and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks and appendages in the city of Chicago, and in, on, over and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the South or West Divisions of the city of Chicago, as the common council of said city have authorized said corporators or any of them or shall authorize said corporation so to do, in such manner and upon such terms and condition, and with such rights and privileges as the said common council has or may have contracted with said parties or any or either of them prescribe, but said corporation shall not be liable for the loss of any baggage carried on said railways kept in and under the care of its owner, his servant or agent.

SEC. 3. [As to capital stock.]

SEC. 4. [As to directors, etc.]

SEC. 5. The said corporation is hereby authorized to extend the said several railways herein authorized to be built, in the manner aforesaid to any point or points within the county of Cook in this State; and to enable said corporation to construct any or all the railways therein authorized, or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes and in the manner prescribed by an act entitled "An act to amend the law condemning right of way for purposes of internal improvement," approved June 22, 1852, and the several acts amendatory thereof, and may exercise all the powers conferred upon railroad corporations by the twenty-fifth and twenty-sixth sections of "An act to provide for a general system of railroad incorporations," approved November 5, 1849, ascertaining and making recompense for all damages sustained agreeably to the provisions of the act hereinbefore first mentioned.

SEC. 6. The said corporation is hereby authorized, with the assent of the supervisor of any township, to lay down and maintain the said railway or railways in, upon, over and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same. In all cases where vehicles shall meet the cars or carriages of said railway, either in the city or country, said vehicle shall give way to the cars or carriages on the railway.

SEC. 7. All of the rights and privileges granted or intended so to be to said Franklin Parmalee, Liberty Bigelow, Henry Fuller, and their associates, in and by the ordinances of the common council and the amend-

v. *Ormsby*, 141 U. S. 81; *Pope* v. *Louisville, New Albany &c. R. R. Co.*, 173 U. S. 577.

The bills should have been dismissed by the court for lack of jurisdiction, upon an examination of the record, which

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ments thereto, are hereby in all things affirmed and shall pass to and become vested in the corporation hereby created.

SEC. 8. Nothing herein contained shall authorize the construction of more than a single track with the necessary turn-outs, which shall only be at street crossings upon State street between Madison and Twelfth streets, except by the consent of the owners of two-thirds of the property, in lineal measurement, lying upon said State street between Madison and Twelfth streets aforesaid, nor shall anything herein contained be construed to authorize the company hereby incorporated to permit the cars of any other railroad company whatever, propelled by steam, to be run along or upon the railway of the company hereby incorporated.

SEC. 9. The said company hereby incorporated, shall, within two years from the passage of this act, erect, maintain and operate two railways, one from Lake street to the southern boundary of the city and one from the south branch of the Chicago River, on Madison street, to the western boundary of said city, and upon failure to do so this act and all the privileges and franchises hereby conferred shall cease and determine.

SEC. 10. All the grants, powers, privileges, immunities and franchises conferred upon, and all duties and obligations required of Franklin Parmalee, Liberty Bigelow, Henry Fuller and David A. Gage by this act for the South and West Divisions of the city of Chicago and the county of Cook, are hereby conferred upon and required of William B. Ogden, John B. Turner, Charles V. Dyer, James H. Rees and Valentine C. Turner, by the name of "The North Chicago City Railway Company" for the North Division of said city, and said county of Cook, as fully and effectually to all intents and purposes as if they had been by a separate act incorporated, with all of said grants, powers, privileges, immunities and franchises, conferred upon them, and all of said duties and obligations imposed upon them, and the said last named corporation, may take, hold, mortgage and convey real estate.

SEC. 11. This act shall be deemed a public act and noticed by all courts as such without pleading, and shall take effect from its passage.

Act of February 21, 1861.

An act to authorize the extension of horse railways in the City of Chicago.

SECTION 1. *Be it enacted by the people of the State of Illinois represented in the General Assembly*, That Edward P. Ward, William K. McAllister, Samuel B. Walker, James L. Wilson, Charles B. Brown, Nathaniel P. Wilder, and their successors, be and they are hereby created and constituted a body corporate and politic, by the name of "The Chicago West Division

showed upon its face collusion and the attempted imposition of a fraud upon the court. *Sage* v. *Memphis, Little Rock R. R. Co.*, 18 Fed. Rep. 571; *S. C.*, 125 U. S. 362; *Little* v. *Bowers*, 134 U. S. 547; *Industrial & Min. Guar. Co.* v. *Electric Supply*

Railway Company," for the term of twenty-five years, with all the powers and authority pertaining to corporations for like purposes.

SEC. 2. The said corporation shall possess all the powers conferred by and be subject to all the provisions contained in the second, third, fifth and sixth sections of an act entitled "An act to promote the construction of horse railways in the city of Chicago," approved February 14, 1859: *Provided*, that nothing herein contained shall be so construed as to in any manner invalidate or injuriously affect any of the rights of either of the corporations created by said act, or to authorize the corporation hereby created to construct or use any railway track in the North Division of Chicago, except by the written consent of the North Chicago City Railway Company: *And, further, provided*, the consent of the owners of two-thirds of the property, by lineal measure, fronting upon the streets through which said railway shall pass, shall be obtained.

SEC. 3. [As to directors, etc.]

SEC. 4. The corporation hereby created is authorized to purchase, hold and convey real or personal estate; to mortgage or lease its franchises and property; to acquire, unite and exercise any of the powers, franchises, privileges or immunities conferred upon the Chicago City Railway Company by the act aforesaid, or any ordinance of the common council of said city, upon such terms and conditions as may by contract between the said railway corporations, be prescribed; and the consent of the board of directors of the said Chicago City Railway Company, manifested in writing, shall be a condition precedent to the corporation hereby created exercising the powers or any of them conferred upon it by the second section of the act aforesaid, as to any street of said South and West Divisions of Chicago, in which the said Chicago City Railway Company has acquired the right of laying down its track: *Provided*, that upon obtaining such contract or consent as aforesaid, this corporation shall thereupon and thereby become entitled, as to the streets last above mentioned and no others, to use the same according to the provisions of said contract and ordinances aforesaid, anything herein contained to the contrary notwithstanding.

SEC. 5. [As to obstructing cars, etc.]

Act of February 6, 1865.

An act concerning horse railways in the city of Chicago.

SECTION. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the first section of an act of said General Assembly, entitled "An act to promote the construction of horse railways in the city of Chicago," approved February 14, 1859, and the first section of a certain other act of said General Assembly, entitled "An act to au-

Co., 58 Fed. Rep. 732; *Put-in-Bay Waterworks Co.* v. *Ryan*, 181 U. S. 409; *Farmington* v. *Pillsbury*, 144 U. S. 138; *Bernard's Township* v. *Stebbins*, 109 U. S. 341, 354; 23 Am. & Eng. Ency. of Law, 2d ed. p. 1040; *Robinson* v. *Anderson*, 121

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thorize the extension of horse railways in the city of Chicago," approved February 21, 1861, be and the same are hereby so amended as that all the words in said respective sections after the word "company" therein, respectively, shall be and read as follows, viz: "for ninety-nine years, with all the powers and authority hereinafter expressed, or pertaining to corporations for the purposes hereafter mentioned.

SEC. 2. That the second section of the act first above referred to by its title, and which section is included in and made a part of the act secondly above referred to by the title thereof, be and the same is hereby as to both of said acts so amended as to read as follows, viz: "The said corporation is hereby authorized and empowered to construct, maintain and operate, a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks and appendages, in the city of Chicago, and in, on, over and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south and west divisions of the city of Chicago, as the common council of said city have authorized said corporators, or any of them, or shall, from time to time authorize said corporations, or either of them, so to do in such manner, and upon such terms and conditions, and with such rights and privileges, immunities and exemptions, as the said common council has or may by contract with said parties, or any or either of them prescribe, and any and all acts or deeds of transfer of rights, privileges or franchises, between the corporations in said several acts named or any two of them, and all contracts, stipulations, licenses and undertakings, made, entered into or given, and as made or amended by and between the said common council, and any one or more of the said corporations, respecting the location, use or exclusion of railways in or upon the streets, or any of them of said city shall be deemed and held and continued in force during the life hereof as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part of said several acts: *Provided*, that it shall be competent for the said common council, with the written consent or concurrence of the other party or parties, or their assigns, to any of said contracts, stipulations, licenses or undertakings, to amend, modify or annul the same; but said corporations shall not, or any or either of them, be liable for the loss of any property or thing carried on said railways, kept in and under the care of its owner, his servant or agent: *Provided*, that any contract hereafter made by the common council of the city of Chicago, with either of the corporations referred to in this act, for a higher rate of fare than five cents, shall be subject to modification or repeal at any regular meeting of said common council, by a majority vote of all the aldermen elected, or by the general assembly of the State of Illinois.

U. S. 522; *Overton, Trustee,* v. *Memphis & Little Rock R. R. Co.,* 10 Fed. Rep. 866; *People* v. *Weigley,* 155 Illinois, 491.

Regarded as a bill to remove a cloud from and quiet title to property in the custody of the receivers, the allegations of the bill and proofs were insufficient to warrant the exercise of the jurisdiction of the court. *Preston* v. *Smith,* 26 Fed. Rep. 885; *Madison Ave. Baptist Church* v. *Madison Ave. Baptist Church,* 26 How. Pr. 73; *Hannewinkle* v. *Georgetown,* 15 Wall. 547; *Meloy* v. *Dougherty,* 16 Wisconsin, 287; *Dunklin County* v. *Clark et al.,* 51 Missouri, 60; *Leech* v. *Day,* 27 California, 644, 648; *Gamble* v. *Loop,* 14 Wisconsin, 505; *Parker* v. *Shannon,* 121 Illinois, 452; *Spring Valley Waterworks &c.* v. *Bartlett, Mayor,* 16 Fed. Rep. 616; *Sanders* v. *Village of Yonkers,* 63 N. Y. 489; *Fox* v. *Williams,* 92 Wisconsin, 320; *Ogden City* v. *Armstrong,* 168 U. S. 224; *Benjamin Rich* v. *Tamlin Braxton et al.,* 158 U. S. 375; *Simpson* v. *Edmiston,* 23 W. Va. 675, 678; *Roby* v. *South Park Commissioners,* 215 Illinois, 200; *Holland* v. *Challen,* 110 U. S. 15; *United States ex rel. McIntosh* v. *Crawford et al.,* 47 Fed. Rep. 561. Regarded from the point of view of bills to prevent an interference on the part of the city with the receiver's possession of the estate, the *allegata et probata* made out no case of interference or threatened interference.

Under the revised charter of the city of Chicago of 1851, which gave the common council of the city of Chicago power to "exclusively control and regulate the streets and alleys," the common council had lawful authority to pass ordinances granting the privilege of constructing and operating street railways on the streets of Chicago, and to prescribe the terms and conditions of such grants. *Moses* v. *P. F. W. &c. R. R. Co.,*

Sec. 3. [As to the Chicago and Evanston Railroad.]

Sec. 4. Each of said corporations shall be authorized to purchase, hold and convey, real or personal estate, necessary for the use of such corporation, and to manufacture materials, machinery and rolling stock, for the use of such corporation.

Sec. 5. This act shall be deemed a public act, and noticed by all courts as such, without pleading, and shall take effect from its passage.

21 Illinois, 522; *Murphy* v. *Chicago*, 39 Illinois, 286; *Chicago Dock Co.* v. *Garrity*, 115 Illinois, 155; *McWethy* v. *Aurora Elec. Light Co.*, 202 Illinois, 218; *State* v. *Murphy*, 134 Missouri, 548; *Chicago Telephone Co.* v. *N. W. Telephone Co.*, 199 Illinois, 324; *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, 523; *City of St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 629; *Atchison Street R. Co.* v. *Pacific Ry. Co.*, 31 Kansas, 660; *State* v. *Carrigan Consolidated Street Ry. Co.*, 85 Missouri, 263; *City of St. Louis* v. *Western Union Tel. Co.*, 149 U. S. 464; Dillon, Mun. Corp. § 727.

Especially does such authority exist where, as in Chicago, the municipality owns the streets in fee. *City of Chicago* v. *Union Bldg. Assn.*, 102 Illinois, 379; *City of Mt. Carmel* v. *Shaw*, 155 Illinois, 37; *City of Chicago* v. *Rumsey*, 87 Illinois, 348.

The ordinance passed by the common council of the city of Chicago on August 16, 1858, was a valid exercise of its charter power "to regulate the streets," and gave to Parmalee and his associates the power to construct and operate street railways on the streets therein described, including Madison street, from State street to Western avenue, upon the terms and conditions therein stated, including the time limitation therein contained. The ordinance also constituted a valid contract between the city of Chicago and Parmalee and his associates, by means whereof the city became vested with the right, at any time after August 16, 1883, to purchase the street railway lines therein described, and the property appurtenant to and then used in connection therewith, at a price to be determined by appraisement, in accordance with the provisions of the ordinance.

The act of February 14, 1859, is unconstitutional and void. The constitution of Illinois then in force provided that no private or local act should contain more than one subject. The act is a private or local act, although its last section declared "This act shall be deemed a public act," etc. *McCartney* v. *C. & E. R. R. Co.*, 112 Illinois, 611; *Belleville &c. R. R. Co.* v.

Gregory, 15 Illinois, 28; *State* v. *I. C. R. R.*, 33 Fed. Rep. 730, opinion by Mr. Justice Harlan.

The act embraced the general subject of the incorporation of the Chicago City Railway Company, the method of its government, its capitalization, the exercise of certain powers of eminent domain, and the authority to construct and operate street railways in the south and west divisions of the city, where and as the city should by ordinance prescribe, with important exemptions and immunities from the ordinary liability of common carriers; the extension of its business beyond the limits of Chicago; the organization of another private corporation, the North Chicago City Railway Company, with like powers and duties, privileges and exemptions, in the north division of Chicago. Apparently *contra* is an expression, manifestly *obiter dictum*, in *N. C. C. Ry. Co.* v. *Lake View*, 105 Illinois, 213. Such an act embracing more than one subject is unconstitutional, even though both subjects are expressed in its title. *People* v. *Nelson*, 133 Illinois, 565, 577; Cooley, Const. Lim. 6th ed. ch. 6, § 4, p. 177.

The real subject of the first nine sections of this act was the creation of one certain private corporation. The real subject of the tenth section of this act was the creation of another and entirely distinct private corporation. A private or local act which attempts to incorporate two private corporations, and make two separate contracts between the State and the private interests concerned in the corporations, offends against the constitutional inhibition. *Belleville & Ill. R. R. Co.* v. *Gregory*, 15 Illinois, 20; *People* v. *Denahy*, 20 Michigan, 349; *Ex parte Conner*, 51 Georgia, 571; *King* v. *Banks*, 61 Georgia, 20. And for a close analogy see *Supervisors of Fulton County* v. *M. & W. R. R. Co.*, 21 Illinois, 338; *People ex rel. &c.* v. *County of Tazewell*, 22 Illinois, 147.

The title was "An act to promote the construction of horse railways in the city of Chicago." Section 5 attempted to authorize the corporation to extend its railways "to any point or points within the County of Cook," and section 6 attempted

to authorize said corporation, "with the assent of the supervisor of any township, to lay down and maintain its said railway or railways in, upon, over and along any public highway in said township." The sections providing for such extension beyond the city limits are not expressed in the words "in the city of Chicago," which limit the whole title, and are, therefore, void. *People ex rel.* v. *Mellen*, 32 Illinois, 181; *Lockport* v. *Gaylord*, 61 Illinois, 276; *People* v. *Inst. of Protestant Deaconesses*, 71 Illinois, 229; *Middleport* v. *Ætna Life Ins. Co.*, 82 Illinois, 562; *Snell* v. *Chicago*, 133 Illinois, 413; *Ex parte Paul*, 94 N. Y. 497.

If said act is valid to any extent and for any purpose, the only rights which the complainants could receive thereunder would be limited to horse railways in the city. *North Chicago City Ry. Co.* v. *Town of Lake View*, 105 Illinois, 207.

The preëxisting charter power of the city, recognized and reaffirmed by this act, to prescribe terms and conditions, included the power to fix the time when the privileges granted should terminate. *Cleveland Elec. Co.* v. *Cleveland*, 137 Fed. Rep. 111; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Detroit Citizens' St. Ry. Co.* v. *Detroit*, 64 Fed. Rep. 646; *Chicago Terminal R. R. Co.* v. *Chicago*, 203 Illinois, 576; *Coverdale* v. *Edwards*, 155 Indiana, 374; *Plymouth Township* v. *Railway*, 168 Pa. St. 181, 187; *Minersville Borough* v. *Schuylkill Elec. Ry. Co.*, 205 Pa. St. 294. The time limit and the consent are inseparable. The court cannot strike down the one and hold the other valid. The consent must stand or fall in its entirety. *St. Louis & Meramec R. R. Co.* v. *City of Kirkwood*, 159 Missouri, 238, 253; Elliott on Railroads, § 1081; *Blaschko* v. *Wurster*, 156 N. Y. 437, 444.

Where a municipality has the power to give or refuse consent to the occupation and use of its streets for street railway purposes, it may impose terms and conditions, including a time limit; and an acceptance of a grant carries with it all the conditions and limitations upon which it is based. *Chicago Terminal R. R. Co.* v. *Chicago*, 203 Illinois, 576, 589; *Byrne* v.

Chicago Gen. Ry. Co., 169 Illinois, 75; *Chicago Gen. Ry. Co.* v. *Chicago*, 176 Illinois, 253; *City of Chester* v. *W. C. & W. R. R. Co.*, 182 Illinois, 382; *People* v. *Suburban R. R. Co.*, 178 Illinois, 594; *Coverdale* v. *Edwards*, 155 Indiana, 374; *Plymouth Township* v. *Ry. Co.*, 168 Pa. St. 181, 186; *Minersville Borough* v. *Schuylkill Elec. Ry. Co.*, 205 Pa. St. 394, 401; *Allegheny City* v. *Millvale &c. Ry. Co.*, 159 Pa. St. 411, 414; *St. Louis & Meramec R. R. Co.* v. *City of Kirkwood*, 159 Missouri, 239; *City of Detroit* v. *Detroit Ry.*, 95 Michigan, 456; Elliott on Railroads, § 1081; McQuillin on Mun. Ord. § 576; Dillon on Mun. Corp. 3d ed. § 706. The companies and the city for over forty years have repeatedly contracted for limited periods of street occupancy. The grants of the city have proceeded upon its right and power, and the full recognition thereof by the companies, to impose time limits. This practical construction of the acts and ordinances is controlling. *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273; *Topliff* v. *Topliff*, 122 U. S. 131; *Chicago* v. *Sheldon*, 9 Wall. 54; *Lehigh Coal & Nav. Co.* v. *Harlan*, 27 Pa. St. 439; *District of Columbia* v. *Gallagher*, 124 U. S. 505; *Burgess* v. *Badger*, 124 Illinois, 295.

The act of February 21, 1861, incorporating the Chicago West Division Railway Company, is also unconstitutional and void because it embraces more than one subject, to wit: The creation of the private corporation named in section 1 thereof, and the vesting of said company with powers conferred upon another company by certain sections of the act of February 14, 1859; the authorization of contracts between said private corporations for the purchase of ordinance rights and privileges; the creation and definition of certain misdemeanors, and the establishment of penalties for the commission thereof. So much of the act as sought to vest in the company the power enumerated in the fifth and sixth sections of the act of February 14, 1859, is void because the subject matter of said sections five and six is not expressed in the title of said act of February 21, 1861, or the title of said act of February 14, 1859.

So much of said act of February 21, 1861, as attempted to

vest the company with power to acquire, unite and exercise the powers, franchises and privileges of the Chicago City Railway Company, by the act of February 14, 1859, or by any of the ordinances of the common council, on such terms as should be agreed upon by a contract between said corporations, is void, because the subject matter thereof is not expressed in the title of said act. The act, if valid to any extent, merely vested said Chicago West Division Railway Company with power to accept grants of street railway privileges in the streets of the city from the common council, and to recognize the preëxisting right of the city to pass such ordinances and prescribe the terms and conditions of such grants, including the period of time at which the said privileges should terminate.

The act of February 6, 1865, is unconstitutional and void, in that it embraced more than one subject, to wit: The amendment of two separate private and local acts of the General Assembly; the ratification of deeds of transfer of rights, privileges and franchises between the corporations in said acts named; the ratification of ordinance contracts between the city and said corporations; the ratification of an ordinance contract with still another private corporation (the Chicago & Evanston Railroad), not mentioned in the acts of 1859 and 1861. None of the sections of this act except those the subject matter of which is expressed in the general words of the title, "Horse Railways in the city of Chicago," is valid. *N. C. C. Ry. Co.* v. *Lake View*, 105 Illinois, 207. The ratification of (*a*) the conveyances from one private corporation to another private corporation of personal property and ordinance rights and of (*b*) contracts between these companies respectively and the city, are not included within the title of the act. *Village of Lockport* v. *Gaylord*, 61 Illinois, 276.

The act did not amend sections 5 or 6 of said act of 1859, nor did it purport to extend or affect contracts between the companies and township supervisors. Nor did it extend or affect street railway privileges or ordinance contracts in any of the streets mentioned in the exclusion clause of the Chicago

and Evanston charter, reënacted in section 3 of said act of 1865.

The expression "during the life hereof," as used in the said second section, is vague and ambiguous. It may be capable of three interpretations: As meaning the life of the act; or the life of the deeds, licenses and contracts; or the lives of the railway corporations, respectively. That interpretation of the words, "during the life hereof," must be adopted, which will give to the companies as against the city and the public the minimum of privileges in the streets. *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49; *Citizens' St. Ry. Co.* v. *Detroit Ry.*, 171 U. S. 48, 54; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 598; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 696; *Rockland Water Co.* v. *Camden &c. W. Co.*, 80 Maine, 562, 563; *Chicago Terminal R. R. Co.* v. *Chicago*, 203 Illinois, 576. See also *Long* v. *City of Duluth*, 49 Minnesota, 280; *S. C.*, 51 N. W. Rep. 913; *Wright* v. *Nagel*, 101 U. S. 796; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 544, 549 *et seq.*, and notation thereon in 3 Rose's Notes to United States Reports, pp. 582–587; *City of Detroit* v. *Detroit City Ry. Co.*, 56 Fed. Rep. 872, 873; *Omaha Horse Ry.* v. *Cable Tramway Co.*, 30 Fed. Rep. 324; *Citizens' Street Co. Ry. Co.* v. *Jones*, 34 Fed. Rep. 579; *Syracuse Water Co.* v. *City of Syracuse*, 116 N. Y. 167; *S. C.*, 22 N. E. Rep. 381; *State* v. *Consumers' Co.*, 51 N. J. L. 422; *Freeport W. W. Co.* v. *Prager*, 3 Pa. Co. Ct. 371; *Saginaw Gas L. Co.* v. *Saginaw*, 28 Fed. Rep. 529; *Clarksburg Elec. L. Co.* v. *Clarksburg* (W. Va. 1900), 50 L. R. A. 142; *Commonwealth* v. *E. & E. R. R. Co.*, 27 Pa. St. 339.

The rule of construction is well settled that where a statute or clause of a statute contains repugnant or irreconcilable provisions the last in order of date or position must prevail. Endlich on Interpretation of Statutes, § 183; Potter's Dwarris on Statutes, p. 156 and n.; *Harrington* v. *Trustees*, 10 Wend. 554;

Brown v. *County Commissioners*, 21 Pa. St. 42, 43; *Pacher* v. *Sunbury R. R. Co.*, 19 Pa. St. 211; *Hall* v. *Equator &c. Co.*, Fed. Cas. No. 5931; *Smith* v. *Moore*, 26 Illinois, 396; *Quick* v. *Whitewater Twp.*, 7 Indiana, 578. As against a statute framed in covert and obscure language, and claimed to ratify and confirm by wholesale the acts of a municipality in its dealings with the claimants, the court will adopt the strictest possible construction in order to prevent the wresting of valuable rights from the public by such insidious and surreptitious legislation. *Oakland* v. *Oakland Water Front Co.*, 118 California, 160, 194; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550–561; Ordranaux on Const. Legislation, p. 604.

The act of February 6, 1865, did not postpone the date when the city might purchase from the Chicago West Division Railway Company under the ordinance of August 16, 1858. The right of purchase was conferred by the Parmalee ordinance of August 16, 1858, and affirmed by section 7 of the act of 1859, for the period of twenty-five years. This right was affirmed by the act of 1865, and said section 7 of said act of 1859 was not amended by the act of 1865.

If the act of 1865 be construed as postponing the date upon which the city was entitled to purchase the railway property, then the act impairs the obligation of the city's contract with the company and deprives the city of its property without due process of law, in violation of the Constitution of the United States and of the State of Illinois. Art. I, sec. 10, Constitution U. S.; Art. V and XIV, Amendments to Constitution U. S.; Art. XIII, sec. 17, Const. Ill. 1848. The right of purchase vested in the city was a private property right which it could sell. *De Motte* v. *Valparaiso* (Ind.), 67 N. E. Rep. 985.

In contracting with the railway company for the purchase of its rails, cars, etc., the city was acting in its proprietary or business capacity and not in its governmental capacity, and its contract is within the constitutional protection. *Wagner* v. *City of Rock Island*, 146 Illinois, 139, 154; *County of Richland* v. *County of Lawrence*, 12 Illinois, 1; *Cicero Lumber Co.* v. *Town*

of Cicero, 176 Illinois, 1; *Board of Park Com'rs* v. *Detroit*, 28 Michigan, 230; *Western Sav. Fund Soc.* v. *City of Philadelphia*, 31 Pa. St. 185, 189; *Trustees Dartmouth College* v. *Woodward*, 4 Wheat. 518, 633; *Pike's Peak Power Co.* v. *City of Colorado Springs*, 105 Fed. Rep. 111; *Proprietors Mt. Hope Cemetery* v. *City of Boston*, 158 Massachusetts, 509, 511; *Town of Milwaukee* v. *City of Milwaukee*, 12 Wisconsin, 93; *New Orleans Ry. Co.* v. *New Orleans*, 26 La. Ann. 478, 481; *State* v. *Barker*, 116 Iowa, 96, 244; *Montpelier* v. *E. Montpelier*, 29 Vermont, 12, 19.

The following species of property have been held to be possessed by a city in its capacity as a private corporation: Water works system, *Bailey* v. *The Mayor of N. Y.*, 3 Hill, 531; *Pike's Peak Power Co.* v. *Colorado Springs*, 105 Fed. Rep. 1. A building used partly for a city hall and partly rented out for offices, *Oliver* v. *Worcester*, 102 Massachusetts, 489. Gas works, *Scott* v. *Mayor of Manchester*, 2 H. & N. 204, 210; *The Western Savings Fund Society* v. *Philadelphia*, 31 Pa. St. 185; *S. C.*, 31 Pa. St. 135. Water lots granted by the State to the city of San Francisco, *Grogan* v. *San Francisco*, 18 California, 590. Ferries and railway franchises, *Mayor &c.* v. *Second Avenue Railway Co.*, 32 N. Y. 261. Public wash houses, *Cowley* v. *The Mayor &c. of Sunderland*, 6 H. & N. 565. A public cemetery, *Proprietors of Mount Hope Cemetery* v. *Boston*, 158 Massachusetts, 509.

Upon failure of a company to construct a specific line within the time allowed therefor in the particular ordinance covering the same, all rights of the company to construct under said ordinance lapsed. *Atchison St. Ry. Co.* v. *Nave*, 38 Kansas, 744; *Wilmington City Ry. Co.* v. *Wilmington & B. S. Ry. Co.*, 46 Atl. Rep. 12; and see *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92; *Minersville Borough* v. *Schuylkill &c. Ry.* Co., 205 Pa. St. 294; *S. C.*, 54 Atl. Rep. 1050.

Where an ordinance authorizes construction of a particular street railway line, but nothing is done under it and subsequently another new and plainly superseding ordinance, relating to the same privilege, and to the same grantee, is passed,

the provisions of the last ordinance will control, and acceptance of and action under the last ordinance will be a waiver, surrender or abandonment of any privileges sought to be conferred by the first ordinance. The second ordinance is, in legal effect, a revocation of and a substitution for the first. *East St. Louis Union Ry. Co.* v. *City of East St. Louis,* 39 Ill. App. 400; *Logansport Ry. Co.* v. *Logansport,* 114 Fed. Rep. 688; *Cleveland Elec. Ry. Co.* v. *Cleveland,* 137 Fed. Rep. 111; *Cain* v. *Wyoming,* 104 Ill. App. 540; *Belleville* v. *Cit. Horse R. Co.,* 152 Illinois, 171; *Galveston City R. Co.* v. *Galveston City St. Ry. Co.,* 63 Texas, 529. Failure to construct or operate forfeits rights of the grantee, as the chief consideration of the grant is the performance of the public service. *Citizens' St. Ry. Co.* v. *Jones,* 34 Fed. Rep. 579; *State* v. *E. Fifth St. Ry. Co.,* 140 Missouri, 539; *Louisville T. Co.* v. *Cincinnati,* 76 Fed. Rep. 726. A mere colorable operation is not sufficient. *Snouffer* v. *Cedar Rapids &c. Ry. Co.,* 92 N. W. Rep. 79.

Street railway rights on any streets under an ordinance which may be construed to contain no provision for the term of the grant are terminable at the will of the city council. *Boise City & C. Co.* v. *Boise City,* 123 Fed. Rep. 232; *Lambe* v. *Manning,* 171 Illinois, 612; *Freeport Water Co.* v. *Freeport,* 186 Illinois, 179; *S. C.,* 180 U. S. 587. A grant indefinite as to time will be construed as perpetual and therefore void under the strict rule of construction applicable to such grants. *Milhau et al.* v. *Sharp et al.,* 27 N. Y. 611; *West End &c. Co.* v. *Atlantic &c. Co.,* 49 Georgia, 151, 155; *State of New York* v. *Mayor &c.,* 3 Duer, 119; *Blaschko* v. *Wurster,* 156 N. Y. 432; *Ampt* v. *City of Cincinnati,* 21 Ohio Cir. Ct. 300; *Birmingham* v. *Birmingdam St. R. Co.,* 79 Alabama, 465, 473. And the rule is established, by a preponderance of the later authorites, that where the constitution or statute of a State fixes a maximum period of time for which a franchise may be granted, or a contract made, a franchise or contract running for a longer time is wholly void, and will not be upheld for the valid period. *Flynn* v. *Little Falls E. & W. Co.,* 74 Minnesota, 180; *Gaslight*

&c. Co. v. *City of New Albany*, 156 Indiana, 406; *S. C.*, 59 N. E. Rep. 176; *State* v. *Minnesota Transfer Ry. Co.*, 83 N. W. Rep. 32; *Westminster Water Co.* v. *City*, 56 Atl. Rep. 990; *City of Somerset* v. *Smith*, 49 S. W. Rep. 456; *Manhattan T. Co.* v. *City of Dayton*, 59 Fed. Rep. 327; *City of Fort Wayne* v. *Lehr*, 88 Indiana, 62; *Blaschko* v. *Wurster*, 156 N. Y. 437; *Davis* v. *Harrison*, 46 N. J. L. 79.

Apparently, *contra*, *Cedar Rapids Water Co.* v. *Cedar Rapids*, 118 Iowa, 234, 240.

And see, also, as to invalidity of grants of street privileges for any fixed term, in absence of express charter authority, *City of Wellston* v. *Morgan*, 59 Ohio St. 147, 157; *East St. Louis* v. *East St. Louis G. L. & C. Co.*, 98 Illinois, 415, 432, 456; *Garrison* v. *City of Chicago*, 7 Biss. 480, 487; *West End &c. Co.* v. *Atlantic &c. Co.*, 49 Georgia, 151, 155; *State* v. *Minn. Transfer Ry. Co.*, 83 N. W. Rep. 32; *Gas Co.* v. *Parkersburg*, 30 W. Va. 435, 440; *Syracuse W. Co.* v. *City*, 116 N. Y. 167, 182; *City of Danville* v. *Danville W. Co.*, 178 Illinois, 299, 306; *S. C.*, 180 Illinois, 235; *Northern Cent. Ry. Co.* v. *Maryland*, 187 U. S. 258, 270; *People* v. *Pullman Car Co.*, 175 Illinois, 125; *Harvey* v. *Aurora & Geneva Ry. Co.*, 174 Illinois, 295, 307; *Cumberland Tel. & T. Co.* v. *City*, 127 Fed. Rep. 187; *People ex rel.* v. *Chicago Gas T. Co.*, 130 Illinois, 268; *Chas. Simons' Sons Co.* v. *Maryland Tel. & Tel. Co.* (Md. 1904), 57 Atl. Rep. 193; *S. C.*, 63 L. R. A. 727; *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 290, 309, 312.

The general city and village law, from the date of its adoption, limited all municipal street railway grants to twenty years. Clause 24, sec. 1, Art. V, Cities and Villages Act; *Chester* v. *W. C. & W. R. R. Co.*, 182 Illinois, 382, 389. This limitation cannot be avoided by artifice or indirection. *Cedar Rapids Water Co.* v. *Cedar Rapids*, 118 Iowa, 234, 240; *Gas Light & Coke Co.* v. *New Albany*, 156 Indiana, 406; *Blaschko* v. *Wurster*, 156 N. Y. 432.

The city is not estopped to assert the invalidity of any grant beyond twenty years or otherwise *ultra vires*. *City of Chester*

v. *W. C. & W. R. R. Co.*, 182 Illinois, 382; *Cedar Rapids W. Co.* v. *Cedar Rapids*, 91 N. W. Rep. 1081; *Levis* v. *City of Newton*, 75 Fed. Rep. 889, 890; *City of Detroit* v. *Detroit City Ry. Co.*, 56 Fed. Rep. 893, 894; 20 Am. & Eng. Ency. of Law, 1182, and n. And see *Seeger* v. *Mueller*, 133 Illinois, 85, 94, quoted with approval in *City of Danville* v. *Water Co.*, 178 Illinois, 311; *Snyder* v. *City of Mt. Pulaski*, 176 Illinois, 397; *Cedar Rapids W. Co.* v. *Cedar Rapids*, 91 N. W. 1081, 1085, *Attorney General* v. *Bristol W. W. Co.*, 10 Exch. 884; *S. C.*, 24 L. J. Exch. (N. S.) 205.

By accepting the "power" ordinance of March 30, 1888, the Chicago West Division Railway Company expressly recognized and agreed to the time limitations prescribed in the ordinances under which the various lines of the company were being operated, as a legitimate exercise of the power of the city to fix time limits. It was at the end of those time limits that the company agreed to remove its tracks. *Cleveland E. R. Co.* v. *Cleveland*, 137 Fed. Rep. 118.

The Chicago West Division Railway Company, Chicago City Railway Company and North Chicago City Railway Company, had no corporate capacity to accept permission from the city of Chicago to operate its cars by other than animal power. *North Chicago Street Railway Co.* v. *Town of Lake View*, 105 Illinois, 207; *McCartney et al.* v. *Chicago Edison Co. et al.*, 112 Illinois, 611, 653; *Omaha Horse Railway Co.* v. *Cable Tramway Co.*, 30 Fed. Rep. 324; *Farrell* v. *Winchester Ave. R. R. Co.*, 61 Connecticut, 127; *Rapid Transit Company* v. *The Hawaiian Tramway Companies, Limited*, 13 Hawaiian Reports, 371, 374; *Indiana Cable Street Railroad Company* v. *The Citizens' Railroad Company*, 8 L. R. A. 539, 548; *Newport & Newport* v. *Dayton Street Railway Co.*, 1 Ky. L. Rep. 404; *The People ex rel. Third Avenue Railway Company* v. *Newton*, 112 N. Y. 396, 407; *V. & S. Railway Co.* v. *Denver Street Railway Co.*, 2 Colorado, 673, 680.

The leases and transfers under which the receivers claim are invalid. Thompson, Law of Corporations, vol. 5, § 5880;

Noyes, Intercor. Rel. §§ 135, 170, 172; Rev. Stat. Ill. ch. 114, §§ 44, 45 (Hurd's ed.); ch. 114, Rev. Stat. of Ill. § 29; *Evans* v. *City of Chicago*, 24 Illinois, 52; Rev. Stat. Ill. ch. 32; Rev. Stat. Ill. ch. 120, §§ 32, 40; *People ex rel.* v. *Chicago Gas Trust*, 130 Illinois, 268, 285; *Oregon Railroad Co.* v. *Oregonian R. R. Co.*, 130 U. S. 1; *Chicago Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484; *Cox* v. *Terre Haute & I. R. R.*, 133 Fed. Rep. 371, 374.

Mr. Brainard Tolles, *Mr. John S. Miller* and *Mr. John G. Johnson*, with whom *Mr. Joseph S. Auerbach*, *Mr. W. W. Gurley*, *Mr. John P. Wilson* and *Mr. John J. Herrick* were on the briefs, for the receivers and the railway corporations:

The Circuit Court has jurisdiction of the controversies presented by these bills. The jurisdiction of the court herein must be determined alone from the record of these cases in equity, now here on appeal. The transcripts of the record of the suits at law in which the judgments were recovered, which were the basis of the creditors' bills in which the receivers were appointed, are no part of the transcript of record here. Nor are the transcripts of record of such creditors' suits. *Pacific R. Co.* v. *Missouri Pacific R. Co.*, 111 U. S. 505, 522; *Continental Trust Co.* v. *Toledo &c. R. Co.*, 82 Fed. Rep. 642, 645; *Richardson* v. *Loree*, 94 Fed. Rep. 375, 379. They are records of other suits than those before the court on these appeals. Neither of them can be looked into in order to defeat the jurisdiction of the court below to enter these decrees; although there is authority that they might be offered in evidence here, if necessary, in order to sustain the decrees. *Wines* v. *Mayor*, 70 N. Y. 613, 614; *Stillwell* v. *Carpenter*, 62 N. Y. 639.

The declarations in each case showed that promissory notes were delivered to the plaintiff by the defendant bearing the indorsement of the assistant treasurer of the maker, and that the money was advanced to the defendant by the plaintiff, so that the plaintiff held the notes as first taker, and not as an assignee. The jurisdiction of the Circuit Court to render judg-

ment on the notes was clear. *Wachusett Nat'l Bank* v. *Sioux City Stove Works*, 56 Fed. Rep. 321; *Holmes* v. *Goldsmith*, 147 U. S. 150; *Bank of British North America* v. *Barling*, 46 Fed. Rep. 357.

The notes were made payable to the order of the makers and by them indorsed, as held by this court in *Falk* v. *Moebs*, 127 U. S. 597. And that question is one of general commercial law on which that decision is conclusive and not of Illinois law as conceived by counsel for the city of Chicago. *Burgess* v. *Seligman*, 107 U. S. 20; *Independent Dist.* v. *Rea*, 111 Fed. Rep. 1; *Peck* v. *Central Vt. R. R.*, 79 Fed. Rep. 590; *Phipp* v. *Harding*, 70 Fed. Rep. 468; *Windsor Bank* v. *McMahon*, 38 Fed. Rep. 283; *Bank* v. *Board*, 90 Fed. Rep. 7. In any event, the common counts in the declaration for money loaned and advanced to the defendant, and upon an account stated, etc., showed a controversy within the jurisdiction of the court, and it must be presumed that these counts were sustained by proof. *Cuddy, Petitioner*, 131 U. S. 280; *Galpin* v. *Page*, 18 Wall. 350; *Wolcott* v. *Coleman*, 2 Connecticut, 324; *Bunyea* v. *Metropolitan R. Co.*, 19 D. C. App. 76; *Harvey* v. *Laflin*, 2 Indiana, 477. Again, this attack on the judgments is a collateral attack, and cannot be made. Every intendment is made in their favor. *Cuddy, Petitioner*, 131 U. S. 280, 285; Van Fleet, Collateral Attack, §§ 12, 829.

The jurisdiction of the court to entertain the creditors' bills brought for the collection of these judgments rested upon the ground that said bills were brought for the collection of judgments at law rendered by said Circuit Court of the United States, and upon the ground of diversity of citizenship. That jurisdiction cannot be here collaterally questioned. *Re Cuddy*, 131 U. S. 280, 285; *Commercial Bank* v. *Burch*, 141 Illinois, 519; *St. Paul Trust Co.* v. *St. P. Pub. Co.*, 60 Minnesota, 105; *Cap. City Ins. Co.* v. *Boggs*, 172 Pa. St. 91.

The jurisdiction of the Circuit Court to entertain the bills upon which the present decrees were rendered was dependent upon three grounds: The fact that the subject matter of the

controversy was in the actual possession of receivers appointed by the Circuit Court of the United States. The fact that the purpose of the action was to aid in the collection of judgments at law by preserving certain assets properly applicable to the satisfaction of said judgments, and by establishing and quieting the title of the receivers to property of which they were in possession or with which they were vested, and which it might become necessary to sell in the course of a complete administration of the property of said corporation defendants for the benefit of their creditors. The fact that the ground of action was the attempted impairment of the obligation of a contract by the ordinances, resolutions and legislative acts of the defendant, acting through its common council, and the imminent danger of further action in the same direction with still more destructive consequences. *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Gumbel* v. *Pitkin*, 124 U. S. 131; *Morgan's Company* v. *Texas Central Ry.*, 137 U. S. 171; *In re Tyler*, 149 U. S. 164; *Rouse* v. *Letcher*, 156 U. S. 47; *White* v. *Ewing*, 159 U. S. 36; *Pope* v. *Louisville &c. Ry.*, 173 U. S. 570; *Porter* v. *Sabin*, 149 U. S. 473, 479; *Byers* v. *McAuley*, 149 U. S. 608, 618; *Price* v. *Abbott*, 17 Fed. Rep. 506; *Armstrong* v. *Trautman*, 39 Fed. Rep. 275; *Compton* v. *Jesup*, 68 Fed. Rep. 263; *S. C.*, 15 C. C. A. 397; *Lanning* v. *Osborne*, 79 Fed. Rep. 657, 662; *Toledo &c. R. Co.* v. *Continental Trust Co.*, 95 Fed. Rep. 497, 505; *S. C.*, 36 C. C. A. 155; *Davis* v. *Martin*, 113 Fed. Rep. 6, 9; *S. C.*, 51 C. C. A. 27.

A Federal question was presented. *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65.

It makes no difference whether the repudiation by the city was legislative or administrative in its character—by ordinance or resolution. *Walla Walla* v. *Water Co.*, 172 U. S. 1; *American Waterworks &c. Co.* v. *Water Co.*, 115 Fed. Rep. 171; *Riverside &c. Ry. Co.* v. *Riverside*, 118 Fed. Rep. 736.

The jurisdiction in these actions cannot be impaired by collateral attacks on the judgments at law. *Cuddy, Petitioner*, 131 U. S. 280; *Cutler* v. *Huston*, 158 U. S. 423; *Dowell* v. *Ap-*

plegate, 152 U. S. 327; *W. B. Conkey Co.* v. *Russell*, 111 Fed. Rep. 417.

There was no collusion in bringing the suit. The only possible subject of collusion was in the choice of tribunals as between the courts of Illinois and the courts of the United States. "Collusion" can not be predicated of such choice. The right to make a choice was one given to the complainant by the Constitution and laws of the United States, without restriction as to motive. There being a real debt and a real diversity of citizenship, the motive of the creditor in bringing the suit is not a matter of inquiry in this court. *South Dakota* v. *North Carolina*, 192 U. S. 286, 310; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 190; *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 336; *Crawford* v. *Neal*, 144 U. S. 585; *Cheaver* v. *Wilson*, 9 Wall. 108, 123; *Smith* v. *Kernochen*, 7 How. 198, 216. See also *Sage* v. *Memphis &c. R. R. Co.*, 18 Fed. Rep. 571.

The Circuit Court had jurisdiction to render a decree protecting the possession and quieting the title of the receivers. The whole attitude of the municipal authorities was calculated to lead irresponsible persons to take the law into their own hands. It needed only some overt and conspicuous official act, like the notice from the Commissioner of Streets, to turn loose forces of chaos and destruction. The Mayor had by his public declarations and messages, made police protection a political impossibility.

That a court of equity has power to give relief against such an intolerable condition of affairs is clear. In holding that equity will give such relief, this court has shown no disposition to be restrained within the narrow limits of ancient precedents. Cases of this kind are *sui generis* and constitute a striking instance of the adaptability of equitable remedies to new conditions. *Walla Walla* v. *Walla Walla Waterworks Co.*, 172 U. S. 1, 12; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, 581; *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S. 368, 379; *Vicksburg Water Co.* v. *Vicksburg*, 185 U. S. 65; *Cleveland* v. *Cleveland City R. Co.*, 194 U. S. 517, 531.

The existence of a cloud upon title is one of the irreparable injuries of which the complainants complain and against which it is the duty of a court of equity to give relief. Where the cloud complained of is serious and substantial and occasions irreparable injury, relief is not limited to cases where there is an apparently valid lien or title outstanding. *Vicksburg Water Co.* v. *Vicksburg*, 185 U. S. 65; *American Waterworks &c. Co.* v. *Horn Water Co.*, 115 Fed. Rep. 171; *Detroit* v. *Detroit Citizens' Ry. Co.*, 184 U. S. 368. This is not only a principle of general equitable jurisprudence, but a part of the local law of Illinois. *Cicero Lumber Co.* v. *Town of Cicero*, 176 Illinois, 9; *Glucose Refining Co.* v. *Chicago*, 138 Fed. Rep. 209; *Monson* v. *Kill*, 144 Illinois, 248.

It is a maxim of equity that the court having once obtained jurisdiction over a subject matter, will proceed to a complete determination of the entire controversy between the parties relating to such subject matter. *United States* v. *Union Pacific R. Co.*, 160 U. S. 1, 52; *Ober* v. *Gallagher*, 93 U. S. 199; *Cathcart* v. *Robinson*, 5 Pet. 264.

The removal of a cloud from the title was within the ancillary jurisdiction of the court because it was essential to an intelligent administration of the property and to the full development of its public usefulness during the time that it should remain under the control of the court; and also to protect its value from unlawful impairment in case a sale should become necessary. *Davis* v. *Gray*, 16 Wall. 203; *Connor* v. *Alligator Lumber Co.*, 98 Fed. Rep. 155; *Lanning* v. *Osborne*, 79 Fed. Rep. 657; *In re Tyler*, 149 U. S. 164, 181; *Rouse* v. *Letcher*, 156 U. S. 47, 49.

It was no objection that complainants' title is an estate for years and not in fee. *Goldsmith* v. *Gilliland*, 22 Fed. Rep. 865; *McKee* v. *Howe*, 17 Colorado, 538; 31 Pac. Rep. 115; *Pennie* v. *Hildreth*, 81 California, 127, 130; *City of Newport* v. *Taylor's Ex'rs*, 55 Kentucky, 669.

The city's claim of a right to purchase was a cloud on title. The claim of an outstanding option of purchase, unaccom-

panied by any present attempt to exercise such option, was a cloud upon title from which the Circuit Court as a court of equity was bound to grant relief. *Sea* v. *Morehouse,* 79 Illinois, 216; *Altschul* v. *Hogg,* 62 Fed. Rep. 539; *Lane* v. *Lesser,* 135 Illinois, 567; *Monson* v. *Kill,* 144 Illinois, 248. This is generally recognized as a ground of relief in equity, even when no present possibility of trespass and no multiplicity of suits are to be apprehended. *Hodgen* v. *Guttery,* 58 Illinois, 431; *Key City Gas Light Co.* v. *Munsell,* 19 Iowa, 305; *Tucker* v. *Kennis-ton,* 47 N. H. 267. It is no objection to complainants' right to maintain the suit, that the city's claim is to a right *in futuro.* An unfounded claim to an estate in remainder or reversion is a cloud on title against which equity will give relief. *Rhea* v. *Dick,* 34 Ohio St. 420; *Niles* v. *Gray,* 12 Ohio St. 320; *Onder-donk* v. *Mott,* 34 Barb. 106; *Clark* v. *Darlington,* 7 S. Dak. 148. It is no objection to complainants' right to maintain the suit that they sue in a representative capacity. *Davis* v. *Gray,* 16 Wall. 203; *Laverty* v. *Sexton,* 41 Iowa, 435; *City of Newport* v. *Taylor's Ex'rs,* 55 Kentucky, 699. While it has been repeatedly held in Illinois that a suit to quiet title cannot be maintained by an administrator, the reason given is that the administrator has no estate or interest in the land, but only a power of sale. *Ryan* v. *Duncan,* 88 Illinois, 144. It is no objection that there is no statute of Illinois specifically authorizing it. Courts of equity have inherent jurisdiction to grant such relief in a proper case. *Whitney* v. *Stevens,* 97 Illinois, 482; *Lamb* v. *Farrell,* 21 Fed. Rep. 5; *Allen* v. *Halliday,* 25 Fed. Rep. 688; *Sharon* v. *Tucker,* 144 U. S. 533; *Holland* v. *Challen,* 110 U. S. 15. Nor that the defendant is a municipal corporation claiming certain powers under a statute of the State. *Watson* v. *City of Elizabeth,* 35 N. J. Eq. 345; *City of Newport* v. *Taylor's Ex'rs,* 55 Kentucky, 699; *Davis* v. *Gray,* 16 Wall. 203.

The complainants were under no obligation to set out specifically in their bills the nature of the adverse claims made by the city. It was sufficient to allege generally that such adverse

claims existed. *Ely* v. *New Mexico &c. R. Co.*, 129 U. S. 291; *Tolleston Club of Chicago* v. *Clough*, 146 Indiana, 93; *Holbrook* v. *Winsor*, 23 Michigan, 394. When issues have been joined and fully tried between the proper parties, the courts will not draw fine distinctions to defeat a remedy which it is in the public interest to have administered. *Detroit* v. *Detroit Citizens' Street R. Co.*, 184 U. S. 368; *Gridley* v. *Watson*, 53 Illinois, 186; *Mollie* v. *Peters*, 28 Nebraska, 670; *Goodrum* v. *Ayers*, 56 Arkansas, 93.

The franchises possessed respectively by the North Chicago City Railway Company and the Chicago West Division Railway Company to construct, maintain and operate street railways in the streets and other public places of the city of Chicago in and over highways in the county of Cook, were derived by direct grant from the State of Illinois. It was the duty of the legislature to provide increased transportation facilities in the streets. *Chicago & N. W. Ry.* v. *Chicago*, 140 Illinois, 309; *Chicago, B. & Q. Ry.* v. *Attorney General*, Fed. Cas. No. 2666; *Barney* v. *Keokuk*, 94 U. S. 341. The ownership of the fee of the streets by the city made no difference. *Palatine* v. *Kreuger*, 121 Illinois, 72.

It is equally clear, under the decisions in Illinois, that the public right of passage in 1859 was under the direct and immediate control of the General Assembly. Its powers in this respect had been delegated only to a limited extent, and for purposes clearly defined. In the exercise of these powers, in 1859, it was practically free from all constitutional restrictions. Except as modified by subsequent constitutional provisions, this continues to be the doctrine in Illinois to the present day. *People ex rel Jackson* v. *Suburban Railroad Co.*, 178 Illinois, 594; *West Chicago Park Commissioners* v. *McMullen*, 134 Illinois, 170. The act of 1865 was a legislative construction of the act of 1859 to this effect.

In every grant by a sovereign authority the courts will endeavor to see an intelligible and beneficial purpose, and will so construe the grant as to favor that purpose and not go be-

yond it. In a country constituted as this is, where sovereign powers are exercised by representative legislative bodies, the courts recognize but one mode of "favoring the State," and that is by sustaining and making effective the legislative purpose. *Romer* v. *St. Paul City R. Co.*, 75 Minnesota, 217; *Union Pacific Railroad Co.* v. *Hall*, 91 U. S. 343; *Pearsall* v. *Great Northern R. R.*, 161 U. S. 646; *State* v. *Newport St. Ry. Co.*, 16 R. I. 533; *State ex rel. &c.* v. *Hancock*, 35 N. J. L. 537; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24; *Telephone Co.* v. *Manning*, 186 U. S. 238; *Wilmington City Ry.* v. *Railroad*, 46 Atl. Rep. 12; *Yates* v. *Milwaukee*, 10 Wall. 497; *Smith* v. *McDowell*, 148 Illinois, 51. It is only in matters not essential to the main object of the grant that the rule of strict interpretation will be applied. *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 676; *Brooklyn Heights R. Co.* v. *City of Brooklyn*, 152 N. Y. 244; *People ex rel.* v. *Deehan*, 153 N. Y. 528, 532.

Neither the city nor its common council ever possessed power, prior to May 3, 1875, to limit the time for the enjoyment of the grant made directly to these specially chartered companies by the General Assembly. Until the passage and acceptance of the Cities and Villages Act the whole power was retained by the assembly. The regulation of highways was purely a state function and the corporations created and affected by the acts prior to that time did not derive their powers from the municipality. See acts of 1859, 1861, 1865.

This view as to the powers of the common council under the acts of 1859, 1861 and 1865 finds support in the judicial decisions in many other States. *Westport* v. *Mulholland*, 159 Missouri, 86; *Atlantic City Water Works* v. *Consumers' Water Company*, 44 N. J. Eq. 427; *State* v. *Dayton Traction Co.*, 18 Ohio C. C. 490; *Galveston &c. R. Co.* v. *Galveston*, 90 Texas, 398; *Appeal of City of Pittsburgh*, 115 Pa. St. 4; *Citizens' Street R. Co.* v. *City R. Co.*, 64 Fed. Rep. 647; *Citizens' Street R. Co.* v. *City of Memphis*, 53 Fed. Rep. 715, 732; *National Foundry and Pipe Works* v. *Oconto*, 52 Fed. Rep. 29, 34; *Beek-*

man v. *Third Ave. R. R. Co.*, 153 N. Y. 144, 158; *The People ex rel.* v. *Deehan*, 153 N. Y. 528, 532.

There are limits on the rule of contemporaneous construction of legislative acts especially in the case of a public corporation. The municipality, through the exercise of its strictly municipal powers, can so far embarrass the work of any public service corporation, that the inducement to avoid controversy is almost irresistible. A "course of conduct" on the company's part under such circumstances may be more naturally referred to a desire to preserve the peace than to an intention to place a construction on a statute. *City of Chicago* v. *Evans*, 24 Illinois, 52; *City of Wichita* v. *Old Colony Trust Co.*, 132 Fed. Rep. 641; *Los Angeles* v. *Los Angeles Water Co.*, 177 U. S. 558.

Specific legislative authority was needed in order to enable the council to contract for a definite period of occupancy. *Peoples' Railroad* v. *Memphis Railroad*, 10 Wall. 38, 52; *Potter* v. *Collis*, 156 N. Y. 16; *Stillwater* v. *Lowry*, 83 Minnesota, 277. Or for a fixed rate of fare. *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S. 368, 382. Or for incidental rights and privileges. *City of Chicago* v. *Sheldon*, 9 Wall. 50.

The act of February 14, 1859, embraced but one subject and the entire contents of said act were within the scope of its title. There may be included in an act any means which are reasonably adapted to secure the object indicated by the title. *Larned* v. *Tiernan*, 110 Illinois, 173; *People ex rel. &c.* v. *Ottawa Hydraulic Co.*, 115 Illinois, 281. The constitutional provision was not intended to require that every subject of the enactment, subordinate and incidental to the main subject thereof, should be specifically referred to in the title of the act. *Mahomet* v. *Quackenbush*, 117 U. S. 508; Sutherland Statutory Construction, p. 86. See also *People* v. *People's Gas Co.*, 205 Illinois, 482; *S. C.*, 194 U. S. 1; *Hoboken* v. *Pennsylvania R. R. Co.*, 124 U. S. 656; *Jonesboro City* v. *Cairo &c. R. R. Co.*, 110 U. S. 192; *Carter County* v. *Sinton*, 120 U. S. 517; *Van Brunt* v. *Flatbush*, 128 N. Y. 50; *Morris & Cummings Dredging Co.* v. *The Mayor*, 64 N. J. L. 587; *Sweet* v. *City of Syracuse et al.*,

129 N. Y. 316; *Diana Shooting Club* v. *Lamoreaux*, 114 Wisconsin, 44.

The act of 1865 was within the power of the assembly. The contract under which the right to occupy the streets of Chicago is derived, is a contract between the State and the specially chartered companies whose railways are held under lease. The common council had authority to act in the matter only as an agent of the State, not of the city. Its function did not extend to the making of the contract, but only to supplying certain administrative details, necessary to carry the contract into execution. Hence it appears to be impossible that any constitutional question should arise as to the power of the State to modify the State's own contract, without asking the consent of the city of Chicago.

But if the question were squarely presented as to the power of the General Assembly of Illinois in 1865 to modify a contract made by a municipality of that State, the conclusion must be in favor of the existence of the power. Chicago had no special constitutional status, such as is possessed by Denver or St. Louis. In that regard she stood on a level with the most obscure village in the State. *People* v. *Hill*, 163 Illinois, 186; *Hawthorne* v. *People*, 109 Illinois, 302; *Wilson* v. *Trustees*, 133 Illinois, 443. See also *Covington* v. *Kentucky*, 173 U. S. 231; *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511; *Atkin* v. *Kansas*, 191 U. S. 207.

The act of 1865 was not meaningless. Governor Ogelsby vetoed it in 1865 on the ground that it granted an extension of franchises as we now contend. See also opinion of corporation counsel, 1871; Message of Mayor Harrison, 1883; Report Street R. R. Commission, 1900.

Though this particular act is abundantly justified as a wise exercise of legislative judgment, with the wisdom or unwisdom of the legislation the court can have no judicial concern. *Priestman* v. *United States*, 4 Dall. 28; *Everett* v. *Knells*, 2 Scott N. R. 531; *McCrusky* v. *Cromwell*, 11 N. Y. 601; *Atkin* v. *Kansas*, 191 U. S. 207.

In giving effect to the act of 1865, the only principles of interpretation are those applicable to any statute in which there is a plain declaration of the legislative purpose about a matter clearly within the competency of the legislature to decide. *City of Springfield* v. *Edwards*, 84 Illinois, 626; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1; *Fry* v. *C., B. & Q. R. Co.*, 73 Illinois, 399; *Beardstown* v. *Virginia*, 76 Illinois, 34; *Ottawa Gas Light & Coke Co.* v. *Downey*, 127 Illinois, 201; *Steere* v. *Bromwell*, 124 Illinois, 27; *McGann* v. *The People*, 97 Ill. App. 591.

It is a cardinal principle of construction that effect must be given, if possible, to all the words of the statute. *Ogden* v. *Strong*, 2 Paine, 584; *Decker* v. *Hughes*, 68 Illinois, 33, 41; *Attorney General* v. *Plank Road*, 2 Michigan, 139; *Opinion of Justices*, 22 Pick. 571; *Nichols* v. *Wells*, 2 Kentucky, 255; *Leversee* v. *Reynolds*, 13 Iowa, 310.

The words "during the life hereof" mean "during the continuance or existence of this statute as an amendatory act." *Benham* v. *Minor*, 33 Connecticut, 252. A section of a statute has or can have no life except as a part of the whole statute. It has no force or meaning or significance apart from the enacting clause. *Wheeler* v. *Chubbock*, 16 Illinois, 361; *Burritt* v. *State Contracts Comm'rs*, 120 Illinois, 322; *In re Seat of Government*, 1 Wash. T. 115; *State* v. *Patterson*, 98 N. Car. 660. No "life" can be predicated of any part of a statute, but only of the statute as a whole. The words "hereof," "herein," or "hereby," in an original statute, refer to the act itself; in an amendatory statute they refer to the original act as amended. *Lane* v. *Kolb*, 92 Alabama, 636; *Holbrook* v. *Nichol*, 36 Illinois, 161; *McKibbin* v. *Lester*, 9 Ohio St. 628; *Ely* v. *Holton*, 15 N. Y. 595.

The suggested difficulty as to the words "as made or amended" is equally devoid of substance. The word "as" may express either similarity, identity or simultaneity. It may relate to form, manner or time. Its use in the latter significance is well established and frequently recognized. *Seibert's Appeal*, 13 Pa. St. 500.

The rule is always applicable that the legislature is presumed to legislate for the future, not for the past. For this reason courts are reluctant to give statutes a retrospective operation. *White* v. *United States,* 191 U. S. 545. This rule has been frequently recognized by the Supreme Court of Illinois. *Cleary* v. *Hoobler,* 207 Illinois, 97.

Particularly is this principle applicable to a statute which expresses a general principle, as is here done by the words "all contracts," etc. To lay down a general rule and then to exclude from its operation all future cases, would be verging upon absurdity. *City Railway Co.* v. *Citizens' Railroad Co.,* 166 U. S. 565. So firmly established is this rule of construction that the courts in many cases have construed statutes prospectively, even where the legislature had apparently confined its language with intention to the past or present tense. *Amsbry* v. *Hinds,* 48 N. Y. 57; *Harvey* v. *Tyler,* 2 Wall. 328; *Railroad Co.* v. *Blackman,* 63 Illinois, 117; *People* v. *Hinrichsen,* 161 Illinois, 223; *Harris* v. *White,* 81 N. Y. 532.

The term "horse railway" is not used in the acts in the zoological sense, but in the popular sense as distinguishing such railways from steam roads.

Words in a statute which are not technical are to be taken in their common or popular acceptation, unless some special reason exists for giving them a strict interpretation. *City of Chicago* v. *Evans,* 24 Illinois, 52; *State* v. *Bridgewater Township,* 49 N. J. L. 614; *Gross* v. *Fowler,* 21 California, 393; *Schriefer* v. *Wood,* 5 Blatchf. 215; *File Sharpening Co.* v. *Parsons,* 54 Connecticut, 310; *Maillard* v. *Lawrence,* 16 How. 251. This principle has been held to apply with peculiar force to the titles of legislative acts. *Enterprise* v. *Smith,* 62 Kansas, 815; *West Plains Township* v. *Sage,* 69 Fed. Rep. 943, 950; *Little* v. *State,* 60 Nebraska, 749.

The motive power to be used by a street railway is peculiarly a subject for regulation, from time to time, by the police power of the State. The courts will not attribute to the legislature an intention to abridge or limit the police power by a

corporate charter, even assuming that such a limitation is possible. *Pearsall* v. *Great Northern R. Co.*, 161 U. S. 646, 665. See as to popular significance of the term "horse railway," *Omaha Horse Railway Co.* v. *Cable Tramway Co.*, 30 Fed. Rep. 324, and *Paterson Ry. Co.* v. *Grundy*, 51 N. J. Eq. 213.

In Illinois steam railroads impose an additional servitude on the highway while horse railroads do not. *C., B. & Q. R. R. Co.* v. *West Chicago Street R. Co.*, 156 Illinois, 255; *Railroad Co.* v. *Hartley*, 67 Illinois, 439; *Bond* v. *Pennsylvania Co.*, 171 Illinois, 508. Neither are electric railways a burden. Cases *supra*. The conclusion so reached was in accord with the great weight of authority in other States. *Taggart* v. *Newport Street Railway Co.*, 16 R. I. 669; *Halsey* v. *Rapid Transit Street Railway Co.*, 47 N. J. Eq. 380; *Detroit City Railway Co.* v. *Mills*, 85 Michigan, 634; *Koch* v. *North Avenue R. Co.*, 75 Maryland, 222; *Buffalo &c. R. Co.* v. *Du Bois Passenger R. Co.*, 149 Pa. St. 1; *Baker* v. *Selma Street &c. R. Co.*, 130 Alabama, 474; *State ex rel. Howard* v. *Hartford Street R. Co.*, 76 Connecticut, 174. In regard to cable railways the decisions, while less numerous, are to the same effect. *Tuebner* v. *California St. R. Co.*, 66 California, 171; *Lorie* v. *North Chicago City R. Co.*, 32 Fed. Rep. 270.

The term "horse railway," as used in the charter of the city, has been construed includes railways operated by electricity. *Harvey* v. *Aurora and Geneva R. Co.*, 174 Illinois, 299; *S. C.*, 186 Illinois, 290.

The act of 1865 applied to the North Chicago City Railway Company in the same manner and with the same effect as to the other two companies referred to in the first and second sections of the act.

By all principles of statutory construction such an amendment as is contained in the act of 1865 amends all parts of the act to which it has reference, and from the time of the amendment, the former act is to be read as if it had originally been in the form fixed by the amendment. *Holbrook* v. *Nichol*, 36 Illinois, 161, 163; *Farrell* v. *State*, 54 N. J. L. 423; *Dexter &c.*

Co. v. *Allen*, 16 Barb. 15; *Drew* v. *West Orange*, 64 N. J. L. 483; *McKibbin* v. *Lester*, 9 Ohio St. 627; *Ely* v. *Holton*, 15 N. Y. 595.

The city has no standing to question the rulings of the Circuit Court in regard to the validity of the leases under which the complainant receivers derived title to the franchises.

There are executed contracts and whether *ultra vires* or not titles have passed under them. Such a conveyance or lease of real or personal property, including notes and other choses in action, like a conveyance or transfer to a corporation in excess of its powers, is not absolutely void, but voidable, and passes the title, and no one can object thereto save the sovereign and, under certain conditions, the stockholders of the company. *National Bank* v. *Whitney*, 103 U. S. 99; *National Bank* v. *Matthews*, 98 U. S. 621; *Swope* v. *Leffingwell*, 105 U. S. 3; *Fritts* v. *Palmer*, 132 U. S. 282; *City of Spokane* v. *Trustees*, 60 Pac. Rep. (Wash.) 141; *Mallett* v. *Simpson*, 94 N. Car. 37; *Fayette Land Co.* v. *L. & N. R. Co.*, 93 Virginia, 274; *The Banks* v. *Poitiaux*, 3 Rand. (Va.) 136; *Land Co.* v. *Bushnell*, 11 Nebraska, 192; *Barnes* v. *Suddard*, 117 Illinois, 237; *Lancaster* v. *A. I. Co.*, 140 N. Y. 576; *Houston &c. R. Co.* v. *Shirley*, 54 Texas, 125; *Grand Gulf Bank* v. *Archer*, 8 Smed. & M. (Miss.) 151.

The act of 1865 had the effect of postponing for the extended corporate life of the Chicago West Division Railway Company the provision made by the ordinance of August 16, 1858, for terminating its occupation of certain streets, through purchase of its property by the city.

A state legislature with respect to municipal corporations has unlimited power to pass any legislation not expressly prohibited by state or Federal constitutions, and thereby to divest them of property rights and franchises conferred by the legislature and unexecuted by the city at the date of the subsequent legislation, provided only that in the case of property held upon specific trusts, the spirit and purpose of the trust be preserved. *Simon* v. *Northup*, 27 Oregon, 487; *Coyle* v. *McIn-*

tire, 30 Atl. Rep. 728; *Brooklyn Park Comm'rs* v. *Armstrong*, 45 N. Y. 234; *Philadelphia* v. *Fox*, 64 Pa. St. 169; *Atkin* v. *Kansas*, 191 U. S. 207; *Covington* v. *Kentucky*, 173 U. S. 231.

They can have no property rights or franchises of their own in the sense in which those words are applicable to individuals, although they may represent as trustees private rights and interests which the legislature cannot impair or destroy. *Ashby* v. *Hall*, 119 U. S. 526. As applicable to many of these points, see *Potter* v. *Collis*, 19 App. Div. N. Y. 392.

The city was bound to purchase, or provide a purchaser for, the tracks, cars, carriages, implements and appurtenances used in the operation of certain lines of railway of the Chicago West Division Railway Company before taking any steps to cause a discontinuance of the operation of said lines of railway by the company, its successors or assigns. The city is not entitled to possession until payment is made. *National Water Works Co.* v. *Kansas City*, 62 Fed. Rep. 853; *Los Angeles City Water Co.* v. *Los Angeles*, 103 Fed. Rep. 711, 734.

In accordance with the spirit of these decisions are those cases which hold that when a lessor has covenanted to pay at the end of the term for improvements made by the lessee upon the demised property, the lessee, upon breach of such covenant, may remain in possession until he receives payment. *Franklin Land Co.* v. *Card*, 84 Maine, 528; *Hopkins* v. *Gehnan*, 22 Wisconsin, 476; *S. C.*, 47 Wisconsin, 581; *Mullen* v. *Pugh*, 16 Ind. App. 337; *Van Rensselaer* v. *Penniman*, 6 Wend. 569.

The lines of the Chicago West Division Railway Company on Ogden avenue from Randolph street to Madison street, and on Randolph street from State street to Wabash avenue, were constructed with the consent and authority of the common council of the city, and as to such lines the Chicago West Division Railway Company and its lessees are vested with an unimpeachable right to maintain the same during the period prescribed by the act of 1865.

There is no provision in the acts that the designations to be made by the common council shall be by ordinance or resolu-

tion. The fact of acquiescence in the construction and public operation of such lines for a period of forty years, constitutes a designation as substantial, binding and precise as any ordinance; and raises a conclusive inference of law that such use was under sanction of proper authority. *Chicago City* v. *Robbins*, 2 Black, 418, 425; *Robbins* v. *Chicago City*, 4 Wall. 657, 679; *Gridley* v. *The City of Bloomington*, 68 Illinois, 47, 50; *Gregsten* v. *City of Chicago*, 145 Illinois, 451; *Town of New Castle* v. *Lake Erie &c. R. R. Co.*, 155 Indiana, 18; *People ex rel. &c.* v. *Cromwell*, 89 App. Div. N. Y. 291; *City Railway Co.* v. *Citizens' Street R. R. Co.*, 166 U. S. 557, 568; *Town of Bruce* v. *Dickey*, 116 Illinois, 527; *Jennings* v. *Van Schaick*, 108 N. Y. 530, 532; *Jorgensen* v. *Squires*, 144 N. Y. 280, 285; *Babbage* v. *Powers*, 130 N. Y. 281; *Donnelly* v. *City of Rochester*, 166 N. Y. 315, 318.

In any event the city is now estopped to deny the existence of a proper designation. The situation cannot be distinguished from that in *City of Chicago* v. *Stock Yards Company*, 164 Illinois, 224.

The Chicago West Division Railway Company had a contract right, under its charter, to complete the construction of its railway and to operate the same for the period prescribed by its charter, upon any route designated for it or its predecessor in title prior to May 3, 1875, upon which its railway had been partly constructed before said date, at least to the extent of prolonging such railway to its authorized terminus on the same street on which such construction had been begun.

The Illinois decisions are a unit in holding that where ordinances are not only formally accepted but actually acted upon, they become contracts which neither the State nor the city can impair without the consent of the company, save by the exercise of some reserved power. *City of Quincy* v. *Bull*, 106 Illinois, 337, 349; *Chicago Mun. Gas Light Co.* v. *Lake*, 130 Illinois, 42; *Belleville* v. *Citizens' H. Ry. Co.*, 152 Illinois, 171, 185; *The People* v. *The Chicago West Division Railway Co.*, 18 Ill. App. 125; *S. C.*, aff'd 118 Illinois, 113; *Village of*

London Mills v. *Telephone Circuit*, 105 Ill. App. 146, 150. See also *Louisville &c. R. Co.* v. *Bowling Green Ry. Co.*, 63 S. W. Rep. 4; *Hoodman* v. *Kansas City Horse R. R.*, 79 Missouri, 632; *Mayor* v. *Houston St. Ry. Co.*, 83 Texas, 548; *Hudson Tel. Co.* v. *Jersey City*, 49 N. J. L. 303; *Rochester &c. Water Co.* v. *Rochester Co.*, 84 App. Div. N. Y. 71; *Telephone Co.* v. *City of St. Joseph*, 121 Michigan, 502; *Northwestern Telephone Co.* v. *Minneapolis*, 81 Minnesota, 140; *City of Duluth* v. *Duluth Telephone Co.*, 84 Minnesota, 486, 492; *Abbott* v. *Duluth*, 104 Fed. Rep. 833; *City of Indianapolis* v. *Gas Company*, 104 Indiana, 107, 115.

A consent when once given by a muncipiality or an abutting owner to the use of a street for railway purposes is property within the meaning of the constitutional provision forbidding the deprivation of a person of property without due process of law. *City of Chicago* v. *Baer*, 41 Illinois, 306; *Chicago T. T. R. R. Co.* v. *Chicago*, 203 Illinois, 576, 587; *Cicero Railway Co.* v. *Chicago*, 176 Illinois, 501, 504; *Rich* v. *Chicago*, 152 Illinois, 18; *Indianapolis* v. *Consumers' Gas Co.*, 140 Indiana, 107, 113; *People* v. *O'Brien*, 111 N. Y. 1; *S. R. T. Co.* v. *Mayor*, 128 N. Y. 510, 520; *Paige* v. *Schenectady Ry. Co.*, 178 N. Y. 102, 112; *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 532; *Matter of Seaboard T. & T. Co.*, 68 App. Div. N. Y. 283, 285; *H. G. & C. Trac. Co.* v. *H. & L. Elec. Tran. Co.*, 69 Ohio St. 402, 410.

The words "in the city of Chicago" in the title of the act of 1859 did not render void the authority conferred in the act upon the North Chicago City Railway Company to extend its lines outside of the limits of the city of Chicago. *City of Ottawa* v. *The People ex rel.*, 48 Illinois, 233; *Prescott* v. *City of Chicago*, 60 Illinois, 123; *Binz* v. *Weber*, 81 Illinois, 288; *Cole* v. *Hall*, 103 Illinois, 30; *Timm* v. *Harrison*, 109 Illinois, 597; *McGurn* v. *Board of Education*, 133 Illinois, 122; *West Chicago Park Commissioners* v. *Sweet*, 167 Illinois, 332; *Hudnall* v. *Ham*, 172 Illinois, 76; *Bobel* v. *The People*, 173 Illinois,

23; *Park* v. *Modern Woodmen of America*, 181 Illinois, 227; *Boehm* v. *Hertz*, 182 Illinois, 156; *Village of London Mills* v. *Edward White*, 208 Illinois, 289; *Montclair* v. *Ramsdell*, 107 U. S. 155; *Detroit* v. *Detroit Citizens' St. Ry.*, 184 U. S. 368; *People* v. *Mellen*, 32 Illinois, 181; *Lockport* v. *Gaylord*, 61 Illinois, 276; *Jonesboro* v. *Cairo & St. L. R. R. Co.*, 110 U. S. 198; *People* v. *Institution of Protestant Deaconesses*, 71 Illinois, 229.

The incorporation by the act of the legislature of the town of Lake View did not deprive the North Chicago City Railway Company of its charter right to extend its street railway lines into the town of Lake View upon its streets and highways. *Chicago Municipal Gas Light Co.* v. *Town of Lake*, 130 Illinois, 54; *City of Quincy* v. *Bull et al.*, 106 Illinois, 349; *The People* v. *Blocki*, 203 Illinois, 368.

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

The jurisdiction of the Circuit Court to render the original judgments against the companies and to maintain the ancillary bill is challenged at the outset. These objections require notice before considering the controversy upon its merits. It is insisted that the Circuit Court had no jurisdiction to render the judgments at law because of the provisions of the act of August 13, 1888, 25 Stat. 433, 434, providing that no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note in favor of any assignee, or subsequent holder if such instrument be payable to bearer, unless such suit might have been prosecuted in such court to recover, if an assignment or transfer had not been made. As the notes were made payable to the order of "Markham B. Orde, Treas.," and there is no allegation that Orde was not a citizen of the State of Illinois, of which State the defendant companies were corporations and citizens, it is insisted that the jurisdiction must fail, under the provisions of the statute just referred to. Assuming without deciding that this ques-

tion could be raised by way of defense to the ancillary bill, we think the objection must fail, for under the allegations of the declaration the money was furnished directly to the defendants by the Guaranty Trust Company, and that company was the first taker of the notes. In *Falk* v. *Moebs*, 127 U. S. 597, it was held that notes made in this form, payable to the treasurer, indorsed before delivery by him, are the notes of the company. And when it appears that the indorser is not in fact an assignee of the paper, suit may be brought in a Federal court by a holder having the requisite diverse citizenship, notwithstanding the indorser might have been a citizen of the same State with the defendant. *Holmes* v. *Goldsmith*, 147 U. S. 150.

It is further argued that the entire proceedings were fraudulent and collusive; that no money was in fact loaned, and that they were the result of a conspiracy between corporations of Illinois to obtain the jurisdiction of the Federal court, and its decision on the controverted rights of the parties under the statutes of the State. We have examined the supplemental records submitted since the argument in this court, on this branch of the case, and think the charges of bad faith and conspiracy are not sustained. We have no doubt that the money was loaned by the Guaranty Trust Company to these corporations and that the original judgments were *bona fide*. As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking Federal jurisdiction is immaterial. *South Dakota* v. *North Carolina*, 192 U. S. 286, 310; *Dickerman* v. *Northern Trust Company*, 176 U. S. 181, 190; *Lehigh Mining and Manufacturing Com-*

pany v. *Kelly*, 160 U. S. 327, 336; *Crawford* v. *Neal*, 144 U. S. 585; *Cheever* v. *Wilson*, 9 Wall. 108, 123; *Smith* v. *Kernochen*, 7 How. 198, 216.

It is true that the judgments were taken and the receivers appointed on the same day, and it is quite likely that the receiverships were in view when the judgments were taken, and that preparations had been made in that direction, but we perceive in this no legal objection to the jurisdiction of the court. It is further insisted by the counsel for the city that the ancillary bills cannot be sustained upon their merits. But we think a case was made out by the allegations of the bills, especially when considered with reference to the admissions of the answer, which showed that the extent and character of the property rights of the corporations whose rights and franchises were the subjects of the receivership were in direct and serious controversy between the company and the receiver on the one hand and the city on the other. While it may be that there would have been no interference on the part of the city with the property while it was in the hands of the court's receivers, still the record shows that the city strenuously contested the asserted rights of the corporations to the franchise to use the streets of the city for ninety-nine years, the term claimed to have been granted to them by the act of February, 1865. It was the claim of the city that as to many of the ordinances granting rights in a number of the streets, the right to the use and occupancy of them would expire July 30, 1903. The city had asserted in a number of ways its purpose to treat the rights of the companies and whatever franchises they had as terminated at that date. It declared its purpose to resume possession of the streets and resort to all legal means to protect its rights against what were deemed the unfounded claims of the companies as to the extended franchises. Without going into further detail upon this branch of the case, we think that the attitude and claims of the city cast a cloud upon the title to this property which was in the hands of the receivers to be administered

under the orders of the court, and that in such case the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of the claims of the parties which cast a cloud upon the franchises and rights claimed by the companies and the receivers, and that in such case it was proper to grant an injunction until the rights of the parties could be determined. *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S. 368; *In re Tyler*, 149 U. S. 164; *Rouse* v. *Letcher*, 156 U. S. 47; *White* v. *Ewing*, 159 U. S. 36. We think, then, that the court had jurisdiction of the case made in the ancillary bills.

A further preliminary question is made in the contention that the leases under which the various transfers were made, and which are supposed to have vested title in the Chicago Union Traction Company, are void for want of corporate power in the companies to make or receive the same. We do not think the city of Chicago is in a position to raise that question. The corporations have undertaken to transfer the rights of the lessor companies, and the lessees have gone into possession thereof, and the same are now in possession of the receivers under authority of the court. All of the companies are parties to the suit, and the rights and franchises of all are by order of the court vested in the receivers. They hold the title to all these rights to be sold at judicial sale, or otherwise dealt with as the court may direct. In this view we cannot see that it is material to inquire into the validity of the intermediate transfers between the companies. No contract is undertaken to be enforced with the city of Chicago which depends upon the validity of these transfers. The city has no power to invalidate them, and the State has not attempted to inquire into their validity by a proceeding in *quo warranto*. In such case, we think, the principle laid down in *Fritts* v. *Palmer*, 132 U. S. 282, 293, is controlling: "The question whether a corporation having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities,

has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so."

Passing now to the merits of the case, we will first notice the objection that the acts of 1859, 1861 and 1865 are unconstitutional. The Illinois constitution of 1848 contained the provision that no private or local law shall embrace more than one subject, and that shall be expressed in the title. The acts are attacked upon the ground that they are violations of this requirement. But we do not think that these objections are tenable. The title of the act of February 14, 1859, is "An act to promote the construction of horse railways in the city of Chicago;" the title of the act of February 21, 1861, is "An act to authorize the extension of horse railways in the city of Chicago;" the title of the act of February 6, 1865, is "An act concerning horse railways in the city of Chicago." In *People* v. *People's Gas Light Company*, 205 Illinois, 482, the Illinois cases were reviewed and the conclusion reached that the purpose of the constitutional provision is accomplished if the title is comprehensive enough as reasonably to include within the general subject or the subordinate branches thereof, the several objects which the statute seeks to effect. And it was held that the generality of the title is no objection to a law so long as it is not made to cover legislation incongruous in itself and which by no fair intendment can be included as having necessary or proper connection. In the case of *Montclair* v. *Ramsdell*, 107 U. S. 147, a statute of New Jersey was before this court which was claimed to be unconstitutional, because it embraced more than one subject, not expressed in its title. The provision of the New Jersey constitution was "To avoid improper influences which may result from intermixing in one and the same act, such things as have no proper relation to each other, every law shall embrace but one object,

and that shall be expressed in the title." The *Montclair* case held: 1. That this provision does not require the title of an act to set forth a detailed statement or an index or abstract of its contents; nor does it prevent uniting in the same act numerous provisions having one general object fairly indicated by its title. 2. That the powers, however varied and extended, which a township may exercise, constitute but one object, which is fairly expressed in a title showing nothing more than the legislative purpose to establish such township. In the late case of *Detroit* v. *Detroit Citizens' Street Railway Company*, 184 U. S. 368, the court had occasion to deal with a similar provision in the constitution of Michigan. In it the language of Judge Cooley in *People ex rel. Secretary of State* v. *State Insurance Company*, 19 Michigan, 392, was quoted with approval: "We must give the constitutional provision a reasonable construction and effect. The constitution requires no law to embrace more than one object, which shall be expressed in its title. Now the object may be very comprehensive and still be without objection, and the one before us is of that character. But it is by no means essential that every end and means necessary or convenient for the accomplishment of the general object should be either referred to or necessarily indicated by the title. All that can reasonably be required is, that the title shall not be made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." Applying this principle, we do not think that any of the subjects treated were so far foreign to the title of the several acts as to be open to this constitutional objection. See, also, upon this subject: *Ackley School District* v. *Hall*, 113 U. S. 135, 141; *Jonesboro City* v. *Cairo & St. L. R. R. Co.*, 110 U. S. 192, 198; *Otoe County* v. *Baldwin*, 111 U. S. 1; *Mahomet* v. *Quackenbush*, 117 U. S. 508; *Carter County* v. *Sinton*, 120 U. S. 517.

Without taking time to analyze the acts in this connection we pass to what we deem more important features of the case.

The principal controversy in this case turns upon the con-

struction of the act of 1865, amending the act of 1859. On the part of the companies it is insisted that this act means to give an irrevocable grant from the State of the right to use the streets of the city of Chicago for street railway purposes for a term of ninety-nine years from the passage of the law; that the only right conferred upon the city is one of designation of the streets to be occupied and the regulation by agreement with the companies of what are termed the "administrative" features of the occupancy. It is insisted that this broad right is derived from the public act of the state legislature, which, upon its acceptance, has become an inviolable contract between the State and the companies. Upon the part of the city it is contended that there has been no grant to the railways to occupy the streets of the city except with the authorization of the city council and upon such terms and conditions, including the term of occupancy, as that body may see fit to fix by contract with the companies; that the only legitimate effect of the act of 1865, other than the extension of the corporate life of the companies, has been to continue the control of the city over the streets, and to reaffirm the contracts theretofore made between the city and the companies. The theory that the franchise to use the streets was derived solely from the State, subject only to the right of the city to designate the streets to be occupied, and to regulate the "administrative" features of the use, was adopted by the learned Circuit Court in construing the act in controversy. It is therefore important to consider the nature of the franchises, licenses, rights and privileges, dealt with in the act of 1865, to ascertain, as near as may be, in what sense its terms were used, and with what meaning they are incorporated into the act. In order to construe this act and determine, if possible, its true meaning and the extent of the powers and rights intended to be granted or confirmed, reference may appropriately be had to prior legislation upon the subject, for the act of 1865 is amendatory and can only be understood if a correct apprehension is first had of the powers previously granted, and the extent and nature of the rights and

privileges conferred and the sources from which they severally came. Whether the city charter, granted while the constitution of 1848 was in force, gave the city the right to grant to railway companies the privilege of using the streets for street railway purposes is a question much discussed in the briefs and the arguments at bar. The city, by the charter of 1851 and the amendment of 1863, had general power to control the use and occupation of the streets of the city and to regulate the use of horse railways therein and the laying of tracks thereon. It is insisted for the city that, independent of the acts under consideration in this case, the general powers conferred in the city charter, as construed by the Supreme Court of Illinois, were broad enough to empower it to grant the use of the streets for street railway purposes. See *City of Quincy* v. *Bull et al.*, 106 Illinois, 337, 349, and cases cited in the opinion. On the part of the companies it is contended that this right could only come from the State, and that the effect of the act in question was to confer the right upon the companies as a charter right granted by the sovereign power.

It is said to have been the settled understanding of all concerned, and in accordance with the then existing policy of the State, that the act of 1859 was a franchise directly granted by the State, giving the full right to use the streets of the city for the term of the corporate life of the companies, subject only to the designating power of the city as to streets to be used. In this connection it may be observed that the Supreme Court of Illinois in *Chicago Union Traction Company* v. *City of Chicago*, 199 Illinois, 484, 525, distinctly stated that the act of 1859 recognized the power of the common council to pass the ordinance of August 16, 1858. "There," it is said in the opinion, "was no other action of the common council, taken before the passage of the act of February 14, 1859, except the ordinance of August 16, 1858. By the use of the words, 'with such rights and privileges as the said common council has prescribed,' the legislature could not have referred to any other action of the common council than the passage of the ordinance

of August 16, 1858. It thereby recognized the power of the common council to pass that ordinance, and the appellant here introduces it and relies upon it. The legislature, by thereby affirming and recognizing the passage of the ordinance of August 16, 1858, also recognized the power of the common council to pass that ordinance under clause nine of section four of chapter four, of the charter of 1851." In the act of 1859 the legislature did not assume to fix independently the term for the use of the streets, but affirmed that which the common council had authorized the corporators to do, and gave authority to confer future rights by agreement with the corporations. In the first grants after the passage of the act of February 14, 1859, those of May 23, 1859, to the Chicago City Railway Company and the North Chicago City Railway Company, as we shall have occasion to show later, so far from acting upon the theory that the State had granted to the corporations the full right to use the streets for the corporate life of the companies and needed no permission from the city council other than such as designated the streets and regulated administrative features, the council made and the companies accepted the ordinances which on the north side were for the term of twenty-five years and no longer, and on the south and west sides for the term named in the act of 1859, which had affirmed the grant from the council in the ordinance of 1858. The south and west side ordinance, as its recitals show, was not only passed in pursuance of the act of February 14, 1859, but also by virtue of the power and authority otherwise vested in the common council by its charter. *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, 525. Thereafter and frequently until the passage of the act of 1865, the council made and the companies accepted specific ordinances fixing the time of occupancy, as had been done in the original ordinances of May 23, 1859. And neither before nor after the passage of the act of 1865 was the ninety-nine year term recognized or acted upon in ordinances granting the use of the streets.

Under the ordinance of 1858 the council undertook to au-

thorize the persons named to lay and operate a horse railway in certain streets of the city. This right, by the terms of the ordinance, was granted for the period of twenty-five years, and until the common council, in the manner designated, should elect to purchase and pay for the property of the railway companies. If this ordinance had been without legislative authority previous to the act of February 14, 1859, that act constituted the persons named in the ordinance of 1858, with one other, and their successors, a body politic and corporate under the name of the Chicago City Railway Company, for the term of twenty-five years, with all the powers incident to such corporations. The corporation was authorized to construct, maintain and operate a single or double track railway in the city of Chicago, within the present or future limits of the south or west divisions of the city. But the grant did not stop there. It was immediately qualified and limited by the authority given to the common council of the city, for it provided that this right to maintain and operate street railways was upon streets, etc., "as the common council of said city have authorized said corporators, or any of them, or shall authorize said corporation so to do in such manner and upon such terms and condition, and with such rights and privileges, as the common council has or may by contract with said parties, or any or either of them, prescribe." The corporation was given the right of eminent domain. Then as to the action of the city, already taken under the ordinance of 1858, by section 7, all of the rights and privileges granted or intended so to be, to the incorporators and their associates by the ordinances and amendments thereto passed by the council were approved and vested in the corporation. By section 10 of the act the North Chicago City Railway Company was incorporated. Is this act consistent with the theory that the full franchise of occupying and using the streets, without regard to authority from the city, except in designating streets, was vested by the State in the companies incorporated? This act conferred upon the railway companies, it is true, the right to use and occupy

the streets of the city, but this right was upon the terms prescribed in the law. Conceding the plenary power of the legislature over the subject at that time, and that franchises, broadly speaking, are rights and privileges conferred by the State, and are derived from a grant of the sovereign power, nevertheless the State while exercising its authority might give to the city such measure of right and control in the matter as it saw fit. Dillon on Munic. Corps., 3d ed., § 705; *Railroad Co.* v. *Richmond*, 96 U. S. 521. The city is the corporate body directly interested in the use and control of the streets. By the charter of 1851 exclusive control over the streets was given to the council. That it was the intention of the legislature to give effect to the right of municipal control in the act under consideration is shown in its confirmation of terms already fixed by contract between the city and the companies. As to the future, companies were to have no right to the use and occupancy of the streets until they should obtain from the city council authority to that end, under contracts to be agreed upon as to terms and conditions. A more comprehensive plan of securing the city in the control of the use of the streets for railway purposes could hardly be devised. The company must be "authorized" by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To authorize is to "clothe with authority," Webster's Dict.; "To give legal power to," Century Dict. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets. This power of the city, in the absence of language in the statute, excluding the authority and reserving its exercise to the State, necessarily includes the right to fix the time for which the streets may be used. This doctrine was, we think, correctly stated by Judge Lurton, in delivering the opinion of the Court of Appeals in *Louisville Trust Company* v. *Cincinnati*, 76 Fed. Rep. 296, 308. "The right of the local authority to impose terms and conditions is

clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enters into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant." *Coverdale* v. *Edwards*, 155 Indiana, 374, 381; Elliott on Railroads, § 1081.

The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the terms and conditions which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to running of cars, etc., by the city council. On the contrary, under the terms of this act, the city, by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the terms of this act, by withholding assent, determine that it was undesirable to have the corporations in control of the use of the streets.

While the decisions of the Supreme Court of the State are not binding upon us in determining whether a contract was made which is entitled to protection under the Federal Constitution, we may notice the case of *Chicago City Railway Company* v. *People ex rel. Story*, 73 Illinois, 541. That was a proceeding in *quo warranto* against the Chicago City Railway Company, asking to declare a forfeiture of its franchise to operate upon a portion of Indiana avenue. The grounds relied upon were that the railway company had not obtained the consent of two-thirds of the owners of the property fronting on the avenue within fifteen months from the passage of the

ordinance of August 22, 1864, the time limited for construction in the ordinance of that date. The respondent, the Chicago City Railway Company, relied upon an ordinance passed November 13, 1871, amendatory of the ordinance of August 22, 1864, extending the time to complete its railway for a period of two years from the date of the last-named ordinance. The court found that two-thirds of the property owners had consented, as provided in the ordinance of August 22, 1864, but found that the company had neglected to construct its road to the city limits within fifteen months from the passage of the ordinance, as therein provided. The question turned upon the validity of the extending ordinance of November 13, 1871, passed after the constitution of 1870 went into effect. The majority of the court—Chief Justice Walker and Justices Breese and Sheldon dissenting—held that the common council had authority under the act of 1865 to extend the time for the building of the roads on Indiana avenue, as the time limitation was a provision in favor of the city, which it might waive, as the charter of the company was silent upon the time within which the railway might be constructed, and in this connection held that the right granted by the city to construct the railway was a license as distinguished from a franchise derivable from the State, and, therefore, not within the constitutional prohibition against the passage of local or special laws granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for that purpose, or granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The minority of the court were of opinion that the constitution of 1870 made the extending ordinance invalid. In neither the majority nor the dissenting opinions is there any intimation that the railway company could occupy or use a street of the city of Chicago without the permission of the city. In discussing how far the charter authorized the company to act without the consent of the city, Mr. Justice Sheldon, in the course of an able dissenting opinion, concurred in by the Chief

Justice and Mr. Justice Breese, is careful to point out that the right to occupy the streets is not complete in the grant of the charter from the State, and is only capable of being exercised when supplemented by the authorization of the city. And see *People's Railroad* v. *Memphis Railroad*, 10 Wall. 38, 55. In that case this court held that a charter authorizing a street railroad company to operate street railroads in all the streets of the city "with the consent of the city" was unavailing until the consent of the city was first had, which consent was a condition precedent to the use of the streets.

What, then, was conferred in the franchise granted by the State? It was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. The franchise conferred by the State is of no practical value until supplemented by the consent and authority of the council of the city. After the passage of the act of 1859 the common council of the city on May 23, 1859, passed an ordinance authorizing the extension and operation of certain horse railways in the streets of the south and west divisions of the city, and granting the use thereof to the Chicago City Railway Company. The city purported to act under authority of the act of 1859, and by virtue of the powers and authority otherwise vested in the common council by law. By this ordinance the term of use and occupation was fixed at "during all the term in the said act of the fourteenth of February, A. D. 1859, specified and prescribed." On the same day the council passed an ordinance granting rights in certain streets to the North Chicago City Railway Company. This ordinance contained this language: "The rights and privileges granted to the said company by this ordinance, or intended to be, shall continue and be in force for the benefit of said company for the full term of twenty-five years from the passage of this ordinance, and no longer." On February 21, 1861, the legislature passed an act incorporating the Chicago West Division Railway Company for the term of twenty-five years, the corporation to pos-

sess the powers enumerated in the second, third, fifth and sixth sections of the act of February 14, 1859. By section 4 of the act the corporation was authorized to acquire from the Chicago City Railway Company the powers, franchises, privileges and immunities conferred upon that company, and the consent of the directors of said company was made a condition precedent to the exercise of the powers conferred as to any streets of the south and west divisions of the city of Chicago.

Before the passage of the act of 1865 a number of ordinances were passed, conferring the privilege of using streets, in most cases with a time limit definite in character. The record discloses that by an agreement of July 29, 1863, the Chicago City Railway Company had agreed to convey to the Chicago West Division Railway Company certain rolling stock, equipment, etc., together with "all and singular the franchises, rights, privileges and immunities" of the Chicago City Railway Company in and upon certain streets, "conferred, given or granted by or under any or all acts of the General Assembly of the State of Illinois, and any and all ordinances of the city of Chicago or contracts with the common council." In this contract it was also provided that if at any time it should be adjudged that consent to the sale by the council of the city of Chicago is, or was, necessary to secure to the grantee company the rights and privileges embraced in the contract, the grantor company would do all in its power by reasonable and proper effort to secure such consent of the common council. By the deed of transfer of July 30, 1863, the grantor company conveyed its rights, privileges and franchises in the use and occupation of certain streets, "to have and to hold the above bargained and granted premises and property to the party of the second part, etc., for and during all the time which the said party of the first part might hold, exercise and enjoy the same under its present charter and any and all extensions thereof." On December 13, 1859, the Chicago City Railway Company by agreement gave to the North Chicago City Railway Company permission and authority to make, construct and use for

twenty-four years, tracks, etc., as might be necessary to extend its railway southerly to such points in the south and west divisions along certain streets, "as the party of the first part (Chicago City Railway Company) has been or may be authorized to make and have the same."

It thus clearly appears, at least up to the passage of the act of 1865, that legislation upon the subject recognized and enforced the right and authority of the city to fix the term during which the streets might be occupied by street railway companies. The legislature had confirmed the ordinance of the city fixing the term at twenty-five years and until the city should see fit to purchase the property of the railway company. It had required the companies to obtain the authority of the city before using the streets, such use to be upon terms and conditions, and with such rights and privileges as the city had or might thereafter prescribe by contract with the companies.

We find no intention evidenced in legislative action thus far to prevent the municipal authorities from exercising the important and far-reaching authority of fixing by contract with the persons or corporations to whom franchises are granted by the State the term during which the occupancy shall continue. This feature of the right to use the streets, it need hardly be said, is of most vital importance to both parties. Some latitude of time is essential to the value and stability of the investment to be made. An unduly long period might conclude municipal action when changing conditions and growing population demanded it in the public interest.

We come now to the act of 1865. Does its interpretation justify the contention that by its terms the State took from the local authorities the control which had been theretofore recognized, the right and authority to determine upon what terms and for what length of time the railways might occupy the streets, and without other consideration than the building, equipment and operation of the roads, conferred upon the companies the right to use and occupy for ninety-nine years to

come the streets of the city which might thereafter be designated by the city council, and confirmed without qualification for that term the right to use and occupy the streets covered in contracts already made with the city? We may premise, before taking up this act for more detailed consideration, that it is a firmly established rule, which we shall have occasion to refer to later on in this discussion, but which must be borne in mind as we enter upon the consideration of this act, that one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. The first section of the act of 1865 was effectual to extend the corporate life of the two companies, created by the acts of 1859 and 1861, from twenty-five to ninety-nine years each. The second section authorizes the construction and maintenance of street railways in the city of Chicago upon such streets, etc., within the limits named, as the common council have authorized or shall from time to time authorize, the rights, privileges and immunities and exemptions to be such as the common council has prescribed or may by contracts with said parties, or either of them, prescribe. In the first clause of that section, then, there is shown no disposition to depart from the policy of the State as indicated by the act of 1859, and the action of the companies thereunder, which required the street railway companies before entering upon the occupation or use of the streets to obtain by agreement with the city its sanction and authority for the right and privilege of so doing. Then comes the clause, which it is contended, works a revolution of former policies and extends former franchises and rights to the full term of ninety-nine years, and withholds from the city the power of granting any further use of the streets to the railway companies, except upon terms of extending the right for the like period. While we have no right to consider this act by segregating its clauses as though they were separate enact-

ments, for the purpose of having its provisions clearly in view, we insert this clause:

". . . and any and all acts or deeds of transfer of rights, privileges or franchises between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses and undertakings, made, entered into or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life hereof, as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part of said several acts."

Does a fair interpretation of this clause of the act extend all the franchises, privileges and contracts theretofore made for the term of ninety-nine years? This clause deals with:

1. The transfers of rights, privileges or franchises between the corporations.

2. Comprehensively speaking, the contracts made between the city and the companies.

The definition of "rights and privileges," as the terms are used in this act, is not difficult to find. It is contained in the context of the act confirming "such rights and privileges, immunities and exemptions, as the common council has [prescribed], or may by contract with said parties, or any or either of them, prescribe." This definition conforms to the use of the terms in prior acts of the legislature on the subject as well as to ordinances of the city granting the use of the streets. The rights and privileges intended are such as have been derived from contracts with the city. Franchises in the sense we have stated have been the grants of the State. Licenses and all other privileges have been obtained from the city, acting under the authority of the acts of the legislature in the manner outlined earlier in this discussion. As to the deeds and acts of transfer of rights, privileges and franchises, as well

as the contract rights secured from the city, the act declares they "shall be deemed and held and continued in force during the life hereof, as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part of said several acts."

What does this mean? It cannot operate to extend the contract rights and privileges, obtained directly from the city before or after the transfer by one company to the other, ninety-nine years, for as to these the act distinctly declares that the contracts, stipulations, licenses and undertakings, between the council and the companies shall stand "as made or amended." This declaration is in the past tense, and can have no reference by any fair construction to future engagements.

The contracts by this clause in all their terms, including time limits, are written into the original acts of 1859 and 1861, as if made a part thereof. Much discussion has been had as to the proper interpretation of the ambiguous expression "during the life hereof." For the companies it is insisted that its meaning is to extend all franchises and contracts, and whether the latter have been or may thereafter be made to the end of the ninety-nine years, so as to give the railways the franchise to use the streets for that period by an irrevocable grant, irrespective of any limitations by state or municipal action subsequently undertaken. To give this act the construction insisted on by the companies is inconsistent with the policy of the State, declared in the act of 1859, which ratified the ordinance of 1858, and gave additional rights in the streets only upon obtaining the consent of the city. It practically reads out of the act the preceding clause of the very section under consideration, which expressly recognizes the authority of the city council to control the use of the streets by contracts which it has made or may make in the future. To say that contracts, the terms and conditions of which are left to agreement with the city, could only be made upon terms of extension to ninety-nine years, is to nullify in an important partic-

ular the powers conferred in the act. The construction contended for requires us to ignore or entirely change the sense of terms establishing the contracts as made, and requires an interpretation which applies to the future what is specifically stated to be meant for the past. It does violence to the rule contended for by counsel for the companies; that words are to be considered in their ordinary signification, and every part of the statute, if practicable, given meaning in harmony with its other provisions upon the subject. It is urged that the words "as made or amended" must have reference to the future, and were intended to give a prospective operation to the act and to read into all contracts thereafter to be made, as well as theretofore made, a right to use the streets without the consent of the city for the extended period. And it is said that this is particularly shown by the use of the words "as amended." But this expression was used in the seventh paragraph of the act of 1859, vesting in the corporations the rights and privileges granted by the ordinances of the common council "and the amendments thereto." The ordinance of August 16, 1858, was itself an amendment of prior municipal legislation. The purpose of the act of 1865 was to continue, as made, the former contracts, with their amendments. If it was intended to extend all past contracts and licenses for the use of the streets to the term of ninety-nine years, and to require the city council to enter into no new engagements for terms and conditions which should not extend to that period, it would have been easy to give expression to such purpose in plain words, and not resort to language which, as stated in one of the briefs of the learned counsel for the companies, is "unusual and more or less figurative." If the words used have no effect to control the right of future contract, but do extend the term of the contracts made to ninety-nine years, then we may have the anomalous situation of some contracts for short and some for long terms in the same system of railroads. It is true that we are to consider the situation as it was when the act was passed, and not in the light of the subsequent growth and development

of the city. But in 1865 the policy of local control of the streets for railway purposes had been declared and acted upon. So radical a departure as is contended for must be found in terms plainly stated and clearly defined. It is contended that unless the construction insisted upon for the companies is given to the act, no force or effect is given to the expression "during the life hereof," and a well-recognized rule is invoked that all parts of this law must be given force and effect in interpreting its meaning. While it is incumbent upon those claiming under a public grant, as we have already stated, to make out the rights contended for by terms which clearly and unequivocally convey them, and it is enough to deny the privileges contended for, if, upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred, we think this act can be given a construction which shall give some meaning and effect to the words "during the life hereof." Literally construed, the phrase would mean for the life of the act. It has been suggested that it may mean until the corporations, by forfeiture or otherwise, go out of existence. But these meanings do not seem to aid the purpose manifested in the law, and meaningless phrases are not supposed to be used to express the legislative will. Bearing in mind that the franchises granted came from the State, the nature and extent of the rights included in those franchises, that the franchise to be a corporation was extended by the first section of the act, and that the franchise, the transfer of which was intended to be confirmed in the clause now before us, embraced the right granted by the State to use the streets with the authority of the city, and that the rights and privileges were obtained from the city, let us see if some meaning can be found consistent with the other parts of the act, and recognized rules of construction. Conceding for this purpose the contention on behalf of the companies that the phrase, "during the life hereof," may mean for the term of ninety-nine years, for that period the act provides that certain things "shall be deemed and held and continued in force." What

are they? 1. "Any and all acts or deeds of transfer of rights, privileges or franchises between the corporations in said several acts named or any two of them." 2. "All contracts, stipulations, licenses and undertakings, made, entered into, or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use or exclusion of the railways in or upon the streets or any of them of said city." The context of the act, as we have seen, defines rights and privileges to be such as are derived from the contracts with the city. It recognizes, as do the ordinances previously passed, in the use made of the same phrase, that the city is the source from whence they came. Franchises, as we have said, came from the State. The phrase, "during the life hereof," cannot be held to extend contract rights to ninety-nine years without doing violence to the terms which just precede this phrase and are found in the same sentence, confirming all contracts, stipulations, licenses and undertakings "as made or amended." The vital part of such contracts is the duration of the occupancy of the streets, expressly limited to twenty-five years, and in some cases twenty-five years and until purchase by the city. To say that "during the life hereof," in the sense that it means ninety-nine years, is to be the life of the contracts, permits that part of the sentence to repeal the provision of the clause which reads them into the original act in all respects as made or amended. Rejecting, therefore, such impossible construction as doing violence to the very terms of the law, there is only left of the things provided for which can be consistently extended for ninety-nine years, the acts or deeds of transfer between the corporations so far as they relate to franchises which are not subject to the express limitations of the act—that they shall stand as made. These franchises as conveyed were necessarily limited to twenty-five years, the then life of the companies. The first part of this act has prolonged the corporate life to ninety-nine years. In the sense which we have already defined the franchise granted by the State, as

conferring the right to use and occupy the streets with permission from the city, the act may be consistently held to extend and validate the deeds of transfer as conveying a continued right to such franchise for the extended period of the lives of the corporations. This construction gives some weight and force to this ambiguous expression, and, taking the entire act together, is more consistent with the legislative purpose expressed than is the one put forward, which ignores the reference to the contracts in their original form and extends them all for ninety-nine years, while the act declares they shall not be disturbed as made. It is not to be understood that the interpretation herein suggested frees the judicial mind from doubt as to the meaning of this act, any more than its ambiguous and contradictory phrases could have impressed upon the legislative understanding the meaning now contended for by the companies. It is the application of the settled rule of interpretation to such grants which invalidates the claims made for it, rather than any clear and satisfactory interpretation which has been suggested by counsel or arrived at by the court.

This construction is in harmony with the policy of the State, as evidenced in its prior legislation on the subject, and in the earlier part of the section under consideration, it gives some meaning to all parts of the act, and makes its provisions consistent with each other. It preserves local control of streets for railway purposes, which the legislature in all of the acts under consideration has sought to protect. Considering the act as a whole, it has the effect to extend the life of the corporations to ninety-nine years and to authorize the use of the streets of Chicago, with the consent and upon terms agreed upon with the council, and this right may be acquired in like manner during the extended life of the corporations for such periods as may be contracted for. Contracts already made are affirmed as made. The transfers between the companies are validated.

Further contracts may be entered into and amendments made without resort to new legislation empowering the cor-

porations, as the right of amendment is given, reserving the right of modification or repeal, by a majority of the aldermen elected or act of the General Assembly, of the right to charge a higher rate than five cents.

While it is true that if by the act the State had conferred a grant of the right to use the streets for the period of ninety-nine years, entitled to the protection of the contract clause of the Constitution, such right could not be impaired by any subsequent legislation, it is worthy of note, as showing the continuous legislative policy of the State, that in the act of March, 1867, amending the charter of the city of Chicago, it was provided that no grant of the right to use the streets should be given, or those already given extended, unless by a vote of three-fourths of all the aldermen elected, and that no grant, consent or permission theretofore given or made, or thereafter given, should in any case be extended until within one year of the expiration of the grant, consent or permission, and in case of veto by the mayor such grant or permission should receive the vote of three-fourths of all the aldermen. This act shows a consistent policy of local control, and is inconsistent with the theory of a grant already made for the use of the streets for ninety-nine years.

In reaching the conclusions herein stated as to the proper construction of the act of 1865, amending the act of 1859, we are not unmindful of the fact that much can be said in favor of the view contended for by the learned counsel for the companies. The construction of this act, as we have said, is by no means free from difficulty.

It is true that Governor Oglesby in his message returning this act with his veto gave it a construction which would maintain the right to use the streets for the period of ninety-nine years. While his construction was assumed rather than demonstrated, and the stress of his argument was upon the impropriety and constitutional invalidity of thus postponing the right of the city to purchase, it may be admitted that his interpretation of the act sustains the view contended for by

the companies. But, as we have said, the act upon its face is ambiguous and uncertain. We must judge of it by the terms in which it is expressed. A construction can be given it which would extend all the contracts with the city for the term of ninety-nine years. On the other hand, it can be maintained, with at least equal force, that, notwithstanding the Governor's view, it affirmed the contracts as made, thus distinctly recognizing the comparatively short term of twenty-five years, for which they expressly stipulated. It must be, therefore, uncertain whether the legislators voted for this act upon one construction or the other. It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. Pierce on Railroads, 491; *New Orleans &c Railroad Co.* v. *City of New Orleans,* 34 La. Ann. 429, 447. "Words of equivocal import," said Mr. Chief Justice Black, in *Pennsylvania Railroad Company* v. *Canal Commissioners,* 21 Pa. St. 9, 22, "are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature." "The just presumption," says Cooley in his work on Constitutional Limitations, 7th ed. p. 565, "in every such case is that the State has granted in express terms all that it designed to grant at all;" and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: "This is sound doctrine, and should be vigilantly observed and enforced."

Since the decision of the *Dartmouth College Case,* 4 Wheat

518, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the State or municipalities acting under state authority. Concurrent with this principle and to be considered when construing an alleged grant of this character is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often-cited case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, and has been uniformly applied in many subsequent cases in this court. In *Perrine* v. *Chesapeake & Delaware Canal Company*, 9 How. 172, 192, the same eminent Chief Justice, speaking for the court, said: "The rule of construction in cases of this description . . . is this,—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained or unusual construction, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded." In the case of *The Binghamton Bridge*, 3 Wall. 51, 75, it was said: "The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State."

This principle has been declared axiomatic as a doctrine of this court. *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659,

666. In *Slidell* v. *Grandjean*, 111 U. S. 412, 438, it is declared a wise doctrine, "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." Among other cases affirming the principle in this court is *Coosaw Mining Company* v. *South Carolina*, 144 U. S. 550, in which it was applied in adopting, of two doubtful constructions, the one more favorable to the State. Many of the cases are cited in a note to *Knoxville Water Company* v. *Knoxville*, decided at this term. 200 U. S. 22, 34. Applying the principle so frequently asserted and uniformly maintained, we think it cannot be successfully maintained that the act of 1865 contains a clear expression of legislative intention to extend the franchise of these companies to use the streets of Chicago, without reference to the assent of the city, for the long term of ninety-nine years, and for that time preventing other and different legislation restricting this grant of a practically exclusive right. So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are here asserted, fail when they can only be maintained by strained construction in their favor.

The effect of the act of 1865 was to affirm the contracts as made between the council and the companies; these contracts must stand as concluded, unless changed by subsequent agreement between the parties. As we have said, the principal question in the case concerns the construction of the act of February 14, 1859, as amended by the act of February 6, 1865. The learned Circuit Court, holding the opinion that the right to use the streets was extended for the prolonged term of the corporate life of the companies, also held that the adoption of

the Cities and Villages Act by the city of Chicago, in May, 1875, which act was passed under the constitution of Illinois, taking effect in 1870, put an end to the right of the city of Chicago to thereafter designate streets under the former acts, and that contracts subsequently made were subject to the limitation of twenty years, as provided in the Cities and Villages Act of 1872. The court applied the principles upon which it construed the acts in question, and gave it effect as to numerous streets which were the subject of contracts between the city and the companies. Under our conclusions the decree must be reversed, and the construction we have given the act may require a decree differing from that rendered in the Circuit Court, when applied to particular streets. But we shall not take up all these controversies in detail and shall leave to the Circuit Court a readjustment of the decree upon the lines of this opinion. There are, however, certain matters in the case which have been fully argued and should be determined before the case is again considered in the Circuit Court. On these features of the case we will not enter upon extended discussion, but briefly indicate our views upon them.

It was held by the learned Circuit Court that the amending act of 1865 had application to the North Chicago City Railway Company, and had the effect to extend the corporate life of that company. We think this is a correct view. By the tenth section of the act of 1859 all the grants, powers, privileges, immunities and franchises conferred upon Parmalee and others, by the act for the south and west divisions of the city of Chicago, were conferred upon certain persons by the corporate name of the North Chicago City Railway Company, for the north division of the city, in the county of Cook, as fully and effectually as if they had been by a separate act incorporated, with all of said grants, powers, immunities, privileges and franchises. By the first section of the act of 1865 the corporate lives of the Chicago City Railway Company, created by the first section of the act of 1859, and the Chicago West Division Railway Company, created by the first section of the

act of 1861, were expressly extended for ninety-nine years. While nothing was specifically said of the North Chicago City Railway Company in this connection, the tenth section of the act, after this amendment, we think, should be read in connection with the amended act, so that the act of 1859 is to be read as if it had originally been in the amended form. In this view the extended life of the corporations created by the first section must be read into the charter of the North Chicago City Railway Company, created by the tenth section.

We believe this view is sustained by reason and authority. *Holbrook* v. *Nichol*, 36 Illinois, 161. The rule was thus stated in *Farrell* v. *State*, 54 N. J. Law, 421: "As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *People* v. *Circuit Judge*, 37 Michigan, 287. In *Conrad* v. *Nall*, 24 Michigan, 275, a section in the chapter of the code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter in its present form must be read as one act. The rule is correctly stated in Endlich on Statutes, section 294, as follows: 'A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendments eliminated.' " This view is strengthened by the language of the second section, which speaks of the deeds of transfer of rights between the corporations, in said several acts, or "any two of them."

The city of Chicago has constantly recognized the corporate existence of this company and has made numerous agreements with it as such corporation. In *Chicago* v. *Sheldon*, 9 Wall. 50, in considering a contract between the North Chicago City Railway Company and the city as to the extent of street improvement by way of paying, etc., which could be required of

the company under the ordinance of May 23, 1859, granting it rights and privileges in the streets, this court, speaking through Mr. Justice Nelson, concluded its opinion as follows: "A point is made that the legislature has not conferred, or intended to confer, authority upon the city to make this contract. We need only say that full power was not only conferred, but that the contract itself has since been ratified by this body." The learned justice, speaking of the contract, obviously referred to the ordinance of May 23, 1859, passed under the authority conferred by the act of February 14, 1859, and the ratification by the legislature under the act of February 6, 1865. We have no doubt that this act was intended to apply to the North Chicago City Railway Company as well as to the companies specifically covered in the first section of the act. The ordinance of 1858 in its tenth section gave the right to operate the "said railways for twenty-five years, and thereafter to parties operating said railways the enjoyment of all privileges granted until the common council shall elect by order for that purpose to purchase the tracks, railway cars, carriages, station houses, station grounds, furniture and implements of every kind and description used in the construction and operation of said railways or the appurtenances in and about the same." By section seven of the act of February 14, 1859, all of the rights and privileges granted or intended so to be to Parmalee and others, by the ordinances and amendments were confirmed and vested in the corporations. The affirmance of these rights and privileges gave them the sanction and made them part of the legislative act. Afterwards certain of the rights and privileges of the Chicago City Railway Company were transferred by the deed of July 30, 1863, as stated in said conveyance, to the Chicago West Division Railway Company. This deed of transfer is confirmed by the act of 1865. Later the system of railways was extended under ordinances of the city and with the assent of village boards of trustees. It is the contention of the receivers that by reason of the premises the railway companies became entitled to operate the entire system for

the extended period of the act of 1865—for ninety-nine years —and thereafter until the city of Chicago shall lawfully purchase all of the said railways, property, equipment and appurtenances, and pay for the same in cash at its then appraised value. It is the contention of the city that this extension of the right to purchase by virtue of the ordinance of 1858, affirmed in the act of 1859 and the amendment of 1865, must be confined to the streets covered by the ordinance of 1858. That the right to use the streets under the ordinance of 1858 was extended to all subsequently acquired rights to use the streets under the new contracts, so that the right would continue until purchase be made of the entire property of both systems of railway, we cannot concede. It does violence to the language of the ordinance of 1858, which, by its terms, is limited to the railways therein and thereby provided for, and would be an extension of corporate privileges by implication, in violence of the settled rule to which we have had occasion to refer in the principal discussion.

While not conceding the soundness of the contention that the right of purchase is extended to all the property of the railway companies by reason of the unity of the system, there are certain ordinances confirmed by the act of 1865 which require special attention. As we have seen, by the ordinance of May 23, 1859, permission was given to lay a street railway on and along certain streets and bridges in the south and west divisions of the city of Chicago, "and the same to keep, maintain and use and to operate thereon railway cars and carriages during all the term of the said act of February 14, 1859, specified and prescribed, in the manner and upon the conditions hereinafter designated." On the same day, May 23, 1859, a grant was made to the North Chicago City Railway Company of the right to use certain streets, the rights and privileges granted to be in force for the benefit of the company for the full term of twenty-five years from the passage of the ordinance and no longer. This difference in the grants to the two railway companies is significant. In the ordinance of 1858 the

grant to Parmalee and others was for the term of twenty-five years, with the right of the parties operating the railways to enjoy all the said privileges until the common council elect by order for that purpose to purchase the tracks and other property used in the construction and operation of said railways and appurtenances, and pay for the same in the manner designated in the ordinance. This grant was expressly confirmed by the act of 1859, in section seven thereof. Otherwise there was no specific grant in that act fixing the time for which the railway company might operate in the streets. As we have seen, in that law there was a distinct affirmation of what the common council had authorized the corporators to do, and might thereafter authorize the corporation to do by contract. The North Chicago City Railway Company, prior to the act of 1859, had no agreement as to streets. The reason for the grant of different terms to the different companies, we think, is apparent. On the west side reference was made to the term granted in the act of February 14, 1859, for the purpose of giving the Chicago City Railway Company the same term as had been granted and confirmed therein as to the streets named in the ordinance of August, 1858, and, in our judgment, gave to that company a grant in the same terms, that is, for twenty-five years, and until the city purchase in the manner designated. On the north side, there being no such legislative confirmation of rights already undertaken to be conferred by the council, the grant was specifically limited to a period of twenty-five years, "and no longer."

In considering the effect of the ordinances passed by the common council of the city of Chicago in the period from February, 1859, to May 3, 1875, it may be well to briefly summarize the terms of these ordinances. They will be found in the margin.[1]

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[1] On the west side we find the following:

May 23, 1859—

"A grant during all the term in the said act of February 14, 1859, specified and prescribed." Streets are designated and the time

After the passage of the Cities and Villages Act of 1872, accepted by the city of Chicago in May, 1875, the following ordinance was passed, being the so-called "compromise ordinance:"

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for completion of the railways thereon is limited, for some at three months, others at five, one year and eighteen months, and still others "as soon as practicable."

February 13, 1860—

Amendatory of the above last-mentioned ordinance. Extends the time for completion to ten years for some, and five years for others. Certain lines mentioned must be completed in two years.

November 18, 1861—

Exempting certain streets and substituting others. Ordinance of May 23, 1859, in force except as amended, and time for completion of certain railways named is extended to five years

November 16, 1863—

Excluding railways from certain streets named.

March 14, 1864—

Releasing one street and substituting another.

March 28, 1864—

Authority to remove from one street to another.

March 28, 1864—

Authorizing temporary tracks while a bridge is being constructed.

July 11, 1864—

Amending ordinances of March 28, 1864, repealing the temporary use of certain streets.

August 17, 1864—

Creating new lines, extending others, and regulating the use thereof. Times for completion fixed at ninety days and fifteen months. No time or duration stated by reference or directly.

November 13, 1871—

Extension of tracks on certain streets named.

March 8, 1875—

Authorizing the construction and operation of a new line. To be completed by October 1, 1876, and the term to extend to October 1, 1894, and thereafter until purchased by the city.

April 19, 1875—

Amending last-mentioned ordinance as to certain uses and legal claims arising from the operation of the lines.

On the north side we find the following:

May 23, 1859—

Term "twenty-five years and no longer." Times for completion fixed at January, 1860, and July, 1862, different for some than others.

January 18, 1864—

Term "subject to all the rules and limitations and restrictions"

July 10, 1883 (amended August 6, 1883)—

Extending the term for twenty years from this date. Accepted by North Chicago City Railway Company, August 8, 1883; by the Chicago City Railway Company and the Chicago West Division Railway Company, August 10, 1883.

This ordinance contained this proviso, "but nothing in this section contained, or the acceptance hereof, shall in any manner impair, change or alter the existing rights, duties, and obligations of the city or of said companies, respectively, from and after the said term of years hereinbefore mentioned."

We thus perceive a consistent purpose running through the grants to the north side company to adhere to the term of the original ordinance of May 23, 1859, limiting the right to use the streets to the period of twenty-five years, "and no longer," by reference in subsequent ordinances, to the prior ordinance. We do not regard the exceptional character of the ordinance of October 26, 1874, amended April 26, 1875, as overcoming, as to other ordinances, the general purpose reflected in them. That ordinance was a grant in part to the

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prescribed in the ordinance of May 23, 1859. Authorizes connection of tracks.

August 11, 1864—

Term "subject to all the restrictions and conditions, the rights and privileges, mentioned" in ordinance of May 23, 1859. Time for completion fixed at sixty days, unless restricted, etc.

May 8, 1871—

Same term. Time for completion fixed at June 1, 1872, for the street railway named.

November 20, 1871—

Term "subject to all rules and limitations and restrictions" prescribed in ordinance of May 23, 1859. Rights and privileges granted shall continue for a term of —— years.

October 26, 1874—

Term until October 1, 1894, and thereafter until purchased by the city. To be completed July 1, 1875. As lessee of Chicago City Railway Company as to certain portion.

April 26, 1875—

Amending the last-mentioned ordinance, and otherwise similar to it as to terms and conditions.

North Chicago Company as the lessee of the Chicago City Company, and was doubtless changed in terms to make it comply with the grant of the latter company as to streets in which it operated.

As to the west side companies we find running through the ordinances making grants in the divisions covered by that system a purpose to preserve the original permission of the ordinance of August 16, 1858, which granted the use of the streets for the term of twenty-five years and until purchase by the city. The language used in the ordinance of May 23, 1859, granting the use of the streets, is "during all the term in said act of the fourteenth of February, A. D. 1859, specified and prescribed." This ordinance and similar ones passed prior to the act of February 6, 1865, were confirmed by that act, and rights under them were reserved by the compromise ordinance of July 10, 1883. We hold that when streets were occupied under the authority of these ordinances the company has the right to the use of the streets until the city shall purchase under the contracts thus made.

In the west side system, the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to confer the right in perpetuity to the occupancy of the streets, a point which we do not feel called upon to decide. The other ordinances by direct terms or references to prior ordinances have made the grants for the west side system for the term of twenty-five years, and until purchase by the city, in the manner stated, and we do not think there was any intention to depart from the plan in this one ordinance omitting specifically to name a definite time of occupancy. At this time there had been no extension of the life of the corporation, and it was specifically limited to twenty-five years.

In reaching this conclusion we are not unmindful of the decision of this court in *Detroit* v. *Detroit Citizens' Railway Company*, 184 U. S. 368, 395, holding that although a corpo-

ration be organized for a limited period by the terms of its charter, it may receive a grant which would inure to the benefit of those lawfully entitled to succeed to the rights of the corporation, although for a period of years beyond the corporate life. But in the present case the right granted must be construed with reference to the system of which it was made a part, and where the terms of the grant were limited to twenty-five years, and until purchase, we can find no intention to grant or receive a perpetuity simply because no term of years was named in the one ordinance under consideration.

It is contended that whatever rights would otherwise be included in contracts confirmed by the act of 1865, they were lost to the companies by accepting the privileges conferred in the "power ordinances" of June 7, 1886, and March 30, 1888. But prior to the passage of those ordinances was the so-called "compromise ordinance" of July 10, 1883, as amended August 6, 1883, settling certain controversies as to license fees and street paving, and extending the time of operation for twenty years, and further providing: "But nothing in this section contained, or the acceptance hereof, shall in any manner impair, change or alter the existing rights, duties and obligations of the city, or of said companies, respectively, from and after the expiration of the said term of years hereinbefore mentioned." In the North Chicago City Railway ordinance and the West Chicago City Railway Company ordinance clauses are inserted to the effect that privileges as to time after the expiration of the term of twenty years are to be governed by ordinances theretofore passed. In view of this reservation we are of opinion that whatever rights and privileges the company had in the streets after the expiration of the time limitation in the "power ordinances" were not lost by the acceptance of privileges conferred in those ordinances.

It is contended that the railway companies had no power to accept ordinances for the use of other than animal power in the operation of railways, because of the titles of the various

acts which constituted the charter of the companies, limiting them to the use of animal power, and because of the constitutional provision, which we have referred to earlier in this opinion, providing that no private or local law shall embrace more than one subject, which shall be expressed in its title. We think the intention of the legislature in this respect was not to confine the operation of the road to animal power, but to incorporate street railway companies as distinguished from steam railways, and to endow them with the rights and privileges named in the acts. Section two of the law (act of 1865) expressly gives the power of amendment, in providing that "it shall be competent for the said common council, with the written consent or concurrence of the other party or parties or their assigns to any of said contracts, stipulations, licenses or undertakings, to amend, modify or annul the same." We think this grant of power was broad enough to authorize the city to grant, and the railway company to accept, a changed method of operation of the railways by applying thereto a new and more efficient and economical power. It is true that the Supreme Court of Illinois in *North Chicago City Railway Company* v. *Town of Lake View,* 105 Illinois, 207, held that the charter of the North Chicago City Railway Company had not authorized a steam railway, but that court has held in later decisions that an electric railway, incorporated under the general incorporation acts to build horse and dummy railways, might organize a street railway company to be operated by electricity or by any motive power other than steam, and might appropriate private property for this purpose. *Harvey* v. *Aurora & Geneva Railway Company,* 174 Illinois, 295, 299. The court has also held that the provisions of the horse and dummy act applied to electric railway companies, as did a paragraph of the general incorporation act in regard to horse railways. We think the Illinois cases recognize the distinction in legislation in that State between railways intended to be operated upon the streets of the city of Chicago and other cities for local accommodation, and steam railways as such are

generally understood. And the declaration inserted in the title of the acts, that they concern horse railways, will not, because of the constitutional provision, prevent the exercise of the power of amendment conferred by law upon the city and the companies in such manner as to authorize the use of such power as electricity and cable. We agree with the learned Circuit Court that these grants as to changed methods of operation were within the powers legally conferred by the act of 1865. Furthermore, on June 9, 1897, the legislature passed an act having application to companies organized under general or special laws, which provided: "Every such street railway may be operated by animal, cable, electric or any other motive power that may have been or shall hereafter be granted to it by the proper public officers or authorities, except steam locomotive engines." It is true that this statute was repealed by the act of March 7, 1899, but we do not perceive how this could destroy its effect to ratify the contracts which were in existence when the act was passed. This view renders it unnecessary to pass upon the question whether the city of Chicago, having undertaken to authorize the use of new power, upon the faith of which authority large sums of money have been expended and extensive changes made, can now be heard to say that it had no authority to grant such right.

The learned Circuit Court held that privileges granted under ordinances of the town of Jefferson were limited to twenty years. This ruling, it is contended by the Chicago West Division Railway Company, is erroneous, because of the act of 1859, which provided: "Section 5. The said corporation is hereby authorized to extend the said several railways herein authorized to be built in the manner aforesaid to any point or points within the county of Cook, in this State; and to enable said corporation to construct any or all of the railways therein authorized, or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes and in the manner prescribed," etc. Section 6: "The said corporation is hereby authorized,

with the assent of the supervisor of any township, to lay down and maintain its said railway or railways in, upon, over and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same." The town of Jefferson was one of the townships in Cook County, adjoining the city of Chicago on the northwest. So far as the record discloses, no effort was made to extend the lines of the Chicago West Division Railway Company into the town of Jefferson until 1877. Before that year the town of Jefferson had adopted the provisions of the Cities and Villages Act of 1872, in which the power to grant the use of the streets for street railway purposes was limited to twenty years. On January 28, 1878, the village passed the ordinance granting to the Chicago West Division Railway Company and its successors the right to maintain and operate a street railway in Milwaukee avenue and Armitage road, in said village, the rights and privileges thereby granted to extend for the term of eighty-one years. Under the act of 1859 the right to lay down tracks and maintain railways over and along the common highways in the townships in Cook County required the consent of the supervisor in the township. This does not appear to have been obtained, and when the authority was given by the president and board of trustees of the village, it was subject to the limitation already referred to. We cannot assent to the soundness of the argument that the act of 1859, in the event of the abolition of the office of supervisor, during the life of the corporation, would authorize the extension to these adjoining townships of the system of railways intended to be constructed, without official consent.

Before the passage of the act of 1865, incorporating the board of trustees of the town of Lake View, the supervisors granted permits to use some of the highways of Lake township. This authority was exercised under sections five and six of the act of February 14, 1859. We cannot agree that the duration of these permits would be in perpetuity, because of the fact that no time was specifically named in them. The extension into

Lake View was part of the north side railway system, which by the terms of the grants from the city were limited to twenty-five years, and no longer. There certainly could be no intention in granting these permits from the supervisors as extensions of the system to make perpetual grants, when the right of user of the main part of the line was expressly limited to twenty-five years. A fair inference would be that, in extending this part of the system so as to make a portion of that already granted, such grants were to be for the same term as those already made. As to extensions in the town of Lake View, obtained otherwise than from the supervisors, it appears that on February 16, 1865, an act was passed entitled "An act to incorporate a board of trustees for the town of Lake View, in Cook County," and it was provided that the supervisors, assessors and commissioners of highways and their successors in office should be constituted and incorporated, *ex officio*, a board of trustees for the said town of Lake View. On March 5, 1867, an amendatory act was passed entitled "An act to incorporate a board of trustees for the town of Lake View, in Cook County," which provided (section 7) that the board of trustees should have the control and supervision of the highways, streets, alleys and public parks in said town. This board afterwards passed ordinances consenting to the laying down of tracks in the town of Lake View, on a number of avenues and streets named in the ordinances.

The cases in the state courts are much divided as to the right of a municipal corporation, because of its charter power of controlling the streets, to grant the use thereof to a street railway company. Some of the cases are collected in *Detroit Citizens' Railway Company* v. *Detroit*, 64 Fed. Rep. 628, 637.

The act of 1859, section six, required the consent of the supervisor to the extension of the railways into townships of Cook County outside of Chicago. When the supervisor became a member of the township board of trustees and that board gave its consent, we think this satisfied the requirement of the act in that respect. The legislature might have given the railway

company the right to extend its lines in Cook County without the consent of any local authority. We are not concerned with the general powers of the supervisor. When the legislature designated him as the official whose assent should be obtained it empowered him to give such assent, and when given in any substantial way that satisfied the requirements of the act of 1859.

As we understand the decisions of the Supreme Court of Illinois, the power to control the streets and highways by the township trustees, given by the act of March 5, 1867, would include the right to authorize their use for street railway purposes. In *Chicago Municipal Gas Light Co.* v. *The Town of Lake*, 130 Illinois, 42, 54, the court held: "The power to control and regulate the streets, alleys and other public places within the limits of the town of Lake, and abate any obstructions, encroachments or nuisances thereon, was given, in its charter, to the corporate authorities of the town. Under this power the town could lawfully permit any use of such streets and alleys that is consistent with the public objects for which they are held, and could make a grant of a right of way for the purpose of laying gas pipes and mains under the surface." In *People* v. *Blocki*, 203 Illinois, 363, 368, the same court said, having reference to a grant of the right to lay switch tracks in the street: "The street, at the time said permits were granted, was under the control of the board of trustees of the town of Lake, and under the power conferred upon that municipality by law it was authorized to allow the use of said street for any purpose not incompatible with the purpose for which it was established, and to allow a railroad track to be laid therein was not a use incompatible with the purpose for which it was established." In *City of Quincy* v. *Bull*, 106 Illinois, 337, on page 349 it was said: "In this State there is vested in municipal corporations a fee simple title to the streets. Under the power of exclusive control over streets, it is very well settled by decisions of this court that the municipal authorities may do anything with, or allow any use of, streets which is not in-

compatible with the ends for which streets are established, and that it is a legitimate use of a street to allow a railroad track to be laid down in it. *Moses* v. *Pittsburg, Ft. Wayne & Chicago Railroad Co.*, 21 Illinois, 515; *Murphy* v. *City of Chicago*, 29 Illinois, 279; *Chicago & Northwestern Railway Co.* v. *People ex rel.*, 91 Illinois, 251." In view of these Illinois decisions, construing the legislative acts of the State, we think the learned Circuit Court erred in holding that the trustees of the town of Lake had no power to grant the railway the use of the streets for street railway purposes.

The question remains as to the term for which the rights granted by the trustees and the municipality of Lake View were to be held. The ordinances making these grants required the company to perform certain duties to the municipalities, such as the laying of pavement subject to the approval of the trustees. On April 16, 1887, the incorporated town of Lake View became incorporated as the city of Lake View under the Cities and Villages Act of 1872. On July 15, 1889, the territory included in the city of Lake View was annexed to the city of Chicago. We think in such case that the terms granted would not extend beyond the life of the corporation conferring them where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to grant a perpetuity. Our attention has been called to a late case decided in the Supreme Court of Illinois, *People ex rel.* v. *Chicago Telephone Co.*, not officially reported, in which it was held that where trustees of villages and towns have granted rights extending telephone privileges not for a definite period, that such grants could not be construed to be perpetuities and did not extend beyond the lives of the corporations granting them. The court says: "The ground of the defendant's claim that the ordinance does not limit its charges in the annexed territory is that before the annexation the minor municipalities had granted to it the right to occupy the streets therein for its business, without any limits as to time. If the grants had been for terms of

years under legislative authority authorizing them, and the term had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the city, because they had become binding contracts under which the defendants had vested contract rights for such term; but they were not for definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service to the town or village hall or the village authorities, free or for some reduced rate. Such grants cannot be construed to be perpetual, and at most, cannot extend beyond the lives of the corporations granting them. Upon annexation there ceased to be any town or village authorities entitled to the benefits of the contract or authorized to demand or receive them, and it could not have been understood that the grant could continue, discharged of the obligation annexed to it. . . . The ordinances of the city extended over the annexed territory immediately upon annexation, *Illinois Central R. R. Co.* v. *City of Chicago*, 176 U. S. 646, and the limitations of the ordinance applied to the annexed territory."

This seems to us a reasonable view, and being the construction of the highest court of the State of Illinois, we are willing to accept it. Furthermore, these grants in Lake View were mere extensions of the old system, which, as we have seen, was limited in its rights to use the streets received from the city to the term of twenty-five years, extended twenty years by the compromise ordinance. In the absence of express language conferring a longer term, we do not think it was intended to extend the grant beyond the period already permitted to the system by grants from the city.

As we have said, we do not deem it necessary to take up all the questions which were raised and determined by the Circuit Court in considering the case and settling the decree in that court. Upon further proceedings the judgment of this court is only to be held conclusive upon matters specifically stated in this opinion.

The decree is reversed and the cause remanded to the Circuit Court for further proceedings, in accordance with the views herein expressed.

Mr. Justice McKenna, with whom concur Mr. Justice Brewer and Mr. Justice Brown, dissenting.

This case as to questions common to all the railways depends mainly upon the acts of 1859 and 1865—incidentally upon the act of 1861. The latter act may be omitted from special consideration, as it depends upon the others. Private Laws of Illinois, 1861, p. 340. It incorporated the Chicago West Division Railway Company and gave to that company all the powers conferred upon the other companies by the second, third, fourth and sixth sections of the act of 1859.

It will be observed of the acts of 1859 and 1865 that they created corporations respectively for the period of twenty-five and ninety-nine years, and empowered them to construct, maintain and operate a single and double track railway in Chicago.

The acts, as was remarked by the Circuit Court, fall into three divisions: (1) The granting part, the authority of the companies to construct railways; (2) the identifying part, the designation of the streets by the common council; (3) the terms and conditions of the occupation of the streets by the companies and the manner in which the terms and conditions shall be prescribed.

The meaning of the third division is one of the chief controversies in the case; in other words, the extent of the authority of the common council—whether it was virtually an authority to grant rights in the streets or authority to regulate the rights conferred by the legislature; or, as it is aptly expressed by the Circuit Court, whether it was an authority to fix by stipulation with the companies that which relates "to the physical side of the occupancy of the streets or the administrative side of the operation of the lines."

It will be convenient in the discussion to exhibit the acts of 1859 and 1865, showing wherein the latter amends the former, omitting the provision extending the corporate lives of the companies from twenty-five years to ninety-nine years, about which there is no dispute. The words in italics are the amendments made by the act of 1865:

"The said corporation is hereby authorized and empowered to construct, maintain and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks and appendages, in the city of Chicago and in, on, over and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the South *and* [or] West Divisions of the city of Chicago, as the common council of said city have authorized said corporators or any of them or shall *from time to time* authorize said corporations, *or either of them*, so to do, in such manner and upon such terms and conditions *and* with such rights and privileges, *immunities and exemptions* as the said common council has or may by contract with said parties, or any or either of them, prescribe; *and any and all acts or deeds of transfer of rights, privileges or franchises between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses and undertakings made, entered into or given, and as made or amended by and between the said common council, and any one or more of the said corporations, respecting the location, use or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life hereof, as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts: Provided that it shall be competent for the said common council, with the written consent or concurrence of the other party or parties, or their assigns, to any of said contracts, stipulations, licenses or undertakings, to amend, modify or annul the same.*"

It is obvious, as far as words can accomplish it, and as directly as words *can* accomplish it, the companies were granted

the right "to construct, maintain and operate" railways upon the streets of the city. And no other power could have granted such right. *Chicago City Ry. Co.* v. *The People ex rel.*, 73 Illinois, 541.

That such grant must come from the State is, of course, not denied, but it is urged, that the grant of rights passed to the railway companies through the agency of the city, the city receiving a delegation of the State's power. This is based upon the words of the city's charter, and the authority given in the acts of 1859 and 1865 to designate the "terms and conditions" upon which the streets might be occupied.

The view I take of the acts makes it comparatively unimportant to consider the city's charter. There seemed to be a necessity for the acts, and they were complete in themselves, independent of other grants of power, except what were continued or confirmed by them. If the charter was adequate to invest in the city plenary power over the streets, we may wonder at the enactment of those statutes and many years of misapprehension of them and concern about them. Counsel for the companies assert, and the assertion does not seem to be denied, that an injunction was issued by the Circuit Court of Cook County, restraining the laying of tracks under the ordinance of 1858. The extent of the power of the city, however, I shall presently consider more at length, and will now pass to those parts of the act which the city insists conferred authority on the common council.

The stress of the argument is on the words "terms and conditions," in the third division. The city contends, and the court decides, reversing the decree of the Circuit Court, that the authority of the city to prescribe terms and conditions of the occupation of the streets included the authority to fix the time of occupation. I dissent from that interpretation for several reasons. It is opposed to the context in which the words "terms and conditions" are used. It is opposed to their primary and natural meaning. It would be a careless employment of them, and disregard or destroy dis-

tinctions necessary to be observed. As was said by the Circuit Court, ordinarily in legal phraseology those terms are not employed "to convey power over the time or period through which the tenure dealt with is intended to run; but conveys power over, or relates to the means, the methods, and the incidents connected with the exercise of such tenure." Citing *Hurd* v. *Whitsett*, 4 Colorado, 77; *Chicago Terminal R. R. Co.* v. *Chicago*, 203 Illinois, 576. Of course, directness and simplicity of methods are not always used, but some argument can be based on their omission, and it is natural to believe that had it been intended to give the power contended for to the city, words would not have been employed which would have to be turned from their first and legal signification to express it, and which could be claimed to be in opposition to other parts of the act, and made dependent, besides, upon contracts with the companies, which could only be amended by consent of the companies. The power would have been more directly conferred by a delegation of the whole matter to the city, and would have been absolute—not limited or embarrassed or opposed by conditions unnecessary to it.

The act of 1859 was certainly a direct grant from the State to the companies for the time of their charter life, and the necessity or the advisibility of conferring authority upon the city to limit the time of occupancy of the streets could not have entered into the head of anybody. No conditions existed which suggested the necessity or prudence of giving such authority. The time of occupancy expressed in the ordinance of 1858, the time of the life of corporations prescribed in the act of 1859, and the time for which the franchises conferred by that act could be exercised, all coincided. It could not have occurred to any one that twenty-five years, the term fixed in all the instruments, was injuriously long and demanded authority somewhere to limit its excess. To these considerations as proof that the words "terms and conditions" were not intended to give authority to prescribe a time

of occupancy of the streets may be added that of contemporary practice.

By an ordinance passed in 1859 the time of occupation was expressed to be "during all the term in the said act of the fourteenth of February, A. D. 1859, specified and prescribed." This, as said by counsel for the companies, "is a distinct recognition of the fact that the term for the enjoyment of the franchise was to be found in the statute, and was not among the elements of the contract which the ordinance might prescribe."

With the act of 1865 there came a change—differences from the act of 1859 of conspicuous and striking import. These differences were too full of meaning not to be considered enlargements of the act of 1859, and they were not misunderstood. The lives of the corporations were extended to ninety-nine years. There is no dispute about this, and it would seem necessarily that the other provisions were on account of and completed the purpose of the extension. And the extension had some valuable purpose. It was certainly not for the purpose only of extending the time of the abstract beings with nothing to do—no functions to exercise, no rights, no obligations—and the latter might, we can conceive, be as necessary for the public to enforce as the former for the companies to exercise. *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484. It would be a strange confusion and confounding of purposes to make the existence of a corporation more important than that which it was created to do. Necessarily, life and functions went together, the term of the rights and obligations of the corporations coinciding with the term of their life.

This coincidence of the life and the rights of the corporations being kept in mind, we can easily resolve whatever ambiguities are in the statute of 1865. It will give to every word a use and meaning, and keep distinct the power which was exercised by the legislature and the powers to be exercised by the common council. Let me, at the expense of repetition, enter into some detail. The act of 1865, amending the act of

1859, enlarged the life of the corporations from twenty-five years to ninety-nine years, and in section 2 empowered the companies to "construct, maintain and operate" a single or double track of railway in the streets of Chicago. These words necessarily imported a continuing power. Time was of the very essence of the right. It is true that there was no designation of time but the life of the corporations, but this was sufficient in the absence of qualification, and there was no qualification, certainly none in explicit words. Streets were not designated by name, but in a certain sense all streets were subject to whatever right was given, though it could be exercised in none without the designation of the common council. This is sought to be made very dominant—determinative, indeed, of the power of the city—making the city, in effect, the source of the rights of the companies, not merely the regulator of the manner of exercising those rights.

Upon what reasoning is the conclusion based? Before considering the question, however, let me refer to the statement in the opinion that "the council made and the companies accepted specific ordinances fixing the time of occupancy, as had been done in the original ordinances of May 23, 1859. And neither before nor after the passage of the act of 1865 was the ninety-nine year term recognized or acted upon in ordinances granting the use of streets." I am uncertain as to the conclusion deduced from the statement. It needs some explanation. Standing alone it may produce an erroneous impression. If the companies accepted the ordinances, conceding the power of the city, without protest or reservation of their rights under the act of 1865 to longer terms of occupancy, there could be no controversy over the interpretation of the act of 1865. Other considerations would supervene and demand attention. Counsel for the city contended for an estoppel against the companies, and because the court has not responded to that contention, but discusses and bases its opinion upon the meaning of the act, I also have discussed its meaning as necessary to the case and determinative of it;

and I recur to the question, Upon what reasoning is the plenary power of the city supported?

First, let me quote the language of the act of 1865, separated from the parts which I think are not relevant to the present part of the discussion: "The said corporation is authorized and empowered to construct, maintain and operate a single or double track railway . . . in the city of Chicago, and in, on, over and along such street or streets . . . as the common council of said city have authorized said corporators, or any of them, or shall from time to time authorize said corporations, or either of them, so to do, in such manner and upon such terms and conditions . . . as the said common council has (prescribed) [1] or may by contract with said parties, or any or either of them, prescribe, . . . and any and all acts or deeds of transfer of rights, privileges, or franchises between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses, undertakings made, entered into or given and as made or amended by and between the said common council, and any one or more of the said corporations, respecting the location, use or exclusion of railways in or upon the streets, or any of them of said city, *shall be deemed and held and continued in force during the life hereof, as valid and effectual to all intents and purposes as if made a part of said several acts.* . . ." (Italics mine.)

The language is orderly and, to me, unmistakable in its relations and meaning. What element is omitted necessary to the clear expression of a definite purpose? Not one. We have already seen that the rights given would have been, if there had been no other expression of time, coincident with the life of the corporations, but time was not left to implication, however clear the implication might have been. It was expressed. It is true it is not said that the rights, contracts, etc., shall be "held and continued in force" for ninety-nine years. If it

[1] In *Union Traction Co.* v. *City of Chicago*, 199 Illinois, 484, 524, it is said "the word 'prescribed,' to which the word 'has' applies, was accidentally omitted."

had, there certainly would be no ambiguity. It would suit with the other words and complete their meaning without change of a single syllable. Why then is there any ambiguity, if we substitute an equivalent for the phrase "for ninety-nine years"? If, "during the life hereof," is not the equivalent for ninety-nine years," that is, the life of the corporations, what does it mean?

There are various answers offered, some accepting that meaning, others disputing it. One counsel for the city submits rather tentatively that the words "during the life hereof" may be words of limitation, and that "the grants by the common council thus ratified by the act should continue for their full term," unless "the corporate existence of one or more of the corporations be terminated by dissolution or forfeiture within the period for which its privileges in the streets were granted." It is said "thus construed, the act means precisely and exactly what it says, that is, during the life, *i. e.*, during the corporate lives of the several companies, the contracts made with them by the common council are as valid and effectual as if made part of the act. . . ."

Other counsel for the city leave a choice of interpretations. They say "the expression during the life hereof" is vague and ambiguous. It may be capable of three interpretations: As meaning the life of the act; or the life of the deeds, licenses and contracts; or the lives of the railway corporations, respectively. They incline rather to the second, and say that "during the life hereof" means the life of the section or the matters mentioned in the section, and "hereof" should be changed to "thereof." The court accepts neither of the interpretations, but gives its authority to another. It was apparent that the interpretations advanced by counsel were too restricted and ignored too much the words of the act. It was apparent that the clause referred to the lives of the corporations (ninety-nine years), continued something for those lives, and the court selects as the things so continued "the acts or deeds of transfer between the corporation so far as

they relate to franchises which are not subject to the express limitations of the act—that they shall stand as made." The construction, however, is not confidently asserted. It seems to be adopted in submission to the rule of strict construction. A word therefore as to that rule.

I concede the rule to be that nothing passes by a grant of franchises, such as those conferred by the acts under review, unless it be clearly stated or necessarily implied, but I do not think the statutes under review call for an application of the rule. Whatever is ambiguous in the acts yields a definite and consistent purpose and meaning by the application of the simple rules of interpretation. In such case there is no place for the rule of strict construction. Our reports abound in cases where, against bold and able controversy, public grants have been sustained, and where division in the court has marked with emphasis the strength of the doubts which existed. And we have taken care to warn against a misunderstanding of the rule in a case of significant import. It will be conceded, I think, that the power of taxation is the highest attribute of sovereignty, one the most necessary to it, and against the limitation of which all intendments proclaim. *The Delaware Railroad Tax,* 18 Wall. 206. Limitations of this power have been sustained in favor of private individuals arising from statutes of disputable meaning. In *Citizens' Bank* v. *Parker,* 192 U. S. 73, interpreting the charter of the bank, it was held that the bank was exempt from a license tax, and we there said that the rule of strict construction is to be used to solve ambiguities, not to create them. There was a dissent that pressed the rule against the reasoning and conclusions of the court.

Returning then to the argument of the court, not required by any rule to find ambiguity in the statutes, but required by every rule to solve if found, what is that argument? Its first premise is the assumption that it was the policy of the State to vest in the city the control of the streets. Some control, yes; but how much? Was it a policy of unlimited or qualified

control; the grant of rights in them or the regulation of rights? Or, to use a technical term, the grant of franchises or the grant of power of administration over their exercise? The answer is found in the case of *Chicago City R. Co.* v. *The People ex rel., supra.*

The case was based on the act of 1859, and the right derived from it as distinguished from rights derived from an ordinance of the city. It was said: "It is a misconception of the law to suppose the railway company derives its powers to construct a railroad from any ordinance of the city. All its authority is from the State, and is conferred by its charter. The city has delegated to it the power to say in what manner and upon what conditions the company may exercise the franchises conferred by the State, but nothing more." The reason given was that the ordinance emanated from a source not "competent to grant a franchise." That power the legislature alone possessed. The date of the ordinance was November 13, 1871. It is manifest, therefore, that the policy of the State of Illinois up to 1871, and necessarily in 1859 and 1865, was not to give its municipal corporations the authority to grant a right in the streets, but only empowered them to regulate the right. And it was necessary to decide the kind and the extent of authority that was vested in the city. It was urged that the ordinance passed on purported to grant "special privileges" or "franchises," and was therefore void under the constitution of 1870. The court replied that the ordinance did not grant a franchise and that by no construction could the constitution be said to be a "limitation upon the municipal corporation to designate certain streets and fix the conditions upon which a railway company, organized under a special charter previously granted or under a general law since the adoption of the constitution, might lay its track." (p. 548).

This view acquired emphasis from the dissenting opinion, which took issue with the court and virtually made the city the source of the rights of the railway and not the State, and,

describing what the court said as to the power of the city, observed: "These special privileges of the rights of the railways upon particular streets are said to be conferred, not by the city by its ordinance, but by the State by the company's charter, and the *city only regulates the use.*" (Italics mine.)

The case was decided in 1874, and the principle it declared is the exact contention of the railways to-day, and, to the strength of the reasoning of the court, may be added the consideration that the property acquired and the investments made under the sanction of the decision for thirty-two years now claim its protection against impairment. Such considerations should prevail over ambiguity, could ambiguity ever have been asserted to exist. It received its solution and should never again be brought forward to cloud the meaning of the statute.

The distinction between the plenary and the limited control over the streets by the city is substantial in the controversy between it and the railway companies. Manifestly, the power to grant a franchise is not the same as the power to designate streets on which the franchise can be exercised. Of course, the streets must be designated before the franchise can be exercised, and therefore the power to designate may be magnified and confounded with the other power. It is so magnified, and the inability of the railroads to compel any action upon the part of the city is urged and dwelt on by counsel. The argument is that, as the city could have refused to designate any street, it had the right to exact anything of the railroads. In other words, the defects in the remedies of the railway companies enlarged the power of the city and changed the nature of the grant to the companies. Or it may be put this way, the power given to the city as a subordinate instrumentality of the State may be employed to defeat the purpose of the State. This cannot be done. *Appeal of City of Pittsburg,* 115 Pa. St. 4; *Atlantic City Water Works Co.* v. *Consumers' Water Company,* 44 N. J. Eq. 427; *Galveston, &c., R. Co.* v. *Galveston,* 90 Texas, 398; *S. C.,* 91 Texas, 17; *Homestead*

Street Railway v. *Homestead Electric Railway*, 166 Pa. St. 162, 171, 172. And I may observe that there are some duties, the performance of which cannot be immediately coerced. It need not be pointed out that the agencies of government are kept, in a great measure, to coöperation by sense of duty and propriety, and if they should, disregarding that sense, exercise the mere physical power possessed, to refuse to act, disorder, temporary at least, would result. It is besides a strange contention to me that a municipality of a State, because of its ability, physical, it may be, more than legal, to refuse to exercise powers conferred upon it, can assume or assert other powers. Let us not overlook that a municipality must have warrant, express or necessarily implied, for what it does. It, too, is within the rule of strict construction. Dillon on Municipal Corporations, section 91.

In the grant of franchises from the State and their regulation merely by the city there was no inconsistency, and this division of functions was not only natural of itself, but comported with the policy of the State, as explained in *Chicago City Ry. Co.* v. *The People, supra.* The decision cannot, it seems to me, be explained away. It was nearer in time to the enactment of the statutes than we are to-day, and it is the conditions of that time we should try to realize. This is not as easy as it seems to be. Whatever we may profess, it is not easy to realize the conditions, thoughts and purposes of another time. In 1859 nothing indicated the necessity of giving the city the power now contended for. In 1859 there could be no foresight of the development of street railways. Then they were just beginning to be thought of as a means of transportation and the city was as eager to procure them as capitalists to construct them. It is said that time is the wisest thing on earth, and taking to ourselves its wisdom, in 1906, we are sure we would have seen in an enterprise just starting, and yet tentative, the growth it might attain and the measures that would be necessary to restrain and control it. But if there was anyone capable of such prophecy the act of 1859 did

not challenge its exercise. There was nothing in it excessive, as I have already pointed out; nothing to invoke a jealous care. I dwell on this because the provisions of the act of 1859 were carried into the act of 1865, and certainly were not intended to give a greater power to the city than when used in the act of 1859. In other words, a provision which could have had no purpose in the act of 1859 to give power to the city to fix the time of the occupation of the streets could not, by mere repetition, in the act of 1865 have such purpose.

The situation in 1859 was exceedingly simple. Certain persons had been given the power by an ordinance of the city to construct a street railway. The right under the ordinance was questioned—maybe it had been adjudged illegal, and the act of 1859 was passed. It explicitly gave, in my opinion, the right to construct and operate railways in the streets and gave authority to the city only to regulate the exercise of the right. But granting that some of its words are ambiguous—granting that the words "terms and conditions" can be interpreted to authorize a limitation of time—such interpretation is not the only one of which they are susceptible. We should, therefore, consider whether that interpretation can be adhered to in view of the other provisions of the act of 1865.

First, I may lay down as a fundamental rule that we must seek the meaning of the act from its words, and that we should so exercise interpretation as "to bring a sense out of the words used, and not to bring a sense into them." *McCluskey* v. *Cromwell*, 11 N. Y. 593, 602. And with the consequences of the act we should not concern ourselves. This court has said that a plain meaning of a provision of a statute not contradicted by another provision must prevail, even against a charge of absurdity and injustice, unless they be so monstrous that all mankind would without hesitation unite in rejecting the meaning. *Sturgis* v. *Crowninshield*, 4 Wheat. 122, 202. With these rules in mind, and by referring to section 2 of the act of 1865, it will be observed that its parts are providently arranged and its words are clear—so clear, that conjecture must be put

to work and speculation must be indulged in to resist their manifest meaning.

The section makes provision for certain things, to wit, (1) the acts or deeds of transfer of rights, privileges or franchises between the corporations; (2) contracts, stipulations, licenses and undertakings made and entered into "and as made or amended" between the corporations and the common council "respecting the location, use or exclusion of the railways in or upon the streets." And what is done with these things? The answer is in the following provision: "shall be deemed and held and continued in force during the life hereof as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts." Can a distinction be made between the things provided for? Which of those things shall "be deemed and held and continued in force during the life" of the corporations? I say life of the corporations, as that, it is decided, is the meaning of the phrase.

Considering the language of the provision, there can be but one answer. It permits no exception of any of the things, nor a distinction between them. A distinction is, however, asserted, and the provision is confined to the instruments transferring "franchises," as distinguished from the instruments transferring "rights and privileges," and is denied all application to the "contracts, stipulations, licenses and undertakings" between the companies and the city. In what way is this done and with what consequences?

It will be observed that the provision does not simply confirm or ratify either the acts or deeds of transfer or the contracts; it does more. It continues them in force and makes them valid and effectual for the life of the act, the conceded equivalent of the life of the corporations. The provision is not, therefore, that the contracts and privileges obtained from the city shall "stand as made," but shall be continued in force during the life of the corporations—a distinctly different purpose, one which the words of the act sustain and at the same time exclude the other. It was not a provision for simple rat-

ification which would carry by necessary force the time limits of the contracts, but one which adopts another measure of time, the life of the corporations. And a provision was necessary to make the new measure of time applicable to the contracts. It was afforded, and again the necessity is demonstrated of adhering to the words of the act, unless we may regard it a mistake in the act for any of its words to have a purpose.

Plainly, therefore, the phrase "during the life hereof" cannot be limited to the acts or deeds of transfer of franchises. To do so is not only to distinguish between the instruments of transfer of franchises and the instruments of transfer of rights and privileges, but is to detach the phrase and its correlated words from its immediate objects, the "contracts, stipulations, licenses and undertakings" entered into by the common council and the companies, and to leave those objects without provision —without connection with anything, coherence or purpose. Against this all the rules of interpretation protest, and the rules of construction cannot be invoked to justify a greater liberty. The purpose of construction, it is true, is to arrive at conclusions beyond the absolute sense of the text. Lieber, Hermeneutics, 53. But the integrity of the text cannot be disregarded. I do not overlook the fact that the court sees an inconsistency between the parts of section two and attempts to reconcile them. But in what way? As it seems to me, by magnifying the obscure in one part of the section and making it prevail over the manifestly clear in another part. By making the words "terms and conditions" doubtful necessarily, and which, as I think, can only by an extreme indulgence be given the meaning put upon them, dominate everything else, even to the breaking of the section into unrelated and meaningless parts. To my mind a strange situation is presented. The legislature of the State had in its mind, we are told, a simple purpose—the purpose to create corporations and to give them power to acquire rights from the city; and how did they express the purpose—simply, directly and obviously? No; but in such way that the words

it employed confused or opposed the purpose. And the legislature was dealing with important rights, some to be confined to twenty-five years, others to be extended to ninety-nine years; and we are asked to believe that it bunched those rights indiscriminately and trusted to a searching construction to sort them afterwards and take them out of the meaning of words which included them all.

There is another consideration of potent weight. The construction of the court was not the contemporary construction of the act of 1865. It was not the construction proclaimed by the Governor, justifying his veto of the act. He pointed out that the necessary effect of extending the lives of the corporations was to extend their rights in the streets of the city, and that he had received petitions signed by a large number of the citizens of Chicago, protesting against the measure as one which had been passed without their assent, or that of the corporate authorities, and that it extended the franchise for ninety-nine years in advance of the term already vested in the corporation. And he also pointed out that the right given to the city to purchase the railway property at the end of twenty-five years, secured to it by the ordinance of August 16, 1858, was also extended to ninety-nine years. And upon a fair construction the Governor said, "the act seems hardly susceptible of any other meaning," "and he had heard," he further said, "none other claimed for it." The Governor also considered the clause which continued in force the acts or deeds of transfer, and, so far as his words indicate, he perceived no difference between the instruments of transfer.

Seldom has a statute enacted at a distant time received so clear and influential proclamation of its meaning and effect as is afforded of the act of 1865, by the Governor's message. It seems now, forty years removed from the enactment of the law, that the Governor, who was close to its enactment, and the citizens of Chicago who protested against it, were mistaken in its meaning. And the Governor was part of the lawmaking power. It was his duty, therefore, to study the statute and

to try to know its purpose, not only from its text but from external circumstances. His misunderstanding needs to be accounted for. The misunderstanding of the protesting citizens of Chicago needs to be accounted for. Explanation cannot be found by asserting ambiguities in the act. There is not a syllable of evidence to indicate that any were perceived or regarded of consequence. The Governor was confident in his views. Of one of the effects of the act, and one which could not result unless his construction was correct, he said he had heard no other claimed for it than that which he entertained and expressed. There was no doubt with him, therefore, no disguise of the measure by its advocates. We are, however, now asked to believe that the legislature alone either saw or was persuaded of the real merits of the measure, and passed it over a groundless veto and ignorant opposition, with consciousness that it would be construed to have the meaning now given it. I am unable to so believe and am constrained to dissent from the judgment.

WEST CHICAGO STREET RAILROAD COMPANY *v.* PEOPLE OF THE STATE OF ILLINOIS *ex rel.* CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 241. Argued January 10, 11, 1906.—Decided April 9, 1906.

Although the judgment of the state court rests partly on grounds of local or general law, and although the opinion may not expressly refer to the Constitution of the United States, if by its necessary operation the judgment rejects a claim, based on a constitutional right specially set up in the answer, that the relief prayed cannot, in any view of the case, be granted consistently with the contract or due process clauses of the Constitution, this court has jurisdiction to review under § 709, Rev. Stat.

In a navigable stream the public right is paramount, and the owner of the soil under the bed can only use it so far as consistent with the public right; and a municipality, through which a navigable stream flows, cannot grant a right to obstruct the navigation thereof nor bind itself to permit the continuance of an obstruction, and this rule is not affected

by the fact that the person claiming a right to continue such an obstruction is the owner in fee of the bed of the stream.

A municipal ordinance giving permission to a street railroad company to construct a tunnel under a navigable stream, the law of the State providing that railways shall not be constructed so as to interrupt the navigation of any water in the State, does not amount to a contract under the contract clause of the Constitution, so that the city could not subsequently require the company to lower the tunnel so as not to interfere with the increased demands of navigation; nor, in the absence of any provision to that effect, would it be construed as containing an implied covenant that the municipality would bear the expense of such alterations required by subsequent ordinances.

A municipality is under the duty of protecting the unobstructed navigation of navigable rivers under its jurisdiction; and it cannot be exempted therefrom by making agreements in regard thereto.

Courts may look through and behind mere forms, and interfere, whenever necessary, for the protection of private rights against an illegal, arbitrary exercise of governmental power.

The right of a railroad company to maintain a tunnel under a navigable river is subject to the paramount public right of navigation, and where it has been constructed under municipal ordinance and state law that it shall not interrupt navigation, the duty of not obstructing the navigation is a continuing one; and, if the increased demands of navigation at any time require a deeper channel than when the tunnel was originally constructed, it is within the power of the municipality to compel the railroad company at the latter's own expense to either remove the tunnel or lower it to conform with the necessities of commerce, and, as in this case, to the rule established by act of Congress, and such action of the municipality is not unconstitutional, and does not amount either to taking the property for public use without compensation, or depriving the company of its property without due process of law. *C., B. & Q. R. R. Co.* v. *Drainage Commission*, 200 U. S. 251, followed.

THE facts are stated in the opinion.

Mr. John P. Wilson, with whom *Mr. Charles S. Babcock* was on the brief, for plaintiff in error:

This court has jurisdiction. The judgment seeks to enforce an ordinance passed by the city council of Chicago. Whether or not such subsequent ordinance impairs the obligation of the contract between the company and the city depends upon the construction given to such contract. The Supreme Court of Illinois entered its judgment requiring the company to comply with the ordinance which, it is alleged, impairs the obligation

of the contract between the company and the city. The judgment is based upon a construction of the contract between the city and the company, which is denied by the company.

If this court should uphold the company's construction of the contract, then the subsequent ordinance, enforced by the judgment, impairs the obligation of such contract. This presents a Federal question involving an independent determination by this court of the true construction and legal effect of the contract between the city and the company under which the tunnel was constructed. *Vicksburg R. R. Co.* v. *Dennis*, 116 U. S. 667; *Bryan* v. *Board of Education*, 151 U. S. 639; *City Light Co.* v. *Tallahassee*, 186 U. S. 406; *Wilson* v. *Standefer*, 184 U. S. 399; *L. & N. R. R. Co.* v. *Palmes*, 109 U. S. 244; *Chicago R. R. Co.* v. *Nebraska*, 170 U. S. 57; *University* v. *The People*, 99 U. S. 321; *Houston &c. R. R.* v. *Texas*, 177 U. S. 66.

An ordinance passed by the city council is a law within the meaning of the impairment clause of the Federal Constitution. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 148.

The railroad company's tunnel when and as constructed was lawful and was private property owned in fee by the railroad company. The company was the owner in fee of the bed of the river at the point where the tunnel was constructed. *Chicago* v. *Laflin*, 49 Illinois, 172; *McCartney* v. *C. & E. R. R. Co.*, 112 Illinois, 611; *Chicago* v. *Van Ingen*, 152 Illinois, 624.

The tunnel was constructed wholly below the bed of the Chicago river and at a depth sufficient to allow the free navigation of said river by vessels of the largest size in use on the river at the time of the completion of the tunnel and below the depth of said river as established by any lawful authority having jurisdiction.

At the date of the contract made by the city under which the tunnel was constructed the city of Chicago under its charter had jurisdiction over the river and full power to authorize the construction of the tunnel. Rev. Stat. Ill. c. 24, art. 5. Until the United States assumed jurisdiction over the Chicago river by the act of Congress, September 13, 1900, the State of

Illinois had plenary authority over the Chicago river. *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Peters, 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Corrigan Transportation Co.* v. *Sanitary District*, 125 Fed. Rep. 611; *Escanaba* v. *Chicago*, 107 U. S. 678; *Miller* v. *Mayor of New York*, 109 U. S. 385; *Cardwell* v. *Bridge Co.*, 113 U. S. 205; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Prosser* v. *North Pac. R. R. Co.*, 152 U. S. 59; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1.

The tunnel was as lawful as though it had been directly constructed by the city itself under its charter powers. *McCartney* v. *Chicago & Evanston R. R. Co.*, 112 Illinois, 611. The carrying of passengers through the tunnel is commerce of the same grade as the carrying of passengers or freight on the river. *Transportation Co.* v. *Chicago*, 99 U. S. 635.

The ordinance requiring the company to lower the tunnel, constructed by it under agreement with the city, was void and inoperative as it impaired the obligation of that contract, in violation of § 10, Art. I, of the Constitution of the United States.

The tunnel being the lawful property of the railroad company could not be taken from the company for the purpose of improving the navigation of the Chicago river without compensation being made to the company. *Yates* v. *Milwaukee*, 10 Wall. 497; *Bridge Co.* v. *United States*, 105 U. S. 470; *United States* v. *Navigation Co.*, 148 U. S. 312; *Scranton* v. *Wheeler*, 179 U. S. 141; *United States* v. *Lynch*, 188 U. S. 445; *Chicago* v. *Laflin*, 49 Illinois, 172; *Chicago* v. *Van Ingen*, 152 Illinois, 624.

The enforcement of the judgment of the state court would constitute a taking of the railroad company's property. The mandate is either to remove the tunnel or to lower it, at the expense of the company. A removal of the tunnel at the expense of the company would take the tunnel away from the company and also take from it the cost of its removal. The lowering of the tunnel would take from the company the money expended in such lowering. In either case the private property of the company is taken from it for public use, namely,

in the interest of the improvement of the navigation of the Chicago river. *Bridge Co.* v. *United States*, 105 U. S. 470, 506.

The enforcement of the ordinance requiring the railroad company to lower its tunnel at its own cost would deprive the company of its property without due process of law. *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 235.

There was no reservation, express or implied, in the contract under which the tunnel was constructed that the company would lower or remove its tunnel in case it became an obstruction to navigation. When the ordinance was passed under which the tunnel was constructed, the State of Illinois had plenary power over the Chicago river. *Escanaba Co.* v. *Chicago*, 107 U. S. 683. This power included the right to construct a bridge over or across the river without a draw. *Gilman* v. *Philadelphia*, 3 Wall. 713. See also *Transportation Co.* v. *Chicago*, 99 U. S. 635, where the right of the city to construct a tunnel under the river at La Salle street was involved. The Supreme Court of Illinois had decided in *McCartney* v. *C. & E. R. R. Co.*, 112 Illinois, 611, that where a railroad company constructed a bridge across the river under an ordinance passed by the city council, that in legal effect the bridge was constructed by the city of Chicago under its charter powers.

Relying upon this decision of the Supreme Court of Illinois, and on the authority and power given to the city of Chicago to construct tunnels under the river, the railway company entered into the contract under which the tunnel was constructed. The tunnels and bridges constructed by the city directly have long been obstructions to navigation.

The city of Chicago had no power to require or authorize any changes to be made in the bed of the Chicago river without the approval of the Secretary of War, and therefore the company was neither under obligation nor had the right to do the work required by the ordinance and the mandate of the court. § 10, River and Harbor Act of 1899; River and Harbor Act of 1890; *Cummings* v. *Chicago*, 188 U. S. 410; *Chicago* v. *Law*, 144 Illinois, 569; *Lussem* v. *Sanitary District*, 192 Illinois, 404.

Mr. James Hamilton Lewis and *Mr. Granville W. Browning* for defendants in error:

The writ of error should be dismissed for want of jurisdiction. The Supreme Court of Illinois decides that the question of fact, under the Illinois law, is finally settled by the Appellate Court that this tunnel is an obstruction to navigation of the Chicago river at the point where situated. *West Chicago St. R. R. Co.* v. *The People,* 214 Illinois, 18. When the decision of the highest court of a State is brought before this court by writ of error, the conclusions of fact found by the state court will not be reviewed. *Telluride Power Co.* v. *Rio Grande &c. Ry.,* 175 U. S. 639; *Egan* v. *Hart,* 165 U. S. 189. This construction of the state statute will be adopted by this court. *Bacon* v. *Texas,* 163 U. S. 207; *Allen* v. *Arguimbau,* 198 U. S. 149.

Where the state court construes the charter of the company in such a manner that the subsequent legislation or ordinance can cut no figure, there is no Federal question and the writ of error will be dismissed. *Henderson Bridge Company* v. *Henderson,* 141 U. S. 679. The Illinois Supreme Court has construed plaintiff's charter rights—its contract—under the ordinance of 1888. As that construction was broad enough to dispose of the whole case, this writ of error must be dismissed. Before this court can be called upon to decide whether there has been an impairment of a contract it must first appear that there was a valid contract, subject to impairment. *New Orleans* v. *Water Works Co.,* 142 U. S. 79; *Bacon* v. *Texas,* 163 U. S. 207; *Baltimore & Potomac R. R.* v. *Hopkins,* 130 U. S. 210; *White* v. *Leovy,* 174 U. S. 91; *Central Land Co.* v. *Laidley,* 159 U. S. 103; *Yesler* v. *Commissioners,* 146 U. S. 646.

Plaintiff's title is not disputed, nor its franchise, nor its right to maintain a tunnel under the river which will not interfere with navigation. The question of the title of the riparian owner is one of local law. *Whitaker* v. *McBride,* 197 U. S. 510.

Plaintiff's tunnel is now an unlawful structure. Plaintiff claims that without the ordinance of 1888 it has the right to maintain its tunnel in the bed of the river because it owns both

sides of the river at that point. To constitute a lawful structure in this navigable river there must be a grant from the State, or, in this case, by the city, the agent of the State, and since the United States Government has taken jurisdiction over the river, the Government also must give its consent. *Cummings* v. *Chicago*, 188 U. S. 410; *Atlee* v. *Packet Co.*, 21 Wall. 389.

But whether the plaintiff's right rests on the ordinance of 1888 or rests on the ownership of both banks of the river, when the tunnel, by the growth of commerce, becomes an obstruction to navigation, it must be abated as a nuisance; it is an unlawful structure. Any structure in the bed of a navigable stream is erected and maintained subject to the paramount right of navigation. *C., B. & Q. Ry. Co.* v. *The People*, 212 Illinois, 103; *United States* v. *Bellingham Boom Co.*, 176 U. S. 211.

Plaintiff's title is subject to the permanent right of navigation, and the maintenance of the tunnel is subject to the same right. The title to the soil under the bed of the river is in the plaintiff but it is a qualified title, subject at all times to the public easement of navigation.

Any structure put under the river bed must be at plaintiff's risk, and must be removed or lowered whenever navigation requires. *The People* v. *West Chicago R. R. Co.*, 203 Illinois, 551; *C., B. & Q. Ry. Co.* v. *The People*, 212 Illinois, 103; *Chicago* v. *Laflin*, 49 Illinois, 172; *Stockton* v. *B. & N. Y. Ry.*, 32 Fed. Rep. 9; *Braxon* v. *Breslet*, 64 Illinois, 488; *Hawkins Point Light House Case*, 39 Fed. Rep. 87; *Illinois Central R. R.* v. *Illinois*, 146 U. S. 458; *Scranton* v. *Wheeler*, 179 U. S. 163; *S. C.*, 57 Fed. Rep. 809; *Parmenter* v. *Attorney General*, 10 Price, 412; *Sage* v. *Mayor*, 154 N. Y. 61; *Attorney General* v. *Johnson*, 2 Wils. Ch. 87; *Attorney General* v. *Richards*, 2 Const. 603.

The State could give the city the power to lessen or destroy the navigability of the river, or to enable plaintiff so to do, only by explicit language, if at all. There can be no pretense that it has attempted so to do. *Chicago* v. *Blair*, 149 Illinois, 310; *Coquard* v. *Oquawaka*, 192 Illinois, 355; *Kiel* v. *Chicago*, 176 Illinois, 137; *Smith* v. *McDowell*, 148 Illinois, 51.

The city has power to order this obstruction removed or lowered. Under the Cities and Villages Act of 1872 the city has the power to construct tunnels and regulate the use thereof, and to deepen, widen, alter or change the channel of water courses. It has jurisdiction on all waters within or bordering upon the same to the extent of three miles beyond the limits of the city. While the authority of Congress is paramount, if there were a difference of opinion, the power is cumulative and concurrent. *Lake Shore & Mich. S. Ry.* v. *Ohio*, 165 U. S. 365; *Cummings* v. *Chicago*, 188 U. S. 410.

Plaintiff is not entitled to compensation. The decisions of the state Supreme Court in this case are conclusive on this point and are binding on this court. In these decisions are found a construction of the rights of a riparian owner on a navigable stream entirely within the State, a construction of the Horse and Dummy Act, and a construction of plaintiff's contract. Neither of these is a Federal question, and wherever such matters are construed by the state courts, this court follows the construction of the state court. *West Chicago St. R. R. Co.* v. *The People*, 214 Illinois, 9; *The People* v. *West Chicago St. R. R. Co.*, 203 Illinois, 551; *C., B. & Q. Ry. Co.* v. *The People*, 212 Illinois, 103; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, 166 U. S. 269, 276; *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211; *Scranton* v. *Wheeler*, 179 U. S. 159; *S. C.*, 57 Fed. Rep. 803; *Bridge Co.* v. *United States*, 105 U. S. 470; *State* v. *The Wheeling Bridge Co.*, 13 How. 518; *United States* v. *Moline*, 82 Fed. Rep. 592; *Hawkins Point Light House Case*, 39 Fed. Rep. 77; *Stockton* v. *B. & N. Y. Ry.*, 32 Fed. Rep. 9; *State* v. *Sargent*, 45 Connecticut, 358; *New Orleans Gas Co.* v. *Drainage Commissioners of N. O.*, 197 U. S. 453.

Mr. Justice Harlan delivered the opinion of the court.

This case presents some questions of jurisdiction and constitutionality arising out of the relative rights and duties of the city of Chicago and the West Chicago Street Railroad Com-

pany in respect of a tunnel maintained by that company under the South Branch of Chicago river at or near Van Buren street in that city.

The judgment in the Circuit Court of Cook County, Illinois, was in favor of the railroad company, but it was reversed in the Appellate Court, First District, the former court being directed to give to the city the relief asked. Upon appeal to the Supreme Court of Illinois a judgment was rendered in favor of the city.

The contention of the company is that the judgment under review cannot be sustained consistently either with the contract clause of the Constitution of the United States or with the due process of law enjoined by the Fourteenth Amendment.

The case presented by the record is substantially as will be now stated.

On or about April 2, 1888, the City Council of Chicago adopted in due form the following ordinance:

"Whereas, the board of directors of the West Chicago Street Railroad Company, on the second day of April, 1888, by and at the request of the Mayor of the city of Chicago, adopted the following resolution: Resolved, That the West Chicago Street Railroad Company, in consideration of the passage and approval by the Mayor of the three ordinances passed by the City Council of Chicago on the thirtieth day of March, 1888; one granting to the West Division Railway Company the right to change its motive power from horse to cable or electric power; one granting to the Chicago Passenger Railway Company the right to make the same change; and one granting to the West Chicago Street Railroad Company the right to construct its tracks on Jefferson street between Madison and Washington streets, and to use horse, cable or electric power thereon, hereby agrees by and with the city of Chicago at its own expense to construct a tunnel under the Chicago river and acquire the necessary right of way therefor on a route to be located by said company between Madison and Twelfth streets, with the east terminus at Fifth avenue or west thereof, and

the western terminus at Halsted street or east thereof; provided, however, that this company shall have the right from said city to construct said tunnel under any intervening street or streets and said river within said limits, but such location and construction shall be such as not to interfere with the capacity, usefulness or grade of said streets; said tunnel to be used by this company for street railroad tracks, and the construction thereof shall be commenced within three years and be completed within four years after the said City Council shall grant permission to said railroad company to make said improvements, unless prevented by injunctions or strikes, and the time said construction is so interfered with shall be added to said four years, all work to be done in a manner satisfactory to the Commissioner of Public Works, and the tracks through the tunnel shall be connected with the street railroad tracks controlled by this company. Now, therefore, be it ordained by the City Council: That the agreement in said resolution contained be and the same is hereby accepted by and on behalf of the city of Chicago as a consideration from said company for the passage and approval by the Mayor of the ordinances in said resolution specified, and authority is hereby granted said company to make the improvements therein mentioned."

When this ordinance was passed there was in force what is known as the Horse and Dummy Act, passed in 1874, which provided: "That any company which has been or shall be incorporated under the general laws of this State, for the purpose of constructing, maintaining or operating any horse or dummy railroad or tramway, may enter upon and appropriate any property necessary for the construction, maintenance and operation of its road, and all necessary siding, side tracks and appurtenances, and may, subject to the provisions contained in this act, locate and construct its road upon or over any street, alley, road or highway, or across or over any waters in this State, *in such manner as not to* unnecessarily obstruct the public use of such street, alley, road or highway, or *interrupt the navigation of such waters.*"

In *West Chicago Street R. R. Co.* v. *The People*, 214 Illinois, 9, 19, the Supreme Court of Illinois, referring to this act, said: "This act was *an addition* to the charter of any company organized under the general incorporation act, and its provisions have existed under some form ever since, conferring powers upon street railroad companies organized as the defendant is. It gave the defendant the right to construct its railroad either over or across the Chicago river, which included the tunnel, *subject to the condition contained in it.* Defendant could only hold real estate for the transaction of its business of maintaining and operating a street railroad, and the statute fixed the conditions under which it might use its real estate for building the tunnel."

The tunnel was completed by the railroad company in March, 1894, and has ever since been used and is now being used as a passageway under the river for its cars. When constructed (as well as at the present time) the water in the South Branch of the Chicago river over the tunnel near Van Buren street varied in depth from seventeen to eighteen and three-tenths feet.

On the third day of March, 1899, Congress passed a River and Harbor Act, among the provisions of which was one directing the Secretary of War to cause surveys to be made and the cost of improving certain rivers and harbors to be estimated and reported to Congress, as follows: "Improving Chicago river in Illinois: survey and estimate of cost for a channel twenty-one feet deep from its mouth to the stock yards, on the South Branch, and to Belmont avenue, on the North Branch so far as may be permitted by existing docks and wharves, exclusive of cost of removing or constructing bridges or piers or lowering tunnels; and the aforesaid depth of twenty-one feet is hereby adopted as the project depth for the improvement in lieu of that fixed by the act of June third, eighteen hundred and ninety-six; *Provided*, that all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a practicable channel with said depth to

be obtained shall be done, or caused to be done, by the city of Chicago, without expense to the United States." 30 Stat. 1121, 1156.

After the passage of that act steps were taken to dredge the Chicago river so as to deepen its channel in accordance with the provisions of the act of Congress, and, it is alleged, such work "has been proceeding under the authority and supervision of the Government of the United States, for the purpose of providing a sufficiently deep channel for the uses and purposes of commerce and navigation as aforesaid."

For the purpose of obeying the act of Congress, and in order to obtain a free and unobstructed navigation of the Chicago river for the benefit of commerce, interstate and domestic, the City Council of Chicago, on the nineteenth day of March, 1900, duly passed the following ordinance: "*Whereas*, by act of Congress of March 3, 1899, it is provided that in the survey and estimate of cost for a channel twenty-one feet deep, in the improvement of the Chicago river from its mouth to the stock yards on the South Branch, and to Belmont avenue on the North Branch, the aforesaid depth of twenty-one feet is adopted as the project depth for such improvement; *whereas*, it is in said act further provided that all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a practicable channel with said depth to be obtained, shall be done or caused to be done by the city of Chicago, without expense to the United States; *whereas*, the tunnel under the South Branch of the Chicago river at Van Buren street was constructed by the West Chicago Street Railroad Company under a certain ordinance of the city of Chicago, passed April 2, 1888; *whereas*, a channel in the Chicago river, of the depth of at least twenty-one feet is now made necessary by the requirements of navigation and by the increase in the draft of vessels engaged in the shipping trade of the Lakes; *whereas*, the said tunnel is an obstruction to said proposed improvement to the Chicago river and to the navigation thereof, and as such obstruction must be lowered so that there may be above it in

said river a depth of at least twenty-one feet of water, or be removed altogether: *Now, therefore, be it ordained by the City Council of the city of Chicago:* That the West Chicago Street Railroad Company be and it is hereby ordered and directed within three months after the date of the passage of this ordinance, at the sole cost and expense of said West Chicago Street Railroad Company and without cost, damage, loss or expense of any kind, whatsoever to the city of Chicago, to proceed to lower the tunnel under the South Branch of the Chicago river at or near Van Buren street, being the same tunnel heretofore constructed by the said West Chicago Street Railroad Company under an agreement dated April 2, 1888, between the said West Chicago Street Railroad Company and the city of Chicago, and an ordinance passed by the City Council of the city of Chicago, April 2, 1888, authorizing the construction of said tunnel in accordance with the provisions of said agreement, so as to provide for a clear depth above said tunnel of at least twenty-one feet of water at all times. Said work shall be performed by the said West Chicago Street Railroad Company under the supervision and direction and subject to the approval of the Commissioner of Public Works of the city of Chicago, and shall be completed on or before March 1, 1901."

In execution of the provisions of that ordinance the city caused notice to be given to the railroad company, demanding compliance with its provisions. The company did not heed that notice.

The present action was thereupon instituted by the people of Illinois, on the relation of the city of Chicago, against the railroad company. The specific relief asked was the issuing of a writ of mandamus directing the railroad company, without cost, damage, loss or expense of any kind whatsoever to the city, to proceed to lower its tunnel under the South Branch of the Chicago river at or near Van Buren street, so as to provide for a clear depth above it of at least twenty-one feet of water at all times, for its entire width and length, *or* to wholly remove it "so that the same shall cease to be an obstruction to the free

navigation of said Chicago river or the South Branch thereof, and to perform said work under the supervision and direction of the Commissioner of Public Works of the city of Chicago."

The Circuit Court found the issues for the defendant, and denied the application for a mandamus. Upon error to the Appellate Court, First District, the judgment of the Circuit Court was reversed and the cause remanded with directions "to issue a writ of mandamus commanding the railroad company to remove its tunnel, said writ not to be executed until the Washington street and La Salle street tunnels are both removed or lowered to a sufficient depth to be no longer an obstruction to navigation."

Upon appeal to the Supreme Court of Illinois a final judgment was there entered awarding a peremptory writ of mandamus as prayed for in the petition. *West Chicago Street R. R. Co.* v. *People*, 214 Illinois, 9.

As explanatory of the reference to the tunnels on Washington and La Salle streets it may be here stated that those tunnels belonged to the city, and were located between the tunnel at Van Buren street, owned by the railroad company, and the mouth of the river at the Lake. Of course, until the city's tunnels are lowered or removed, the lowering or removal of the tunnel on Van Buren street would not be of material aid to navigation.

We come now to consider the questions arising on the record and discussed at the bar.

1. The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation—although the opinion of the state court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting

the State from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for, the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561.

2. Great stress is placed by the railroad company on the fact that it is the owner in fee of the bed of the river at the point where the tunnel was constructed. But that fact is not vital in the present discussion; for it was adjudged by the state court—in harmony with settled doctrines, as will presently appear—that "the title to land under a navigable river is not the same as the title to the shore land;" that "in a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as is consistent with the public right, which must be free and unobstructed;" that "the title to the upland is absolute and paramount, while the title to the lands over which the navigable water flows is subordinate to the public right of navigation;" and that "the city could not, if it would, grant the right to obstruct the navigation of the river, or bind itself to permit anything which has become an obstruction to be continued." 214 Illinois, 9, 20, 21.

3. We next consider the first of the strictly Federal questions raised by the company. Its contention is that the tunnel was constructed under a valid contract with the city, evidenced by the ordinance of 1888, and that the mere order to remove or lower the tunnel impaired the obligation of that contract, in violation of the Constitution.

Upon a careful scrutiny of the ordinance of 1888, we find no

clause or provision which so restricted the power of the city that it could not require the railroad company to lower or remove the tunnel when the public interests, as involved in the unobstructed navigation of Chicago river, demanded that to be done. The railroad company, in consideration of certain rights and privileges granted to it by the city, undertook to construct the tunnel; and it is true that when constructed the tunnel did not interfere with navigation; nor would it now obstruct navigation, if only boats and vessels of the size and capacity in use when the tunnel was constructed were engaged in commerce on the river. But such boats and vessels are insufficient to meet the present needs of commerce at Chicago. The business of that city has enormously increased since the passage of the ordinance of 1888, and, admittedly, the tunnel is now an obstruction to free navigation on the river by boats and vessels of large size. The railroad company may have believed, when the ordinance of 1888 was passed, that the tunnel would never interrupt or obstruct navigation. Nevertheless, the ordinance did not expressly or by necessary implication bind the city to forbear the exercise of any power it had to deepen the channel of the river and thereby improve navigation. As the city could not legally adopt an ordinance inconsistent with a statute of the State, we must read into the ordinance of 1888 that part of the act of 1874 which, as construed by the Supreme Court of Illinois, made it a condition of the right of a street railroad company to cross its cars through a tunnel under Chicago river that its road and tunnel should be so located and constructed as not unnecessarily to interrupt navigation. Apart from any question as to the power of the city to bargain away or surrender its authority to improve navigation and protect it against obstruction, the railroad company must be held to have accepted the ordinance and constructed the tunnel subject to the requirement that navigation should not be interrupted by it. As the present tunnel is an obstruction to the use of the river by many boats and vessels employed in commerce on the Lakes, and as, by the ordinance

in question, the city did not stipulate—even if it could lawfully have stipulated—that it would not exert whatever powers it had in order to protect the free navigation of Chicago river whenever it became necessary or proper to do so, the result must be that the execution of the order to lower or remove the tunnel would not impair the obligation of any contract protected by the Constitution of the United States. If, in the ordinance of 1888, the city had stipulated that it would meet the expense of any alteration of the tunnel made by its direction, a different question would have been presented. But the ordinance cannot be construed as containing such a stipulation, and consistently with the settled doctrines of this court no such stipulation can arise from mere implication. There is, in our judgment, no ground whatever for holding that the city, by the ordinance of 1888, came under the obligation of a *contract* to meet the cost of any changes in the tunnel that might be lawfully required in order that the river could be safely navigated by large vessels.

4. This brings us to the principal question in the case: Whether, consistently with the Constitution of the United States, the railroad company can be required to lower or remove the tunnel in question and (if it continues to use a tunnel in crossing Chicago river with its cars) to construct and maintain, at its own expense, such a tunnel as will conform to the provisions of the ordinance of March 19, 1900.

It is indisputable, on this record, that the depth of water over the present tunnel is not sufficient to accommodate many boats and vessels now commonly employed in commerce between Chicago and other cities and towns on the Lakes. It is to be taken also as indisputable that in order that such boats and vessels may navigate the South Branch of Chicago river with safety, the depth of water over the Van Buren street tunnel must be at least as great as that specified in the city ordinance of 1900. We assume also—as by the record we may properly do—that the ordinance is a reasonable, not an arbitrary exertion of the power conferred on the city "to construct and keep

in repair bridges, viaducts and tunnels and to regulate the use thereof," and "to deepen, widen, dock, cover, wall, alter and change the channel of watercourses." We must, in addition, upon this record, assume that the means adopted by the city have a direct, real and substantial connection with the public object intended to be accomplished, namely, to free the navigation of the South Branch of Chicago river from an obstruction which prevents the use of that river by vessels of the size demanded by the vast business transacted at Chicago.

As already observed, the contention of the company is, in effect, that even if the present tunnel be an obstruction to the navigation of the river by large vessels, the lowering or removal of the tunnel against the company's will, would be a *taking* of private property for public use without compensation, in violation of the constitutional guarantee of due process of law.

This result, it is supposed by the railroad company, necessarily follows from the fact that the present tunnel was constructed with the assent of the city, and when constructed was sufficient for purposes of navigation by vessels, of whatever size, then engaged in commerce on the Chicago river. But these facts are not all that must be considered in this discussion. They cannot be considered apart from other matters of a vital character, namely: That the city was under the duty of protecting the free navigation of the river and its branches—a duty from the discharge of which it could not be exempted by any agreement it might make with the railroad company; that the city granted the right to construct the present tunnel under the river subject to the condition, necessarily implied by the statute of 1874 in force when the ordinance of 1888 was adopted, that the tunnel should not interrupt navigation; that if the assent of the company to such a condition was important, it must be held to have given such assent by accepting the ordinance of 1888, into which, as already indicated, must be read the requirement in the statute of 1874 that navigation should not be unnecessarily interrupted; and that the provision in

that statute forbidding any interruption of the navigation of the river had reference to the needs of navigation not only at the time the tunnel was constructed, but its needs at any subsequent period as found and declared by the city, upon reasonable grounds; which declaration would, of course, be subject to the condition, vital in our system of government, that the courts may look through and behind mere forms, and interfere, whenever necessary, for the protection of private rights against an illegal, arbitrary exercise of governmental power.

In addition to these considerations we may suggest the important one that the rights of the company, as the owner of the fee of land on either side of the river or in its bed, were subject to the paramount right of navigation over the waters of the river. *Weber* v. *Harbor Com'rs*, 18 Wall. 57, 66; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, 458; *Shively* v. *Bowlby*, 152 U. S. 1, 30; *Gibson* v. *United States*, 166 U. S. 269, 276; *Scranton* v. *Wheeler*, 179 U. S. 163; *C., B. & Q. Ry. Co.* v. *People*, 212 Illinois, 103; *Brazen* v. *Bressler*, 64 Illinois, 488; *People* v. *Vanderbilt*, 28 N. Y. 396; *Sage* v. *Mayor*, 154 N. Y. 61; *State* v. *Parrott*, 71 N. Car. 311; *State* v. *Dibble*, 4 Jones (N. C.), 107; *Diedrich* v. *Northwestern &c. Ry. Co.*, 42 Wisconsin, 248; *Parmeter* v. *Attorney General*, 10 Price, 412; *Williams* v. *Wilcox*, 8 Ad. & El. 314; *Colchester* v. *Brooke*, 7 Q. B. 339. The principle is thus declared by a leading text-writer: "The privilege of navigation upon all waters which are capable of such use in their natural condition and are accessible without trespassing upon private lands, is a common and paramount right. . . . At common law the right of navigating a public stream is paramount to the right of passage across the stream by means of a bridge." Gould on Waters, §§ 86, 88.

If, then, the right of the railroad company to have and maintain a tunnel under the Chicago river is subject to the paramount public right of navigation; if its right to maintain a tunnel in the river is a qualified one, because subject to the specific condition in the act of 1874 that no tunnel should interrupt navigation; if the present tunnel is an obstruction to

navigation, as upon this record we must take it to be; and if the city, as representing the State and public, may rightfully insist that such obstruction shall not longer remain in the way of free navigation; it necessarily follows that the railway company is under a duty to comply with the demand made upon it to remove, at its own expense, the obstruction which itself has created and maintains. If the obstruction cannot be removed except by lowering the tunnel to the required depth and (if a tunnel is to be maintained) providing one that will not interrupt navigation, then the cost attendant upon such work must be met by the company. The city asks nothing more than that the railroad company shall do what is necessary to free navigation from an obstruction for which it is responsible, and (if it intends not to abandon its right to maintain a tunnel at or near Van Buren street) that it shall itself provide a new tunnel with the necessary depth of water above it. The case differs somewhat from *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, just decided. In that case we held it to be the duty of the railway company, at its own cost, to remove the bridge, culvert, timbers, and stones which it placed in Rob Roy creek, and which prevented the execution of the plan devised by the Drainage Commissioners. But the Commissioners demanded that more be done; for, their plan contemplated that earth outside of the railroad bridge and culvert be removed, in order that the channel be enlarged, widened and deepened. But in that improvement the railway company had no interest. It was not responsible for the inadequacy of the original channel of Rob Roy creek for the system of drainage adopted by the Commissioners. Its only duty, and the only burden imposed upon it, was to remove, at its own cost, the obstructions placed by it in the creek, and which stood in the way of the proposed system of drainage. In the case before us the public demands nothing to be done by the railroad company except to remove the obstruction which itself placed and maintains in the river under the condition that navigation should not at any time be thereby in-

terrupted. The removal of such obstruction is all that is needed to protect navigation. So that whatever cost attends the removal of the obstruction must be borne by the railroad company. The condition under which the company placed its tunnel in the river being met by the company, the public has no further demands upon it. This cannot be deemed a taking of private property for public use or a denial of the equal protection of laws within the meaning of the Constitution, but is only the result of the lawful exercise of a governmental power for the common good. This appears from the authorities cited in *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Com'rs, supra,* just decided.[1] The state court has well said that to maintain the navigable character of the stream in a lawful way is not, within the meaning of the law, the taking of private property or any property right of the owner of the soil under the river, such ownership being subject to the right of free and unobstructed navigation. *People* v. *West Chicago Street R. R. Co.*, 203 Illinois, 551, 557. What the city asks, and all that it asks, is that the railroad company be required, in the exercise of its rights and in the use of its property, to respect the public needs as declared by competent authority, upon reasonable grounds, to exist. This is not an arbitrary or unreasonable demand. It does not, in any legal sense, take or appropriate the company's property for the public benefit, but only insists that the company shall not use its property so as to interrupt navigation.

Further discussion of the general question will be found in

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[1] *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *Mugler* v. *Kansas*, 123 U. S. 623, 669; *N. Y. & N. E. Railroad Co.* v. *Bristol*, 151 U. S. 556, 561; *Chicago, Burlington and Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 252; *Gibson* v. *United States*, 166 U. S. 269, 271, 276; *Scranton* v. *Wheeler*, 179 U. S. 141, 164; *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453; *Mills* v. *United States*, 46 Fed. Rep. 738; *United States* v. *Lynch*, 188 U. S. 445; *Bedford* v. *United States*, 192 U. S. 217; *Ohio & Miss. R. R. Co.* v. *McClelland*, 25 Illinois, 140, 144; *Kankakee & Seneca R. R. Co.* v. *Horan*, 131 Illinois, 288; *Village of Carthage* v. *Frederick*, 122 N. Y. 268; Sedgwick's Const. & Stat. Law, 313, 320.

Chicago, Burlington & Quincy R. R. Co. v. *Drainage Com'rs, supra,* just decided. We need not repeat all said in the opinion in that case on this question.

Another matter requires notice. The railroad company contends that the city had no power to require or authorize any changes in the bed of the river without the approval of the Secretary of War. River and Harbor Act of 1899, § 10; 30 Stat. 1151. The same act contains directions for the improvement of Chicago river. Construing all the provisions together, we think it clear that when Congress declared in the River and Harbor Act of 1899, under the heading of "Improving Chicago river in Illinois," p. 1156, that "all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a navigable channel" with the prescribed "project" depth of twenty-one feet in Chicago river should be done by the city, without expense to the United States, it meant to give the assent of the United States to any work done by the city towards accomplishing the end which the Government had in view. The state court properly said that "the city has power, under its charter, to deepen the channel, and as a preliminary to doing so, to require this tunnel to be lowered or removed, and the act of Congress permits it to proceed, so far as the lowering of the tunnel is concerned."

As showing that the action taken by the city of Chicago is in accordance with the will of Congress, we may refer to the act of Congress of April 27, 1904, relating to certain tunnels under Chicago river, including the particular tunnel here in question. That act provides: "That the tunnels under the Chicago river in the State of Illinois at La Salle street, Washington street, and near Van Buren street, in the city of Chicago, in said State of Illinois, are, and each of them is hereby, declared to be, as now constructed, an unreasonable obstruction to the free navigation of said Chicago river, and each of said tunnels is hereby declared to be a public nuisance. And it shall be the duty of the Secretary of War to give notice to the persons or corporations owning or controlling said tunnels, or any of them, so to

alter the same as to render navigation over said tunnels free, easy, and unobstructed, and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are needed to be made in order that said tunnels, or any of them, shall not thereafter be an obstruction to navigation, and shall prescribe in each case a reasonable time in which to make said changes. If at the expiration of such time such changes have not been made, the Secretary of War shall forthwith notify the United States District Attorney for the Northern District of Illinois, in which said tunnels are situated, to the end that the criminal proceedings hereinafter prescribed may be taken. If the person or persons, corporation or corporations, owning or controlling any of the said tunnels shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, fail or refuse to remove the same or to make the changes specified in the notice of the Secretary of War, such person or persons, corporation or corporations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars; and each and every month such person or persons, corporation or corporations, shall remain in default in respect to the removal or alteration of such tunnel shall be deemed a new offense and subject the person or persons, corporation or corporations, so offending to the penalty herein prescribed: *Provided*, That in any case arising under the provisions of this act an appeal or writ of error may be taken from the District Court or from the Circuit Court direct to the Supreme Court either by the United States or by the defendants." 33 Stat. 314. For some reason, not explained in the record, no allusion was made to this act in the opinion of the Supreme Court of Illinois, nor is it alluded to in in the briefs of counsel. That act, it seems to the court, emphasizes and strengthens the views expressed in this opinion, and tends to support the conclusions reached.

For the reasons we have stated, and in conformity with the principles announced in *Chicago, Burlington & Quincy R. R.*

Co. v. *Drainage Com'rs,* the judgment of the Supreme Court must be affirmed.

It is so ordered.

MR. JUSTICE HOLMES concurs in the judgment, upon the authority of *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Commissioners,* 200 U. S. 561.

THE CHIEF JUSTICE, MR. JUSTICE BREWER, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, dissent.

CLEVELAND *v.* CLEVELAND ELECTRIC RAILWAY COMPANY.

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

No. 183. Argued Febuary 27, 28, 1906.—Decided April 9, 1906.

In construing municipal ordinances dealing with important matters such as extensions of street railway franchises it may reasonably be presumed that no provision escaped attention or was misunderstood; and, while a mistake might occur in one ordinance, it will not be supposed that the mistake occurred in four ordinances dealing with the same subject.

Ordinances granting an extension to a consolidated street railway corporation, possessing franchises expiring at different times, on conditions involving great expense to the corporation and resulting in substantial benefits to the public as to transfers for single fares and relating to the entire system as well as the extensions granted, and providing that the right granted terminate with the then existing grants of the main line at a specified date later than that of termination of some of the franchises, amount, on the acceptance by the company and compliance with the conditions, to a contract within the protection of the impairment clause of the Constitution extending the various franchises to that date; the period, in this case of four years, not being an unreasonable one in view of the substantial benefits accruing to the public. *Cleveland* v. *Cleveland City Railway Co.*, 194 U. S. 517, followed as to the power of the city council of Cleveland to pass ordinances diminishing the rate of fare on street railways in view of the contracts contained in ordinances heretofore passed in regard to street railways.

BILL in equity to enjoin the enforcement of an ordinance of the city of Cleveland, passed January 11, 1904, purporting to grant to the Forest City Railway Company the right to maintain and operate a street railroad upon streets alleged to be covered by grants to the appellee not yet expired and which, it is contended, constitute contracts, the obligation of which is impaired by the ordinance of January 11, 1904, in violation of the contract clause of the Constitution of the United States.

A preliminary injunction was granted, which, upon final hearing, was made perpetual. 135 Fed. Rep. 368. And this appeal was taken. The case was heard upon bill and answer, and an outline of the facts is as follows:

The Cleveland Electric Railway Company is a consolidated company, organized under the laws of Ohio in 1893. None of its constituent companies had at that time any rights in the streets in controversy. In 1903 the company acquired by purchase the lines of railway and the rights, privileges and franchises of the Cleveland City Railway Company. The latter company was constituted of the Woodland Avenue and West Side Street Railway Company and the Cleveland City Cable Railway Company, each of these companies being itself a consolidated company.

The Woodland Avenue Railway Company, before its consolidation with the West Side Street Railroad Company, was the successor by purchase in 1885 of the Kinsman Street Railroad Company, its rights, property and franchises, which, by the terms of the consolidation of the Woodland Avenue and West Side Companies in 1886, vested in the Woodland Avenue and West Side Railroad Company.

The rights, privileges and franchises of the Kinsman Street Railroad were derived from the city by an ordinance dated August 25, 1879, which granted to the company and to its successors and assigns the right to maintain and operate a double track street railroad in the city of Cleveland, "commencing on Superior street at the intersection of Water street, thence through Superior street and around the southwest corner of

Monumental square to Ontario street; thence through Ontario street to and through a portion of Broadway and Woodland avenue (formerly Kinsman street); thence through said Woodland avenue to Madison avenue."

It was provided that "the authority, privileges and franchises . . . granted and renewed to said company, its successors and assigns," should continue for a period of twenty-five years from the twentieth day of September, 1879. The expiration of the grant was, therefore, fixed at September 20, 1904. The ordinance was accepted by the Kinsman Company.

On May 14, 1883, the city passed an ordinance entitled "An ordinance to permit the Woodland Avenue Railway Company to extend its lines of railway on Woodland avenue from the Cleveland and Pittsburgh Crossing to Corwin street." The ordinance was accepted and the line built as an extension of the tracks built by the Kinsman Company.

Prior to the year 1885 the two companies which formed the Woodland avenue and West Side Street Railroad Company were independent lines, with independent franchises from the city, one operating on the west side of Cuyahoga river, the other upon the east side and running to the southeasterly portion of the city. There was no interchange of traffic between them, and, at the time of the consolidation, the West Side Company had the right by ordinance from the city to operate its road for twenty-five years from February, 1883, namely, to February, 1908.

Under the laws of Ohio the city council had the power to fix the terms and conditions upon which railways might be consolidated, and in pursuance of the statute the companies notified the council of their proposed consolidation, and thereupon the council passed an ordinance February 1, 1885, giving the consent of the city to the consolidation upon the following conditions:

"The said consolidated company is to carry passengers through, without change of cars, by running of the cars through from the workhouse on the line of the Woodland Avenue Rail-

way Company to the point on the West Side Railroad where Gordon avenue crosses Lorain street; and, when practicable in the judgment of the council, to do likewise on the branches of the consolidated lines; and that for a single fare from any point to any point on the lines and branches of the consolidated road no greater charge than five cents shall be collected; and that tickets at the rate of eleven for fifty cents or twenty-two for one dollar shall at all times be kept for sale on cars by conductors."

It was provided that the ordinance should take effect after its legal publication and the filing of the written acceptance by the companies of the terms thereof. The written acceptance was filed and the terms of the ordinance complied with.

The line fixed in the ordinance covers the lines of the Kinsman Street Railroad Company and the lines referred to in the ordinance of January 11, 1904, sought to be enjoined.

No date for the expiration of the grant was fixed, but it was provided that the consolidated company should be liable to all the liabilities, conditions and penalties to which the several companies were liable.

On April 8, 1887, an ordinance was passed authorizing the consolidated company to lay an additional track on Franklin avenue between Pearl street and the westerly line of Franklin circle, and to occupy and operate said extension as therein provided, but on the express condition that no increase of fare should be charged by said railroad company or any part *of its main line* or *said extension*, and so that but one fare, not to exceed five cents, should be charged between any points on *said company's main line or extensions*. The ordinance contained the following provision: "and the grant here granted shall terminate with the *present grant of the main line*, to wit, tenth day of February, 1908." And it is alleged that the "main line" referred to includes the line operated on Woodland avenue (formerly Kinsman street) and originally granted to the Kinsman Street Railroad Company by the ordinance of August, 1879.

On August 12, 1887, an ordinance was passed authorizing the consolidated company to lay and extend a track in Franklin avenue, from Kentucky street to Waverly avenue. In this ordinance there was a prohibition of increase of fare "between any points on said company's *main line or extension,*" and that the right granted should "terminate with the present grant of the *main line,* to wit, on the tenth day of February, 1908."

Prior to March, 1889, the lines of the railway of the Woodland Avenue and West Side Street Railway Company were operated by horse power, and there came a demand for more rapid means of transit afforded by electrical equipment, and on March 22, 1889, and, it is alleged, to secure such means of transit, the city granted to the consolidated company the right to use electricity in operating its entire line of street railroad, as the same then existed, with any and all extensions that might thereafter be made thereto. It was provided that the grant should be in force from the time of its legal publication and written acceptance by the company. The ordinance recited that "said company shall have the right to maintain and operate its present line and any and all extensions until the expiration of the present grant of said company, to wit, the tenth of February, 1908." The written acceptance was filed, and, it is alleged, through and by compliance with its terms the consolidated company, and the Cleveland Electric Railway Company, as its successor, acquired the absolute right by contract to continue to maintain and operate its line of road as it then existed and all extensions thereof up to the tenth day of February, 1908. This is denied. It is alleged that the appellee expended not less than the sum of $700,000 in equipping its road with electricity as a motive power.

On June 20, 1892, the city passed an ordinance authorizing the consolidated company to lay an additional track on Kinsman street, thereby making its line on said street a double-track railway. The point of beginning was designated to be "at the intersection of its *main tracks.*" There was a provision for termination on the tenth of February, 1908, as in the

other ordinances. And there was the same provision in an ordinance passed August 1, 1892, authorizing an extension of tracks on Lorain street. Again, in an ordinance of the twenty-second of August, authorizing the construction and maintenance of a suitable and necessary line of feed wires upon certain streets. An ordinance of October 17, 1892, empowering the company to lay an additional track on Woodland avenue between certain streets, contained the same provision. On July 17, 1893, an ordinance was passed authorizing the Cleveland City Railway Company, which had become the owner of the rights of the Woodland Avenue and West Side Street Railroad Company, to lay an additional track upon South Woodland avenue. This ordinance contained a provision as to the operation of the tracks in connection with the other lines, the kind and number of cars to be used and the manner of running and intervals of time to be run, and the sprinkling of tracks. The grant was to remain in force until the twenty-sixth of January, 1910. February 19, 1894, an ordinance was passed granting permission to the Cleveland Electric Railway and the Cleveland City Railway Company to build a cross-town road on Willson avenue. It was provided that the grant was to continue in force until the first day of July, 1914.

Of this ordinance the bill alleges:

"This grant shall be in force until the first day of July, 1914.

"Your orator shows that the grant under which the Cleveland Electric Railway Company was, at the time of the passage of the last-mentioned ordinance, operating, as to several of its lines, expires on the first of July, 1914, and that the obligations imposed upon the Cleveland City Railway Company by virtue of said ordinance, in this paragraph set forth, are continuing obligations, requiring of your orator the performance of all and singular the conditions of said ordinance, including the issuing of transfers from its other lines and accepting transfers from its said Willson avenue line, up to the first day of July, 1914, whereby your orator submits that the council thereby not only granted but required of said the Cleveland City Railway Com-

pany the operation of its entire system of railway up to the first day of July, 1914.

"Your orator further shows that Willson avenue and the lines of road therein constructed are intersected by both Kinsman street and Woodland avenue (formerly Kinsman street)."

Mr. Newton D. Baker and *Mr. D. C. Westenhaver* for appellants:

A course of procedure imposed by statute for the exercise of powers conferred by the State is of the substance of the powers themselves when those powers relate to the transactions of a municipal corporation in its public, as distinguished from its private or proprietary character. 1 Dillon Mun. Corp. § 307.

A municipal corporation possesses and can exercise the following powers and no others. First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation not simply convenient but indispensable. 1 Dillon Mun. Corp. § 89.

Its powers are strictly limited. *Bloom* v. *Xenia*, 32 Ohio St. 461, 465; *Ravenna* v. *Penn. Co.*, 45 Ohio St. 118.

The contract right claimed by the plaintiff is a franchise. Franchises are special privileges conferred by the government on individuals but which do not belong to the citizens of a country generally of common right. *Peoples' Railroad* v. *Memphis R. R.*, 10 Wall. 308; *Bank of Augusta* v. *Earle*, 13 Peters, 519; *State ex rel.* v. *The Cincinnati Gas Co.*, 18 Ohio St. 262; *Railway* v. *Railway*, 30 Ohio St. 604.

The continued existence of a government would be of no great value if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420; *Detroit* v. *Detroit City Railway*, 60

Fed. Rep. 161; *Citizens' Railway* v. *Detroit*, 171 U. S. 48; *Water Co.* v. *Freeport*, 180 U. S. 598.

The appellee took only what was within the powers of the municipal corporation to grant and what it has not granted in terms express and free from doubt, the complainant cannot claim. *Cleveland* v. *State Bank of Ohio*, 16 Ohio St. 236, 269; *McCloud* v. *Columbus*, 54 Ohio St. 493; *Thomas* v. *City of Richmond*, 12 Wall. 356; *Stone* v. *Bank of Commerce*, 174 U. S. 424; Booth on Street Railways, §§ 33, 43; *N. O. & Carrolton R. R. Co.* v. *New Orleans*, 34 La. Ann. 429.

It is manifest that if the correct date of the termination of the grant to which the extension was made was not the tenth day of February, 1908, but was the twentieth day of September, 1904, the misrecital of the true date after a *videlicet* would not control the interpretation, but the true date would prevail. The misrecital of the date in these ordinances cannot control the fact which is made the primary test of the date of expiration. That this is the uniform construction of instruments in which there is a conflict between the precedent matter and that which follows a *videlicet*, is well known. *Sullivan* v. *State*, 67 Mississippi, 346; *Gleason* v. *McVickar*, 7 Cowan (N. Y.), 42, 43; *Commonwealth* v. *Quinlan*, 153 Massachusetts, 483, 484; *Buck* v. *Lewis*, 9 Minnesota, 314; *Stukely* v. *Butler*, Hobb, 175; *Cotton* v. *Ward*, 19 Kentucky (3 Monroe), 310.

Mr. Andrew Squire and *Mr. John W. Warrington*, with whom *Mr. William B. Sanders* was on the brief, for appellee:

The bill presents a case which was clearly within the jurisdiction of the Circuit Court. *City Railway Co.* v. *Citizens' Railway Co.*, 166 U. S. 357; *Cleveland* v. *Cleveland City Railway Co.*, 194 U. S. 517, and shows a state of facts entitling appellee to relief in equity. *Iron Mountain R. R. Co.* v. *Memphis*, 96 Fed. Rep. 131; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 12; *Cleveland* v. *Cleveland City Railway Co.*, *supra*.

The city having, by the ordinance of March 22, 1889, provided that the company might equip its road with electricity

and operate its entire system therewith until February, 1908, is estopped from alleging that the right to the operation of any portion of said system expires before such date. *City Railway* v. *Citizens' Railroad Co.*, 166 U. S. 557.

The legal effect of the ordinance providing for the establishment of a cross-town line upon Willson avenue, to be operated in connection with the other systems of railway then in operation, was to make a uniform date for the expiration of the franchise grants of the two companies which jointly built the Willson avenue line as an extension to their existing lines, and were to operate it in accordance with the provisions of the ordinance; and this uniform date was the first day of July, 1914. *Cleveland* v. *Railway Co.*, 194 U. S. 517.

The ordinance of January 11, 1904, which is attacked in the bill, is a law of the State authorizing the taking of the property of the railway company without due process of law, and void as in contravention of the Constitution of the United States.

The tracks, poles, wires and appliances in use by the complainant company in the operation of its railroad in Woodland avenue constitute its private property, and such private property of the complainant is protected by the same guaranties of the Constitution against taking without due process of law as is the property of an individual. *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Davidson* v. *New Orleans*, 96 U. S. 97; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; Cooley's Constitutional Limitations, 694; *Turnpike Co.* v. *Parks et al.*, 50 Ohio St. 598; *Richer* v. *Hoyt*, 53 Michigan, 185.

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

The system of railways operated by the appellee comprises about two hundred and thirty-six miles of track. The lines in controversy are but seven miles of this aggregate, and rest for their initial grant on the ordinance of the twenty-fifth of August, 1879, to the Kinsman Street Railroad Company. This

grant expired on the twentieth of September, 1904, unless extended by subsequent ordinances. That it was so extended is the contention of the appellee, and that it has the right to operate its railways on the streets in controversy until February, 1908, under the contracts constituted by those ordinances and their acceptance. A special reliance is based on the ordinance authorizing a change to electricity as a motive power in compliance with which, it is alleged, that the appellee expended a sum not less than $700,000. The city takes issue with these contentions. It asserts that the original grant to the Kinsman Company was not extended as a matter of fact and could not be extended as a matter of law, the city not having the power to prolong the life of the original grant. The argument advanced is somewhat roundabout. Its ultimate reliance is upon certain sections of the Revised Statutes of Ohio, from which it is deduced that it was incompetent for the council to authorize an extension to expire at a different time from the main grant. To hold otherwise, it is said, would be to hold that the council would have power to grant extensions in perpetuity, while by section 2502 of the Revised Statutes of Ohio there can be no grant or a renewal of a grant for a greater period than twenty-five years.

Ordinarily it would be more orderly to consider the power of the city before considering its exercise or the intention to exercise it. For our purposes, however, it becomes convenient to consider first the intention of the city by the ordinances in question.

The purpose of the ordinances, we think, presents no insolvable doubts. Indeed we think it is clear that the city intended to secure, and did secure for its citizens, valuable transportation facilities and intended to extend that part of the system of railways consisting of the Kinsman street line and its extension until February, 1908. There can be no other reasonable meaning of what the city did or of the language it used. It recognized a main line not in one ordinance but many ordinances, and the purpose was to join the initial grant and its

extensions together, and continue it, and those combined, until 1908. There could have been no mistake in the language used or misunderstanding of it. We might suppose a mistake in one ordinance but we cannot suppose a mistake in four ordinances. The matters dealt with were important, and it is a reasonable presumption that no provision concerning them escaped attention or was misunderstood. The situation must be kept in mind. The Woodland Avenue Railway Company (successor to the right of the Kinsman Street Company) operated a road on the west side of the Cuyahoga river; the West Side Street Railroad Company operated on the east side. They were independent companies, and the interchange of traffic between them was obviously a public advantage. This was accomplished by the consolidation of the companies and the ordinance fixing the terms and conditions of the consolidation. By that ordinance through cars were provided for and a single fare was established "from any point to any point on the lines and branches of the consolidated road." This imposed duties on the companies and it also secured to them rights. The grants of the constituent companies expired at different times, respectively 1904 and 1908, and it is contended that by the mere union of the lines the duties and rights of the companies continued for the longer term. This, however, we are not required to determine.

In April, 1887, an ordinance was passed to authorize the consolidated company to lay a double track in Franklin avenue. In this ordinance the words upon which the controversy turns as to the extension of the grant to 1908 occur for the first time. The grant was on the express condition that no increase of fare should be charged by the company "on any part of its *main line* or said extension, so that but one fare, not to exceed five cents, shall be charged between points on said company's *main line* or extension . . . and the right herein shall terminate with the present grant of the *main line*, to wit, on the tenth day of February, 1908." This language is substantially repeated in the three other ordinances. We think there can be

no doubt of its purpose, and if it were any part of our function to pass upon the wisdom of actions we might say it was a wise purpose, certainly had much reason to commend it. Why break up, or risk the breaking up, of a union of lines and the interchange of their traffic in a continuous carriage of passengers at one rate of fare? The extension was not for an unreasonable time. One of the grants did not expire until 1908, and it was reasonable to continue the other till that time. What policy or purpose could be urged against it? The suggestion of counsel for appellants does not commend itself. The suggestion is that possibly it was the purpose of the city to preserve different dates for the expiration of the grants, so that, the company coming to the city with its line in fragments, the city could consider whether concessions in the public interest might not be required as a condition of the renewal of rights. To adopt the suggestion we must suppose a situation more difficult than that presented. Forethought of the public interests must be attributed to the city council when it passed the consolidation and other ordinances. There was an immediate public benefit to be considered, and the time of extension was not so long as to cause a dread of unforeseen conditions or to make necessary a provision for them. Besides, inducement to the company had to be offered and secured. However, a discussion of policies is unnecessary. We find the ordinances plainly written, and we turn to the construction of the power of the city to grant the extension.

The question of the intention of the ordinances being settled, the question of the power of the city council is settled, in so far as this case can be distinguished from *Cleveland* v. *Cleveland City Railway Company*, 194 U. S. 517. In the latter case we had occasion to consider the power of the city to pass the ordinances relied on by the appellee in the case at bar, and their effect as contracts between the city and the companies. The suit was brought to enjoin the enforcement of an ordinance passed October 17, 1898, reducing the fare on the Kinsman Street Railroad to four cents, under a right reserved to "in-

crease or diminish the rate of fare" on said road as the city might "deem justifiable and expedient." The Cleveland City Railway Company, successor of the Kinsman Street Company, contended that the power had been given up in subsequent ordinances, and the decision sustained the contention. The sections of the Revised Statutes of Ohio were quoted and by them it was said "there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension no increase in rate of fare should be allowed." This extract leaves nothing to be said as to the power of the city and the rest of the opinion leaves little to be said as to the question of the ordinances constituting contracts with the company. All the considerations which could be urged against them as such were discussed and passed on, and the ordinances involved were those relied on by the appellee in the present case, to wit, the ordinance making the grant to the Kinsman Street Company of August, 1879, the ordinance consolidating the West Side Railroad Company and the Woodland Avenue Railroad Company, and the ordinance of April 8, 1887, and August 12, 1887. There was a reference to the provision of the ordinance of April 8, and its repetition in the ordinance of August 12, making the time of the termination of the grants that "of the *main line,* to wit, on the tenth day of February, 1908." The reference was not casual. The provision was regarded as an element in the purpose of the extension of the roads and as a means of securing the public advantages of the union of the lines and one rate of fare over all of them.

Another contention was noticed which was pressed there and it is again pressed here, based on section 2502 of the Revised Statutes of Ohio, that a municipal corporation could not, during the term of the grant or the renewal thereof, release the grantee from any obligation or liability imposed by the grant.

This provision was urged as preventing a surrender by the city of the power reserved in the grant to the Kinsman Street Railway Company, because the reservation was an obligation and liability imposed upon the railroad corporation. Section 2501 was urged as precluding any attempt to treat the consent of the city to extensions, consolidations, or change of motive power as of renewals of the rights renewed by the ordinance of 1879, because it was contended that the positive provisions of that section permitted such renewals only at the expiration of original grants. Both contentions were rejected. Of section 2502 it was said that the laws of Ohio permitted a modification of a contract between a municipality and the owner of a street railroad, and section 2501 had been held to authorize renewals to be made before the expiration of the original grant. To support the latter conclusion we cited *State* v. *East Cleveland Railroad Co.*, 6 Ohio Circuit Court Rep. 318, affirmed by the Supreme Court of Ohio. Appellants concede the authority of that case, but say the ordinance it passed upon left no doubt of the intention of the city, whereas in the case at bar, considering the provisions of the statutes and the ordinances, all intendments must be held to be against an intention to renew the original grant. In other words, the contention is that while "no set form of words is necessary," it is yet urged that "such result can only be effected by apt words evincing a plain and unmistakable purpose to make a renewal." It is not a question of power, therefore, to pass the ordinances, but of the intention of the city in passing them, and the latter we have sufficiently considered. It is only necessary to add that we do not find uncertainty in them and cannot, therefore, yield to the conclusion deduced from its supposed existence. The situation was plain and the city council met it with a definite and reasonable plan. It must not be overlooked that if the city gave rights it secured benefits and that the rights could not be exercised without large expenditures of money or be of any value unless assured of stability. Seven hundred thousand dollars, the appellee urges, it expended on the change to elec-

trical power, and the allegation is hardly made doubtful by the answer. We cannot believe that the expenditure of that sum was unworthy of consideration by the city, or that the city intended to exact it as an obligation that could be imposed on the company, or regarded it as anything but a benefit to the city, to be recompensed and secured by the ordinance which was passed.

It is urged by the appellee that the roads operated by it constituted a unified system, and by virtue of the ordinance of July 17, 1893, fixing the time of the expiration of the grant thereby made the twenty-sixth of January, 1910, and the ordinance of February, 1894, in which the date of the expiration of the grant there provided for was the first day of July, 1914, extended the time of all the grants composing the system until 1914. We do not think this question properly arises on the record, and we, therefore, do not pass upon it.

Decree affirmed.

POWERS, AUDITOR GENERAL OF THE STATE OF MICHIGAN, *v.* DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

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

No. 394. Argued February 26, 1906.—Decided April 16, 1906.

Where a railroad company is reorganized under a special act of the legislature but no new corporation is chartered a statutory exemption from taxation is not destroyed.

A State may, through its legislature, make a valid contract as to taxation with a corporation which the latter can enforce; and this court is not, under the rule generally applicable as to the binding effect of decisions of the Supreme Court of the State construing its statutes, concluded by

the decisions of that court as to whether such a contract exists, the extent of its terms and whether any subsequent law has impaired its obligation. But where the Supreme Court of the State sustains the validity of the statute from which a contract is claimed, this court follows that decision and determines what the contract is.

Provisions in a state statute for a special rate of taxation in respect to a particular corporation, made with a view of inducing large expenditures and the completion of an unfinished road of great public importance, and which are formally accepted and complied with, amount to a contract within the protection of the impairment clause of the Federal Constitution, and no other tax can be imposed on the corporation.

An annual tax of one per cent imposed by a special statute on the capital stock of a particular corporation to be paid in lieu of all other taxes except for penalties imposed thereupon and prescribed to be estimated each year on the last annual report of the corporation, *held*, under the circumstances of this case, to be a tax upon the property of the corporation, and not a tax upon the shares of stock held by the stockholders.

THIS case, which is a suit brought by the appellee in the Circuit Court of the United States for the Western District of Michigan, while involving the validity of the railroad tax law of the State of Michigan, acts 1901, p. 236, No. 173, recently considered by this court (*ante*, p. 245), involves the further question of the existence and scope of an alleged contract in respect to taxation. The Detroit and Pontiac Rail Road Company was chartered by the legislature of the Territory of Michigan, March 7, 1834, the Oakland and Ottawa Rail Road Company by the legislature of the State of Michigan, April 3, 1848, Laws 1848, p. 351. By an act of February 13, 1855, Laws of 1855, p. 305, the Detroit and Pontiac Rail Road was authorized to change its name to the Detroit and Milwaukee Railway Company, to purchase all the rights, property and franchises of the Oakland and Ottawa Rail Road Company for the building and operating a continuous line of road from Detroit to Lake Michigan, and the purchase and sale thus provided for was duly effected. Section 9 of this act provided that—

"* * * the said company shall, on or before the first day of July, pay the state treasurer an annual tax of one per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company

by its act of incorporation, or any other law of this State. The said tax shall be estimated upon the last annual report of said corporation."

Since 1850 the state constitution has contained these provisions:

"Corporations may be formed under general laws but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed. But the legislature may, by a vote of two-thirds of the members elected to each house, create a single bank with branches." Section 1, art. XV.

"The legislature shall pass no law altering or amending any act of incorporation heretofore granted, without the assent of two-thirds of the members elected to each house; nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations." Section 8, art. XV.

In 1860 certain mortgages on the road were foreclosed and the company reorganized, and again in 1878 the road with its appurtenances and franchises was sold upon mortgage foreclosure and again reorganized as the Detroit, Grand Haven and Milwaukee Railway Company. These foreclosures and reorganizations took place under the authority of act No. 96, p. 252, Laws of 1859.

On the hearing in the Circuit Court it was held that section 9, above quoted, created a contract between the State and the company which prevented the enforcement against it of the railroad tax law, and a decree was entered accordingly, 138 Fed. Rep. 264, from which decree the state auditor appealed directly to this court.

Mr. Timothy E. Tarnsey, with whom *Mr. John E. Bird*, Attorney General of the State of Michigan, was on the brief, for appellant:

There was also a separate brief by *Mr. Roger Irving Wykes*, on which were *Mr. John E. Bird*, Attorney General of the State of Michigan, *Mr. Charles A. Blair* and *Mr. Loyal E. Knappen*.

The act of 1834, the original charter, is silent upon the subject of taxation; hence the power to tax remained unfettered. *Providence Bank* v. *Billings*, 4 Pet. 514.

It is denied that the railroad company obtained any new contract rights by the legislation of 1855. That act merely changed the name of the Detroit & Pontiac Rail Road Company to the Detroit & Milwaukee Railway Company, and authorized such company to purchase the property, rights and franchise of the Oakland & Ottawa Rail Road Company, and then declared in section 4, "in case of said purchase or consolidation, the said Detroit & Milwaukee Railway Company shall hold the whole of said road and property, subject in all respects to the original charter of the Detroit & Pontiac Rail Road Company, as amended from time to time," etc.

To ascertain the extent of the powers, privileges and franchises which may be exercised by the Detroit & Milwaukee Railway Company, the original charter or act of 1834 must be searched, and amongst the powers, privileges and franchises there conferred is not found the immunity from taxation. If the legislature of 1855 intended that the exemption or immunity from taxation should become a part of the charter of said company and a contract between the State and it, it would not have confined the powers, privileges and franchises to the original charter, but would have conferred authority to exercise the powers, privileges and franchises therein and herein conferred. No language is contained in the ninth section by which the State binds itself to continue the rate of taxation therein imposed, during the continuance of the charter by the railway company or for any definite time.

The legislature of Michigan did not possess the power to enter into a contract to exempt from taxation in 1855 under the constitution of 1850. *Walcott* v. *People*, 17 Michigan, 81; *Gulf & Ship Island Ry. Co.* v. *Hewes*, 183 U. S. 71.

The constitution of 1850 provided for formation of corporations under general laws and for the amendment and repeal of all laws passed pursuant to it. The provisions of the

act of 1855 must be read in connection with the constitution. *Planters' Fire & Marine Ins. Co.* v. *Tennessee,* 161 U. S. 193.

The tax provision in the act of 1855 was a mere gratuity and subject to repeal. *Tucker* v. *Ferguson,* 22 Wall. 527; *West Wisconsin Ry. Company* v. *Supervisors,* 93 U. S. 595; *Turnpike Co.* v. *Illinois,* 96 U. S. 63; *Philadelphia R. R. Co.'s Appeal,* 102 Pa. St. 123; *Attorney General* v. *Joy,* 55 Michigan, 94.

This court will decide for itself independently of the state courts whether there is a contract or whether its obligation is impaired. If the decision of that question requires a construction of state constitutions and laws, this court is not necessarily governed by previous decisions of a state court upon the same or similar points except where they have been so firmly established as to constitute a rule of property. *Jefferson Branch Bank* v. *Skelly,* 1 Black, 436; *Bridge Proprietors* v. *Hoboken Co.,* 1 Wall. 116; *L. N. R. R. Co.* v. *Palmes,* 109 U. S. 244; *Vicksburg S. & P. R. Co.* v. *Dennis,* 116 U. S. 665; *Mobile & Ohio Ry. Co.* v. *Tennessee,* 153 U. S. 486; *Shelby County* v. *Union & Planters' Bank,* 161 U. S. 149.

If the immunity from taxation contained in the act of 1855 is held to be a contract with the railway company named therein such immunity did not pass to the complainant. *Morgan* v. *Louisiana,* 93 U. S. 217.

The exemption from taxation is a personal right and not a franchise essential to the operation of a railroad, hence without express statutory direction it does not pass to the purchaser of the road at foreclosure. *Railroad Co.* v. *Gaines,* 97 U. S. 711; *Railway Co.* v. *Commissioners,* 103 U. S. 4; *Railroad Co.* v. *Hamblen County,* 102 U. S. 274; *Wilson* v. *Gaines,* 103 U. S. 421; *Memphis R. R. Co.* v. *Commissioners,* 112 U. S. 617; *Chesapeake &c.* v. *Miller,* 114 U. S. 184; *Pickard* v. *East Tennessee &c. R. R. Co.* 130 U. S. 641; *Mercantile Bank* v. *Tennessee,* 161 U. S. 164.

The franchise to be a corporation was neither mortgaged nor sold, nor could it have been. *Memphis &c. R. R. Co.* v. *Berry,*

112 U. S. 609; *Julian* v. *Central Trust Co.*, 193 U. S. 93; *People* v. *Cook*, 148 U. S. 397.

Attorney General v. *Joy*, 55 Michigan, 94, is not in conflict with this view. That involved whether the Detroit, G. H. & Milwaukee existed as a corporation, not whether it was the same corporation as the Detroit & Pontiac or the Detroit & Milwaukee.

The foreclosure proceedings of 1860 did not extinguish the corporate existence of the Detroit & Milwaukee Railway Company, nor did it continue that same existence in the new purchasers, but it continued as a separate and distinct entity for such purposes as the stockholders thereof might lawfully use it for, and it was in legal effect nothing more nor less than a surrender or abandonment of the old charter by the corporators to the State and a grant *de novo* of a similar charter to the purchasers, as was held in *Memphis &c. R. R. Co.* v. *Berry*, 112 U. S. 609.

Foreclosure sale under mortgage of corporate property conveys merely a right to organize under existing laws, and such organization is a distinct entity, not acquiring original corporation's immunity from taxation. Section 1, art. 15 of the Michigan constitution declares that corporations may form under general laws but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed. When the present complainant and its immediate predecessor acquired rights in this railroad, this constitutional provision was in force. *Memphis &c. R. R. Co.* v. *Berry*, 112 U. S. 609; *St. Louis &c. Ry. Co.* v. *Berry*, 113 U. S. 476; *Dow* v. *Beidelman*, 125 U. S. 689; *People* v. *Cook*, 148 U. S. 397. See also *Northern Central R. R. Co.* v. *Maryland*, 187 U. S. 258.

Section 9 of the act of 1855 relates only to taxation upon capital stock paid in, and does not assume to exempt or limit taxation upon other property of the company.

There must be no doubt or ambiguity in the language used upon which the claim to exemption is found. *Phœnix F. & M.*

Ins. Co. v. *Tennessee,* 161 U. S. 174; *Chicago &c.* v. *Guffey,* 120 U. S. 596; *Farrington* v. *Tennessee,* 95 U. S. 687; *Tennessee* v. *Whitworth,* 117 U. S. 129.

The capital stock and the shares of stock in the hands of the shareholders may both be taxed and it is not double taxation. *Van Allen* v. *Assessors,* 3 Wall. 573; *People* v. *Tax Commissioners,* 4 Wall. 244.

The term capital stock is defined in *Burrall* v. *Bushwick Railroad Company,* 75 N. Y. 211, as that money or property which is put in a single corporate fund by those who by subscription therefor become members of a corporate body. See also *Berry* v. *Merchants' Exchange Company,* 1 Sandf. 307; *State* v. *Morristown Fire Association,* 3 Zabr. 195; *Bailey* v. *Clark,* 21 Wall. 286; *Tradesmen's Pub. Co.* v. *Knoxville Car Wheel Co.,* 95 Tennessee, 634.

But the capital stock is not the same thing as the property of the corporation. *Commercial F. Insurance Co.* v. *Board of Revenue,* 99 Alabama, 4; *Henderson Bridge Co.* v. *Commonwealth,* 99 Kentucky, 623; Beach on Priv. Corp. 426; *Central R. &c. Co.* v. *Wright,* 164 U. S. 327; *Memphis &c. R. Co.* v. *Gaines,* 97 U. S. 697; *State* v. *Morristown F. Assoc.,* 23 N. J. L. 195; *Berry* v. *Merchants' Ex. Co.,* 1 Sandf. Ch. 307; *Quincy R. Bridge Co.* v. *Adams County,* 88 Illinois, 621.

The property of a corporation fluctuates, and may be greater or less than the original capital invested, according as the business has resulted in a profit or a loss. But the capital stock remains fixed and unaffected by the accidents of business. *Farrington* v. *Tennessee*; *Commercial Fire Insurance Co.* v. *Board of Revenue*; *State* v. *Morristown F. Association, supra.*

The sum total of all the assets of a corporation is sometimes said to constitute a capital, but the term "capital" is here used in its economic sense as "wealth in use," and not as synonymous with capital stock, in which sense it is also sometimes used. *Bank of Commerce* v. *Tennessee,* 104 U. S. 495; *State* v. *Norwich &c. R. Co.,* 30 Connecticut, 290; *Ohio &c. R. Co.* v. *Weber,* 96 Illinois, 443; *Pacific Hotel Co.* v. *Lieb,* 83 Illinois,

602; *Traders &c. Insurance Co.* v. *Brown,* 142 Massachusetts, 403; *People* v. *Wemple,* 78 Hun, 67; *People* v. *Knight,* 75 App. Div. N. Y. 164; *Howland* v. *Edmonds,* 24 N. Y. 315; *People* v. *Tax &c. Commissioners,* 23 N. Y. 219; *State* v. *Cheraw &c. R. Co.,* 16 S. Car. 528; *Tradesmen's Pub. Co.* v. *Knoxville Car Wheel Co.,* 95 Tennessee, 634; *State Bank* v. *Milwaukee,* 18 Wisconsin, 284.

Undivided profits or surplus form no part of the capital stock, though they do form part of the general capital or assets of the corporation. *Farrington* v. *Tennessee,* 95 U. S. 686; *Hightower* v. *Thornton,* 8 Georgia, 486 (52 Am. Dec. 412); *People* v. *Wemple,* 78 Hun, 63; *Berry* v. *Mer. Exch. Co.,* 1 Sandf. Ch. 307; *Williams* v. *Western U. Tel. Co.,* 93 N. Y. 187; *Sun Mut. Ins. Co.* v. *New York,* 8 N. Y. 241; *State* v. *Bank of Commerce,* 95 Tennessee, 221; *State Bank* v. *Milwaukee,* 18 Wisconsin, 284.

Money borrowed by the corporation forms no part of its capital stock. *State* v. *Cheraw R. Co.,* 16 S. Car. 528. The franchise of the corporation constitutes no part or element of its capital stock. *People* v. *Coleman,* 34 Am. & Eng. Corp. Cas. 223.

A corporation is not limited in its ownership of property to the amount fixed as its capital stock. *State* v. *Morristown F. Assoc.,* 23 N. J. L. 195; *Berry* v. *Merchants' Exch. Co.,* 1 Sandf. Ch. 307.

Upon the other hand the amount of capital stock is limited to the amount actually subscribed for and issued, and is not necessarily the amount named in the articles of association, which latter is merely the authorized capital stock. *Fisk* v. *Chicago R. Co.,* 36 How. Pr. (N. Y.) 22; *Pratt* v. *Munson,* 17 Hun, 475; *Green Point Sugar Company* v. *Whitin,* 69 N. Y. 338; *Commonwealth* v. *Lehigh Ave. R. Co.,* 129 Pa. St. 414; *Philadelphia* v. *Ridge Ave. Pass. R. Co.,* 102 Pa. St. 190; *Philadelphia* v. *Philadelphia &c. R. Co.,* 52 Pa. St. 177.

The accumulated surplus of a corporation is defined to be "the fund the corporation has in excess of its capital stock, after

payment of its debts." *State* v. *Parker*, 35 N. J. L. 578; *State* v. *Utter*, 34 N. J. L. 480; *State* v. *Yard*, 42 N. J. L. 359.

In view of the clear distinction between the stock in the hands of the shareholders, the capital stock, the property of the corporation, the surplus over and above the capital stock and the franchise, each may be regarded as separate and distinct classes of property, and the exemption, if one exists, be no further than the language clearly imports, viz., upon the amount of the capital stock paid in.

But it is not the capital stock the State seeks to tax; it is the property of the railroad company; appraised at $6,195,000, while the amount of capital stock paid in, as shown by the bill of complaint is the sum of $2,517,140, showing property of the value of $3,677,860 in excess of the amount of capital stock paid in.

Whether this excess is the result of accumulated earnings, or property produced by the sale of bonds, does not appear, but it is quite clear that it is a surplus and is the property of the corporation and subject to taxation, and it does not appear that any part of said capital stock paid in has been converted into the property taxed. If it did so appear, then the exemption could only extend to the amount of the capital stock paid in.

Mr. H. Geer and *Mr. L. C. Stanley* for appellee:

Section 9, act 140, Laws of 1855, is a part of the complainant's charter, and its repeal by act 5, Laws of 1900, was in violation of the contract clause of the Constitution of the United States, in that it impaired the obligation of the contract between complainant and the State of Michigan, and therefore complainant is not subject to taxation under act 173, Laws of 1901. *Bank* v. *Knoop*, 16 How. 369; *McHenry* v. *Alford*, 168 U. S. 651; *Stearns* v. *Minnesota*, 179 U. S. 223; *Railroad Co.* v. *St. Louis County*, 179 U. S. 302; *Bank* v. *Parker*, 192 U. S. 73.

The charter is a contract protected by the Constitution both

of the United States and of the State. *Greenwood* v. *Freight Co.*, 105 U. S. 13.

A territorial legislature has all the power of a state legislature, except as limited by the Constitution and by the act of Congress. *Walker* v. *Southern Pac. Ry.*, 165 U. S. 593.

A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise is pointed out in *East Saginaw Co.* v. *East Saginaw*, 13 Wall. 373; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379.

The test of a covenant, according to the court in the *Wisconsin & Michigan* case, is that the consideration should purport to be the motive for the promise, and the promise must purport to be the motive for the consideration. This test is met and satisfied in this case. The State proposed the terms on which it was to get a completed railroad highway, and these terms were accepted, and by these terms some millions of money were expended in providing that highway. See *New Jersey* v. *Yard*, 95 U. S. 114.

In the present case, the legislature was making a contract and not a law, because, first, the statute was passed with reference to this case alone, and not generally as to all; second, acceptance was provided for and doubtless was made.

The tax limit is part of the charter, and is not such a contract under the state constitution as to make it subject to amendment. That it is a contract appears from its form and the circumstances under which it was made; that is to say, the need and desire on the part of the people in 1855 to have a railroad across the State.

No new corporation resulted from the merger.

The act itself speaks of the transaction as merger, consolidation or purchase, but it is essentially a merger. No new corporation is created; but the old Detroit & Pontiac Company is given a new name. The period of its existence is not prolonged. The name is not a controlling circumstance. A new corporation might have been created with the old name or a

new name given to the old corporation, as was done here. But it is significant that the act declares that the Detroit & Pontiac Company shall be known hereafter by the name of the Detroit & Milwaukee Railway Company. No new company purchases or absorbs the property of both companies, but one company purchases all the property of the other. The charter of the one continues; its functions continue; new stockholders are admitted. In short, "the Oakland & Ottawa Rail Road Company shall thereupon become merged in the Detroit & Milwaukee Railway Company." The case is covered by *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301. No new stock is created. There is no new property to be represented by stock. See also *Tennessee* v. *Whitworth*, 117 U. S. 137; *Tomlinson* v. *Branch*, 15 Wall. 460; *Central R. R.* v. *Georgia*, 92 U. S. 665; *Wilmington &c. R. R.* v. *Alsbrook*, 146 U. S. 279.

The act of 1855 is not repugnant to the constitution. *Attorney General* v. *Joy*, 55 Michigan, 94. And the Federal courts choose to be bound by such decision. *Pennsylvania College*, 13 Wall. 190; *Cromwell* v. *County of Sac*, 94 U. S. 359, 365.

The statute of 1901 increasing the rate of tax impairs the obligation of the contract. *Pingree* v. *Michigan Central*, 118 Michigan, 314; *New Jersey* v. *Yard, supra; Pearsall* v. *Great Northern R. R.*, 161 U. S. 663.

This appellee is the identical Detroit & Pontiac Rail Road Company, and entitled to enjoy charter rights and immunities both of that company and of the Detroit & Milwaukee Railway Company under the amendment of 1855. No new corporations resulted from foreclosure.

A grant of corporate existence, that is, of a new corporate existence, is never implied. In the construction of the statute every presumption is against it. *Memphis Railroad Company* v. *Commissioners*, 112 U. S. 609, 618; *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665, 670. Unless restricted by constitutional provisions the legislature has supreme power with reference to corporations either in endowing them with life or

continuing their existence. *Williamette Company* v. *Bank of B. C.*, 119 U. S. 191; *Morris* v. *Railroad*, 67 Texas, 692, 700. Corporate life is not cut short by insolvency. *Chemical Bank* v. *Hartford*, 161 U. S. 4. A reorganization is not necessarily the organization of a new corporation. 2 Clark & Marshall, Private Corporations, 974. The enlargement of the powers of a company is not by any means necessarily the creating of a new corporation. *Broughton* v. *Pensacola*, 93 U. S. 266.

The act of 1901 which assumed to enact that this and other like companies, in whose chartered history there had been a foreclosure and sale, should thereby become extinct as corporations and get new and different life under the general statute, or should be deemed to have done so, impaired the charter tax limit. *Wallace* v. *Loomis*, 97 U. S. 154.

The charter was construed by the legislature as well as by the courts prior to the act of 1901. See act of 1861 reaffirming tax limitation. This legislative construction will be followed. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Southern Pacific R. R.* v. *Orton*, 32 Fed. Rep. 478; *Webster* v. *Cooper*, 14 How. 504.

This court will follow the decision of the Supreme Court of the State; and by reason of the long acquiescence in the decision, will hold the State estopped from claiming the contrary. *Wilkes Co.* v. *Coler*, 180 U. S. 506; *Burgess* v. *Seligman*, 107 U. S. 20.

The terms "capital stock paid in," as used in the charter tax limit, extend to and mean the corporate property in which that stock is invested. The company is to pay this tax. The words "paid in" signify the capital amassed in the treasury. There is no thought in this language of the *shares* in the hands of shareholders. It is capital collected, not capital distributed among the shareholders. This extends to the corporate property represented by the capital and in which the capital is invested. *Railroad Co.* v. *Gaines*, 97 U. S. 697, 707; *D., L. & W. Ry. Co.* v. *Pennsylvania*, 198 U. S. 354.

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

Many questions which might otherwise be perplexing are settled by the decision of the Supreme Court of Michigan in *Attorney General* v. *Joy et al.*, 55 Michigan, 94. That was an information brought by the Attorney General in the Supreme Court of the State, charging the defendants with claiming and usurping the corporate rights and franchises of the Detroit, Grand Haven and Milwaukee Railway Company. The act of 1855 was sustained, notwithstanding some alleged defects in its passage, and it was decided that it did not create a new corporation but simply authorized the old territorial corporation, the Detroit and Pontiac Rail Road Company, to change its name and extend its line of road, and, further, that this act in no respect conflicted with sections 1 and 8, article XV, of the state constitution. The court also sustained the act of 1859, under which the foreclosures took place, and held that by them no new company was chartered, that there was simply a reorganization and continuance of the old company.

The latter act provides that upon certain conditions new stock shall be issued in lieu of the old stock, the old officers of the company superseded, "and the new stockholders and officers shall, in the law, be deemed and taken to be the stockholders and officers of said corporation, the charter and all laws appertaining thereto continuing to be the charter and laws regulating and governing said corporation, except that it may be known and called, and sue and be sued, and may contract and do all acts which in the law it could have done in its old name, in and by the name set forth in the declaration aforesaid" (p. 253).

The testimony in this case shows compliance with these conditions. Compliance was also shown in *Cook* v. *Detroit, Grand Haven & Milwaukee Railway Company*, 43 Michigan, 349, and in that case the validity of the new organization as a continuance of the old corporation was recognized.

We thus come to the question of the effect of section 9 of the act of 1855. It has been often decided by this court, so often that a citation of authorities is unnecessary, that the legislature of a State may, in the absence of special restrictions in its constitution, make a valid contract with a corporation in respect to taxation, and that such contract can be enforced against the State at the instance of the corporation. It is said that we are not concluded by a decision of the Supreme Court of a State in reference to the matter of contract; that while the rule is to accept the construction placed by that court upon its statutes, an exception is made in case of contracts, and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation. *Douglas* v. *Kentucky*, 168 U. S. 488. It is in order to uphold the provision of the Federal Constitution that no State shall pass a law impairing the obligation of a contract that this duty of independent judgment is cast upon this court. But here the Supreme Court of the State has ruled in favor of the continued existence of a corporation and the applicability of certain statutes, and when upon the face of such statutes a valid contract appears we accept the ruling that the statutes are valid and applicable enactments. In other words, the Supreme Court of the State having sustained the validity of a statute from which a contract is claimed, this court follows that decision, and starts with the question, what contract is shown by statute?

The particular section which it is claimed creates the contract (section 9 of the act of 1855) provides that the company shall pay an "annual tax of one per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation, or any other law of this State." It is contended in the first place that this is a mere gratuity, which can be withdrawn at any time, a statute in respect to taxation subject to change like other revenue statutes, and *Wisconsin*

& Michigan Railway Company v. *Powers*, 191 U. S. 379, is cited as authority. But the difference between that case and this is obvious. That arose on a general law in respect to taxation; this on a provision in a special act having reference to a particular corporation, an act which called for and received acceptance by the corporation. It was said in the opinion in that case (p. 385):

"A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in *East Saginaw Manufacturing Company* v. *East Saginaw*, 13 Wall. 373 ('*Salt Company* v. *East Saginaw*'); *S. C.*, 19 Michigan, 259. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. *Rector &c. of Christ Church* v. *Philadelphia County*, 24 How. 300; *Tucker* v. *Ferguson*, 22 Wall. 527; *Grand Lodge &c. of Louisiana* v. *New Orleans*, 166 U. S. 143. . . . The presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into account in determining whether the State has purported to bind itself irrevocably or merely has used words of prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant."

That there was ample consideration for a contract in this case, if consideration be necessary, is shown by the opinion of the Supreme Court in *Attorney General* v. *Joy*, *supra*, when it says (p. 101):

"The act of 1855 was not promoted exclusively in the interest of the railroad companies named in it, but the State itself was largely concerned, and expected to accomplish important public purposes by means of it. Twenty years before that time the State had planned for the construction of several parallel lines of railroad across the State from east to west, one of which was to be north of the line of the Michigan Central Railroad, and was expected to be of very high value, not only

to all that part of the State through which it would run, but to the whole State. Much disappointment had come from the road not being constructed; and when the Detroit and Pontiac Rail Road Company, which already had near thirty miles of road in successful operation, and could command means for the construction of more, proposed, on certain terms which were expressed in the act of 1855, to purchase the rights and franchises of the Oakland and Ottawa Company, and to extend their own road to Lake Michigan, there is no reason for doubting that the people of the State at large looked upon this as a favorable opportunity for accomplishing a desire which twenty years before had found expression in the legislation of the State, and which ever since had been kept constantly in view."

* * * * * * * *

"It has already been seen that the important public purpose which the State had in view in assenting to the act of 1855 has been accomplished; the railroad from Pontiac to Lake Michigan has been constructed and for many years operated, and the State has reaped the benefits. But in order to accomplish this public purpose it seems to have become necessary to put the bonds and shares of the Detroit and Milwaukee Railway Company upon the market as well in Europe as in this country: the State recognized the necessity, and by its legislation provided for facilitating sales. The bonds and shares were sold to the amount of very many millions; and every purchaser of one of them made the purchase in reliance upon legislation of this State which appeared to sanction if not to invite it" (p. 104).

See further *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 436, in which we said:

"It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

"There is no necessity of looking for the consideration for a

legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it."

Surely no clearer case of contract can be presented than one in which a legislature passes an act in respect to a particular corporation making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation and the completion of an unfinished road, whose completion is deemed of great public importance, and where the special provision is, as required, formally accepted, the expenditures made and the road completed.

It is suggested that this provision is not in terms made perpetual. A sufficient answer to this is found in *Home of the Friendless* v. *Rouse*, *supra* (p. 437):

"Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. 'All property of said corporation shall be exempt from taxation,' are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature, without taking direct action on the subject, could at its will resume the power of taxation."

It is further contended that the contract provided in section 9 is one relating to the property of the shareholders and not to that of the corporation. The terms "share," "stock," "capital," "capital stock" are of frequent and not uniform use, and we have often to turn to the context to see what is intended by its use in a particular case. That a distinction exists between that which is the property of the several shareholders and subject to taxation as other property belonging

to them, and that which is the property of the collective incorporated person we call a corporation, and subject to taxation as such, has been repeatedly pointed out. See *Farrington* v. *Tennessee*, 95 U. S. 679; *Railroad Companies* v. *Gaines*, 97 U. S. 697; *Railway Company* v. *Loftin*, 98 U. S. 559; *Bank* v. *Tennessee*, 104 U. S. 493; *Tennessee* v. *Whitworth*, 117 U. S. 129; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134; *Shelby County* v. *Union &c. Bank*, 161 U. S. 149; *Central Railroad &c. Company* v. *Wright*, 164 U. S. 327; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *Citizens' Bank* v. *Parker*, 192 U. S. 73; *Delaware, L. &c. Railroad Company* v. *Pennsylvania*, 198 U. S. 341.

In the first of these cases a bank's charter provided that the company "shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes," and it was held that that was a contract in reference to the property of the shareholders, and prevented further taxation upon their separate property. In the opinion it was said (pp. 686, 687):

"The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. . . . The capital stock and the shares may both be taxed, and it is not double taxation."

In the second is this ruling (p. 707):

"In general, an exemption of capital stock, without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which, in the legitimate operations of the corporation, comes to represent the capital."

And in *Tennessee* v. *Whitworth*, *supra*, p. 136, this description of separable elements of value was given:

"In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each

of these is, under some circumstances, an appropriate subject of taxation."

In several of the cases attention is called to the qualifying words which show an intent on the part of the legislature of something other than that generally embraced within the term "capital stock." But it is unnecessary to review these cases in detail.

By section 9 the tax is "on the capital stock of said company paid in." Clearly that refers to the property which the corporation has received and presumably holds. It is not the individual property of the shareholders which is contemplated, but that which is in the treasury of the corporation, or included among its assets. This, as we have seen, is the ordinary meaning of the term "capital stock." Further, we find that this tax is to be "in lieu of all other taxes, except for penalties imposed upon said company." In other words, the tax upon the company of one per cent may be increased by penalties imposed upon the company and in no other way. Again, the tax is to "be estimated upon the last annual report of said corporation." While such report might be expected to include not merely the property belonging to the corporation but also the number and names of the stockholders and the number of shares held by each, and possibly also the amount paid in by each, yet the word "estimated" carries with it the idea of valuation rather than of mathematical apportionment. It suggests that the property reported by the corporation is to be the basis upon which the assessors shall make their valuation, so that the tax is "estimated" upon that property rather than fixed by the mere process of multiplication or division. That the tax is to be paid by the company is of course not conclusive on the question, but it is in harmony with all the other provisions of the section. Still further, we have the practical construction placed by the authorities for a long series of years—continued up to the year 1898. Under those circumstances we are of opinion that the tax provided for by section 9 is a tax upon the prop-

erty of the corporation and not a tax upon the shares of stock held by the shareholders. There was, however, a contract between the State and the corporation which prevented the subjection of the property of the corporation to any other than the tax prescribed in the statute.

The decree of the Circuit Court is

Affirmed.

MR. JUSTICE WHITE dissented.

HADDOCK *v.* HADDOCK.

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

No. 119. Argued December 11, 1905.—Decided April 12, 1906.

The husband and wife being domiciled in New York, the husband left the wife, acquired, in good faith, after a lapse of years, a domicil in Connecticut, and obtained in that State, and in accordance with its laws, a judgment of divorce based on constructive, and not actual, service of process, on the wife, who meanwhile remained domiciled in New York and never appeared in the action. The wife subsequently sued for divorce in New York and obtained personal service in that State on the husband who pleaded the Connecticut judgment. *Held*,

Without questioning the power of the State of Connecticut to enforce the decree within its own borders, and without intimating any doubt that the State of New York might give it such degree of efficacy that it might be entitled to in view of the public policy of the State, that the Connecticut decree, rendered as it was without being based on personal service of the process on, and therefore without personal jurisdiction of the court over, the wife, was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause of the Federal Constitution.

A suit for divorce brought in a State other than that of domicil of matrimony against a wife who is still domiciled therein is not a proceeding *in rem* justifying the court to enter a decree as to the *res*, or marriage relation, entitled to be enforced outside of the teritorial jurisdiction of the court.

Questions concerning alleged fraud in contracting a marriage and laches on the part of one of the parties in bringing an action for divorce are matters solely of state cognizance and may not even be allowed to in-

directly influence this court in determining the Federal question which is involved.

The States at the time of the adoption of the Constitution possessed full power over the subject of marriage and divorce and the Constitution delegated no authority to the Central Government in regard thereto, and the destruction of the power of the States over the dissolution of marriage as to their own citizens cannot be brought about by the operation of the full faith and credit clause of the Constitution of the United States.

Previous decisions of this court hold in regard to the full faith and credit to be given by States to the judicial decrees of other States that:

The requirement is not that some, but that full, faith and credit, equal to that to which it is entitled in the State where rendered, shall be given to a judicial decree of another State. *Harding* v. *Harding*, 198 U. S. 317.

A personal judgment against a non-resident—not a proceeding *in rem*—based merely upon constructive service and therefore jurisdiction not being acquired over the defendant's person may not be enforced in another State under the full faith and credit clause. *Pennoyer* v. *Neff*, 95 U. S. 714.

All governments possess inherent power over the marriage relation, its formation and dissolution, as regards their own citizens, and where a court or legislature of a State has acted conformably with its own laws concerning the marriage tie as to a citizen of that State, its action is binding in that State as to that citizen, and its validity under the due process clause of the Constitution may not therein be questioned. *Maynard* v. *Hill*, 125 U. S. 190.

As a corollary to the power of the State, irrespective of any extraterritorial effect, any other sovereign may, under the principles of comity give to such a decree the efficacy which its own conception of duty and public policy may justify.

Where husband and wife are domiciled in a State jurisdiction exists in that State, for good cause to enter a decree of divorce, entitled to enforcement in another State under the full faith and credit clause; and where a *bona fide* domicil has been acquired in a State by either husband or wife, a decree of divorce obtained by either in a court having personal jurisdiction of the other is likewise entitled to be so enforced in other States. *Cheever* v. *Wilson*, 9 Wall. 108.

Where the domicil of a matrimony is in a particular State, and the husband abandoning the wife, wrongfully goes into another State in order to avoid his marital obligation, such other State does not become a new domicil of matrimony, nor the actual or constructive domicil of the wife. That continues in the original State until she actually acquires a new one. *Barber* v. *Barber*, 21 How. 582.

Where the domicil of the husband is in a particular State, which is also the domicil of matrimony, the courts of that State may, in virtue of the wife's duty to be at the matrimonial domicil, disregard her unjustifiable absence therefrom and treat her as having her domicil therein for the purpose of dissolving the marriage and render a judgment to that effect entitled to recognition in all other States under the full faith and credit clause of the Constitution. *Atherton* v. *Atherton*, 181 U. S. 155.

THE facts, which involved the full faith and credit to be given by the courts of the State of New York to a decree of divorce, obtained in Connecticut by the husband, formerly a resident of New York, from his wife still residing in New York, based on substituted service of the summons, are stated in the opinion.

Mr. Abram J. Rose, with whom *Mr. William H. Willits* and *Mr. Alfred C. Pettè* were on the brief, for plaintiff in error.

Mr. Henry Willis Smith, with whom *Mr. William T. Tomlinson* and *Mr. William W. Smith* were on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the State of New York, sued the husband in that State in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the

fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the State of Connecticut a divorce which was conclusive. At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the State of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband without justifiable cause abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of $780 a year from the date of the judgment. The action of the referee was sustained by the Supreme Court of the State of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the Court of Appeals. As by the law of the State of New York, after the affirmance by the Court of Appeals, the record was remitted to the Supreme Court, this writ of error to that court was prosecuted.

The Federal question is, Did the court below violate the Constitution of the United States by refusing to give to the

decree of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?

As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance, we may not allow them to even indirectly influence our judgment upon the Federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the Federal issue, we are concerned not with the mere form of proceeding by which the Federal right, if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determine what effect it would give to it instead of excluding the record and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicil in Connecticut, sued the wife in that State as a person whose residence was unknown, but whose last known place of residence was in the State of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the State of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are re-

quired to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. *Harding* v. *Harding*, 198 U. S. 317.

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment. *Pennoyer* v. *Neff*, 95 U. S. 714. The facts in that case were these: Neff, who was a resident of a State other than Oregon, owned a tract of land in Oregon. Mitchell, a resident of Oregon, brought a suit in a court of that State upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a non-resident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon affidavit of the absence of Neff, and that he resided in the State of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by

Pennoyer. Neff sued in the Circuit Court of the United States for the District of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon under the circumstances stated was void for want of jurisdiction and was repugnant to the due process clause of the Constitution of the United States. The ruling was based on the proposition that a court of one State could not acquire jurisdiction to render a personal judgment against a non-resident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication could not be aided by the fact that under the statutes of the State in which the suit against the non-resident was brought the sending of a copy of the summons and complaint to the post office address in another State of the defendant was required and complied with. The court said (p. 727):

"Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

And the doctrine thus stated but expressed a general principle expounded in previous decisions. *Bischoff* v. *Wethered*, 9 Wall. 812. In that case, speaking of a money judgment recovered in the Common Pleas of Westminster Hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, speaking for the court, said (p. 814):

"It is enough to say [of this proceeding] that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate, it can have no validity here, even of a *prima facie* character. It is simply null."

Third. The principles, however, stated in the previous proposition are controlling only as to judgments *in personam* and do not relate to proceedings *in rem*. That is to say, in consequence of the authority which government possesses over things within its borders there is jurisdiction in a court of a State by a proceeding *in rem*, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. *Pennoyer* v. *Neff*, *supra*.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard* v. *Hill*, 125 U. S. 190. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicil in the Territory of Washington. Being there so domiciled, an act of the legislature of the Territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the Territory of Washington to recover real estate situated in the Territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs.

Maynard had no notice and that she was not a resident of the Territory when the act was passed. From a decree of the Supreme Court of the Territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the Territory was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the Territory committed no error in giving effect within the Territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a State there exists jurisdiction in such State, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. It has, moreover, been decided that where a *bona fide* domicil has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause. *Cheever* v. *Wilson*, 9 Wall. 108.

Sixth. Where the domicil of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive

domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in *Barber* v. *Barber*, 21 How. 582, where it was said (p. 595):

"The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers. . . ."

And the same doctrine was expressly upheld in *Cheever* v. *Wilson, supra,* where the court said (9 Wall. 123):

"It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues."

Seventh. So also it is settled that where the domicil of a husband is in a particular State, and that State is also the domicil of matrimony, the courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the

full faith and credit clause. *Atherton* v. *Atherton*, 181 U. S. 155.

Coming to apply these settled propositions to the case before us three things are beyond dispute: *a*. In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State. *b*. As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. *c*. As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicil in that State, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the State or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil of the husband in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other States in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether to enforce in another jurisdiction the Connecticut decree would not be to enforce in one State, a personal judgment rendered in another State against a defendant over whom the court of the State rendering the judgment had not acquired jurisdiction. Otherwise stated, the question is this: Is a proceeding for divorce

of such an exceptional character as not to come within the rule limiting the authority of a State to persons within its jurisdiction, but on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced either within the letter or spirit of the doctrines stated in the third and fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or of the person of the defendant, the courts of another State are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. *National Exchange Bank* v. *Wiley*, 195 U. S. 257, 269, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicil within one State of one party to the marriage gives to such a State jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other States by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government in virtue of its authority over marriage may dissolve the tie as to citizens of another

government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the State of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the State of Connecticut, there acquiring a domicil, and procure a dissolution of the marriage which would be binding in the State of New York as to the party to the marriage there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that State to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the States whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other States. Thus the argument comes necessarily to this, that to preserve the lawful authority of all the States over marriage it is essential to decide that all the States have such authority only at the sufferance of the other States. And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in *Maynard* v. *Hill*, referred to in the fourth proposition, which was at the outset stated. For in that case

the sole question was the effect within the Territory of Washington of a legislative divorce granted in the Territory to a citizen thereof. The upholding of the divorce within the Territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other States to whom the jurisdiction of the Territory did not extend.

The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced, that is, the full faith and credit clause of the Constitution. No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the States would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the States over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. That is to say, it would come to pass that, although the Constitution of the United States does not interfere with the authority of the States over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the States over the marriage rela-

tion. And as the Government of the United States has no delegated authority on the subject, that Government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the States nor the National Government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet more remarkable would be such result when it is borne in mind that, when the Constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoritative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicil within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the marriage tie, which exertion of power it would be the duty of other States to respect as to those subject to their jurisdiction.

II. It is urged that the suit for divorce was a proceeding *in rem*, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the *res*, entitled to be enforced in the State of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicil of the person there suing and yet attributes to the decree resting upon the domicil of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject matter of the controversy. But putting this contradiction aside, what, may we ask, was the *res* in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory then upon which the proposition proceeds must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens

of that State, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York, the *res* was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the State of New York and one in the State of Connecticut. Thus considered, it is clear that the power of one State did not extend to affecting the thing situated in another State. As illustrating this conception, we notice the case of *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485. The facts in that case were these: A bill was filed in a District Court of the United States for the District of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi river dividing the States of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States Circuit Court for the District of Iowa exercised the same jurisdiction that a state court of Iowa could exercise and no more, said (p. 494):

"The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case."

Nor has the conclusive force of the view which we have stated been met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and wholly in New York,

for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that State had the power to determine the status of the non-resident wife by a decree which had obligatory force outside of the State of Connecticut. Here, again, the argument comes to this, that, because the State of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that State also had the authority to oust the State of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that State.

III. It is urged that whilst marriage is in one aspect a contract, it is nevertheless a contract in which society is deeply interested and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen but as to a citizen of New York who was not subject to the jurisdiction of the State of Connecticut. The proposition involves in another form of statement the *non sequitur* which we have previously pointed out; that is, that, because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without at the same time saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that State. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that, because in the exercise of its power over its own citizens, a State may determine to dissolve the marriage tie by a decree which is efficacious

within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a State may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another State. The distinction was clearly pointed out in *Blackinton* v. *Blackinton,* 141 Massachusetts, 432. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicil in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicil of the husband was not the domicil of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling and the decree was awarded. The same doctrine was clearly expounded by the Privy Council, in an opinion delivered by Lord Watson, in the divorce case of *Le Mesurier* v. *Le Mesurier* (1895), A. C. 517, where it was said (p. 527):

"When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce *a vinculo,* pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority."

IV. The contention that if the power of one State to decree

a dissolution of a marriage which would be compulsory upon the other States be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one State must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a State should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each State is given the power of overshadowing the authority of all the other States, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one State over one party alone was the test of the right to dissolve the marriage tie as to the other party although domiciled in another State, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one State would have a right to acquire a domicil in a different State and there institute proceedings for divorce. It would hence necessarily arise that domicil would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking differ-

ent forums in other States or the celerity by which in such States judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective States just as that clause operates upon other rights, that is, it compels all the States to recognize and enforce a judgment of divorce rendered in other States where both parties were subject to the jurisdiction of the State in which the decree was rendered, and it enables the States rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicil from which the presence of a party not physically present within the borders of a State may be constructively found to exist.

Having thus disposed of the reasoning advanced to sustain the assertion that the courts of the State of New York were bound by the full faith and credit clause to give full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the

question for consideration. The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because one of the parties to a marriage was domiciled within its borders, where no matrimonial domicil ever existed, had power to render a decree dissolving a marriage which on principles of international law was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country. Wharton, Conf. Laws, 3d ed., v. 1, p. 441, sec. 209 and notes.

It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree. *Shaw* v. *Gould*, L. R. 3 H. L. 55; *Harvey* v. *Farnie*, 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions that exceptional cases might arise which perhaps would justify a relaxation of the rigor of the presumption that the domicil of the husband was the domicil of the wife, per Lords Eldon and Redesdale, in *Tovey* v. *Lindsay*, 1 Dow, 133, 140; per Lord Westbury, in *Pitt* v. *Pitt*, 4 Macq. 627, 640; per Brett, L. J. in *Niboyet* v. *Niboyet*, 4 P. D. 1, 14; *Briggs* v. *Briggs*, 5 P. D. 163, 165; and per James and Cotton, L. JJ., in *Harvey* v. *Farnie*, 6 P. D. 47, 49, the courts of England, in cases where the jurisdiction was dependent upon domicil, have enforced

the presumption and treated the wife as being within the jurisdiction where the husband was legally domicled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course the rigor of the English rule as to the domicil of the husband being the domicil of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicil. *Barber* v. *Barber*, 21 How. 582; *Cheever* v. *Wilson*, 9 Wall. 108; *Atherton* v. *Atherton*, 181 U. S. 155.

And even in Scotland, where residence, as distinguished from domicil, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant. Wharton, Conf. Laws, sec. 215, v. 1, p. 447; per Lord Westbury, in *Shaw* v. *Gould*, L. R. 3 H. L. 88.

As respects the decisions of this court. We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding, *a*, that where the domicil of a plaintiff in a divorce cause is in the State where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other States to recognition under the full faith and credit clause (*Cheever* v. *Wilson*, *supra*); *b*, that, as distinguished from legal domicil, mere residence within a particular State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant. *Andrews* v. *Andrews*, 188 U. S. 14; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Bell* v. *Bell*, 181 U. S. 175. This brings us to again consider

a case heretofore referred to, principally relied upon as sustaining the contention that the domicil of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., *Atherton* v. *Atherton*, 181 U. S. 155. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicil. This is apparent from the following passage, which we excerpt from the opinion, at page 171:

"This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

The contention, therefore, that the reasoning of the opinion demonstrates that the domicil of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the *Atherton* case are taken into view, that the case could not have been decided merely upon the ground of the domicil of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicil at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicil and went to New York. The husband sued her in Kentucky for a divorce. Before the

Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under ordinary circumstances, to constitute a domicil in that State, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective States at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicil of the parties, since upon that hypothesis, even if the efficacy of the individual domicil had been admitted, no solution would have been thereby afforded of the problem which would have arisen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicil, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicil which, isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision.

It is contended that an overwhelming preponderance of the decisions of state courts enforce the doctrine that it is the duty of the States, by virtue of the full faith and credit clause, to give within their borders the full effect required by that clause to decrees of divorce rendered in other States, where there was jurisdiction alone by virtue of the domicil of one of the parties. Whilst we may not avoid the duty of interpreting for ourselves the Constitution of the United States, in view of the persuasive force that would result if an overwhelming

line of state decisions held the asserted doctrine, we come to consider that subject. To examine in detail the many decisions of state courts of last resort, most of which are referred to in the margin,[1] would expand this opinion to undue length. To avoid so doing, if possible, we propose to more particularly direct our attention to the cases in state courts which are specially relied on. In doing so we shall add cases in several of the States not particularly counted on in the argument. We shall do this for the purpose of evolving, if possible, from the state cases thus to be referred to, some classification typical of all the state decisions, hence enabling all the cases to which we do not specially refer to be brought within the appropriate class to which they pertain, without the necessity of reviewing them in detail. We shall not confine ourselves to the particular state decisions relied on, but shall consider such decisions in the light of the general rule obtaining in the particular State.

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[1] Cases relating to the validity and extraterritorial effect of a decree of divorce rendered upon constructive notice:

Turner v. *Turner*, 44 Alabama, 437; *In re James Estate*, 99 California, 374; *Knowlton* v. *Knowlton*, 155 Illinois, 158; *Dunham* v. *Dunham*, 162 Illinois, 589; *Field* v. *Field*, 215 Illinois, 496; *Hood* v. *State*, 56 Indiana, 263, 270; *Hilbish* v. *Hattle*, 145 Indiana, 59; *Kline* v. *Kline*, 57 Iowa, 386; *Van Orsdal* v. *Van Orsdal*, 67 Iowa, 35; *Chapman* v. *Chapman*, 48 Kansas, 636; *Rodgers* v. *Rodgers*, 56 Kansas, 483; *Maguire* v. *Maguire*, 7 Dana, 181; *Hawkins* v. *Ragsdale*, 80 Kentucky, 353; *Edwards* v. *Green*, 9 La. Ann. 317; *Smith* v. *Smith*, 43 La. Ann. 1140; *Butler* v. *Washington*, 45 La. Ann. 279; *Harding* v. *Alden*, 9 Maine, 140; *Stilphen* v. *Stilphen*, 58 Maine, 508; *Stilphen* v. *Hondlette*, 60 Maine, 447; *Garner* v. *Garner*, 56 Maryland, 127; *Lyon* v. *Lyon*, 2 Gray, 367; *Wright* v. *Wright*, 24 Michigan, 180; *Van Inwagen* v. *Van Inwagen*, 86 Michgan, 333; *Thurston* v. *Thurston*, 58 Minnesota, 279; *Gould* v. *Crow*, 57 Missouri, 200; *Anthony* v. *Rice*, 110 Missouri, 223, *Smith* v. *Smith*, 19 Nebraska, 706; *Leith* v. *Leith*, 39 N. H. 20; *Doughty* v. *Doughty*, 28 N. J. Eq. 581; *Flower* v. *Flower*, 42 N. J. Eq. 152; *Felt* v. *Felt*, 59 N. J. Eq. 606; *Wallace* v. *Wallace*, 62 N. J. Eq. 509; *Lynde* v. *Lynde*, 162 N. Y. 405; *Winston* v. *Winston*, 165 N. Y. 553; *Irby* v. *Wilson*, 1 Dev. & Bat. Eq. (21 N. Car.) 568; *Harris* v. *Harris*, 115 N. Car. 587; *Bidwell* v. *Bidwell* (N. Car.), 52 S. E. Rep. 55, 58; *Cox* v. *Cox*, 19 Ohio St. 502; *Doerr* v. *Forsythe*, 50 Ohio St. 726; *Colvin* v. *Reed*, 55 Pa. St. 375; *Reel* v. *Elder*, 62 Pa. St. 308; *Ditson* v. *Ditson*, 4 R. I. 87; *McCreery* v. *Davis*, 44 S. Car. 195; *Thoms* v. *King*, 95 Tennessee, 60; *Prosser* v. *Warner*, 47 Vermont, 667, 673; *Cook* v. *Cook*, 56 Wisconsin, 195.

The cases specially relied on are *Thompson* v. *State*, 28 Alabama, 12; *Harding* v. *Alden*, 9 Maine, 140; *Ditson* v. *Ditson*, 4 R. I. 87; *Burlen* v. *Shannon*, 115 Massachusetts, 438; and *Felt* v. *Felt*, 59 N. J. Eq. 606, to which we shall add for the purposes above stated cases on the same subject decided in New York, Ohio, Wisconsin, Indiana and Missouri.

New York.—It is not questioned that the courts of New York are vested by statute with authority to render decrees of divorce where the plaintiff is domiciled within the State, which shall be operative in that State, even although the defendant is a non-resident and is proceeded against by constructive service.

Borden v. *Fitch*, 15 Johns. 121, and *Bradshaw* v. *Heath*, 13 Wend. 407, were decided, respectively, in the years 1818 and 1835. These cases, as declared by the Court of Appeals of New York in *People* v. *Baker*, 76 N. Y. 78, 82, upheld the principle that a court of another State could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with notice within the other State or voluntarily appeared in the cause. The doctrine that an action of divorce is one *inter partes* was thus clearly reiterated by Andrews, J., in *Jones* v. *Jones*, 108 N. Y. 415, 424:

"The contract of marriage cannot be annulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."

That the principle referred to is still enforced by the New York court is shown by recent cases, viz., *Lynde* v. *Lynde*, 162 N. Y. 405; *Winston* v. *Winston*, 165 N. Y. 553, and the case at bar. And it is indubitable that under this doctrine the

courts of New York have invariably refused, as they have done in the case at bar, to treat a divorce rendered in another State, under the circumstances stated, as entitled to be enforced in New York by virtue of the full faith and credit clause of the Constitution of the United States; and, indeed, have refused generally to give effect to such decrees even by state comity.

MASSACHUSETTS.—*Barber* v. *Root*, 10 Massachusetts, 260; *Hanover* v. *Turner*, 14 Massachusetts, 227, and *Harteau* v. *Harteau*, 14 Pick. 181, were decided, respectively, in 1813, 1817 and 1833. In 1835 the legislature of Massachusetts incorporated into the statutes of that State, following a section forbidding the recognition of divorces obtained in another jurisdiction in fraud of the laws of Massachusetts, a provision reading as follows: "In all other cases, a divorce decreed in another State or country, according to the law of the place, by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this State." And it may be observed that this section, when submitted to the legislature by the commissioners for revising the Massachusetts statutes, was accompanied by the following comment (Rept. Comrs., pt. II, p. 123): "This is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be."

In *Lyon* v. *Lyon* (1854), 2 Gray, 367, the question was as to the validity in Massachusetts of a divorce decreed in Rhode Island in favor of one party to a marriage against the other who was domiciled in Massachusetts. The court refused to give extraterritorial effect to the Rhode Island decree. In the opinion by Chief Justice Shaw it was declared that the three cases which we have previously referred to sustained the doctrine, based upon general principles of law, that a decree of divorce rendered in another State without jurisdiction of both of the parties possessed no extraterritorial force.

In *Hood* v. *Hood* (1865), 11 Allen, 196, the controversy was

this: The parties were married in Massachusetts and, after a residence in that State, moved together to Illinois. The wife left the domicil of the husband in Illinois and returned to Massachusetts. Thereafter, in Illinois, the husband sued the wife for a divorce on the ground of her desertion, obtained a decree, and married again. The case decided in Massachusetts was a suit brought in that State by the former wife against the former husband for divorce on the ground of adultery alleged to have been committed by him with the person whom he had married after the decree of divorce in Illinois had been rendered. The Illinois decree was pleaded in bar. The question whether the Illinois decree should be given extraterritorial effect in Massachusetts depended, under the rule announced in the previous cases, upon whether both the husband and wife were parties to the Illinois decree. For the purpose of the determination of this jurisdictional question it was held that it was necessary to ascertain whether the wife was justified, by the fault of the husband, in leaving him in Illinois and going back to Massachusetts. It was decided that if she was justified in leaving the husband, her legal domicil was in Massachusetts, and she was not a party to the Illinois decree, and that if she was not justified in living separate from the husband, the ordinary rule being that the domicil of the husband was the domicil of the wife, she was domiciled in Illinois, and must be considered as subject to the jurisdiction of the Illinois court. Applying this legal principle to the facts in the case before it, the court held that as there was no evidence showing that the wife had justifiable cause for leaving her husband, the legal presumption that the domicil of the husband was the domicil of the wife prevailed, and that the Illinois decree was entitled to extraterritorial effect in Massachusetts, and bound the wife, because rendered by a court having jurisdiction over both parties.

In *Shaw* v. *Shaw* (1867), 98 Massachusetts, 158, the facts were these: The parties were married in Massachusetts, lived there and left together for the purpose of settling in Colorado.

On the journey, at Philadelphia, the wife was forced by the extreme cruelty of the husband to leave him. She returned to Massachusetts, while he went on to Colorado. Subsequently the wife sued in Massachusetts for a divorce from bed and board. The husband was brought in by substituted service and defaulted. The court, in the most explicit terms, recognized that a decree of divorce to have extraterritorial effect must be rendered with jurisdiction over both parties. It said (p. 159): "For the purposes of divorce the general rule of jurisprudence is that a divorce granted in the place of the domicil of both parties, and there valid, is good everywhere." The court came then to consider whether it could render a decree in Massachusetts in favor of the wife. This depended upon a statute of Massachusetts, which authorized the granting of a divorce where the cause for divorce occurred while the parties had lived together as husband and wife in Massachusetts, and where one of them lived in that State when the cause for divorce occurred. It was held that as at the time of the commission of the cruelty in Philadelphia charged against the husband the domicil of the parties in Massachusetts had not been lost, and as by that cruelty the wife was justified in returning to Massachusetts, and the subsequent acquisition of a new domicil by the husband in Colorado did not make such domicil that of the wife, there was jurisdiction, and the divorce was granted.

Hood v. *Hood* (1872), 110 Massachusetts, 463, was an attempt again to assail the validity of the Illinois decree of divorce which had been adjudged valid in 11 Allen, 196, because it was found that both the husband and wife had been parties to the decree. The Massachusetts decree so holding was therefore held to be *res judicata* as to all persons and to foreclose further inquiry into the validity of the Illinois decree of divorce.

In *Burlen* v. *Shannon* (1874), 115 Massachusetts, 438, the facts leading up to the controversy and those involved therein were as follows: Shannon and his wife lived together in Massa-

chusetts, where she left him. Without stopping to refer to prior legal controversies which arose between Shannon and his wife and between Shannon and Mrs. Burlen, which are irrelevant to be considered, it suffices to say that Mrs. Burlen sued Shannon in 1850 to hold him liable for necessary supplies furnished to the wife. Shannon resisted on the ground that the wife had been living apart from him without his fault or consent, and this defense was maintained. (3 Gray, 387.) Shannon went to Indiana in 1855 and took up his domicil in that State, where, in 1856, he obtained a decree of divorce upon constructive service. Subsequently, in Massachusetts, Mrs. Burlen again sued Shannon for necessaries furnished to the wife between February 22, 1860, and February 7, 1866. He pleaded the Indiana divorce, and the validity of the divorce was assailed by Mrs. Burlen on the ground that the wife had not been a party to the divorce cause, and therefore the Indiana decree had not extraterritorial effect in Massachusetts. The court, in effect, after reiterating the previous rulings and referring to the statute concerning the necessity for the presence of both parties within the jurisdiction where a decree for divorce of another State was sought to be given effect in Massachusetts, also reiterated the previous ruling that the wife might acquire a separate domicil from the husband if she lived separate from him for justifiable cause. The court was brought, therefore, to consider whether Mr. and Mrs. Shannon were both parties to the Indiana decree on the ground that the domicil of the husband was the domicil of the wife. The solution of this question depended, as it had depended in *Hood* v. *Hood*, 11 Allen, 196, upon whether the wife was absent from the husband because of his fault. On this subject it was decided that the previous judgment in favor of Shannon and against Mrs. Burlen in the prior action between the parties had conclusively determined between them that Mrs. Shannon was absent from her husband without his fault or consent, and, therefore, under the legal presumption that the domicil of the husband was the domicil of the wife, both

the husband and wife were parties to the Indiana decree and it was not subject to attack in Massachusetts. To cite, as has sometimes been done, the language of the opinion of the court referring to the previous judgment in the earlier action between Mrs. Burlen and Shannon as if that language referred to the Indiana decree of divorce, leading to the implication that that decree was held to be conclusive, even if only one of the parties was domiciled in the State where the decree was rendered, not only is a plain misconception, but is equivalent to asserting that the Massachusetts court had overruled its previous decisions and disregarded the spirit, if not the letter, of the state statute without the slightest intimation to that effect.

In *Cummington* v. *Belchertown*, 149 Massachusetts, 223, the facts were these: The parties to a marriage, celebrated in Massachusetts, lived together in that State until the wife was taken to a Massachusetts asylum for the insane, when the husband abandoned her, acquired a domicil in New York, there brought suit on the ground of fraud for the annulment of the marriage, and obtained a decree. The wife was only constructively served with process, did not appear, and was not represented. The Massachusetts court held, upon the authority of the *Blackington* case (141 Massachusetts, 432), to which we have already referred, that if the decree was to be recognized in Massachusetts, it could only be on grounds of comity. And in concluding its opinion the court said:

"Upon the ground, then, that the decree of the New York court attempts to annul a marriage in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman, who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares the marriage void for a reason on account of which by the Massachusetts law it cannot be avoided, we are of opinion that it should not be enforced here, and that

no principle of interstate comity requires that we should give it effect."

True it is the court reserved the question as to what effect might be given to a divorce if granted by a New York court under circumstances such as existed in that case. But, as a suit for a declaration of nullity and one for divorce are both but modes for determining judicially the status of the parties, it must in reason follow if jurisdiction over both is a prerequisite in the one class, it is of necessity also essential in the other.

MAINE.—In *Harding* v. *Alden* (1832), 9 Maine, 140, the facts were these: While living together in Maine a husband deserted his wife. He went to North Carolina, where he pretended to marry, and lived there with another woman. In the meantime the wife whom he had deserted took up her residence in Rhode Island, where she sued for a divorce on the ground of the adultery committed by the husband in North Carolina. The husband, who was notified in North Carolina, did not appear in the Rhode Island divorce cause. A decree of divorce was granted and the wife then remarried. The first husband, during the coverture, owned and alienated real estate in Maine, and a statute of that State provided that where a divorce was decreed for adultery by the husband, dower might be assigned to the divorced wife in the same manner as if the husband were dead. The divorced wife brought an action of dower in a court in Maine. The Rhode Island decree was held to possess validity in Maine and the statute relating to dower was decided not to be limited to divorces decreed within the State of Maine. Considering the opinion in its entirety, it is plain that the Rhode Island divorce was given recognition from considerations of right and justice and upon the ground of state comity. Thus, the court called attention to the fact that adultery was a cause for divorce in both States and that divorces were granted in Maine against non-residents; and, it was observed, that "there would be great inconvenience in holding" that divorces ought not to be recognized in other States when granted in the State where the *injured party*

resided against one who had established his domicil in another State and there committed adultery.

True it is in the course of the opinion reasoning was employed tending to show that the Rhode Island court might be considered to have had jurisdiction in the complete sense and it was intimated that the full faith and credit clause might have application, but the operation of the Rhode Island decree in Maine was by the decree of the Maine court expressly limited to the dissolution of the marriage (p. 151). How far removed this was from giving to the Rhode Island decree the benefit of the full faith and credit clause will, we think, be made clear by what follows.

Harding v. *Alden* was decided at the July term, 1832. Less than two years afterward, on March 5, 1834, Public Laws, 1834, c. 116, p. 119, the statute of Maine regulating divorces was supplemented by various provisions, one such being the following: "Sec. 2. Be it further enacted, That in all cases where one party has been or shall be divorced from the bonds of matrimony, the court granting the same may, upon application therefor, grant to the other party a like divorce, on such terms and conditions as the said court in the exercise of a sound discretion may judge reasonable." This provision was carried into the Revised Statutes of 1840, c. 89, sec. 2, and although repealed in 1850, in a general revision of the divorce laws, it was held that the legislature did not intend to deprive the courts of Maine of the power to entertain a suit for divorce brought by a person from whom the other party to a marriage had already been divorced, and that the courts of Maine still possessed power to exercise jurisdiction over such suits. *Stilphen* v. *Stilphen*, 58 Maine, 508. In the cited case, although a husband had already obtained an absolute divorce, a like divorce was granted to the wife, and the court allowed to her certain articles of personal property and the sum of $500. In overruling exceptions to the decree the appellate court adopted the theory that the second decree in no wise impugned the first, and was important only as enabling "the court to make

such ancillary decrees concerning the property as justice and humanity may require" (p. 517). In the course of the opinion the court said (p. 516):

"There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth, as *ex parte* divorce suits. The notice is often imperfect, so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses, testifying in the presence of one of the parties, and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present, each is sure to put the other in the wrong; and *a fortiori* is this true, when one of the parties is permitted to testify in the absence of the other, as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that the court should be possessed of the power in some form to revise their decisions in this class of cases; otherwise, the grossest injustice is liable to be done."

In the light of this decision it cannot be assumed that the courts of Maine would give to a citizen of that State against whom a divorce had been obtained in a foreign jurisdiction, upon constructive service, a less degree of relief than they afford as to a decree rendered in Maine, both parties being present and bound by the decree.

Rhode Island.—*Ditson* v. *Ditson* (1856), 4 R. I. 87, was a suit for divorce on the grounds of desertion, extreme cruelty, and non-support, brought by a wife domiciled in Rhode Island against the husband, who had never resided in Rhode Island, and whose whereabouts was unknown. The question was whether the Rhode Island court ought to exercise jurisdiction. The opinion was mainly devoted to refuting the reasoning employed by Chief Justice Shaw in his opinion in the case of *Lyon* v. *Lyon*, 2 Gray, 367, in which case, as we have previously

shown, the Massachusetts court refused to give effect to a Rhode Island decree of divorce where both parties were not within the jurisdiction. The Rhode Island court (in the *Ditson* case) in effect declared that it would not exercise jurisdiction to grant a divorce if it considered that a decree rendered by it would not be entitled to extraterritorial effect because of a lack of actual jurisdiction over the defendant. The court, however, proceeded to reason that a suit for divorce was in effect a proceeding *in rem*, and that jurisdiction over one of the parties to a suit for the dissolution of the marriage tie drew to the court jurisdiction of the other party, and thereby gave full and complete jurisdiction over the status of both parties, and upon that hypothesis decided that it would exercise jurisdiction, and that its decree dissolving the marriage would be entitled to the benefit of the full faith and credit clause of the Constitution and have binding efficacy in every other State.

New Jersey.—Whilst the courts of New Jersey have exercised the power to grant a divorce from a non-resident defendant, upon constructive service, those courts have from the beginning applied to similar decrees of divorce granted in other States, when sought to be enforced in New Jersey against citizens of that State, a rule like the one prevailing in New York, that is, they decline to enforce them even upon the principles of comity. *Doughty* v. *Doughty*, 28 N. J. Eq. 581, 586; *Flower* v. *Flower*, 42 N. J. Eq. 152. Recently, however, it has been decided, *Felt* v. *Felt*, 59 N. J. Eq. 606, that where a decree of divorce was rendered in another State, and the complainant alone was subject to the jurisdiction of the court, but it was shown that the defendant had been personally served outside of the jurisdiction with notice of the pendency of the divorce proceeding and was afforded reasonable opportunity to make defense and did not avail of the opportunity, effect would be given to such decree in New Jersey, upon principles of comity, provided that the ground upon which the decree rested was one which the public policy of New Jersey

recognized as a sufficient cause for divorce. In *Wallace* v. *Wallace*, 62 N. J. Eq. 509, the subject is quite fully reviewed.

Ohio.—In *Cooper* v. *Cooper* (1836), 7 Ohio, 594, without citation of authority, a divorce granted in Indiana, from a resident of Ohio, upon constructive service, was held to bar an application for divorce and alimony in Ohio. In *Mansfield* v. *McIntyre* (1840), 10 Ohio, 27, despite a divorce obtained in Kentucky, by a husband, upon constructive service, the divorced wife was regarded in Ohio as the widow of her former husband after his decease, and as such widow entitled to dower.

In *Cox* v. *Cox*, 19 Ohio St. 502, decided at the December term, 1869, the facts were these: The husband deserted the wife in Ohio, went to Indiana and there obtained a divorce, upon constructive service. The wife remained in Ohio, and three years after the granting of the Indiana divorce to the husband she sued him for divorce and for alimony, alleging abandonment and gross neglect of duty. The trial court granted a divorce and alimony. The husband appealed, but as such an appeal, under the statutes of Ohio, did not affect the decree as to the divorce, the District Court considered only the question of alimony and rendered a new decree for alimony against the defendant. The case was then taken to the Supreme Court of the State. In that court attention was called to the fact that under the statutes of Ohio and the decisions of its courts jurisdiction might be exercised over non-residents in divorce cases, and reference was made to various authorities as tending to show that public policy required the recognition of the validity of such decrees in other States as to the dissolution of the marriage. After stating the facts, and observing that the wife was entitled under the laws of Ohio to either divorce or alimony, or both, at her election, and alluding to the Indiana decree, the court said (p. 512):

"The question, therefore, is, whether the *ex parte* decree can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the ali-

mony which the statute, upon the facts as they exist in regard to the husband's desertion, intended to provide for her.

"We think the decree ought not to have such effect.

"In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign, and one rendered in a domestic forum.

"In either case, to give to a decree thus obtained the effect claimed for it, would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy —the only grounds upon which *ex parte* decrees of divorce are authorized and supported.

"It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the District Court, notwithstanding the subsisting divorce pronounced by the Court of Common Pleas. It is true that the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony."

The following cases were cited by the court as sustaining the right of the wife to maintain an independent proceeding for alimony, even after the husband had obtained a divorce: *Richardson* v. *Wilson,* 8 Yerger, 67; *Crane* v. *Meginnis,* 1 Gill & J. 463, and *Shotwell* v. *Shotwell,* 1 Sm. & M. Ch. R. 51.

In *Doerr* v. *Forsythe* (1893), 50 Ohio St. 726, an Indiana divorce granted to a husband, upon constructive service, was held not to bar the right of the wife to dower in lands in Ohio owned during coverture by the husband.

Alabama.—In *Thompson* v. *State* (1856), 28 Alabama, 12, the facts were these: Thompson deserted his family in Mississippi, went to Arkansas and there obtained a divorce upon constructive service. The wife returned to her father's home in Alabama, and, after the divorce, the husband also went to

Alabama, where he again married. He was prosecuted for and convicted of bigamy. The conviction was set side, however, upon the ground that the guilt or innocence of the accused depended upon the question as to whether he had a *bona fide* domicil in Arkansas during the pendency of the proceedings for divorce. *Harding* v. *Alden*, 9 Maine, 140, was cited as authority.

In a subsequent case, however, *Turner* v. *Turner* (1870), 44 Alabama, 437, the Supreme Court of Alabama strictly limited, as against a citizen of Alabama, the effect of a divorce rendered in another State upon constructive service. The parties were married in Alabama, where the husband deserted the wife, and located in Indiana, where he obtained a divorce upon constructive service. The wife remained in Alabama, and, after the granting of the divorce to the husband, she sued him in Alabama for a divorce and alimony. The husband pleaded the Indiana decree in bar. The trial court, however, held that the wife was entitled to maintain her suit and entered a decree for divorce and alimony. In affirming the decree the Supreme Court of Alabama, upon the authority of *Thompson* v. *State*, *supra*, said that the decree of divorce obtained by the husband in Indiana might protect him against prosecution for bigamy should he marry again in Alabama. Referring to that decree it further said (p. 450):

"But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot affect the rights of the complainant, except her right in the husband as husband. If it is valid, it unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this State, in the event she should survive him, nor any other interest of a pecuniary character she may have against him. . . . It is the duty of the State to protect its own citizens, within its own borders. This is the

natural compensation for allegiance. This high duty extends to all the pecuniary rights of the citizens, as well as to the rights of security of person. . . . No obligation of comity is paramount to this duty. Without a constant and effective exertion of it, citizenship would become a farce. . . . The wife is as much the citizen of the State as the husband, and is entitled to the protection of its laws to the same extent, so long as she remains within its jurisdiction. It would be a scandal to justice to imperil her, and sacrifice her most important and cherished rights upon a mere technicality; a technicality that often contradicts the truth. When her protection requires it, it would be cruelly unjust for the State, of her actual residence and domicil, to repudiate its own right of jurisdiction to give her aid. I therefore think that the better opinion is, that she has the right to file her bill here, and to all the relief that the court could give her, notwithstanding her husband might not be domiciled in this State at the commencement and during the whole pendency of her litigation with him. . . .

"Then, if the state courts have competent jurisdiction in such a case, as undoubtedly they have, they may go on and exercise that jurisdiction in the manner and to the extent prescribed by their own laws.

"Under the laws of this State, by the contract and consummation of a marriage, the wife, if she has no separate estate, becomes entitled to dower in the husband's lands, and a certain distributive interest in his personal estate, if she survives him, and to temporary and permanent alimony out of his estate upon a separation by divorce in her favor. These are rights that she cannot legally be deprived of without her consent or her fault. . . . If this were not so, then these important statutory provisions in favor of the wife would be repealed or rendered null by a foreign divorce, of which she had no notice and no knowledge, during its whole progress through the forms of a foreign court. To sue in her own domicil is necessary for the protection of the wife. It, therefore,

overrides the technical rule that the husband's domicil is also the domicil of the wife. . . . Here the testimony shows that the wife has no separate estate. The witnesses for the defendants say when she was married she 'brought nothing with her.' It also appears that during her connection with the defendant Matthew Turner, as his wife, she was a chaste, industrious, economical, faithful, useful and obedient wife; and that the husband's property is very considerable; worth possibly not less than one hundred thousand dollars. It is also shown that his three children by a former marriage are already sufficiently provided for.

"Under such a state of facts the sum of thirty thousand dollars was not an unreasonable sum for permanent alimony, to be allowed to the wife, nor the sum of eight hundred dollars too large for temporary alimony. . . ."

INDIANA.—In *Tolen* v. *Tolen* (1831), 2 Blackf. 407, the facts were these: A wife, on being deserted in Kentucky, removed to and became domiciled in Indiana, and after a residence there of five years sued for a divorce from the non-resident husband. In an opinion of great length the court considered the question of its power to grant a divorce which would be *valid in Indiana*, and decided it had such power, but expressly reserved passing on the question whether the decree would have extraterritorial force.

In *Hood* v. *State* (1877), 56 Indiana, 263, 271, it was declared that as an *ex parte* divorce in favor of one domiciled within the jurisdiction of a State, and against a non-resident, although founded upon constructive service, was valid as to the plaintiff, "*public policy* demands that it should be held valid as to both parties."

In *Hilbish* v. *Hattle* (1896), 145 Indiana, 59, certain sections of the Indiana Revised Statutes, wherein it was provided that the divorce of one party to a marriage should dissolve the contract as to both, and that a divorce decreed in another State by a court having jurisdiction of the cause should have full effect in Indiana, were held to be applicable to a decree of

divorce granted in another State, in favor of a husband, upon constructive service, and the same effect was given to the decree, as to the rights of the wife in the property of the husband in Indiana, as if the divorce had been rendered in Indiana.

MISSOURI.—In *Gould* v. *Crow*, 57 Missouri, 200, a decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, was held to operate as a divorce in favor of the husband in Missouri, so as to prevent the wife from claiming her dower in lands in Missouri owned by the husband. *Harding* v. *Alden*, 9 Maine, 140, was relied upon as authority. A statute of Missouri, barring the claim of a wife for dower after divorce granted by reason of her fault, was held to apply to all divorces, whether obtained in Missouri or in other States, and whether obtained on personal service or by order of publication. The doctrine of *Gould* v. *Crow* was reaffirmed and applied in *Anthony* v. *Rice*, 110 Missouri, 223.

WISCONSIN.—In *Shafer* v. *Bushnell* (1869), 24 Wisconsin, 372, an *ex parte* divorce granted a wife in Minnesota upon constructive service of the defendant, a citizen of Minnesota, was held upon the grounds of comity to be conclusive in Wisconsin in respect to the status or domestic and social condition of the wife. The decree was held to bar an action for criminal intercourse against the person whom the complainant in the divorce suit married after the granting of the divorce.

In *Cook* v. *Cook* (1882), 56 Wisconsin, 195, however, in an elaborate opinion, an *ex parte* divorce obtained in Michigan upon constructive service merely, by a husband who had deserted his wife in Wisconsin, was held not to affect the status of the wife in Wisconsin nor to bar her from suing in Wisconsin for divorce, alimony, allowance and a division of the property of such husband situated within Wisconsin.

Deducing the law of the several States from the rulings of their courts of last resort which we have just reviewed and ignoring mere minor differences, the law of such States is embraced within one or the other of the following headings:

a. States where the power to decree a divorce is recognized, based upon the mere domicil of the plaintiff, although the decree when rendered will be but operative within the borders of the State, wholly irrespective of any force which may be given such decree in other States. Under this heading all of the States are embraced with the possible exception of Rhode Island.

b. States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other States, when the court rendering the same had jurisdiction over only one of the parties. Under this heading is embraced Massachusetts, New Jersey (with the qualification made by the decision in 59 N. J. Eq. 606) and New York.

c. States which, whilst giving some effect to decrees of divorce rendered against its citizens, in other States where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of state comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of state comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes the States of Alabama, Maine, Ohio and Wisconsin.

d. Cases which, although not actually so deciding, yet lend themselves to the view that *ex parte* decrees of divorce rendered in other States would receive recognition by virtue of the due faith and credit clause. And this class embraces Missouri and Rhode Island.

Coming to consider, for the purpose of classification, the decided cases in other States than those previously reviewed, which have been called to our attention, the law of such States may be said to come under one or the other of the foregoing headings, as follows:

Proposition *a* embraces the law of all the States, since in the decision of no State is there an intimation expressing the ex-

ception found in the Rhode Island case which caused us to exclude that State from this classification.

Under proposition *b* comes the law of the States of Pennsylvania, Vermont and South Carolina. A line of decisions of the State of North Carolina would also cause us to embrace the law of that State within this classification, but for a doubt engendered in our minds as to the effect of the law of North Carolina on the subject, resulting from suggestions made by the North Carolina court in the opinion in the *Bidwell* case, 52 S. E. Rep. 55.

Proposition *c* embraces the law of Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska and New Hampshire. And it is pertinent here to remark that in Michigan, 3 Comp. Laws Michigan (1897), par. 8621, c. 232, sec. 6, the obtaining of a divorce in another State from a citizen of Michigan is made cause for the granting of a divorce in Michigan to its citizens. A like provision is also in the statutes of Florida. Rev. Stat. Florida (1902), sec. 1480.

Under proposition *d* we embrace the remaining States, although as to several the classification may admit of doubt, viz., California, Illinois, Iowa, Kentucky and Tennessee.

It indubitably, therefore, follows from the special review we have made of cases in certain States, and the classification just made of the remaining state cases which were called to our attention and which we have previously cited in the margin, that the contention is without foundation, that such cases establish by an overwhelming preponderance that, by the law of the several States, decrees of divorce obtained in a State with jurisdiction alone of the plaintiff are, in virtue of the full faith and credit clause of the Constitution, entitled to be enforced in another State as against citizens of such State. Indeed the analysis and classification which we have made serves conclusively to demonstrate that the limited recognition which is given in most of the States to such *ex parte* decrees of divorce rendered in other States is wholly inconsistent with the theory that such limited recognition is based

upon the operation of the full faith and credit clause of the Constitution of the United States, and on the contrary is consistent only with the conception that such limited recognition as is given is based upon state comity. No clearer demonstration can be made of the accuracy of this statement than the obvious consequence that if the full faith and credit clause were now to be held applicable to the enforcement in the States generally of decrees of divorce of the character of the one here involved it would follow that the law of nearly all of the States would be overthrown, and thus it would come to pass that the decisions which were relied upon as establishing that the due faith and credit clause applies to such decrees would be overruled by the adoption of the proposition which it is insisted those decisions maintain. The only escape from this conclusion would be to say that the law of the States as shown by the decisions in question would remain unaffected by the ruling of the full faith and credit clause because not repugnant to that clause. This would be, however, but to assert that the full faith and credit clause required not that full faith and credit be given in one State to the decrees of another State, but that only a limited and restricted enforcement of a decree of one State in another would fulfill the requirements of that provision of the Constitution. To so decide would be to destroy the true import of the full faith and credit clause as pointed out in the outset of this opinion. Thus, in its ultimate aspect the proposition relied upon reduces itself to this, either that the settled law of most of the States of the Union as to divorce decrees rendered in one State, where the court rendering the decree had jurisdiction only of the plaintiff, must be held to be invalid, or that an important provision of the Constitution of the United States must be shorn of its rightful meaning.

Without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the State of New York to give to a decree of that character

rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that State, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore,

Affirmed.

MR. JUSTICE BROWN, with whom were MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE HOLMES, dissenting.

Marriage between these parties was solemnized June 4, 1868. They separated the same day, without a consummation, and have never lived together since. No matrimonial domicil was ever established in New York or elsewhere. Defendant left New York soon after the wedding, drifted about the country for several years, and finally settled in Connecticut in 1877; remained there twelve years, during which time, and in 1881, he obtained a divorce in the Superior Court of Litchfield County, which he now sets up in defense of this action.

Plaintiff took no steps for twenty-six years to obtain a legal separation or maintenance, when, in July, 1894, she applied to the Superior Court of the State of New York for a summons by publication. The defendant did not appear, and a decree was rendered against him by default, separating the parties and granting alimony of $1,500 a year. This decree appears to have been abortive, so far as respects alimony at least, probably for lack of personal service on the defendant. Meantime, and in 1891, defendant had inherited a considerable property from his father.

This action was begun by a summons dated June 3, 1899, thirty-one years after the marriage; was served upon the de-

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fendant, who answered December 18, 1899, setting up, amongst other things, the decree of the Superior Court of Litchfield County, dissolving the marriage, the validity of which presents the only Federal question in this case.

1. This decree is attacked upon the ground that the Connecticut court acted without jurisdiction of the parties lawfully obtained. The record in that case shows that notice of the pendency of the petition was ordered to be published in a Litchfield paper, and also that a copy of the petition be sent to the respondent by mail, postage paid, at Tarrytown, New York. While there is no affidavit of the publication of the notice, there is a recital in the decree "that said complaint and writ have been duly served upon the defendant pursuant to an order of notice made thereon by the clerk of this court." This is sufficient *prima facie* evidence of the publication to entitle the record to be received. *Applegate* v. *Lexington &c. Mining Co.*, 117 U. S. 255, 269, wherein it was said by the court that "while it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless indeed the statute, expressly or by implication, requires it. . . . Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. . . . It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed."

As the record was rejected for reasons appearing only upon its face, it is unnecessary to decide whether the recitals in the decree can be contradicted. Possibly the New York court might have assailed its validity by showing that, notwithstanding the recitals in the record, the court acquired no jurisdiction of the defendant by failure to comply with the order of the court with reference to the publication of notice in a news-

paper, or in sending a copy of the petition and complaint to the defendant by mail at Tarrytown, New York, the last known place of residence. The fact that the referee refused to admit the record, even as *prima facie* evidence, foreclosed any defense founded upon the actual failure to obtain jurisdiction over the defendant.

There is no doubt of the proposition that a decree of divorce may be lawfully obtained at the matrimonial domicil, notwithstanding that the defendant may have taken up his or her residence separate from the other party in another State, providing that the law of the domicil with respect to the personal service or publication be scrupulously observed. *Atherton* v. *Atherton*, 181 U. S. 155.

Doubtless the jurisdiction of the court granting the divorce may be inquired into, and if it appear that the plaintiff had not acquired a *bona fide* domicil in that State at the time of instituting proceedings, the decree is open to a collateral attack, *Bell* v. *Bell*, 181 U. S. 175, and a recital in the proceedings of a fact necessary to show jurisdiction may be contradicted. *Thompson* v. *Whitman*, 18 Wall. 457; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Andrews* v. *Andrews*, 188 U. S. 14.

Subject to these conditions, each State has the right to regulate the marital *status* of its citizens, at least so far as to determine in what manner and by whom marriages may be solemnized, what shall be deemed the age of consent, what obligations are assumed, what property rights are created, for what causes divorces shall be granted, for what length of time the domicil of plaintiff shall have been acquired prior to the institution of the proceedings, and in what manner notice shall be given to the defendant. Nor is the power of the legislature in this connection ousted by the fact that the other party to the contract resides in another State, provided that in case of proceedings adverse to such party he or she shall be given such notice as due process of law requires. If such proceedings be *in rem* or *quasi in rem*, notice by publication is ordinarily deemed sufficient. But in case of actions *in per-*

sonam for the recovery of damages, personal service within the jurisdiction is vital to the proceedings. *Pennoyer* v. *Neff*, 95 U. S. 714; *Huling* v. *Kaw Valley Railway and Improvement Co.*, 130 U. S. 559.

By the laws of Connecticut of 1878, c. 71, p. 305, exclusive jurisdiction is given to the Superior Courts to grant divorces for several causes, among which are "willful desertion for three years with total neglect of duty," with a further provision (Gen. Stats. 4555), "that plaintiff shall have continuously resided in the State three years next before the date of the complaint," with certain exceptions not material to be noticed. A further provision, sec. 4553, that, "where the adverse party resides out of, or is absent from the State, or the whereabouts of the adverse party is unknown to the plaintiff, any judge or clerk of the Supreme Court of Errors, or the Superior Court, or any county commissioner, may make such order of notice as he may deem reasonable, and, such notice having been given and duly proved to the court; it may hear such complaint if it find that the defendant has actually received notice that the complaint is pending, and if it shall not appear that the defendant has had such notice, the court may hear such case, or, if it see cause, order such further notice to be given as it may deem reasonable, and continue the complaint until the order is complied with."

The complaint alleged a willful desertion of the plaintiff for more than three years, and the court found this to be the fact.

2. The case turns upon the question whether the Superior Court of Litchfield County gained jurisdiction by a residence of the plaintiff within the State for more than three years. The testimony also showed that the defendant had acquired a separate domicil in New York, and had been living there for about thirteen years.

In discussing this question two propositions may be admitted at once, and discarded as having no relevancy to the case:

1. That a judgment for damages in an action *in personam* is valid only when personal service has been made upon the

defendant within the jurisdiction of the court rendering the judgment. This disposes at once of the cases of *Pennoyer* v. *Neff*, 95 U. S. 714; of *Mississippi &c. R. R. Co.* v. *Ward*, 2 Black, 485, where an Iowa court had undertaken to abate a nuisance on the Illinois side of the Mississippi river; and of *Delaware &c. R. R. Co.* v. *Pennsylvania*, 198 U. S. 342, where a State had attempted to tax property having a permanent *situs* in another State.

2. That the courts of one State may not grant a divorce against an absent defendant to any person who has not acquired a *bona fide* domicil in that State. The same rule applies if he has removed thither solely for the purpose of acquiring a domicil and obtaining a divorce for a cause, which would have been insufficient in the State from which he removed. *Andrews* v. *Andrews*, 188 U. S. 14.

The jurisdiction of the Connecticut court in this case is shown, not by the facts as they appear in this case, but from the record in that case, and primarily from the petition, which under the practice in that State is incorporated with the summons. The allegations are:

"On the first day of January, 1869, the defendant willfully deserted the plaintiff, and has continued said desertion, with total neglect of all the duties of the marriage on her part to be performed to the date of this writ, being for more than three years, and during the plaintiff's residence in this State."

It is conceded that such desertion is good ground for a divorce in Connecticut, which may be granted to a plaintiff who has continuously resided in the State three years next before the date of the complaint. The complaint obviously made a case for divorce under the statute. The court found that the complaint and writ had been duly served on the defendant, pursuant to an order of notice made thereon by the clerk; that the allegations of the complaint had been sustained and a divorce was granted.

The case then resolves itself into the single question whether a divorce granted to a plaintiff lawfully domiciled within a

State as against a defendant domiciled in another State, who has been served by publication or letter only, is a valid defense to a suit by the latter for a separation and alimony.

Certain cases in this court tend strongly to support the proceedings in Connecticut. *Strader* v. *Graham*, 10 How. 82, was an action to recover the value of certain slaves carried into Ohio, a free State. The case was dismissed, as involving a question of the local law of Kentucky, the court remarking: "Every State has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory, . . . and that it was exclusively in the power of Kentucky," (wherein the suit was brought) "to determine for itself whether their employment in another State should or should not make them free on their return."

In *Barber* v. *Barber*, 21 How. 582, a New York court decreed a separation and alimony to the wife. The husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, and there obtained a divorce *a vinculo* upon the ground of abandonment. The sole question raised by the record was: "Whether a wife divorced *a mensa et thoro* can acquire another domicilation in a State of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States, having equity jurisdiction, to recover from him alimony due, and which he refuses to make arrangement to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case."

It was a suit to recover upon a judgment obtained in New York before proceedings instituted in Wisconsin, and was sustained. Obviously, the Wisconsin divorce was no defense, but its validity was not impugned.

Cheever v. *Wilson*, 9 Wall. 108, turned upon certain rights of property, and incidentally upon a divorce obtained in Indiana, in a suit in which the defendant appeared. The case, however, is valuable for two questions decided: First, that a decree of divorce, valid and effectual by the laws of the State

in which it was obtained, is valid and effectual in all other States; second, that a wife may acquire a domicil different from her husband's whenever it is necessary or proper that she should have such a domicil; and on such a domicil, if the case otherwise allow it, may institute proceedings for divorce, though it be neither her husband's domicil nor have been the domicil of the parties at the time of the marriage, or of the offense.

Of course, it follows that if the wife may obtain a new domicil her husband may do likewise, as was done in this case, after the separation or abandonment had taken place. In delivering the opinion, Mr. Justice Swayne observed: "The decree (of divorce) was valid and effectual, according to the law and adjudications, in Indiana."

The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. " 'If a judgment is conclusive in the State where it is rendered, it is equally conclusive everywhere' in the courts of the United States."

In *Cheely* v. *Clayton*, 110 U. S. 701, a divorce obtained in a territorial court, upon notice by publication insufficient under the laws of the Territory, was held to be of no effect. The court, however, observing: "If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicil, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that State," citing *Burlen* v. *Shannon*, 115 Massachusetts, 438, and *Hunt* v. *Hunt*, 72 N. Y. 218.

In *Maynard* v. *Hill*, 125 U. S. 190, a legislative divorce was upheld, and it was said that the fact that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. It was further said that though the conduct of the husband merited the strongest reprobation, his abandonment of his wife, his loose

morals and shameless conduct could have no bearing upon the power of the assembly to pass the act.

Four recent decisions in this court are too important to pass unnoticed. In *Bell* v. *Bell*, 181 U. S. 175, and in *Streitwolf* v. *Streitwolf* (p. 179), it was held that a divorce obtained in a State in which neither party was domiciled, upon service by publication and in another State, was entitled to no faith and credit. These decisions were unanimous. And in *Andrews* v. *Andrews*, 188 U. S. 14, that a divorce obtained by one who had gone into another State to procure a divorce in fraud of the law of the domicil, was also invalid.

There remains the case of *Atherton* v. *Atherton*, 181 U. S. 155, a divorce obtained by a husband in Kentucky which had been the matrimonial domicil, though the wife had been absent from the State for several months, and apparently had attempted to acquire a new domicil in New York. The court took care to confine the case to the one point decided, namely, the validity of a divorce obtained at the matrimonial domicil. The court out of abundant caution expressly disclaimed that the case involved the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. "In this case, the divorce in Kentucky was by the court of the State, which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

While the *Atherton* case, as already stated, was confined to a divorce obtained at the matrimonial domicil, the cases cited by Mr. Justice Gray in his opinion relate to divorces obtained in a State which was the domicil only of the complaining party, and are practically the same as those cited by him in his opinion as Chief Justice of Massachusetts in *Burlen* v. *Shannon*, 115 Massachusetts, 438. In reading the two cases together one is

strongly impressed with the idea that in the *Atherton* case he had the former case in mind, and gave it such approval as the facts in the latter case would warrant. Not only had the Court of Appeals of Kentucky decided that a wife residing in that State was entitled to obtain a decree of divorce against her husband who had left the State, *Rhyms* v. *Rhyms*, 7 Bush, 316; *Perzel* v. *Perzel*, 91 Kentucky, 634, but a number of cases from other States were cited holding to the same principle.

The opinion of the court in the present case admits that where the domicil of the husband is also the domicil of matrimony, the courts of that domicil may disregard an unjustifiable absence of the wife therefrom, and treat her as having her domicil there for the purpose of dissolving the marriage as to both parties, and that such dissolution would be recognized in all other States by virtue of the full faith and credit clause, citing to this effect *Atherton* v. *Atherton*, 181 U. S. 155, and, as a corollary therefrom, it is admitted that no question can arise concerning the right of the State of Connecticut to give effect to a decree of divorce rendered in favor of the husband while domiciled in that State. The question is, undoubtedly, as stated, whether the Connecticut court, in virtue of the domicil of the husband in that State, had jurisdiction to render a decree against the wife which was entitled to be enforced in other States, under the full faith and credit clause.

I deny, however, that the final question is whether this would be enforcing a *personal* judgment rendered in another State against the defendant, over whom the court rendering the judgment had not acquired jurisdiction. A proceeding for divorce is not *in personam* nor of an exceptional character, except so far as all proceedings *in rem* are governed by a different rule from that applicable to proceedings *in personam*. The validity of the latter class depends upon personal service of the defendant being obtained within the jurisdiction. The validity of the former depends upon the jurisdiction of the court over the *res*—in this case the marriage relation, the domicil of the plaintiff, and such jurisdiction over the defendant as is consonant

with the general principles of the constitution with regard to due process of law.

The propositions of the opinion, as we understand it, may be summarized as follows:

That, if one government by virtue of its authority over marriage, may dissolve the tie as to citizens of another government, that other government would have a similar power, and hence the right of every government over its own citizens might be rendered nugatory by the exercise of the power which every other government possesses. To illustrate by the present case: That, if the husband may desert his original domicil in New York, go to the State of Connecticut, acquire a domicil there and procure a divorce which would be binding in New York as to the party there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage, as to its domiciled citizen, would be of no practical avail. The opinion, however, fails to state the logical result of this proposition, viz., that no divorce would be possible in either State without a personal service upon the other within the State. If the husband, having his domicil in Connecticut, could not obtain a divorce against his wife domiciled in New York without a personal service, it follows that the wife domiciled in New York could not obtain a divorce against her husband in that State without a personal service there.

Undoubtedly the laws of some States are more liberal upon the subject of divorce than those of other States, but that does not affect the question. If the complaining party has acquired a domicil in the State in which he institutes proceedings, he is entitled to the benefit of the laws of that State with respect to the causes of divorce.

It is argued that, as the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce, yet, if the validity of the Connecticut divorce in this case be sustained, it follows that the destruction of the power of the States over the dissolution of marriage of its own citizens would be brought about by the full faith and credit

clause of the Constitution. But this was the very point decided in the *Atherton* case, where a divorce obtained in Kentucky by publication was held good in New York, as against a proceeding by the wife for a divorce in that State. It is true that the matrimonial domicil was in Kentucky. But this does not affect the proposition asserted in the opinion, that the decree did work a dissolution of the marriage, as to her, by the operation of the full faith and credit clause of the Constitution, and to that extent it did work a destruction of the power of the State of New York over the dissolution of the marriage. But the argument to that effect was not considered by this court to be sound. It does undoubtedly follow that the *res*, that is, the marriage relation, was as much in the State of New York as it was in the State of Connecticut, but it does not follow that the action of the Connecticut court with respect to that *res* is not as much obligatory in New York as in Connecticut. It is of the very essence of proceedings *in rem* that the decree of a court with respect to the *res*, whether it be a vessel, a tract of land or the marriage relation, is entitled to be respected in every other State or country. The *status* fixed by the adjudication in the State of the former is operative everywhere. Indeed, the proposition is so elementary as not to need the citation of an authority.

The conclusion of the argument is that, the courts of New York having the same power to decree a dissolution of the marriage at the suit of the wife, that the courts of Connecticut would have to make a similar decree at the suit of the husband, it would become a mere race of diligence between the parties in seeking different forums in other States; or the celerity by which in such States judgments of divorce might be procured, would have to be considered in order to decide which forum was controlling. Granting this to be the case, does not every plea of *res adjudicata* presuppose a prior judgment, and is it a defense to such plea that such judgment was obtained by superiority in a race of diligence? The whole doctrine is founded, if not upon the doctrine of superior diligence, at least upon the

theory of a prior judgment, which fixes irrevocably the rights of the parties, whenever and wherever these rights may come in question. Nor is the rule less operative where suits are in different States and the laws applicable to the questions therein arising are different. To illustrate: Suppose a note and mortgage were given for usurious interest, and the mortgage was sought to be foreclosed in a State where, by statute, usury would invalidate both principal and interest, and a decree were obtained dismissing the bill, can it be doubted that if the note were sued upon in another State where usury did not invalidate the security the plea of *res adjudicata* would be sustained upon the ground that the rights of the parties had been definitely fixed in the suit for the foreclosure of the mortgage? It seems to me the same rule applies in this case. So long as no proceedings are taken, the marriage would remain valid both by the laws of Connecticut and of New York. But if a suit be instituted by either party, by the husband for a divorce or by the wife for a maintenance, and the question of marriage or no marriage be made an issue, and decided in the case first brought, that decree is forever binding upon both parties. Had the wife in this case brought suit to dissolve the marriage, or for a maintenance in affirmation of the marriage, the decree of the court in New York would have been as binding upon the court in Connecticut as the decree obtained in Connecticut ought to be upon the wife in New York.

The cases in the state courts, with a few exceptions, hereinafter noted, overwhelmingly preponderate in holding that where the plaintiff has acquired a *bona fide* domicil in a particular State he may lawfully appeal to the courts of that State for a dissolution of the marriage tie, for the causes permitted by its statutes, and may call in the non-resident defendant by publication. To abstract all these cases would unduly prolong this opinion.

In many of them the full faith and credit clause of the Constitution does not seem to have been called to the attention of the court, and the case was disposed of upon principles of com-

ity, which give to the court a certain latitude of discretion, whereas, under the full faith and credit clause, the consideration given to a decree in the State where it is rendered is obligatory in every other State.

One of the earliest of these cases is that of *Harding* v. *Alden*, 9 Maine, 140, in which the parties separated, the husband going to North Carolina and the wife to Rhode Island. She began proceedings there, which culminated in a divorce for adultery committed in North Carolina, the husband having been personally cited to appear, but refusing to do so. The divorce was held to be valid, the court observing that "the protection of innocent parties and the purity of public morals require that divorces lawfully pronounced in one jurisdiction, and the new relations thereupon formed, should be recognized as operative and binding everywhere," in the absence of fraud or collusion. The ruling was that the wife was entitled to dower in lands of which the husband was seized during coverture, the statute expressly giving the right where divorce was decreed for the cause of adultery, as if the husband were dead.

In *Barber* v. *Root*, 10 Massachusetts, 260, the parties originally domiciled in Massachusetts removed to Vermont, and established a permanent domicil there. The court, while repudiating the idea that a divorce could be granted to a person who was not domiciled in Vermont, held the divorce to be good.

In *Hood* v. *Hood*, 11 Allen, 196, a divorce obtained in Illinois by the husband for desertion, upon notice by publication in a newspaper, was held to be valid as against the wife, although she was then living in Massachusetts under an agreement on his part to pay her a certain sum per week; and although she had no actual notice of the proceedings, and was not in Illinois during the pendency thereof. It was further held that she could not, in a libel for divorce brought by her in Massachusetts, offer evidence that the Illinois decree was obtained by fraud, and upon facts which would not entitle her to a divorce in Massachusetts. In a subsequent case between the same par-

ties, 110 Massachusetts, 463, the court again decided that the Illinois decree could not be impeached, and that she was not entitled to dower in any lands of which the husband was seized during the coverture.

The whole subject was very carefully considered in *Burlen* v. *Shannon*, 115 Massachusetts, 438, which was an action against the husband for board furnished the wife. The husband, whose wife was living apart from him without justifiable cause, removed to Indiana, acquired a domicil there and obtained a decree of divorce by publication, and by leaving a summons at her abode in Massachusetts. The divorce was held to be valid in Massachusetts as to all persons, although the wife had never been in Indiana, never appeared in the suit there, had no knowledge that her husband contemplated going to that State, or had left Massachusetts, until after he had filed his libel for divorce. The authorities are reviewed by Mr. Justice Gray, and the conclusion reached that the divorce in Indiana was valid.

Cummington v. *Belchertown*, 149 Massachusetts, 223, was an action to recover expenses incurred by the plaintiff for the support of an insane pauper. The husband had removed to another State and procured a decree annulling the marriage on the ground of fraud in concealing from him the fact of insanity before their marriage. Notice of the proceedings was served upon her, but she was not represented, and it was held that the decree was insufficient to annul her marriage in Massachusetts. It was held, under the familiar rule that the jurisdiction of the foreign court may be inquired into, that the wife, when the proceedings were commenced and concluded was utterly insane, and that the record of the New York courts showed her to have been so, and that no guardian was appointed. The case was disposed of as one over which the New York court had acquired no jurisdiction. It does not qualify in any way the previous case of *Burlen* v. *Shannon*.

The case of *Ditson* v. *Ditson*, 4 R. I. 87, is directly in point, and I understand it to be so admitted. It was held that a

divorce in Rhode Island on the ground of desertion was valid, though the husband had never been within the jurisdiction of Rhode Island, and only constructive notice of the pendency of the petition had been given him.

The rule in Kentucky is settled in *Rhyms* v. *Rhyms*, 7 Bush. 316, in which a wife proceeded against her husband as a non-resident by a warning order, and it was held that the court had jurisdiction to grant her a divorce, Chief Justice Robertson remarking: "It would be a reproach to our legislation if a faithless husband in Kentucky could by leaving the State deprive his abandoned wife of the power to obtain a divorce at home." In *Hawkins* v. *Ragsdale*, 80 Kentucky, 353, it was held that a divorce obtained by the husband in Indiana by constructive service determined the *status* of the party in Kentucky, and that under the statutes of that State it barred all claim to curtesy or dower in Kentucky lands. To the same effect is *Perzel* v. *Perzel*, 91 Kentucky, 634.

The law of California is settled in *In re Newman*, 75 California, 213, to the effect that a suit for divorce, so far as it affects the *status* of the parties and the custody of their children, is a proceeding *in rem*, and service by publication on a non-resident defendant is good. This ruling was repeated in *In re James*, 99 California, 374, where it is declared that such decree is equally valid in other States.

Nowhere is the rule more strongly asserted than in Tennessee, where a decree obtained in Illinois by publication was sustained in *Thoms* v. *King*, 95 Tennessee, 60, and where it seems to have been held that the decree could not be impeached, even by showing the absence of necessary residence.

In *Cooper* v. *Cooper*, 7 Ohio St. 594, it was held that a divorce granted in Indiana precluded an application for a divorce and alimony in Ohio. In *Cox* v. *Cox*, 19 Ohio St. 502, the validity of a foreign decree of divorce obtained by constructive service, except so far as regarded the question of alimony, was sustained. The same ruling was made in *Doerr* v. *Forsythe*, 50 Ohio St. 726, holding that while the Indiana divorce was good,

it did not affect the property rights of the wife in the State of Ohio.

The rule in Missouri is stated in *Gould* v. *Crow*, 57 Missouri, 200, that a divorce regularly obtained by the husband in Indiana on an order of publication operates as a divorce in his favor in Missouri, so as to prevent his wife from claiming dower in lands owned by him in that State. The decree so pronounced is a judgment *in rem* and is valid everywhere under the Constitution and laws of the United States. A like ruling was made in *Anthony* v. *Rice*, 110 Missouri, 223.

The law in Kansas is settled in *Rodgers* v. *Rodgers*, 56 Kansas, 483, to the effect that the courts of a sister State may dissolve a marriage relation between a husband domiciled there and a wife domiciled in Kansas, by publication, although unknown to her; but that such courts have no power to settle the title of lands in Kansas or control the custody of children residing there. But it was also decided in *Chapman* v. *Chapman*, 48 Kansas, 636, that a wife having obtained a divorce in Ohio upon service by publication, was not entitled to dower in lands in Kansas fraudulently conveyed by her husband in fraud of her or others.

In *Smith* v. *Smith*, 43 La. Ann. 1140, it is held that a wife may acquire a separate domicil from that of her husband where his conduct has been such as to furnish ground for divorce, and her marriage *status* becomes subject to the jurisdiction of that domicil, and that the courts thereof may grant a divorce upon actual or constructive notice. The rights of the Louisiana courts to decree a divorce against an absentee by means of substituted service is again affirmed in *Butler* v. *Washington*, 45 La. Ann. 279.

The law of Wisconsin is the same. *Shafer* v. *Bushnell*, 24 Wisconsin, 372; *Cook* v. *Cook*, 56 Wisconsin, 195, though in the latter case the right of the wife to an interest in her husband's lands in Wisconsin was preserved.

In *Thompson* v. *State*, 28 Alabama, 12, the right of the husband to emigrate and acquire a new domicil and procure a

divorce upon publication in the State of his domicil, was also affirmed. See also *Turner* v. *Turner*, 44 Alabama, 437. In the latter case it is indicated that a foreign divorce did not settle the rights of the wife to dower in his lands, or any other interests of a pecuniary character.

In *Kline* v. *Kline*, 57 Iowa, 386, a decree rendered in another State on service by publication was recognized, except so far as it attempted to fix the custody of the minor children. In *Van Orsdal* v. *Van Orsdal*, 67 Iowa, 35, the property rights of the wife were recognized, but this right was limited to property within the State, and which the husband owned at the time of the divorce, and not to what he subsequently acquired. In this case it was said: "The divorce was granted . . . in May, 1880. In November, 1881, the defendant's father died in this State, possessed of certain property which the defendant inherited. Now, while it may be that the plaintiff might be entitled to alimony if the defendant had owned property in the State at the time the divorce was procured in Nebraska, she cannot be so entitled because he has subsequently acquired property. The plaintiff, if entitled to alimony, was so entitled at the time the divorce was granted. The relation of husband and wife then ceased, and neither party is entitled to any share or interest in property which may be subsequently acquired."

In Indiana the right of a wife domiciled there to a divorce against the husband who never resided in that State, and upon whom service was only obtained by publication, is recognized in *Tolen* v. *Tolen*, 2 Blackford, 407; *Hood* v. *State*, 56 Indiana, 263, and in *Hilbish* v. *Hattle*, 145 Indiana, 59, it was held that the wife had no rights in his property by virtue of her marriage relations with the husband, though the court did not in the divorce proceedings adjudicate the property rights of the parties.

In *Garner* v. *Garner*, 56 Maryland, 127, the power to grant a divorce against a non-resident, upon whom process had not been served, was recognized, but the right to a decree that the non-resident should not marry again was denied.

201 U. S. BROWN, HARLAN, BREWER and HOLMES, JJ., dissenting.

In *Thurston* v. *Thurston*, 58 Minnesota, 279, the divorce was recognized, though process was served outside of the State. But it was held that the question of alimony was not *res adjudicata* by reason of the judgment. The wife was allowed alimony out of property in Minnesota.

The validity of foreign divorces obtained without personal service is recognized in Illinois, in *Knowlton* v. *Knowlton*, 155 Illinois, 158, and in *Dunham* v. *Dunham*, 162 Illinois, 589.

The law in New Jersey appeared at one time to favor the contention of the wife in this case. The gist of the decisions seemed to be that a foreign decree is enforceable in another State only on the ground of comity. This was indicated in *Doughty* v. *Doughty*, 28 N. J. Eq. 581, though the decree in that case was held to have been obtained by fraud. It was admitted that the decree obtained by the husband in Illinois was lawful and binding there, but it was held that it did not change the *status* of the wife in New Jersey, her citizenship there being admitted. The case was properly decided on the ground that the husband went to Illinois to obtain a divorce, and acquired no *bona fide* domicil there. The same rule was recognized in *Flower* v. *Flower*, 42 N. J. Eq. 152. These cases, however, seem to have been overruled in *Felt* v. *Felt*, 59 N. J. Eq. 606, where it was held that the domicil of the complainant in a foreign State was sufficient to give jurisdiction, notwithstanding the defendant had not been served with process there. The court remarked in this case: "A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous as they happen to be within the limits of one State or another is not to be tolerated any further than is plainly required by public policy." This case evidently puts New Jersey in line with the vast majority of other States.

The cases of New York upon this subject are numerous and perhaps not wholly reconcilable, but we think that the law, as summarized in the last case of *Winston* v. *Winston*, 165 N. Y. 553, is adverse to the validity of a divorce obtained in another State without service of process within the jurisdiction. Of

the same tenor are the cases in Pennsylvania: *Colvin* v. *Reed*, 55 Pa. St. 375; *Reel* v. *Elder*, 62 Pa. St. 308. North Carolina: *Irby* v. *Wilson*, 1 Dev. & Bat. Eq. 568; *Harris* v. *Harris*, 115 N. Car. 587. South Carolina: *McCreery* v. *Davis*, 44 S. Car. 195.

The law in this country then may be summarized as follows: In Maine, Massachusetts, Rhode Island, Kentucky, California, Tennessee, Ohio, Missouri, Kansas, Louisiana, Wisconsin, Alabama, Iowa, Indiana, Maryland, Minnesota, Illinois and New Jersey, the validity of a divorce obtained in another State by a party there domiciled in a proceeding where constructive service upon the defendant only is obtained, is fully recognized. In Ohio, Iowa and Minnesota, and perhaps also Louisiana and Alabama, her right to alimony and to dower is preserved. But the very cases which limit the effect of the divorce, so far as property rights are concerned, restrict such rights to dower in lands of which the husband was seized during coverture, and inferentially at least to alimony from such property. It is also limited to property within the State where suit is brought. That her rights in her husband's property should extend to property acquired by him long after the divorce is nowhere indicated.

The only States in which it is held that a party domiciled in another State may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina.

A proceeding for divorce is a suit *in rem*, with which is often incorporated a suit *in personam*. The *res* is aptly stated in *Ellis* v. *Martin*, 53 Missouri, 575, as "the *status* of the plaintiff *in relation to the defendant* to be acted on by the court. This relation being before the court in the person of the plaintiff, the court acts on it, and dissolves it by a judgment of divorce." The fact subsequently ascertained, that it may have been procured by fraud or false testimony, is wholly beside the question, as we shall hereafter show. The fact that the husband changed his domicil to another State, after the cause of action

arose, is also immaterial. The *status* of the husband in this case was irrevocably fixed by the decree. It is unnecessary to consider how far it affected the *status* of the wife in New York, which, in respect to other questions, may be subject to the local law; but her relations as against her husband are controlled by the decree which fixed *his status*. Indeed, it would be a reproach to our jurisprudence if an injured party residing in one State could not obtain a decree from the other party, without pursuing the offending party into another and distant State, where he or she may have chosen to establish a domicil.

In this case the referee reported that the defendant abandoned the plaintiff without cause or justification. An exception was taken to this report, and the testimony was sent up, which shows that the parties separated on the day of their marriage and have never lived together since. The testimony leaves it doubtful whether it was a case of abandonment or of separation by mutual consent. It does, however, show that plaintiff took no steps to assert her marital rights for twenty-six years after her marriage. Her husband having in the meantime inherited a large amount of property from his father, she began suit for divorce *a mensa et thoro* and an allowance of alimony. This suit, however, was ineffectual so far as respects the alimony, as no personal service was obtained. She waited again for five years and began this proceeding both for a separation, which she had already obtained, and for alimony.

We think the defendant may lawfully reply thus: "You are pursuing me as your husband for a separation *de jure* which has existed for thirty-one years *de facto*, and since 1894 *de jure*, and for an alimony which is obviously the sole object of your proceeding. Your only claim against me is as your husband. I am not your husband. Twenty-three years ago the Superior Court of Litchfield County, Connecticut, in which State I had an actual and *bona fide* domicil, and which had had sole jurisdiction over my marital *status* for twelve years, liberated me from the bonds of matrimony and pronounced me a free man. In the meantime I have married another woman, and if your

position be a sound one, I am, at least in the State of New York, a bigamist, and my wife an adulteress." It is difficult to conceive of a case calling more loudly for the application of the general doctrine.

As no question is made as to the validity of the Connecticut decree and its legal effect in that State, and as this court has repeatedly decided that, under the full faith and credit clause of the Constitution, a judgment conclusive in the State where it is rendered is equally conclusive everywhere in the courts of the United States, *Cheever* v. *Wilson*, 9 Wall. 108; *Mills* v. *Duryee*, 7 Cranch, 481; *D'Arcy* v. *Ketchum*, 11 How. 165, I do not understand how this decree can be denied the same effect in New York that it has in Connecticut without disregarding the constitutional provision in question. The result is that the husband, freed from the bonds of matrimony in Connecticut, was at liberty to contract another marriage there, while the wife cannot even at this late day contract another marriage in New York without being guilty of adultery.

3. It is insisted, however, that the decree of the Connecticut court was obtained by the fraud of Haddock, in stating in his complaint that his wife had deserted him, when, in the present case, it appears from his own testimony that he, in fact, abandoned and refused to live with her, or that they separated by mutual consent.

The evidence upon which the Connecticut decree was granted does not appear in the record, and it is possible that the case was made out by the testimony of other witnesses. But, however that may be, this decree cannot be impeached by evidence that it was obtained by false testimony, even though it be testimony of the plaintiff in that proceeding and the defendant in this. *Hood* v. *Hood*, 11 Allen, 196, in which it was held that "both parties had their domicil in that State [Illinois], and were subject to the jurisdiction of the court in which the libel was filed. . . . But the fact of desertion [by the wife] was conclusively settled between the parties by the judgment in Illinois; and it is not now competent for the libellant to

contradict that judgment." See same case, 110 Massachusetts, 463.

The rule is well settled that while a judgment or decree may sometimes be impeached for fraud, it can only be for a fraud extrinsic to the cause—as, that the judgment was collusively obtained to defraud some other person, and that it cannot be impeached by either of the parties thereto by reason of false testimony given at the time, or which must have been given to establish the plaintiff's case, or even by perjury of one of the parties thereto. Granting that the testimony shows the absence of good faith, and even perjury, on the part of the husband in the Connecticut suit, the decree cannot be opened for that reason, or for any reason, which would not logically involve a reëxamination of the entire facts upon which the decree is obtained. *Christmas* v. *Russell*, 5 Wall. 290; *United States* v. *Throckmorton*, 98 U. S. 61; *Sims* v. *Slocum*, 3 Cranch, 300; *Ammidon* v. *Smith*, 1 Wheat. 447; *Smith* v. *Lewis*, 3 Johns. 157; *Marriott* v. *Hampton*, 7 T. R. 269; *Demerit* v. *Lyford*, 7 Foster, 541, 546; *Peck* v. *Woodbridge*, 3 Day, 30; *Dilling* v. *Murray*, 6 Indiana, 324; *Homer* v. *Fish*, 1 Pick. 435; *Lewis* v. *Rogers*, 16 Pa. St. 18; *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *B. & W. R. R. Company* v. *Sparhawk*, 1 Allen, 448; *Damport* v. *Sympson*, Croke, Eliz'bth, 520; *Eyres* v. *Sedgwicke*, Croke, James, 601; *Mason* v. *Messenger*, 17 Iowa, 261, 272; *White* v. *Merritt*, 7 N. Y. 352.

When it is considered that the status of the defendant was fixed by the decree of the Connecticut court in 1881, in a proceeding of which his wife had due notice, that upon the faith of this decree he remarried the following year, and that the plaintiff made no move to establish her conjugal rights for thirteen years thereafter, and for twenty-six years after her marriage, the injustice of holding all these proceedings to be null and void, even upon the assumption of perjury committed by the defendant, becomes the more manifest. We think that at least the record should have been received.

I regret that the court in this case has taken what seems to

me a step backward in American jurisprudence, and has virtually returned to the old doctrine of comity, which it was the very object of the full faith and credit clause of the Constitution to supersede.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE BROWN, dissenting.

I do not suppose that civilization will come to an end whichever way this case is decided. But as the reasoning which prevails in the mind of the majority does not convince me, and as I think that the decision not only reverses a previous well-considered decision of this court but is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage, I think it proper to express my views. Generally stated, the issue is whether, when a husband sues in the court of his domicil for divorce from an absent wife on the ground of her desertion, the jurisdiction of the court, if there is no personal service, depends upon the merits of the case. If the wife did desert her husband in fact, or if she was served with process, I understand it not to be disputed that a decree of divorce in the case supposed would be conclusive, and so I understand it to be admitted that if the court of another State on a retrial of the merits finds them to have been decided rightly its duty will be to declare the decree a bar to its inquiry. The first form of the question is whether it has a right to inquire into the merits at all. But I think that it will appear directly that the issue is narrower even than that.

In *Atherton* v. *Atherton*, 181 U. S. 155, a divorce was granted, on the ground of desertion, to a husband in Kentucky against a wife who had established herself in New York. She did not appear in the suit and the only notice to her was by mail. Before the decree was made she sued in New York for a divorce from bed and board, but pending the latter proceedings the Kentucky suit was brought to its end. The husband appeared

in New York and set up the Kentucky decree. The New York court found that the wife left her husband because of his cruel and abusive treatment, without fault on her part, held that the Kentucky decree was no bar and granted the wife her divorce from bed and board. The New York decree, after being affirmed by the Court of Appeals, was reversed by this court on the ground that it did not give to the Kentucky decree the faith and credit which it had by law in Kentucky. Of course, if the wife left her husband because of his cruelty and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court held that the question of her desertion was not open but was conclusively settled by the Kentucky decree.

There is no difference, so far as I can see, between *Atherton* v. *Atherton* and the present case, except that in *Atherton* v. *Atherton* the forum of the first decree was that of the matrimonial domicil, whereas in this the court was that of a domicil afterwards acquired. After that decision any general objection to the effect of the Connecticut decree on the ground of the wife's absence from the State comes too late. So does any general objection on the ground that to give it effect invites a race of diligence. I therefore pass such arguments without discussion, although they seem to me easy to answer. Moreover, *Atherton* v. *Atherton* decides that the jurisdiction of the matrimonial domicil, at least, to grant a divorce for the wife's desertion without personal service, does not depend upon the fact of her desertion, but continues even if her husband's cruelty has driven her out of the State and she has acquired a separate domicil elsewhere upon the principles which we all agree are recognized by this court.

I can see no ground for giving a less effect to the decree when the husband changes his domicil after the separation has taken place. The question whether such a decree should have a less effect is the only question open, and the issue is narrowed to that. No one denies that the husband may sue for divorce in his new domicil, or, as I have said, that if he gets a decree when

he really has been deserted, it will be binding everywhere. *Hawkins* v. *Ragsdale*, 80 Kentucky, 353, cited 181 U. S. 162. *Cheely* v. *Clayton*, 110 U. S. 701, 705. It is unnecessary to add more cases. The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted his power over the matrimonial domicil remains so that the domicil of the wife accompanies him wherever he goes, whereas if he is the deserter he has no such power. Of course this is a pure fiction, and fiction always is a poor ground for changing substantial rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicil, he is equally powerless to keep her domicil there, if she moves into another State. The truth is that jurisdiction no more depends upon both parties having their domicil within the State, than it does upon the presence of the defendant there, as is shown not only by *Atherton* v. *Atherton*, but by the rights of the wife in the matrimonial domicil when the husband deserts.

There is no question that a husband may establish a new domicil for himself, even if he has deserted his wife. Yet in these days of equality I do not suppose that it would be doubted that the jurisdiction of the court of the matrimonial domicil to grant a divorce for the desertion remained for her, as it would for him in the converse case. See *Cheever* v. *Wilson*, 9 Wall. 108. Indeed in *Ditson* v. *Ditson*, 4 R. I. 87, which, after a quotation of Judge Cooley's praise of it, is stated and relied upon as one of the pillars for the decision of *Atherton* v. *Atherton*, a wife was granted a divorce, without personal service, in the State of a domicil acquired by her after separation, on the sole ground that in the opinion of the court its decree would be binding everywhere. If that is the law it disposes of the case of a husband under similar circumstances, that is to say of the present case, *a fortiori;* for I suppose that the notion that a wife can have a separate domicil from her husband is a modern idea. At least *Ditson* v. *Ditson*, confirms the assumption that jurisdiction is not dependent on the wife's actually residing in

the same State as her husband, which has been established by this court. *Atherton* v. *Atherton,* 181 U. S. 155; *Maynard* v. *Hill,* 125 U. S. 190; *Cheever* v. *Wilson,* 9 Wall. 108. When that assumption is out of the way, I repeat that I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicil and that, admitted to exist to some extent, in a domicil later acquired. I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicil because the domicil of the wife does not follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicil if in consequence of her husband's conduct the wife has left the State. But *Atherton* v. *Atherton* decides that it does not.

It is important to bear in mind that the present decision purports to respect and not to overrule *Atherton* v. *Atherton.* For that reason, among others, I spend no time in justifying that case. And yet it appears to me that the whole argument which prevails with the majority of the court is simply an argument that *Atherton* v. *Atherton* is wrong. I have tried in vain to discover anything tending to show a distinction between that case and this. It is true that in *Atherton* v. *Atherton,* Mr. Justice Gray confined the decision to the case before the court. Evidently, I should say, from internal evidence, in deference to scruples which he did not share. But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished.

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is

a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, § 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicil when the married pair happens to have resided there for a month, even if with intent to make it a permanent abode, than if they had not lived there at all.

I may add, as a consideration distinct from those which I have urged, that I am unable to reconcile with the requirements of the Constitution, Article 4, section 1, the notion of a judgment being valid and binding in the State where it is rendered, and yet depending for recognition to the same extent in other States of the Union upon the comity of those States. No doubt some color for such a notion may be found in state decisions. State courts do not always have the Constitution of the United States vividly present to their minds. I am responsible for language treating what seems to me the fallacy as open, in *Blackinton* v. *Blackinton*, 141 Massachusetts, 432, 436. But there is no exception in the words of the Constitution. "If the judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere." *Christmas* v. *Russell*, 5 Wall. 290, 302; Marshall, C. J., in *Hampton* v. *McConnel*, 3 Wheat. 234; *Mills* v. *Duryee*, 7 Cranch, 481, 485; Story, Const. § 1313. See also *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 644, 645. I find no qualification of the rule in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265. That merely decided, with regard to a case not within the words of the Constitution, that a state judgment could not be sued upon when the facts which it established were not a cause of action outside the State. It did not decide or even remotely suggest that the judgment

would not be conclusive as to the facts if in any way those facts came in question. It is decided as well as admitted that a decree like that rendered in Connecticut in favor of a deserting husband is binding in the State where it is rendered. *Maynard* v. *Hill*, 125 U. S. 190. I think it enough to read that case in order to be convinced that at that time the court had no thought of the divorce being confined in its effects to the Territory where it was granted, and enough to read *Atherton* v. *Atherton* to see that its whole drift and tendency now are reversed and its necessary consequences denied.

ST. JOHN *v.* NEW YORK.

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

No. 210. Argued March 14, 1906.—Decided April 16, 1906.

A State may classify persons and objects for the purpose of legislation, provided the classification is based on proper and justifiable distinctions; and so *held* that chap. 338 of the laws of New York of 1893, prohibiting the sale of adulterated milk, is not in conflict with the equal protection clause of the Fourteenth Amendment because in certain respects, it provides different prohibitions and penalties as to producing and non-producing vendors of milk.

THE facts are stated in the opinion.

Mr. William Brennan, Jr., for plaintiff in error.

Mr. Horace McGuire, with whom *Mr. Julius M. Mayer*, Attorney General of the State of New York, was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error is a non-producing wholesale and retail milk dealer in the city of Buffalo, New York. In February, 1903,

he exposed for sale and sold a quantity of milk in violation of sections 20 and 22 of chapter 338 of the laws of New York for the year 1893, and its amendments and supplements, in that the said milk contained more than 88% of water and less than 12% of milk solids, to wit, 89.24% of water and 10.36% of milk solids.

The Commissioner of Agriculture of the State in pursuance of said laws filed a complaint against plaintiff in error in the Supreme Court of the State, charging him with the violation of the laws, and that it was his second offense. Judgment was prayed for the sum of $200 in pursuance of section 37. Plaintiff in error admitted the charge, but alleged in defense that the laws were in contravention of section 1 of the Fourteenth Amendment of the Constitution of the United States; also of the constitution of New York.

At the trial he offered to show that the milk from which the sample exhibited in the case was taken was in the same condition when the sample was taken as it was when it left the herd of the producer. The testimony was rejected and plaintiff in error excepted. The court directed the jury to find a verdict against him for $100 and costs, which was done. He excepted to the ruling. Under the procedure in New York the court ordered the exceptions to be heard in the Appellate Division. In that court the exceptions were overruled, a motion for a new trial was denied and judgment entered on the verdict. On appeal, the Court of Appeals affirmed the judgment, and the record and proceedings were remanded to the Supreme Court, where judgment was entered in accordance with the remittitur from the Court of Appeals. This writ of error was then sued out.

The purpose of the law which is assailed is to prevent the sale of adulterated and unwholesome milk. Section 20 [1] de-

[1] Sec. 20. Definitions. . . .
The term, adulterated milk, when so used, means:
1. Milk containing more than eighty-eight per centum of water or fluids.
2. Milk containing less than twelve per centum of milk solids.
3. Milk containing less than three per centum of fats.

fines what milk shall be deemed adulterated, and it gives a very comprehensive meaning to the word. Section 22 prohibits the sale or offering for sale of such milk, or "any unclean, impure, unhealthy, adulterated or unwholesome milk." Section 7 makes intention immaterial. Section 37 provides for the forfeiture to the People of the State of New York of not less than $50 for the first violation of the law, and increased sums for second and subsequent violations, and also makes violations of the law misdemeanors. Section 12 is the one which is especially complained of. It was materially amended in 1898, and is (omitting matter not necessary to quote) as follows:

"SEC. 12. Inspection, how conducted. . . . In taking samples of milk for analysis at a creamery, factory, platform or other place where the same is delivered by the producer for manufacture, sale or shipment, or from a milk vendor who produces the milk which he sells, with a view of prosecuting the producer of such milk for delivering, selling or offering for sale adulterated milk, the said Commissioner of Agriculture or assistant or his agent or agents shall, within ten days thereafter, with the consent of said producer, take a sample in a like manner of the mixed milk of the herd of cows from which the milk first sampled was drawn and shall deliver the duplicate sample to the said producer and shall cause the sample taken by himself or his agent to be analyzed. If the sample of

4. Milk drawn from cows within fifteen days before and five days after parturition.

5. Milk drawn from animals fed on distillery waste or any substance in a state of fermentation or putrefaction or any unhealthy food.

6. Milk drawn from cows kept in a crowded or unhealthy condition.

7. Milk from which any part of the cream has been removed.

8. Milk which has been diluted with water or any other fluid, or to which has been added or into which has been introduced any foreign substance whatever.

All adulterated milk shall be deemed unclean, unhealthy, impure and unwholesome.

SEC. 22. Prohibition of the sale of adulterated milk.—No person shall sell or exchange, or offer or expose for sale or exchange, any unclean, impure, unhealthy, adulterated or unwholesome milk. . .

milk last taken by the Commissioner of Agriculture or his agent or agents shall upon analysis prove to contain no higher percentage of milk solids, or no higher percentage of fat than as the sample taken at the creamery, factory, platform or other place, then no action shall lie against the said producer for violation of subdivisions one, two, three, seven and eight of section 20 of the Agricultural Law. In taking a second sample, as above set forth, from the mixed milk of the herd, it shall be the duty of the Commissioner of Agriculture to have an assistant, agent or agents present during the entire time in which the said cattle are being milked to observe closely so as to be sure that the milk thus to be sampled is not adulterated, and to see that it is thoroughly mixed so that the sample taken shall be a fair sample of the average quality of the mixed milk of the entire dairy or herd of cows of said producer. If, however, the said producer refuses to allow such examination of the milk produced by his dairy, then he shall be precluded from offering any evidence whatever tending to show that the milk delivered by him at the said creamery, factory, platform or other place was just as it came from the cow. If the said producer does permit such examination the Commissioner of Agriculture shall, upon receiving application therefor, send to said producer a copy of the analysis of each of the samples of milk so taken and analyzed as above provided."

The contention of plaintiff in error is that non-producing vendors are discriminated against, and hence denied the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, in that they may not, as producing vendors may, exempt themselves from actions or penalties for violations of subdivisions one, two, three, seven and eight of section 20 by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer.

It has been decided many times that a State may classify persons and objects for the purpose of legislation. We will assume the cases are known and proceed immediately to con-

sider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose.

By referring to section 20 it will be observed that adulterated milk, as there defined, includes not only that to which something has been added, but milk from which the cream has been removed, or which is deficient naturally in certain substances, or taken from cows fed on certain things, or cows in certain conditions when milked. In other words, the purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength. All other milk is declared to be "unclean, impure, unhealthy, adulterated or unwholesome."

It is not contended that such purpose is not within the power of the State but, it is contended, that the power is not exercised on all alike who stand in the same relation to the purpose, and quite dramatic illustrations are used to show discrimination. A picture is exhibited of producing and non-producing vendors selling milk side by side; the latter, it may be, a purchaser from the former; the act of one permitted, the act of the other prohibited or penalized. If we could look no farther than the mere act of selling, the injustice of the law might be demonstrated, but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated. Legislation to be practical and efficient must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and

its penalties adjusted. As the standard established can be proved in the hands of a producing vendor, he is exempt from the penalty; as it cannot certainly be proved in the hands of other vendors so as to prevent evasions of the law, such vendors are not exempt. In the one case the source of milk can be known and the tests of the statute applied; in the other case this would be impossible, except in few instances. We cannot see that any particular hardship results. The non-producing vendor must exercise care in his purchases, and good all around may be accomplished. Through penalty on the non-producing vendor the producer is ultimately reached, though he may seem to be indulged. He will have to raise the standard of the milk of his herd if he would keep or extend his trade, as anything but a mere retailer of his product.

Judgment affirmed.

RAWLINS *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 547. Argued April 6, 1906.—Decided April 16, 1906.

If the state constitution and laws in regard to selection of jurors, as construed by the state court, are consistent with the Fourteenth Amendment, this court can go no further, and will not revise the decision of the state court as to whether the local law has been complied with.

There is nothing in the Fourteenth Amendment which prevents a State from excluding and exempting from jury duty certain classes on the *bona fide* ground that it is for the good of the community that their regular work should not be interrupted.

Even when persons liable to jury duty under the state laws are excluded it is no ground for challenge to the array, if a sufficient number of unexceptionable persons are present.

THE facts are stated in the opinion.

Mr. John Randolph Cooper, with whom *Mr. Oscar M. Smith* was on the brief, for plaintiffs in error.

Mr. John C. Hart for defendant in error, submitted, the court declining to hear oral argument.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiffs in error were indicted for murder, tried, and found guilty. Leonard Rawlins was sentenced to the penitentiary for life, and the others were sentenced to be hanged. When the grand jury was organized each of the accused filed a written challenge to the array, on the ground that "while there are in Lowndes County many lawyers, many preachers, ministers, many doctors, many engineers and firemen of railroad trains, and many dentists, as many as ten of each class named, or other large number of each of said class, all citizens and residents of said county, and being competent and qualified jurors, as to age and uprightness, experience and intelligence, and as to all the legal qualifications of a juror, yet each and every one of these classes of citizens, and each and every member thereof in the county, is expressly and purposely excluded from the grand jury service by the commissioners failing and refusing to put any of said names in the box, so that, not being in the box, they can not be legally drawn for service." The challenge was repeated as a plea in abatement, and the petit jury was challenged on the same ground. Rights under the Fourteenth Amendment were specially set up and claimed. The challenges and pleas were overruled subject to exceptions. The exceptions were overruled by the Supreme Court of the State, 52 S. E. Rep. 1, and a writ of error was taken out to bring the case to this court.

At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been complied with. This is a mistake. If the state constitution and laws as construed

by the state court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is, whether a State could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms.

When the question is narrowed to its proper form the answer does not need much discussion. The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission no doubt was that pointed out by the state court, that the business of the persons omitted was such that either they would have been entitled to claim exemption or that probably they would have been excused. Even when persons liable to jury duty under the state laws are excluded it is no ground for challenge to the array, if a sufficient number of unexceptionable persons are present. *People* v. *Jewett*, 3 Wend. 314. But if the state law itself should exclude certain classes on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the Fourteenth Amendment to prevent it. The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains, in short substantially the exemption complained of, is of old standing and not uncommon in the United States. It could not be denied that the State properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case.

Judgment affirmed.

OPINIONS PER CURIAM, ETC., FROM FEBRUARY 27, TO APRIL 16, 1906.

No. —, Original. *Ex parte:* IN THE MATTER OF COLUMBIA GEORGE AND TOY TOY, PETITIONERS. March 5, 1906. Motion for leave to file petition for a writ of *habeas corpus* denied. *Mr. A. E. Crane* and *Mr. F. T. Woodburn* for petitioners.

No. 30. VALENTINE HUBER, PLAINTIFF IN ERROR, *v.* JENNINGS-HEYWOOD OIL SYNDICATE ET AL. In error to the Supreme Court of the State of Louisiana. Submitted March 1, 1906. Decided March 5, 1906. *Per Curiam.* Dismissed for want of jurisdiction. *Capital City Dairy Company* v. *Ohio,* 183 U. S. 238; *Brown* v. *New Jersey,* 175 U. S. 172; *Chapin* v. *Fye,* 179 U. S. 127; *Turner* v. *Richardson,* 180 U. S. 87; *Mutual Life Insurance Company* v. *McGrew,* 188 U. S. 291, 308; *Texas and Pacific Railway Company* v. *Southern Pacific Company,* 137 U. S. 48. *Mr. Branch K. Miller, Mr. James L. Dorman* and *Mr. D. Caffery, Jr.,* for the plaintiff in error. *Mr. Gilbert L. Dupré* for the defendants in error.

No. 218. THE PEOPLE'S NATIONAL BANK OF CHARLOTTESVILLE, VA., ET AL., APPELLANTS, *v.* JAMES H. SAVILLE ET AL. Appeal from the Court of Appeals of the District of Columbia. Argued, and petition for certiorari submitted, March 16, 1906. Decided March 19, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Paving Company* v. *Mulford,* 100 U. S. 147; *Gibson* v. *Shufeldt,* 122 U. S. 27; *Walter* v. *Northeastern Railroad Company,* 147 U. S. 370; *Chamberlin* v. *Browning,* 177 U. S. 605; *Hale* v. *Allinson,* 188 U. S. 56. Application for writ of certiorari denied. *Mr. D. W. Baker* for appellants

and petitioners. *Mr. Fulton Lewis* and *Mr. John Ridout* for appellees and respondents.

No. 69. THE SKANEATELES PAPER COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* THE CITY OF SYRACUSE. In error to the Supreme Court of the State of New York. Argued for plaintiffs in error April 10, 1906. Decided April 16, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Chicago &c. Railway Company* v. *McGuire,* 196 U. S. 128; *Scudder* v. *Comptroller of New York,* 175 U. S. 32; *Eastern Building &c. Association* v. *Welling,* 181 U. S. 47. *Mr. Martin Conboy, Mr. John W. Griggs, Mr. Arthur J. Baldwin* and *Mr. Charles W. Tooke* for plaintiffs in error. *Mr. Charles L. Stone* and *Mr. Walter W. Magee* for defendant in error.

No. 219. J. N. SEALE, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Supreme Court of the State of Georgia. Argued for plaintiff in error April 11, 1906. Decided April 16, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Oxley Stave Company* v. *Butler County,* 166 U. S. 648; *Harding* v. *Illinois,* 196 U. S. 78; *Marvin* v. *Trout,* 199 U. S. 212; *Caro* v. *Davidson,* 197 U. S. 197. *Mr. J. J. Strickland* for plaintiff in error. *Mr. John C. Hart* for defendant in error.

Decisions on Petitions for Writs of Certiorari from February 27 *to April* 16, 1906.

No. 602. ALBERT K: HISCOCK, TRUSTEE, ETC., PETITIONER, *v.* JACOB M. MERTENS. March 5, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Will B. Crowley* for petitioner. *Mr. Dorr Raymond Cobb* for respondent.

No. 431. FANNIE D. GALBRAITH, PETITIONER, *v.* ILLINOIS STEEL COMPANY. March 5, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Adams A. Goodrich* for petitioner. *Mr. William Duff Haynie* for respondent.

No. 575. HONG WING, PETITIONER, *v.* THE UNITED STATES; No. 576. WONG DING CHONG, PETITIONER, *v.* THE UNITED STATES; No. 577. DANG MING, PETITIONER, *v.* THE UNITED STATES; No. 578. WONG WAH, PETITIONER, *v.* THE UNITED STATES; and No. 579. LAM LOY, PETITIONER, *v.* THE UNITED STATES. March 5, 1906. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Francis J. Wing* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 580. T. N. BARNSDALL, PETITIONER, *v.* THOMAS S. WALTEMEYER. March 5, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles S. Thomas* and *Mr. W. H. Bryant* for petitioner. *Mr. T. Webster Hoyt* for respondent.

No. 598. TAYLOR KNOLL, PETITIONER, *v.* THE UNITED STATES. March 5, 1906. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John C. Gittings* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 600. THE ÆTNA INDEMNITY COMPANY, PETITIONER, *v.* CITY OF HAVERHILL. March 5, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

the First Circuit denied. *Mr. T. Tileston Wells* for petitioner. *Mr. John J. Winn* for respondent.

No. 601. The Town of Fletcher, Petitioner, *v.* Samuel G. Hickman. March 5, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Robert W. Bonynge* and *Mr. Halsted L. Ritter* for petitioner. *Mr. Thomas K. Skinker* for respondent.

No. 613. Liverpool, Brazil and River Plate Steam Navigation Company, Limited, et al., Petitioners, *v.* The Steamship Eagle Point, etc. March 12, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Harrington Putnam, Mr. Charles C. Burlingham, Mr. H. G. Ward* and *Mr. George H. Emerson* for petitioners. *Mr. Wilhelmus Mynderse* for respondent.

No. 610. Edwin S. Hartwell Lumber Company, Petitioner, *v.* The United States; and No. 611. John Spry Lumber Company, Petitioner, *v.* The United States. March 19, 1906. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jacob Newman, Mr. Salmon O. Levinson* and *Mr. Benjamin V. Becker* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 619. National Salt Company, Petitioner, *v.* George S. Ingraham. March 19, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the

Second Circuit denied. *Mr. Maxwell Evarts* and *Mr. Henry B. Twombly* for petitioner. *Mr. George S. Ingraham pro se.*

No. 616. THE UNITED STATES, PETITIONER, *v.* NINETY-NINE DIAMONDS. April 2, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General McReynolds* for petitioner. *Mr. W. Wickham Smith* and *Mr. John K. Maxwell* for respondent.

No. 617. GRAND TRUNK WESTERN RAILWAY COMPANY ET AL., PETITIONERS, *v.* CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY. April 2, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. G. W. Kretzinger, Mr. Wells H. Blodgett, Mr. W. O. Johnson* and *Mr. Edgar A. Bancroft* for petitioners. *Mr. W. H. Lyford* for respondent.

No. 624. CHARLES HENRY DAVIS, TRUSTEE, PETITIONER, *v.* GEORGE W. BRAMBLET. April 2, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. D. W. Lindsey, Mr. Frank Chinn* and *Mr. Richard W. Hale* for petitioner. *Mr. Helm Bruce* for respondent.

No. 628. WILLIAM NIXON ET AL., PETITIONERS, *v.* JAMES H. HARRIS, WARDEN, ETC. April 2, 1906. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Armond W. Scott* and *Mr. Marion T. Clinkscales* for petitioners. No appearance for respondent.

No. 605. HITCHCOCK COUNTY, NEBRASKA, PETITIONER, *v.* JAMES B. PLATT. April 9, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. R. Duffie* for petitioner. *Mr. Jesse B. Strode* for respondent.

No. 630. HARRY DODD, TRUSTEE, ETC., PETITIONER, *v.* A. SAMEL and S. SAUL. April 9, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alex. C. King* and *Mr. Benjamin Z. Phillips* for petitioner. *Mr. Victor Smith* for respondents.

No. 644. THE NEW AMSTERDAM CASUALTY COMPANY, PETITIONER, *v.* THE EAST TENNESSEE TELEPHONE COMPANY ET AL. April 9, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. C. McReynolds* and *Mr. Clarence T. Boyd* for petitioner. *Mr. Wm. L. Granbery* and *Mr. John J. Vertrees* for respondents.

No. 646. C. C. SLAUGHTER, PETITIONER, *v.* THE MALLET LAND AND CATTLE COMPANY. April 9, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles A. Culberson* for petitioner. *Mr. S. H. Cowan* for respondent.

No. 654. JOSEPH H. SAVAGE, PETITIONER, *v.* M. ADAH SAVAGE. April 9, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Holmes Conrad* for petitioner. *Mr. R. T. Barton* for respondent.

No. 655. W. K. NIVER COAL COMPANY, PETITIONER, *v.* CHERONEA STEAMSHIP COMPANY, LIMITED; No. 656. W. K. NIVER COAL COMPANY, PETITIONER, *v.* URSULA BRIGHT STEAMSHIP COMPANY, LIMITED; No. 657. W. K. NIVER COAL COMPANY, PETITIONER, *v.* NEW RUPERRA STEAMSHIP COMPANY, LIMITED; and No. 658. W. K. NIVER COAL COMPANY, PETITIONER, *v.* SIR ALFRED LEWIS JONES. April 9, 1906. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. John W. Griggs*, *Mr. Benjamin L. M. Tower* and *Mr. Hugh W. Ogden* for petitioner. *Mr. Eugene P. Carver* and *Mr. Edward E. Blodgett* for respondents.

No. 666. GENERAL FIRE EXTINGUISHER COMPANY, PETITIONER, *v.* JOSEPH R. LAMAR, TRUSTEE, ET AL. April 9, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry A. Alexander* for petitioner. *Mr. William K. Miller* for respondents.

No. 667. A. KLIPSTEIN & CO., PETITIONER, *v.* PETER G. GRANT, TRUSTEE, ET AL. April 9, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry A. Alexander* for petitioner. *Mr. Benjamin Z. Phillips* for respondents.

No. 661. THE NINTH NATIONAL BANK OF NEW YORK, PETITIONER, *v.* MARCUS A. ADLER. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Nelson S. Spencer* for petitioner. *Mr. Charles Strauss* for respondent.

No. 662. GEORGE WESTINGHOUSE, JR., ET AL., PETITIONERS, *v.* THE NEW YORK AIR BRAKE COMPANY ET AL. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Christy* and *Mr. Samuel R. Betts* for petitioners. *Mr. Charles Neave* and *Mr. Wm. A. Jenner* for respondents.

No. 663. DENNISON MANUFACTURING COMPANY, PETITIONER, *v.* SCHARF TAG, LABEL, AND BOX COMPANY. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Archibald Cox* and *Mr. Charles H. MacDonald* for petitioner. No appearance for respondent.

No. 664. CLINTON STEPHENS, JR., PETITIONER, *v.* ESSEX COUNTY PARK COMMISSION. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Andrew Wilson* and *Mr. Noel W. Barksdale* for petitioner. *Mr. Robert H. McCarter* and *Mr. Alonzo Church* for respondent.

No. 669. CHARLES E. COOPER, TRUSTEE, ETC., PETITIONER, *v.* MARTIN BURNS ET AL. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. C. Flansburg* for petitioner. *Mary Burns*, one of the respondents, *pro se.*

No. 671. THE CONSOLIDATION COAL COMPANY, PETITIONER, *v.* AMERICAN MAIL STEAMSHIP COMPANY, CLAIMANT; and No. 672. THE CONSOLIDATION COAL COMPANY, CLAIMANT, PETITIONER, *v.* AMERICAN MAIL STEAMSHIP COMPANY. April 16, 1906. Petitions for writs of certiorari to the United States

Circuit Court of Appeals for the First Circuit denied. *Mr. J. Walter Lord* and *Mr. Edward S. Dodge* for petitioner. *Mr. Wilhelmus Mynderse* and *Mr. Edward E. Blodgett* for respondents.

No. 674. A. M. HASTINGS, ADMINISTRATOR, PETITIONER, *v.* SOUTHERN RAILWAY COMPANY. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Altheus Johnson* and *Mr. Joseph A. McCullough* for petitioner. *Mr. George E. Hamilton* and *Mr. M. J. Colbert* for respondent.

No. 677. GEORGE H. ALLEN ET AL., PETITIONERS, *v.* NANNIE FIELD, EXECUTRIX, ETC., ET AL. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Levy Mayer, Mr. Alfred S. Austrian* and *Mr. Allan McCulloh* for petitioners. *Mr. Wm. Lindsay* and *Mr. J. Culbert Palmer* for respondents.

No. 678. EDWARD MORRIS, PETITIONER, *v.* THE THIRD NATIONAL BANK OF SPRINGFIELD, MASS. April 16, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Vinton Pike* for petitioner. No appearance for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM FEBRUARY 27 TO APRIL 16, 1906.

No. 612. GEORGE B. CORTELYOU, POSTMASTER-GENERAL, PLAINTIFF IN ERROR, *v.* THE UNITED STATES EX REL. MARGARITO ROMERO, MAYOR, ETC., ET AL. In error to the Court

of Appeals of the District of Columbia. March 5, 1906. Dismissed with costs, on motion of *The Solicitor General* for the plaintiff in error. *The Attorney General* for plaintiff in error. No appearance for defendants in error.

No. 377. SIDNEY TURNER DYER, BY ELISHA DYER, JR., HER NEXT FRIEND, ET AL., APPELLANTS, *v.* THE MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. Appeal from the Circuit Court of the United States for the District of Maryland. March 5, 1906. Dismissed at the cost of the appellees, per stipulation. *Mr. Arthur W. Machen* and *Mr. Arthur W. Machen, Jr.*, for appellants. *Mr. W. Cabell Bruce* for appellees.

No. 568. SIEBRAND H. NIEWENHOUS, 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. March 9, 1906. Dismissed, per stipulation. *Mr. Edward S. Hatch* for plaintiff in error. *Mr. Ira A. Place* for defendants in error.

No. 224. SIMON BURNS ET AL., APPELLANTS, *v.* JOHN W. HAYES ET AL. Appeal from the Court of Appeals of the District of Columbia. March 15, 1906. Dismissed with costs, pursuant to the tenth rule. *Mr. John Ridout* and *Mr. R. Golden Donaldson* for appellants. *Mr. Henry E. Davis* for appellees.

No. 635. WALTER H. WREN, PLAINTIFF IN ERROR, *v.* RICHARD RIGGS ET AL. In error to the Circuit Court of the United States for the Western District of Texas. March 19, 1906. Docketed and dismissed with costs, on motion of *Mr. C. A. Culberson* for the defendants in error. No one opposing.

No. 301. ELIZA L. POPE, PLAINTIFF IN ERROR, *v.* ANNA CLARA FALK ET AL. In error to the Supreme Court of the State of Kansas. April 2, 1906. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. L. F. Bird* for plaintiff in error. *Mr. James K. Polk, Mr. Andrew Wilson* and *Mr. Noel W. Barksdale* for defendants in error.

No. 369. BENJAMIN C. CHOUTEAU, PLAINTIFF IN ERROR, *v.* WILLIAM KLAPMEYER. In error to the Supreme Court of the State of Kansas. April 2, 1906. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. L. F. Bird* for plaintiff in error. *Mr. James K. Polk, Mr. Andrew Wilson* and *Mr. Noel W. Barksdale* for defendant in error.

No. 232. THOMAS J. BRESLIN *v.* JAMES G. CARROLL. On a certificate from the United States Circuit Court of Appeals for the Third Circuit. April 11, 1906. Stricken from the docket. *Mr. Thomas E. French* for Breslin. No appearance for Carroll.

No. 6, Original. *Ex parte:* IN THE MATTER OF ALPHONSO B. BOWERS AND BOWERS CALIFORNIA DREDGING COMPANY, PETITIONERS. April 16, 1906. Dismissed on authority of counsel for the petitioners. *Mr. John H. Miller* for petitioners. No appearance for respondents.

No. 9, Original. THE STATE OF WASHINGTON, COMPLAINANT, *v.* NORTHERN SECURITIES COMPANY ET AL. April 16, 1906. Dismissed, per stipulation. *Mr. W. B. Stratton, Mr. Wallace B. Douglas* and *Mr. E. C. Macdonald* for complainant. *Mr. W. P. Clough, Mr. George B. Young, Mr. John W. Griggs, Mr. M. D. Grover* and *Mr. C. W. Bunn* for defendants.

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ACTION.

See APPEAL AND ERROR, 1; CONSTITUTIONAL LAW, 10, 12; INSURANCE; JURISDICTION, C 3, 4; D 1, 2; LIMITATION OF ACTIONS; NATIONAL BANKS, 2; PRACTICE AND PROCEDURE; TRADE-MARKS, 2.

ACTS OF CONGRESS.

ANTI-TRUST ACT of July 2, 1890 (see Jurisdiction, A 2): *Alexander* v. *United States*, 117: (see Witnesses): *Hale* v. *Henkel*, 43; *Nelson* v. *United States*, 92.

CIVIL SERVICE ACT of January 16, 1883 (see Civil Service): *United States* v. *Wickersham*, 390.

IMMUNITY OF WITNESSES, Act of February 25, 1903 (see Witnesses, 2): *Hale* v. *Henkel*, 43.

JUDICIARY, Rev. Stat. § 709 (see Jurisdiction, A 10): *Joy* v. *St. Louis*, 332; (see Jurisdiction, A 11), *West Chicago Railroad* v. *Chicago*, 506; (see Jurisdiction, A 12): *Keen* v. *Keen*, 319. Act of March 3, 1885, 23 Stat. 443 (see Jurisdiction, A 1): *New Mexico* v. *Atchison, Topeka & S. F. Ry. Co.*, 41. Act of August 13, 1888, 25 Stat. 433 (see Jurisdiction, C 3): *Blair* v. *Chicago*, 400. Act of March 3, 1891, sec. 7 (see Appeal and Error, 1): *Ex parte National Enameling Co.*, 156.

NATIONAL BANKS, Rev. Stat. § 5151 (see Jurisdiction, C 4; National Banks, 2): *Wyman* v. *Wallace*, 230; (see National Banks, 1): *Christopher* v. *Norvell*, 216.

PHILIPPINE ISLANDS, Act of July 1, 1902, 32 Stat. 691, § 10 (see Jurisdiction, A 5, 7): *De la Rama* v. *De la Rama*, 303.

REMOVAL OF CAUSES, Rev. Stat. §§ 641, 642 (see Removal of Causes): *Kentucky* v. *Powers*, 1.

SHIPPING, Harter Act, 27 Stat. 445, § 3 (see Maritime Law): *The Wildcroft*, 378.

TARIFF ACT of 1897, 30 Stat. 156, 205, par. 98, § 7 (see Customs Duties): *United States* v. *Downing*, 354.

TERRITORIAL PRACTICE ACT of April 7, 1874, 18 Stat. 27 (see Jurisdiction, A 4): *De la Rama* v. *De la Rama*, 303.

WISCONSIN ENABLING ACT of August 6, 1846 (see Public Lands, 3): *Wisconsin* v. *Hitchcock*, 202.

ADULTERY.
See DIVORCE.

ADVERSE POSSESSION.
See CONSTITUTIONAL LAW, 10.

ALIMONY.
See JURISDICTION, A 3, 5, 6.

AMENDMENT.
See STATUTES, A 4.

AMOUNT IN CONTROVERSY.
See JURISDICTION, A.

ANTI-TRUST LAW.
See WITNESSES.

APPEAL AND ERROR.

1. *Final or interlocutory decree—Effect of appeal under section 7 of act of March 3, 1891.*

Plaintiffs brought suit upon a single patent, in which there were twelve claims. The Circuit Court found that three of the claims were invalid and nine valid, of which five had been infringed, and referred it to a master to report the amount of damages and dismissed the bill as to the claims found invalid and not infringed. Defendants appealed from the decree and plaintiffs also filed cross appeal assigning as errors the rulings adverse to them. The Circuit Court of Appeals dismissed the cross appeal. Petition for mandamus to compel that court to take jurisdiction of the cross appeal denied and *held*, that the decree was interlocutory and not final and in the Federal courts no appeal can as a general rule be taken except from a final decree. The appeal authorized by § 7 of the act of March 3, 1891, does not bring up the cause as a whole; and, unless otherwise specially ordered, the case, except for hearing of the appeal from the interlocutory order, proceeds in the lower court as though no appeal had been taken until final judgment. Cases in which a bill has been dismissed as to some of the defendants and a separable controversy as to others referred to a master for an accounting, and in which the dismissal has been treated as a final decree, have no application to a case of joint liability, or in which there is only a single defendant. *Ex parte National Enameling Co.*, 156; *Ex parte Automatic Switch Co.*, 166.

2. *Bonds; irregularities in; necessity for entry of order regarding.*

Although irregularities may exist in appeal bonds, if the cases are sent back for further proceedings no order need be entered here regarding them. *Amadeo* v. *Northern Assurance Co.*, 194.

3. *Objections as to forms of writ of error—Effect of bringing in corporation in liquidation to bring in liquidator.*

Objections as to forms of writ of error not taken below will not be entertained here to defeat the jurisdiction of this court—and an amendment bringing in a corporation in liquidation as assignee of the party plaintiff *held*, under such conditions, to bring in the liquidator also. *Ib.*

4. *Necessary parties.*

A party having no legal interest in maintaining or reversing a judgment is not always a necessary party to writ of error or appeal, and if the defendant has pleaded below that a party plaintiff has no interest in the cause of action, having assigned the same, and as a result of such plea the assignee has been substituted, the defendant cannot assert in this court that the original plaintiff was more than a nominal party, and the writ will not be dismissed on account of his death and failure to give notice to his succession. *Ib.*

See HABEAS CORPUS, 1, 2;
JURISDICTION.

ASSESSMENT FOR TAXATION.

See TAXATION, 9.

ASSIGNEE.

See JURISDICTION, C 3.

BANKRUPTCY.

Title of trustee—Right of vendor of goods sold under conditional sale contract as against bankrupt's creditors.

The trustee in bankruptcy is vested with no better right or title to the property than the bankrupt had when the trustee's title accrued; and where, as in the State of Ohio, a conditional sale contract is good as between the parties themselves although not filed, the vendor of machinery, sold and delivered under such a contract and payment for which had not been made, may remove the same as against all creditors of the bankrupt who have not fastened upon it by some specific lien. *York Manufacturing Co.* v. *Cassell*, 344.

BANKS.

See NATIONAL BANKS.

BONDS.

See APPEAL AND ERROR, 2.

BOOKS.

See CONSTITUTION LAW, 14; CONTEMPT OF COURT; JURISDICTION, A 2; EVIDENCE; WITNESSES.

BURDEN OF PROOF.

See MARITIME LAW.

CAPITAL STOCK.

See JURISDICTION, C 4;
NATIONAL BANKS;
TAXATION, 2.

CARRIERS.

See CONSTITUTIONAL LAW, 1, 2, 3, 4, 7; MUNICIPAL ORDINANCES;
MUNICIPAL CORPORATIONS; STATUTES, A 2, 3, 5;
TAXATION, 11.

CASES DISTINGUISHED.

Re Nielsen, 131 U. S. 176, distinguished in *Felts* v. *Murphy*, 123.

CASES FOLLOWED.

C., B. & Q. R. R. Co. v. *Drainage Commission*, 200 U. S. 251, followed in *West Chicago Railroad* v. *Chicago*, 506.

Cleveland v. *Cleveland City Railway Co.*, 194 U. S. 517, followed in *Cleveland* v. *Cleveland Electric Ry.*, 529.

Ex parte National Enameling Co., 201 U. S. 156, followed in *Ex parte Automatic Switch Co.*, 166.

Falk v. *Moebs*, 127 U. S. 597, followed in *Blair* v. *Chicago*, 400.

Felts v. *Murphy*, 201 U. S. 123, followed in *Valentina* v. *Mercer*, 131.

Fritts v. *Palmer*, 132 U. S. 282, followed in *Blair* v. *Chicago*, 400.

Hale v. *Henkel*, 201 U. S. 43, followed in *McAlister* v. *Henkel*, 90; *Nelson* v. *United States*, 92.

Holmes v. *Goldsmith*, 147 U. S. 150, followed in *Blair* v. *Chicago*, 400.

Montclair v. *Ramsdell*, 107 U. S. 147, followed in *Blair* v. *Chicago*, 400.

Royal Insurance Co. v. *Miller*, 199 U. S. 353, followed in *Amadeo* v. *Northern Assurance Co.*, 194.

South Dakota v. *North Carolina*, 192 U. S. 286, followed in *Blair* v. *Chicago*, 400.

United States v. *Thomas*, 151 U. S. 557, followed in *Wisconsin* v. *Hitchcock*, 202.

Wyman v. *Wallace*, 201 U. S. 230, followed in *Frenzer* v. *Wallace*, 244; *Poppleton* v. *Wallace*, 245.

CHALLENGES.

See JURY.

CHICAGO TRACTION CASES.

Railway franchises—Contracts for use of streets—Constitutional law—Diversity of citizenship—Jurisdiction of Federal court—Suit by receivers in support of jurisdiction—Ultra vires acts of corporations—Public grants—Practice and procedure—Construction of statutes—Title of statute—Power of limited corporation to receive grant inuring to benefit of successors—Title and control of municipal corporation over streets.

Where notes are made by a corporation payable to the order of its own treasurer, a citizen of the same State, as a matter of convenience and

custom, and indorsed and delivered by him to a *bona fide* holder who, a citizen of a different State, furnishes the money represented by the note directly to the corporation, the treasurer is not in fact an assignee of the note within the meaning of the act of August 13, 1888, 25 Stat. 433, and suit may be brought by such holder in the Circuit Court of the United States having jurisdiction of the parties, notwithstanding such diversity does not exist as to the treasurer first indorsing the note. (*Falk* v. *Moebs*, 127 U. S. 597; *Holmes* v. *Goldsmith*, 147 U. S. 150.)

Where there is a proper cause of action and diverse citizenship, jurisdiction of the Federal courts exists, and the motive of the creditor who desires to litigate in that forum is immaterial, and does not affect the jurisdiction; nor is such jurisdiction if it actually exists, affected by the fact that a receivership was in view when judgments were entered. (*South Dakota* v. *North Carolina*, 192 U. S. 286.)

Where, as in this case, the attitude and claims of the municipality cast a cloud upon the title to property consisting largely of franchises in the hands of receivers and to be administered under orders of the court, the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of claims of parties which cast a cloud upon such franchises and in such a case it is proper to grant an injunction until the rights of the parties can be determined.

Whether a corporation having a limited and definite capacity to purchase and hold real estate has exceeded those limits concerns only the State within whose jurisdiction the property is situated; the question cannot, unless the statute expressly or by necessary implication authorizes it, be raised collaterally by private persons. (*Fritts* v. *Palmer*, 132 U. S. 282.)

The generality of the title of a state statute does not invalidate it under a provision of the constitution of the State that private and local laws shall only embrace one subject which shall be expressed in the title, so long as the title is comprehensive enough to reasonably include within the general subject or the subordinate branches thereof, the several objects which the statute seeks to effect, and does not cover legislation incongruous in itself and which by no fair intendment can be included as having any necessary and proper connection. (*Montclair* v. *Ramsdell*, 107 U. S. 147.)

Although decisions of the highest court of a State are not binding on this court in determining whether a contract was made by legislative action of that State which is entitled to protection under the impairment of obligation clause of the Federal Constitution, it will consider decisions of that court on the point in question.

One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. Legislative grants of franchises which are in any way ambiguous as to whether granted for a longer or a shorter period are to be construed strictly against the grantee.

As a rule of construction a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended.

Although a corporation be organized under a charter for a limited period it may receive a grant inuring to the benefit of its lawful successors for a period beyond its corporate life, but the right granted must be construed with reference to the system of which it is a part and where that general system is for a limited period a single ordinance, not naming a specific term, will not be construed as granting a franchise in perpetuity.

A declaration in the title of state statutes that they concern horse railways, where it is apparent that these terms were intended to indicate street railways as distinguished from steam railways, will not, because of a constitutional provision that the object of the statute must be expressed in the title, prevent the city from exercising its powers under the statute in such manner as to authorize the use of other power such as cable or electricity.

The repeal of a state statute authorizing every street railway to be operated by such animal, electric or other power as the municipal authorities may have granted would not destroy its effect to ratify contracts in existence when it was passed.

Where a state statute requires the consent of a municipal officer to authorize the extension of a street railway the abolition of that office does not authorize the extension without any official consent; and where the consent of municipal authorities is required for franchises relating to special localities by a statute, and subsequently a general act limits the time for which any such franchise can be granted in any city or village, the consent given will be presumed, in the absence of any period specified not to be in perpetuity, but for the period as so limited.

Under the law of Illinois municipal corporations have a fee simple in, and exclusive control over, the streets, and the municipal authorities may do anything with, or allow any use of, the streets not incompatible with the ends for which streets are established, and it is a legitimate use of a street to allow a street railroad track to be laid down in it.

Applying the foregoing principles to the construction and effect of the various acts of the legislature of the State of Illinois, and of the ordinances of the municipal authorities of the city of Chicago and adjacent towns, in regard to the franchises of the several street railway companies owned and controlled by the Chicago Union Traction Company, and the receivers thereof *held*, that :

1. The Circuit Court of the United States for the Northern District of Illinois had jurisdiction to render the judgments against the Chicago Union Traction Company, the North Chicago Street Railroad Company and the West Chicago Street Railroad Company set up in the bills afterwards filed for the appointment of receivers.

2. The proceedings for the appointment of receivers were not shown to be collusive and fraudulent, and the court had jurisdiction to entertain the bills and appoint the receivers and put them in possession of the property of the railway companies.

3. The ancillary bills filed by the receivers were maintainable in aid

of the court's jurisdiction to settle controversies as to the property which was to be administered and disposed of under the orders and decree of the court.

4. The acts of 1859, 1861 and 1865 were not unconstitutional under the constitution of Illinois of 1848 in force when the same were passed.

5. The act of February 6, 1865, amending the act of February 14, 1859, had the effect to extend the corporate lives of the Chicago City Railway Company, the North Chicago City Railway Company and the Chicago West Division Railway Company, for the term of ninety-nine years. It affirmed the contracts with the city prescribing rights and privileges in the streets of Chicago in all respects as theretofore made, including time limitations as contained in the ordinances previously passed. It recognized and continued in force the right of the city and the companies to make contracts for the use of the streets upon terms and conditions, including the time of occupancy, as might be agreed upon between the council and the corporations.

6. Corporate privileges can only be held to be granted as against public rights, when conferred in plain and explicit terms. The ambiguous phrase in the act of 1865, "during the life hereof," did not operate to extend existing contracts for the term of ninety-nine years or limit the right of the city to make future contracts with the companies covering shorter periods.

7. The amending act of 1865 had reference to the North Chicago City Railway Company as well as the corporations specifically named in the first sections of the acts of 1859 and 1861.

8. The ordinances of May 23, 1859, granting rights and privileges in certain streets to the Chicago City Railway Company and the North Chicago City Railway Company, respectively, are radically different. The grant to the former company for the south and west divisions of the city is during all the term specified in the act of February 14, 1859, which act expressly ratified the ordinance of 1858, granting the right to use the streets therein named for the term of twenty-five years and until the city shall purchase and pay for the same as set forth in said ordinance. On the north side the term granted is for twenty-five years " and no longer." The privileges conferred upon the Chicago City Railway Company and its grantee were confirmed, as made, by the act of 1865, with the effect to continue the right of the companies to occupy the streets named in the ordinances of 1858, May 23, 1859, and similar ordinances, for the term of twenty-five years and until the city shall elect to purchase and pay for the property of said railway companies. On the north side, no such right exists to remain in the use of the streets until purchase by the city.

9. Whatever rights existed in the streets, were not lost to the companies by the acceptance of the ordinances granting a change from animal to cable or electric power in the operation of the railways.

10. The grants in the town of Jefferson, having been made after the acceptance of the Cities and Villages Act, are limited to the term of twenty years.

11. The grants by the supervisor of Lake View are not in perpetuity, as the Lake View road was but an extension of the North Side system,

which was expressly limited in the duration of its grants to the term of twenty-five years. No intention will be presumed to make an extension of this part beyond the life of the grant to the main lines of the North Side road.

12. The grants by the trustees of Lake View will not extend beyond the life of the corporation making them and upon the annexation of the town of Lake View to Chicago, the further right to use the streets must be derived from grants by the council of that city under power conferred by the Cities and Villages Act.

The decree is reversed and cause remanded for further proceedings in accordance with the views herein expressed. *Blair* v. *Chicago*, 400.

CIVIL SERVICE.

Power of removal from office—Right to compensation of one wrongfully discharged.

The provisions of the Civil Service Act of January 16, 1883, are broad and comprehensive; under it, the Executive order of May 16, 1896, Rule III, and the order and list of the Secretary of the Interior of June 9 and September 26, 1896, based thereon, stenographers receiving the specified salaries employed in offices of surveyors-general were brought within the protection of the law and can only be removed—at least by a subordinate officer of the Department—for just cause and upon written charges on notice with opportunity to defend; and until removed in accordance with the law and rules thereunder, and so long as he remains ready and willing to discharge the duties of his place, he cannot be deprived of the compensation legally belonging to one entitled to hold the position notwithstanding the surveyor-general in whose office he is employed attempts to discharge him and excludes him from the office. *United States* v. *Wickersham*, 390.

CLASSIFICATION FOR LEGISLATION.

See CONSTITUTIONAL LAW, 6, 8.

CLASSIFICATION FOR TAXATION.

See TAXATION.

CLOUD ON TITLE.

See JURISDICTION, D 2.

COLLATERAL ATTACK.

See PUBLIC LANDS, 4.

COMMERCE.

See CONSTITUTIONAL LAW, 1;
CORPORATIONS, 1.

COMMERCIAL PAPER.

See JURISDICTION, C 3.

CONDITIONAL SALES.

See BANKRUPTCY;
MORTGAGE AND DEED OF TRUST.

CONGRESS.

ACTS OF. *See* Acts of Congress.
POWERS OF. *See* Corporations, 1.

CONSTITUTIONAL LAW.

1. *Commerce clause—Validity of state requirements of railroad engaged in interstate commerce.*

An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain numbers of cars on a specified day, to transport merchandise to another State, regardless of every other consideration except strikes and other public calamities, transcends the police power of the States and amounts to a burden upon interstate commerce; and articles 4497–5000, Rev. Stat. Texas, being such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the Federal Constitution. Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the State. *Houston & Tex. Cent. Railroad* v. *Mayes*, 321.

2. *Contracts within impairment clause—Provision in state statute for special rate of taxation in respect to particular corporation.*

Provisions in a state statute for a special rate of taxation in respect to a particular corporation, made with a view of inducing large expenditures and the completion of an unfinished road of great public importance, and which are formally accepted and complied with, amount to a contract within the protection of the impairment clause of the Federal Constitution, and no other tax can be imposed on the corporation. *Powers* v. *Detroit & Grand Haven Ry.*, 543.

3. *Contracts within impairment clause—Municipal ordinance extending franchises of street railway companies.*

Ordinances granting an extension to a consolidated street railway corporation, possessing franchises expiring at different times, on conditions involving great expense to the corporation and resulting in substantial benefits to the public as to transfers for single fares and relating to the entire system as well as the extensions granted, and providing that the right granted terminate with the then existing grants of the main line at a specified date later than that of termination of some of the franchises, amount, on the acceptance by the company and compliance with the conditions, to a contract within the protection of the impairment clause of the Constitution extending the various franchises to that date; the period, in this case of four years, not being an unreasonable one in view of the substantial benefits accruing to the public. *Cleveland* v. *Cleveland Electric Ry.*, 529.

4. *Contracts within impairment clause—Validity of ordinance reducing street railway fares.*

Cleveland v. *Cleveland City Railway Co.*, 194 U. S. 517, followed as to the power of the city council of Cleveland to pass ordinances diminishing the rate of fare on street railways in view of the contracts contained in ordinances heretofore passed in regard to street railways. *Ib.*

See MUNICIPAL CORPORATIONS, 2;
PRACTICE AND PROCEDURE, 4.

5. *Due process of law—Failure to repeat testimony in criminal trial to accused who is almost totally deaf.*

Where in the criminal trial of a person *compos mentis*, but almost totally deaf, the state court has jurisdiction of the subject matter and of the person, and also to direct and enforce the judgment which was entered, the jurisdiction is not lost by any irregularities caused by the failure of the court to have the testimony repeated to the accused through an ear trumpet; nor is the accused thereby deprived of his liberty without due process of law in violation of the Fourteenth Amendment. Even though the case be a hard one Federal courts cannot on *habeas corpus* proceedings grant relief from the judgment; their power is limited to the question of jurisdiction. *Felts* v. *Murphy*, 123.

6. *Due process of law—Power of State to exempt classes from jury duty.*

There is nothing in the Fourteenth Amendment which prevents a State from excluding and exempting from jury duty certain classes on the *bona fide* ground that it is for the good of the community that their regular work should not be interrupted. *Rawlings* v. *Georgia*, 638.

7. *Due process of law; deprivation of property without—Action of municipality with respect to removal of obstruction to navigation of river.*

The right of a railroad company to maintain a tunnel under a navigable river is subject to the paramount public right of navigation, and where it has been constructed under municipal ordinance and state law that it shall not interrupt navigation, the duty of not obstructing the navigation is a continuing one; and, if the increased demands of navigation at any time require a deeper channel than when the tunnel was originally constructed, it is within the power of the municipality to compel the railroad company at the latter's own expense to either remove the tunnel or lower it to conform with the necessities of commerce, and, as in this case, to the rule established by act of Congress, and such action of the municipality is not unconstitutional, and does not amount either to taking the property for public use without compensation, or depriving the company of its property without due process of law. (*C., B. & Q. R. R. Co.* v. *Drainage Commission*, 200 U. S. 251, followed.) *West Chicago Railroad* v. *Chicago*, 506.

See TAXATION, 10, 11.

8. *Equal protection of laws—Power of State to classify for purpose of legislation.*

A State may classify persons and objects for the purpose of legislation,

provided the classification is based on proper and justifiable distinctions; and so *held* that chap. 338 of the laws of New York of 1893, prohibiting the sale of adulterated milk, is not in conflict with the equal protection clause of the Fourteenth Amendment because in certain respects, it provides different prohibitions and penalties as to producing and non-producing vendors of milk. *St. John* v. *New York*, 633.

See TAXATION, 9, 11.

9. *Fourteenth Amendment; effect of long-settled law and usage in determining constitutionality of state statute.*

In determining whether a statute of a State is constitutional, this court cannot wholly neglect the long-settled law and common understanding of that State, and will not, under the Fourteenth Amendment, upset what has long been established and accepted. Even the incidents of ownership may be cut down by the peculiar laws and usages of a State. *Otis Co.* v. *Ludlow Co.*, 140.

10. *Fourteenth Amendment—Power of State to modify distinction between trespass and disseisin—Validity of Maine statute as to limitations in regard to wild lands.*

The distinction between trespass and disseisin may be modified by statute as properly as it may be established by common law. Nothing in the Fourteenth Amendment hinders a State from enacting that in future the doing of such overt acts of ownership as are possible on wild lands, under a recorded deed showing that the actor claims title coupled with the payment of taxes, the owner not paying any meanwhile or doing any act indicative of ownership, shall constitute a disseisin which if continued long enough shall bar an action for the land; nor is such an act unconstitutional because it fixes the period at twenty years and allows it to become operative as to suits commenced five years after its enactment as it would be within the power of the legislature to fix the entire period of limitation at five years, and the owner would have an opportunity to defeat the disseisin by asserting ownership within that time; such a statute would not be construed as permitting suit to be barred by a period of twenty years' inactivity prior to the enactment of the statute, if acts of ownership were exercised thereafter. *Soper* v. *Lawrence Brothers*, 359.

See REMOVAL OF CAUSES, 4.

11. *Full faith and credit clause—Effect of decree of divorce rendered without personal service on defendant wife.*

The husband and wife being domiciled in New York, the husband left the wife, acquired, in good faith, after a lapse of years, a domicil in Connecticut, and obtained in that State, and in accordance with its laws, a judgment of divorce based on constructive, and not actual, service of process, on the wife, who meanwhile remained domiciled in New York and never appeared in the action. The wife subsequently sued for divorce in New York and obtained personal service in that State

on the husband who pleaded the Connecticut judgment. *Held*, without questioning the power of the State of Connecticut to enforce the decree within its own borders, and without intimating any doubt that the State of New York might give it such degree of efficacy that it might be entitled to in view of the public policy of the State, that the Connecticut decree, rendered as it was without being based on personal service of the process on, and therefore without personal jurisdiction of the court over, the wife, was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause of the Federal Constitution. *Haddock* v. *Haddock*, 562.

12. *Full faith and credit clause—Nature of suit for divorce brought in State other than that of domicil of matrimony against wife still domiciled there.*
A suit for divorce brought in a State other than that of domicil of matrimony against a wife who is still domiciled therein is not a proceeding *in rem* justifying the court to enter a decree as to the *res*, or marriage relation, entitled to be enforced outside of the territorial jurisdiction of the court. *Ib.*

13. *Full faith and credit clause; effect of, as regards power of States over subject of marriage and divorce.*
The States at the time of the adoption of the Constitution possessed full power over the subject of marriage and divorce and the Constitution delegated no authority to the Central Government in regard thereto, and the destruction of the power of the States over the dissolution of marriage as to their own citizens cannot be brought about by the operation of the full faith and credit clause of the Constitution of the United States. *Ib.*

14. *Searches and seizures; scope of interdiction of Fourth Amendment.*
The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production upon a trial of documentary evidence through a *subpœna duces tecum*. *Hale* v. *Henkel*, 43.

15. *Searches and seizures—Immunity of corporations under Fourth Amendment.*
A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate constitutional immunities, and although it cannot refuse to produce its books and papers it is entitled to immunity under the Fourth Amendment against *unreasonable* searches and seizures, and where an examination of its books is not authorized by an act of Congress a *subpœna duces tecum* requiring the production of practically all of its books and papers is as indefensible as a search warrant would be if couched in similar terms. *Ib.*

Self-incrimination. *See* WITNESSES, 3, 5, 6, 7.

CONSTRUCTION.

OF GRANTS. *See* Corporations, 2;
Grants.
OF ORDINANCES. *See* Municipal Ordinances.
OF STATUTES. *See* Practice and Procedure, 2;
Statutes, A;
Witnesses, 2.

CONTEMPT OF COURT.

Validity of order of committal for contempt for failure to respond to subpœna duces tecum; effect of objection to writ.

Although the *subpœna duces tecum* may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this objection would not go to the validity of the order committing him for contempt. *Hale* v. *Henkel*, 43.

See EVIDENCE;
JURISDICTION, A 2.

CONTRACTS.

See BANKRUPTCY;
CONSTITUTIONAL LAW, 2, 3, 4;
INSURANCE;
MUNICIPAL CORPORATIONS, 2, 3;
PRACTICE AND PROCEDURE, 4;
STATUTES, A 3;
TAXATION, 3.

CORPORATIONS.

1. *Power of Congress over state corporations.*

Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress to regulate such commerce; and while Congress may not have general visitatorial power over state corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress. *Hale* v. *Henkel*, 43.

2. *Power of limited corporation to receive grant inuring to benefit of its successors—Construction of right granted.*

Although a corporation be organized under a charter for a limited period it may receive a grant inuring to the benefit of its lawful successors for a period beyond its corporate life, but the right granted must be construed with reference to the system of which it is a part and where that general system is for a limited period a single ordinance, not naming a specific term, will not be construed as granting a franchise in perpetuity. *Blair* v. *Chicago*, 400.

3. *Ultra vires acts in purchase and holding of real estate the concern of State where property situated—Raising of question collaterally by private persons.*

Whether a corporation having a limited and definite capacity to purchase and hold real estate has exceeded those limits concerns only the State

within whose jurisdiction the property is situated; the question cannot, unless the statute expressly or by necessary implication authorizes it, be raised collaterally by private persons. (*Fritts* v. *Palmer*, 132 U. S. 282.) *Ib.*

See CONSTITUTIONAL LAW, 2, 15; TAXATION, 1, 2, 3, 11; JURISDICTION, C 3; WITNESSES, 5, 7, 8.

COURTS.

Power to look behind mere forms—Interference against illegal exercise of governmental power.

Courts may look through and behind mere forms, and interfere, whenever necessary, for the protection of private rights against an illegal, arbitrary exercise of governmental power. *West Chicago Railroad* v. *Chicago*, 506.

See APPEAL AND ERROR; CONSTITUTIONAL LAW, 5, 14; HABEAS CORPUS; JURISDICTION; PRACTICE AND PROCEDURE; PUBLIC LANDS; REMOVAL OF CAUSES; TAXATION.

CRIMINAL LAW.

See CONSTITUTIONAL LAW, 5; HABEAS CORPUS; REMOVAL OF CAUSES; WITNESSES.

CUSTOMS DUTIES.

Carbon sticks as manufactured articles dutiable under § 7 of Tariff Act of 1897.

Carbon sticks from twelve to twenty inches in length and which require only a slight and inexpensive process to adapt them for use in electric lighting are manufactured articles similar in material, quality, texture and use to carbons for electric lighting enumerated in paragraph 98 of the Tariff Act of 1897, 30 Stat. 156, 205, and therefore under § 7 of that act are subject to the same duty. *United States* v. *Downing*, 354.

DISSEISIN.

See CONSTITUTIONAL LAW, 10.

DIVERSE CITIZENSHIP.

See JURISDICTION.

DIVORCE.

Adultery as ground for, under law of Philippine Islands—Sufficiency of evidence to establish adultery.

The abandonment by the husband of his wife, excluding her from his house and forming open and illicit relations with other women who bear him children, is sufficient to bring his adultery within the rule of law in the Philippine Islands that adultery of the husband must be accompanied by public scandal and disgrace to the wife in order to entitle her to a divorce. In this case the Court of First Instance, on uncontradicted evidence as to the husband's adultery and scandal ensuing therefrom,

found that the wife was entitled to a divorce and that there was no adultery on her part; the Supreme Court of the Philippine Islands found that the wife had committed adultery, basing the finding on a letter written by her and construed to be in the nature of a confession, and for that reason alone reversed the judgment. On examining the record this court holds that such letter does not amount to a confession, and that there is insufficient evidence of her having committed adultery, and therefore reverses the Supreme Court of the Philippine Islands. *De la Rama* v. *De la Rama*, 303.

See CONSTITUTIONAL LAW, 11, 12;
JURISDICTION, A 3, 5;
PRACTICE AND PROCEDURE, 5.

DOCUMENTARY EVIDENCE.

See CONSTITUTIONAL LAW, 14; EVIDENCE;
CONTEMPT OF COURT; JURISDICTION, A 2;
WITNESSES, 6, 7, 8.

DOMICIL.

See CONSTITUTIONAL LAW, 11, 12.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 5, 6, 7;
TAXATION, 10, 11.

DUTIES.

See CUSTOMS DUTIES.

EQUAL PROTECTION OF LAWS.

See CONSTITUTIONAL LAW, 8;
TAXATION, 9, 11.

EQUAL RIGHTS.

See REMOVAL OF CAUSES, 2, 4.

EQUITY.

See JURISDICTION, D 2;
PRACTICE AND PROCEDURE, 7;
TRADE-MARKS, 2.

ESTOPPEL.

See APPEAL AND ERROR, 4.

EVIDENCE.

Materiality of books of defendants in suit for violation of Anti-trust Act.

In a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-trust Law of July 2,

1890, a witness refused to answer questions or submit books to inspection before an examiner appointed by the court on the ground of immateriality, also pleading the Fifth Amendment; after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him. On appeal to this court *held*, that in such an action the books of the various defendants both before and after the alleged combination, and the contracts between them, as well as other papers referred to in the opinion, are all matters of material proof, but whether material or not the testimony must be taken and exceptions can be noted by the examiner and the materiality of the evidence passed on by the court. *Nelson* v. *United States*, 92.

See CONSTITUTIONAL LAW, 14; WITNESSES;
DIVORCE; WORDS AND PHRASES, 1.

EXEMPTIONS.

See CONSTITUTIONAL LAW, 6;
TAXATION, 1.

FACTS.

See JURISDICTION, A 4, 5;
PRACTICE AND PROCEDURE, 1, 3.

FEDERAL QUESTION.

Local or Federal nature of question.

What facts constitute a common-law marriage in a State is purely a local, and not a Federal, question. *Keen* v. *Keen*, 319.

See JURISDICTION;
PUBLIC LANDS, 2.

FIFTH AMENDMENT.

See WITNESSES, 3, 5, 6.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW, 9, 10;
REMOVAL OF CAUSES, 4.

FOURTH AMENDMENT.

See CONSTITUTIONAL LAW, 14, 15.

FRANCHISES.

See CONSTITUTIONAL LAW, 3; GRANTS;
CORPORATIONS, 2; JURISDICTION, D 2;
STATUTES, A 5.

FRAUD.

See PRACTICE AND PROCEDURE, 5.

GRAND JURY.

See CONSTITUTIONAL LAW;
WITNESSES.

GRANTS.

Creation of private rights in public property; necessity for plain showing in grant.

One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. Legislative grants of franchises which are in any way ambiguous as to whether granted for a longer or a shorter period are to be construed strictly against the grantee. *Blair* v. *Chicago*, 400.

See CORPORATIONS, 2;
MUNICIPAL CORPORATIONS, 1.

HABEAS CORPUS.

1. *Review by Federal courts, on habeas corpus, of judgment of state court.*

On a trial for murder the accused admitted the killing, and after all the facts were presented the court charged the jury to consider all the evidence and that if the killing was premeditated to find a verdict of guilty in the first degree, if not, then on the admitted facts it was murder in the second degree. The jury found in the first degree. The highest court of the State held the charge was without error. *Held*, that on the record there was a valid trial by a court having jurisdiction of the subject matter and the person and there was no loss of jurisdiction over either at any time during the trial and the judgment of the state court could not be reviewed on *habeas corpus* proceedings in the Federal courts. *Valentina* v. *Mercer*, 131.

2. The writ of *habeas corpus* cannot perform the functions of a writ of error. (*Re Nielsen*, 131 U. S. 176, distinguished.) *Felts* v. *Murphy*, 123; *Valentina* v. *Mercer*, 131.

See CONSTITUTIONAL LAW, 5.

HARTER ACT.

See MARITIME LAW.

IMMUNITY FROM PROSECUTION.

See CONSTITUTIONAL LAW, 15;
WITNESSES.

INDIANS.

See PUBLIC LANDS, 3.

INDICTMENT.

See WITNESSES, 1.

INJUNCTION.

See JURISDICTION, D 2.

INSURANCE.

Liability insurance; waiver, by insurer's refusal to defend suit, of provision of policy against compromise by insured.

An insurance company issued its policy insuring the assured against statutory and common-law liability for damages caused by negligence of insured or its employés, the insured to give immediate notice of any accident to the company, which agreed to defend any suit for damages brought against the assured, the latter not to make any settlement without the company's consent, and not to bring any action under the policy except for loss actually paid in satisfaction of judgment after trial. After an accident of which notice was duly given the assured was sued and the company refused to defend on the ground that the accident was not within the risks assumed. The assured to avoid heavy judgments settled the suits out of court and sued the company. *Held*, that the refusal of the company to defend the suits constituted such a breach of the contract that it released the assured from the agreement not to settle the claim without its consent and amounted to a waiver of the condition that it was only liable for judgment rendered against the assured after trial and satisfied. Under the circumstances of this case the liability of the assured to the person injured and the extent of the liability may be litigated in the first instance in the action brought by the assured against the company on the policy. *St. Louis Beef Co.* v. *Casualty Co.*, 173.

See LIMITATION OF ACTIONS.

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, 1;
CORPORATIONS, 1.

JUDGMENTS AND DECREES.

See APPEAL AND ERROR, 1;
CONSTITUTIONAL LAW, 11, 12, 13.

JUDICIAL NOTICE.

See TAXATION, 7.

JURISDICTION.

A. OF THIS COURT.

1. *Amount in controversy.*

Plaintiff sued in the District Court of a Territory for several items and recovered judgment for less than amount sued for but over $5,000 with interest at six per cent. Defendant alone sued out writ of error from the Supreme Court of the Territory which disallowed $4,880 of the judgment including interest at six per cent. Plaintiff then appealed to this court and prayed for reinstatement of the District Court judgment and, when the case was reached for hearing here, assigned as additional error that the District Court had not allowed twenty-five

per cent instead of six per cent interest which would have made the amount disallowed exceed $5,000. *Held*, that as plaintiff had not complained of the District Court judgment the only matter in dispute was that part of the District Court judgment which was disallowed by the territorial Supreme Court and as that was less than $5,000 the appeal to this court could not under the act of March 3, 1885, 23 Stat. 443, be maintained. *New Mexico* v. *Atchison, Topeka & S. F. Ry. Co.*, 41.

2. *Appeal from order of Circuit Court requiring witness to answer questions; interlocutory nature of order.*

In a suit in a Circuit Court of the United States brought by the United States against corporations for violations of the Anti-trust Law of July 2, 1890, a witness refused to answer questions or produce books before the examiner on the ground of immateriality, also pleading the privileges of the Fifth Amendment; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, that while such an order might leave the witness no alternative except to obey or be punished for contempt it is interlocutory in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an appeal will not lie therefrom to this court. If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case. *Alexander* v. *United States*, 117.

3. *Appeals from territorial courts in divorce proceedings.*

The general rule that courts of the United States have no jurisdiction upon the subject of divorce or for allowance of alimony, because diversity of citizenship does not exist and no pecuniary value is involved, has no application to territorial courts or to the appellate jurisdiction of this court over those courts. *De la Rama* v. *De la Rama*, 303.

4. *Appeals from territorial courts; scope of review on appeal from Philippine Islands.*

The Territorial Practice Act of April 7, 1874, 18 Stat. 27, under which the jurisdiction of this court does not extend to reëxamining the facts but is limited to determining whether the findings support the judgment and to reviewing errors to admission or rejection of testimony on exceptions duly taken, has no application to appeals from the Philippine Islands. *Ib.*

5. *Appeal from Supreme Court of Philippine Islands; scope of review where jurisdiction based on amount involved.*

Under § 10 of the act of July 1, 1902, 32 Stat. 691, appeals are allowed from judgments of the Supreme Court of the Philippine Islands where the amount exceeds $25,000, in the same manner as for judgments of the Circuit Courts of the United States, and such appeals extend to an examination of the facts as well as the law, and where alimony or separa-

tion of conjugal property has been awarded by the decree of divorce amounting to over $25,000 and this court takes jurisdiction of the appeal by reason of the amount involved it may, if necessary to determine whether the decree was right in that respect, pass upon the sufficiency of the testimony authorizing or refusing the divorce. *Ib.*

6. *Appeals from Philippine Islands; nature of jurisdictional amount.*
For the purposes of the jurisdiction of this court it makes no difference whether the amount claimed by the wife in a suit for divorce in the Philippine Islands be termed alimony or her share of community property. *Ib.*

7. *Appeals from Philippine Islands—Amount in controversy; power of court to create exception.*
Under § 10 of the Philippine Island Act of 1902 appeals are allowed in all cases where the amount in controversy exceeds $25,000 and this court has no power to create an exception not made in the statute; it would be judicial legislation. *Ib.*

8. *Direct appeal from Circuit Court—Involution of Federal question.*
In a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-trust Law of July 2, 1890, a witness refused to answer questions or submit books to inspection before an examiner appointed by the court on the ground of immateriality, also pleading the Fifth Amendment; after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him. On appeal to this court *held*, that questions under the Constitution of the United States were involved and this court has jurisdiction of an appeal direct from the Circuit Court. *Nelson* v. *United States*, 92.

9. *Disposition of Federal question in case on denial of right of removal from state to Federal court.*
Where this court holds that a case cannot be removed under § 641 from the state court into the Circuit Court it will not pass upon the merits of any Federal question which may arise in the case. *Kentucky* v. *Powers*, 1.

10. *Review of decision of state court denying Federal right claimed during trial.*
Although a case may not be one on plaintiff's statement of which the Circuit Court has jurisdiction as arising under the Constitution and laws of the United States, if the case is brought in the state court questions of a Federal nature may arise during the trial, and the party who specially sets up a Federal right which is denied may have the same reviewed by this court by writ of error under § 709, Rev. Stat. *Joy* v. *St. Louis*, 332.

11. *Review of judgment of state court rejecting, by its necessary operation, a claim based on constitutional right specially set up.*
Although the judgment of the state court rests partly on grounds of local

or general law, and although the opinion may not expressly refer to the Constitution of the United States, if by its necessary operation the judgment rejects a claim, based on a constitutional right specially set up in the answer, that the relief prayed cannot, in any view of the case, be granted consistently with the contract or due process clauses of the Constitution, this court has jurisdiction to review under § 709, Rev. Stat. *West Chicago Railroad* v. *Chicago*, 506.

12. *Sufficiency of raising of Federal question in state court.*

Where the only assignment of error does not involve any Federal question the mere statement in the motion for new trial that the judgment deprives plaintiff in error of his property without due process of law, denies him equal protection of the laws, and is contrary to the Fourteenth Amendment, without any allegation as to why the judgment has this effect, no notice of which is taken by the state court in denying the motion, does not properly raise a Federal question so as to give this court jurisdiction to review under § 709, Rev. Stat., even though the writ be allowed by the presiding judge of the state court. *Keen* v. *Keen*, 319.

13. *To revise decision of state court as to whether local law complied with.*

If the state constitution and laws in regard to selection of jurors, as construed by the state court, are consistent with the Fourteenth Amendment, this court can go no further, and will not revise the decision of the state court as to whether the local law has been complied with. *Rawlins* v. *Georgia*, 638.

14. *Writ of error where Federal question raised by pleading and necessarily involved in decision.*

Where the Federal question is distinctly set up in the bill, and insisted on at every stage, and the state court could not have decided as it did without overruling the claim, this court has jurisdiction to review the judgment on writ of error. *Otis Co.* v. *Ludlow Co.*, 140.

15. *Writ of error to inferior court of State, being the highest court in which decision of Federal question may be had—Review of judgment of trial court.*

Where the highest court of the State has declared that the action of the trial court in refusing to quash the indictment or the panel of petit jurors cannot under the laws of the State be reviewed by any appellate court, although the motion to quash was based on Federal grounds, then after the highest appellate court of the State has disposed of the matters of which it may take cognizance, a writ of error will run from this court to the highest court in the State in which the decision of the Federal question may be had; and upon such writ of error this court can review the judgment of the trial court, and will exercise such jurisdiction as may be necessary to vindicate any Federal right, privilege or immunity specially set up and denied. *Kentucky* v. *Powers*, 1.

See REMOVAL OF CAUSES, 2.

B. Of Circuit Court of Appeals.

See Appeal and Error, 1.

C. Of Circuit Court.

1. *Raising Federal question; sufficiency of assertion in plaintiff's pleading that defense raises question.*

Where diversity of citizenship does not exist, plaintiff cannot make out a case as arising under the Constitution and laws of the United States so as to give the Circuit Court jurisdiction, unless it necessarily appears by his complaint in stating his own claim, and it cannot be made to appear by an assertion in plaintiff's pleading, that the defense raises a Federal question. *Joy* v. *St. Louis*, 332.

2. *Sufficiency of involution of Federal question.*

The mere fact that plaintiff's title comes from a patent or under an act of Congress does not necessarily involve a Federal question; there must be an actual dispute as to the construction of the patent or act. *Ib.*

3. *Diversity of citizenship—Jurisdiction of suit on note by indorsee where corporation maker and its treasurer as payee and indorser are residents of same State.*

Where notes are made by a corporation payable to the order of its own treasurer, a citizen of the same State, as a matter of convenience and custom, and indorsed and delivered by him to a *bona fide* holder who, a citizen of a different State, furnishes the money represented by the note directly to the corporation, the treasurer is not in fact an assignee of the note within the meaning of the act of August 13, 1888, 25 Stat. 433, and suit may be brought by such holder in the Circuit Court of the United States having jurisdiction of the parties, notwithstanding such diversity does not exist as to the treasurer first indorsing the note. (*Falk* v. *Moebs*, 127 U. S. 597; *Holmes* v. *Goldsmith*, 147 U. S. 150.) *Blair* v. *Chicago*, 400.

4. *Of suit in nature of creditor's bill to enforce liability of stockholder of national bank—Finality of decree of Circuit Court of Appeals.*

Where a national bank has gone into liquidation under § 5220, Rev. Stat., and one holding its notes seeks to enforce the additional liability imposed by § 5151, Rev. Stat., against a stockholder by a suit in the nature of a creditor's bill on behalf of himself and all other creditors, a case is presented under the laws of the United States giving the Circuit Court jurisdiction independently of diverse citizenship, and the decree of the Circuit Court of Appeals is not final but an appeal therefrom will lie to this court. It is not necessary in order to maintain such a suit that the creditor should first obtain judgment on the note. *Wyman* v. *Wallace*, 230.

See Public Lands, 2.

D. Of Federal Courts Generally.

1. *To pass upon conflict between state statute and state constitution prior to determination by state tribunals.*

A state statute may be unconstitutional because conflicting with the constitution of the State or with that of the United States, but all objections to its validity whether state or Federal may be presented in a single suit and call for consideration and determination; and as a Federal court has the jurisdiction it may be its duty, when the question is properly presented, to pass upon an alleged conflict between a state statute and the state constitution even before the question has been considered by the state tribunals. It will however be reluctant to do so especially when the statute is one affecting public revenues of the State. *Michigan Central Railroad* v. *Powers*, 245.

2. *Maintenance of bill by receiver to protect jurisdiction and right of court to administer property.*

Where, as in this case, the attitude and claims of the municipality cast a cloud upon the title to property consisting largely of franchises in the hands of receivers and to be administered under orders of the court, the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of claims of parties which cast a cloud upon such franchises and in such a case it is proper to grant an injunction until the rights of the parties can be determined. *Blair* v. *Chicago*, 400.

3. *Materiality of motive of litigant.*

Where there is a proper cause of action and diverse citizenship, jurisdiction of the Federal courts exists, and the motive of the creditor who desires to litigate in that forum is immaterial, and does not affect the jurisdiction; nor is such jurisdiction if it actually exists, affected by the fact that a receivership was in view when judgments were entered. (*South Dakota* v. *North Carolina*, 192 U. S. 286). *Ib.*

See Constitutional Law, 5; Habeas Corpus, 1; Jurisdiction, A 3; Public Lands, 1; Removal of Causes; Trade-marks, 2.

E. Of State Courts.

See Constitutional Law, 5, 11; Corporations, 3; Habeas Corpus, 1.

JURY.

Exclusion of persons liable to jury duty as ground for challenge to array.

Even when persons liable to jury duty under the state laws are excluded it is no ground for challenge to the array, if a sufficient number of unexceptionable persons are present. *Rawlins* v. *Georgia*, 638.

See Constitutional Law, 6.

LACHES.

See PRACTICE AND PROCEDURE, 5.

LAND DEPARTMENT.

See PUBLIC LANDS, 4.

LEGISLATION.

Effect on legislation of possibility of misconduct on part of officials.

While there is always a possibility of misconduct on the part of officials, legislation may proceed on the assumption of their properly discharging their duties. *Michigan Central R. R. Co.* v. *Powers*, 245.

See CONSTITUTIONAL LAW, 8;
TAXATION, 5.

LIENS.

See BANKRUPTCY;
MORTGAGE AND DEED OF TRUST.

LIMITATION OF ACTIONS.

Limitation of personal actions in Porto Rico.

Royal Insurance Co. v. *Miller*, 199 U. S. 353, followed to effect that, in the absence of express legislation affecting Porto Rico, the law prior to the extension of the Civil Code thereto in 1889 concerning limitations of personal actions, is that generally prevailing under Spanish law and in these cases on insurance policies, the loss under which had occurred prior to 1889, the twenty-year term applied and not the fifteen-year term applicable under the Civil Code after its extension to Porto Rico. *Amadeo* v. *Northern Assurance Co.*, 194.

See CONSTITUTIONAL LAW, 10.

LOCAL LAW.

Florida. Married women (see National Banks, 1). *Christopher* v. *Norvell*, 216.

Illinois. Municipal corporations; control of streets (see Municipal Corporations, 4). *Blair* v. *Chicago*, 400. Street railways (see Chicago Traction Cases). *Ib.*

Massachusetts. Mill Act (see Practice and Procedure, 7). *Otis Co.* v. *Ludlow Co.* 140.

Michigan. Act No. 173, Laws of 1901, Taxation (see Taxation, 11). *Michigan Central Railroad* v. *Powers*, 245.

New York. Sale of adulterated milk, Laws of 1893, chap. 338 (see Constitutional Law, 8). *St. John* v. *New York*, 633.

Ohio. Conditional sales (see Bankruptcy). *York Manufacturing Co.* v. *Cassell*, 344.

Philippine Islands. See Divorce.

Porto Rico. Limitation of actions (see Limitation of Actions). *Amadeo* v. *Northern Assurance Co.*, 194.

Texas. Rev. Stat. Texas, articles 4497–5000 (see Constitutional Law, 1). *Houston & Tex. Cent. Railroad* v. *Mayes*, 321.

See PUBLIC LANDS, 2.

MANDAMUS.

See APPEAL AND ERROR, 1.

MARITIME LAW.

Burden of proof as to seaworthiness of vessel—Harter act.

The relief afforded by § 3 of the Harter act, 27 Stat. 445, to shipowners is purely statutory and in order for a shipowner to avail of the exemptions from liability for errors of management or navigation the burden is on him to prove affirmatively, in all cases, and not only in those where there is conflicting testimony, that the vessel was seaworthy at the beginning of the voyage or that due diligence had been used to make her so. The discharge of the duty of the shipowner in this respect is not left in the absence of proof to any presumption. *The Wildcroft*, 378.

MARRIED WOMEN.

See NATIONAL BANKS, 1.

MARRIAGE AND DIVORCE.

See CONSTITUTIONAL LAW, 11, 12, 13; DIVORCE; FEDERAL QUESTION; PRACTICE AND PROCEDURE, 5.

MINERAL LANDS.

See PUBLIC LANDS, 4.

MISTAKE.

See MUNICIPAL ORDINANCES.

MORTGAGE AND DEED OF TRUST.

Effect of mortgage as lien on machinery subsequently placed on the land.

A mortgage containing no clause covering after-acquired property is not a lien on machinery placed on the land after the execution of the mortgage, and the title to which is reserved in the vendor until payment therefor. *York Manufacturing Co.* v. *Cassell*, 344.

MUNICIPAL CORPORATIONS.

1. *Power to grant right to obstruct navigable stream—Right of owner of soil under bed of stream as to use.*

In a navigable stream the public right is paramount, and the owner of the soil under the bed can only use it so far as consistent with the public right; and a municipality, through which a navigable stream flows, cannot grant a right to obstruct the navigation thereof nor bind itself to permit the continuance of an obstruction, and this rule is not affected

by the fact that the person claiming a right to continue such an obstruction is the owner in fee of the bed of the stream. *West Chicago Railroad* v. *Chicago*, 506.

2. *Grant by municipality constituting contract within impairment clause of Constitution—Power to compel grantee to remove obstruction to navigation.*
A municipal ordinance giving permission to a street railroad company to construct a tunnel under a navigable stream, the law of the State providing that railways shall not be constructed so as to interrupt the navigation of any water in the State, does not amount to a contract under the contract clause of the Constitution, so that the city could not subsequently require the company to lower the tunnel so as not to interfere with the increased demands of navigation; nor, in the absence of any provision to that effect, would it be construed as containing an implied covenant that the municipality would bear the expense of such alterations required by subsequent ordinances. *Ib.*

3. *Duty of protecting unobstructed navigation of rivers under its jurisdiction.*
A municipality is under the duty of protecting the unobstructed navigation of navigable rivers under its jurisdiction; and it cannot be exempted therefrom by making agreements in regard thereto. *Ib.*

4. *Title and control over streets under Illinois law—Legitimate use of street.*
Under the law of Illinois municipal corporations have a fee simple in, and exclusive control over, the streets, and the municipal authorities may do anything with, or allow any use of, the streets not incompatible with the ends for which streets are established, and it is a legitimate use of a street to allow a street railroad track to be laid down in it. *Blair* v. *Chicago*, 400.

See CONSTITUTIONAL LAW, 4, 7;
JURISDICTION, D 2;
STATUTES, A 2, 5.

MUNICIPAL ORDINANCES.

Construction—Effect of mistake in one ordinance in construction of others dealing with same subject.
In construing municipal ordinances dealing with important matters such as extensions of street railway franchises it may reasonably be presumed that no provision escaped attention or was misunderstood; and, while a mistake might occur in one ordinance, it will not be supposed that the mistake occurred in four ordinances dealing with the same subject. *Cleveland* v. *Cleveland Electric Ry.*, 529.

See CONSTITUTIONAL LAW, 3, 4;
MUNICIPAL CORPORATIONS.

NATIONAL BANKS.

1. *Liability of shareholders; exemption from liability by state statute.*
Although in a limited sense there is an element of contract in becoming a shareholder of a national bank, the liability for debts of the institution

is not contractual but is based on the provisions to that effect in the national banking law. The Government creating the bank has prescribed the terms upon which ownership of its shares can be acquired, and only those are exempted from liability who are specially described in the statute; nor can any shareholders be exempted from such liability by a state statute. Under § 5151, Rev. Stat., a married woman residing in Florida, who has inherited stock in a national bank, which has been transferred to her and on which she has received and accepted dividends, is subject to a personal judgment for an assessment of the comptroller, notwithstanding that under the laws of Florida a married woman cannot enter into a contract. Nothing in the law of Florida incapacitates a married woman in that State from becoming the owner, by bequest or otherwise, of stock in a national bank. How and from what property such a judgment shall be satisfied not involved or decided in this action. *Christopher* v. *Norvell*, 216.

2. *Power to borrow money and give time obligations therefor—Liability of stockholders.*

A national bank finding itself embarrassed though possessed of a large amount of assets apparently in excess of its obligations is not prohibited by the national banking act from borrowing, and it has the power to borrow, money to meet pressing demands, which it has not the cash to meet, and to give its time obligations therefor, secured by all of its assets; and if it subsequently goes into liquidation, and the collateral is insufficient to meet the obligations, the stockholders, both assenting and non-assenting to the liquidation are subject to the additional liability to the extent imposed by § 5151, Rev. Stat., and the holder of the notes can enforce the same by creditor's bill. *Wyman* v. *Wallace*, 230.

See JURISDICTION, C 4.

NAVIGABLE WATERS.

See CONSTITUTIONAL LAW, 7;
MUNICIPAL CORPORATIONS, 1, 2, 3.

OBSTRUCTIONS.

See CONSTITUTIONAL LAW, 7;
MUNICIPAL CORPORATIONS, 1, 2.

ORDINANCES.

See CONSTITUTIONAL LAW, 3, 4;
MUNICIPAL CORPORATIONS, 2;
MUNICIPAL ORDINANCES.

PARDONS.

See REMOVAL OF CAUSES, 3.

PARTIES.

See APPEAL AND ERROR, 3, 4;
PUBLIC LANDS, 4.

PATENTS FOR LAND.

See JURISDICTION, C 2;
PUBLIC LANDS.

PHILIPPINE ISLANDS.

See DIVORCE.
JURISDICTION, A 4, 5.

PLEADING.

See JURISDICTION, C 1; D 2.

POLICE POWER.

See CONSTITUTIONAL LAW, 1.

POWERS OF CONGRESS.

See CORPORATIONS, 1.

PRACTICE AND PROCEDURE.

1. *Acceptance by Federal Supreme Court of trial court's findings of fact.*
This court generally accepts the findings of a trial court upon a question of fact when the evidence is conflicting; and so held in this case as to a charge of systematic under-valuation which the trial court found against. *Michigan Central Railroad* v. *Powers*, 245.

2. *Following state court's construction of state statute.*
If a state statute, as construed by the state court, is constitutional, this court follows that construction. *Soper* v. *Lawrence Brothers*, 359.

3. *Following findings of fact concurred in by District Court and Circuit Court of Appeals.*
Findings of fact by both the District Court and the Circuit Court of Appeals as to seaworthiness of a vessel at, and due diligence used prior to, the commencement of the voyage will not ordinarily be disturbed by this court and so held in this case. *The Wildcroft*, 378.

4. *Effect in this court of decisions of state court, in determining existence of contract made by legislative action.*
Although decisions of the highest court of a State are not binding on this court in determining whether a contract was made by legislative action of that State which is entitled to protection under the impairment of obligation clause of the Federal Constitution, it will consider decisions of that court on the point in question. *Blair* v. *Chicago*, 400.

5. *Effect on this court of questions concerning fraud in contracting marriage and laches in bringing action for divorce.*

Questions concerning alleged fraud in contracting a marriage and laches on the part of one of the parties in bringing an action for divorce are matters solely of state cognizance and may not even be allowed to indirectly influence this court in determining the Federal question which is involved. *Haddock* v. *Haddock*, 562.

6. *Consideration of claim not raised below.*

This court will not consider a claim which was not set up in the bill or in the court below, nor suggested until after the argument in this court. *Rodriguez* v. *Vivoni*, 371.

7. *Dismissal without prejudice or retention of bill pending decision of state court.*

Under the Massachusetts Mill Act the right of the lower owner only becomes complete when the land is flowed, and then it is only a right to maintain a dam subject to paying the upper owners for harm actually done, in pursuance of the terms of the act. In a suit at equity brought by the upper owner to restrain the lower owner from building a dam, the state court having declared generally that the Mill Act is valid, but not having definitely expressed itself as to its constitutionality, and as the opinion of this court may depend upon the interpretation of the act by the state court, *held*, that the bill should be dismissed without prejudice, or retained until plaintiff's rights have been determined in an action for damages under the statute pending in the state court. *Otis Co.* v. *Ludlow Co.*, 140.

See APPEAL AND ERROR; JURISDICTION; CONSTITUTIONAL LAW; TAXATION, 3, 7; WITNESSES, 1.

PROCESS.

See CONSTITUTIONAL LAW, 11.

PRODUCTION OF BOOKS.

See CONSTITUTIONAL LAW, 14; CONTEMPT OF COURT; JURISDICTION, A 2; EVIDENCE; WITNESSES.

PROMISSORY NOTES.

See JURISDICTION, C 3.

PUBLIC GRANTS.

See GRANTS.

PUBLIC LANDS.

1. *Construction of Government grants—Determination by State of incidents attached to ownership of property bordering on navigable stream.*

While the Federal court construes Government grants without reference to the construction adopted by the States for their grants, the incidents attached to ownership of property conveyed by the United States

bordering on a navigable stream are to be determined by the State in which it is situated subject to the limitation that its rules do not impair the efficacy of the grant or its use by the grantee. *Joy* v. *St. Louis*, 332.

2. *Title to accretions; nature of question as one of local or Federal law.*

Whether land contained in an original patent reached to a river under the distances called for is a question of fact, and whether the patentee is entitled to accretion is a question of local and not Federal law, and ejectment for the land made by accretion cannot, where diversity of citizenship does not exist, be maintained in the Circuit Court as a case arising under the law of the United States. *Ib.*

3. *Indian reservations; effect of Wisconsin enabling act as grant of sections within, for school purposes.*

The provisions in the enabling act of August 6, 1846, authorizing the people of the then Territory of Wisconsin to form a state government, and by which section 16 in every township of the public lands, in that Territory, not sold or otherwise disposed of was granted to the State for the use of schools, did not operate to vest in the State section 16 of townships within the La Pointe or Bad River and the Flambeau Indian Reservations from which the Indians have never been required to remove; and this notwithstanding by the provisions in treaties executed prior to 1846 the Indians occupying them ceded those lands to the United States only retaining the privileges of occupancy thereof until required to remove therefrom by the President of the United States, and that after 1846 the same lands were included in the reservations as they now exist. *United States* v. *Thomas*, 151 U. S. 557, followed, as determinative of this case (although it did not have reference to the particular Reservation involved in this case). It was held that the court will not, at this time and at the instance of the State, interfere with the administration by the Interior Department of the lands in question for the benefit of the Indians for whom the Reservation was established. *Wisconsin* v. *Hitchcock*, 202.

4. *Parties in adverse proceedings—Restoration of land to public domain—Collateral attack of rulings of Land Department—Final certificate as equivalent of patent.*

The Land Department refused to issue a patent on a mining lode location for which the local office had issued final certificate on the ground that the entry embraced two tracts separated by a placer claim; but gave the applicant the privilege for a definite period of electing which tract he would take, the entry to be cancelled on one of the tracts specified unless he meanwhile appealed or made his election. Within the period he waived his appeal and elected to take the other tract. Subsequently the Land Department entered a formal order cancelling the entry as to the tract abandoned. Meanwhile three entries were made of the abandoned tract. The first immediately after the Land Department had refused the patent; the second immediately after the election and relinquishment was made; and the third immediately after the final

order of cancellation was entered. In consolidated adverse proceedings between these three entrymen, *held*, that:

(*a*) In adverse proceedings each party is practically a plaintiff and must show his title.

(*b*) The order refusing to grant the patent did not of itself restore the land to the public domain during the period of election, but the relinquishment of the original entryman to the abandoned tract operated to do so *eo instanti*, and the formal order of cancellation merely recorded a preëxisting fact, and the rights of the party entering the land immediately after the relinquishment were superior to those of the other entryman.

(*c*) Rulings of the Land Department as to land covered by a location cannot be challenged collaterally in separate proceedings and the principle of freedom from collateral attack is equally applicable in cases of final entry as in those where patent has issued.

(*d*) A final certificate issued after submission of final proof and payment of purchase price is for many purposes equivalent to a patent. *Brown* v. *Gurney*, 184.

PUBLIC OFFICERS.

See CIVIL SERVICE;
LEGISLATION;
STATUTES, A 5.

RAILROADS.

See CONSTITUTIONAL LAW, 1, 2, 3, 4, 7;
MUNICIPAL CORPORATIONS, 2, 4;
MUNICIPAL ORDINANCES;
STATUTES, A 2, 3, 5;
TAXATION, 11.

RECEIVERS.

See JURISDICTION, D 2, 3.

REMEDIES.

See REMOVAL OF CAUSES, 2.

REMOVAL OF CAUSES.

1. *Jurisdiction of subordinate judicial tribunals dependent upon act of Congress.*

Subordinate judicial tribunals of the United States can exercise only such jurisdiction as may be authorized by acts of Congress and whatever the nature of a civil suit or criminal proceeding in a state court it cannot be removed to the Federal court unless warrant therefor be found in some act of Congress. *Kentucky* v. *Powers*, 1.

2. *Right of removal where discrimination against accused due to illegal or corrupt acts of administrative officers unauthorized by constitution or laws of State.*

Under §§ 641, 642, Rev. Stat., there is no right of removal into the Circuit Court of the trial of a person indicted under the state law where the

alleged discrimination against the accused in respect to his equal rights, is due merely to illegal or corrupt acts of administrative officers unauthorized by the constitution or laws of the State as interpreted by its highest court. The remedy for wrongs of that character is in the state court, and ultimately in this court by writ of error to protect any right secured or granted to the accused by the Constitution or laws of the United States which has been denied to him in the highest court of the State in which the decision in respect to that right can be had. *Ib.*

3. *Refusal of state courts on previous trials to recognize alleged pardon by acting governor as ground for removal.*

The fact that the courts of the State have on previous trials refused to recognize the validity of an alleged pardon given to the accused by the acting Governor of the State does not make a case under § 641, Rev. Stat., for the removal of the prosecution from the state court into the Circuit Court. *Ib.*

4. *Application of section* 641, *Rev. Stat.*

While the prior decisions of this court determining the scope of § 641, Rev. Stat., had reference to discrimination against negroes because of their race, the rules announced equally apply where it exists as to the white race; § 641 as well as the Fourteenth Amendment is for the benefit of all of either race whose cases are embraced by its provisions and not alone for the benefit of the African race. *Ib.*

REMOVAL FROM OFFICE.
See CIVIL SERVICE.

REPEAL.
See STATUTES, A 3.

RIPARIAN RIGHTS.
See MUNICIPAL CORPORATIONS, 1;
PRACTICE AND PROCEDURE, 7.

SCHOOL LANDS.
See PUBLIC LANDS, 3.

SEARCHES AND SEIZURES.
See CONSTITUTIONAL LAW, 14, 15.

SELF-INCRIMINATION.
See WITNESSES, 3, 7.

SERVICE OF PROCESS.
See CONSTITUTIONAL LAW, 11.

SHIPPING.

See MARITIME LAW.

STATES.

See CONSTITUTIONAL LAW, 1, 6, 8, 10, 11, 13; CORPORATIONS, 3; LOCAL LAW. PUBLIC LANDS, 1; TAXATION;

STATUTES.

A. CONSTRUCTION OF.

1. *Title; effect of generality of title on validity of statute under constitutional restriction as to subjects.*

The generality of the title of a state statute does not invalidate it under a provision of the constitution of the State that private and local laws shall only embrace one subject which shall be expressed in the title, so long as the title is comprehensive enough to reasonably include within the general subject or the subordinate branches thereof, the several objects which the statute seeks to effect, and does not cover legislation incongruous in itself and which by no fair intendment can be included as having any necessary and proper connection. (*Montclair* v. *Ramsdell*, 107 U. S. 147.) *Blair* v. *Chicago*, 400.

2. *Title; expression of object in; effect of declaration as to character of railways concerned, on exercise of power of city in such manner as to authorize use of other motive power.*

A declaration in the title of state statutes that they concern horse railways, where it is apparent that these terms were intended to indicate street railways as distinguished from steam railways, will not, because of a constitutional provision that the object of the statute must be expressed in the title, prevent the city from exercising its powers under the statute in such manner as to authorize the use of other power such as cable or electricity. *Ib.*

3. *Repeal; effect as to ratification of contracts existing when statutes passed.*

The repeal of a state statute authorizing every street railway to be operated by such animal, electric or other power as the municipal authorities may have granted would not destroy its effect to ratify contracts in existence when it was passed. *Ib.*

4. *Reading of statute amended.*

As a rule of construction a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *Ib.*

5. *Effect of abolition of office, the consent of whose incumbent is necessary under a statute to authorize extension of street railway—Effect of subsequent act limiting life of franchises.*

Where a state statute requires the consent of a municipal officer to authorize the extension of a street railway the abolition of that office does not authorize the extension without any official consent; and

where the consent of municipal authorities is required for franchises relating to special localities by a statute, and subsequently a general act limits the time for which any such franchise can be granted in any city or village, the consent given will be presumed, in the absence of any period specified not to be in perpetuity, but for the period as so limited. *Ib.*

See JURISDICTION, D 1;
MUNICIPAL ORDINANCES;
PRACTICE AND PROCEDURE, 2;
WITNESSES, 2.

B. ENACTMENT OF.

See LEGISLATION.

C. OF THE UNITED STATES.

See ACTS OF CONGRESS.

D. OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STATUTE OF LIMITATIONS.

See CONSTITUTIONAL LAW, 10;
LIMITATION OF ACTIONS.

STOCKHOLDERS.

See JURISDICTION, C 4;
NATIONAL BANKS;
TAXATION, 2.

STREET RAILWAYS.

See CONSTITUTIONAL LAW, 3, 4, 7; MUNICIPAL ORDINANCES;
MUNICIPAL CORPORATIONS, 2, 4; STATUTES, A 2, 3, 5.

STREETS AND HIGHWAYS.

See MUNICIPAL CORPORATIONS, 4.

SUBPŒNA DUCES TECUM.

See CONSTITUTIONAL LAW, 14, 15;
CONTEMPT OF COURT.

TARIFF.

See CUSTOMS DUTIES.

TAXATION.

1. *Effect of reorganization of railroad company on exemption from taxation.* Where a railroad company is reorganized under a special act of the legislature but no new corporation is chartered a statutory exemption from taxation is not destroyed. *Powers* v. *Detroit & Grand Haven Ry.*, 543.

2. *Nature of tax imposed by special statute on capital stock of particular corporation in lieu of other taxes.*

An annual tax of one per cent imposed by a special statute on the capital stock of a particular corporation to be paid in lieu of all other taxes except for penalties imposed thereupon and prescribed to be estimated each year on the last annual report of the corporation, *held*, under the circumstances of this case, to be a tax upon the property of the corporation, and not a tax upon the shares of stock held by the stockholders. *Ib.*

3. *Power of State to make valid contract with corporation as to taxation—Application of rule as to binding effect of state court's construction of state statutes.*

A State may, through its legislature, make a valid contract as to taxation with a corporation which the latter can enforce; and this court is not, under the rule generally applicable as to the binding effect of decisions of the Supreme Court of the State construing its statutes, concluded by the decisions of that court as to whether such a contract exists, the extent of its terms, and whether any subsequent law has impaired its obligation. But where the Supreme Court of the State sustains the validity of the statute from which a contract is claimed, this court follows that decision and determines what the contract is. *Ib.*

4. *State taxation; National supervision.*

There is no general supervision by the Nation over state taxation, in regard to which the State has, generally speaking, the freedom of a sovereign both as to objects and methods. *Michigan Central Railroad* v. *Powers*, 245.

5. *Legislative exercise of function as to determination of rate.*

Where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year, and created without reference to the matter of that rate, there is no abdication of the legislative function, but on the contrary there is a direct legislative determination of that rate. *Ib.*

6. *Power of State as to creation of taxing districts.*

Unless there is some specific provisions in the state constitution compelling other action a State may treat its entire territory as composing but a single taxing district, and deal with all property as within the district and subject it to taxation accordingly. *Ib.*

7. *Taxing districts; judicial notice as to railroads.*

This court may in a case of this nature take judicial notice of the fact that the State of Michigan is traversed in almost every direction by railroads and that the county in which there are no railroads, if any there be, is an exception. *Ib.*

8. *Uniformity of tax—Classification for taxation.*

A legislature is not bound to impose the same rate of tax upon one class of

property that it does upon another; it is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them. *Ib.*

9. *Classification for taxation—Application of proceeds.*

Nothing in the Federal Constitution prevents a State from separating a particular class of property and subjecting it to assessment and taxation in a mode and by a rate different from that imposed on other property and applying the proceeds to state rather than local purposes. *Ib.*

10. *Sufficiency of hearing afforded interested persons to constitute due process of law.*

One hearing is sufficient to constitute due process and a state statute giving a state assessing board power to correct valuations, naming time and place at which any person interested may be heard, does not deprive the persons assessed of their property without due process of law because those parties do not have further opportunities to be heard by a court or the legislature. *Ib.*

11. *Constitutionality of Michigan act for taxation of railroad and corporate property.*

Act No. 173, Michigan Laws of 1901, imposing upon railroad and corporate property the average rate of tax upon other property subject to ad valorem taxes, applying the proceeds to state purposes, and providing for ascertaining the rate by mathematical computations by the state board of assessors based upon reports from the local assessors, does not conflict with the constitution of the State or with that of the United States. *Ib.*

See CONSTITUTIONAL LAW, 2.

TERRITORIAL COURTS.

See JURISDICTION, A 3, 4.

TITLE.

See BANKRUPTCY; MUNICIPAL CORPORATIONS, 4; PUBLIC LANDS, 2; STATUTES, A 1, 2.

TRADE-MARKS.

1. *Definiteness—Color as essential feature.*

A trade-mark for wire rope of a red or other distinctively colored streak applied to or woven in the rope is too wide and too indefinite. Where color is made the essential feature of a trade-mark it must be so defined or connected with some symbol or design that other manufacturers may know what they can safely do. A trade-mark not limited to a particular color must stand or fall in its entirety and if the description is too broad it cannot be sustained by proof that only a particular color

is used. *Quære,* whether mere color not impressed in a particular design can constitute a valid trade-mark. *Leschen Rope Co.* v. *Broderick,* 166.

2. *Jurisdiction of Federal court of equity action for infringement.*
In an equity action between citizens of the same State for infringement of trade-mark the jurisdiction of the Federal court depends solely on whether plaintiff's registered trade-mark is valid, and if it is not valid jurisdiction cannot be assumed of the case as one where defendant has used plaintiff's device for the purpose of fraudulently palming off his goods as those of the plaintiff. *Ib.*

TREATIES.
See PUBLIC LANDS, 3.

TRESPASS.
See CONSTITUTIONAL LAW, 10.

TRIAL.
See CONSTITUTIONAL LAW, 5;
HABEAS CORPUS, 1.

ULTRA VIRES.
See CORPORATIONS, 3.

UNREASONABLE SEARCHES AND SEIZURES.
See CONSTITUTIONAL LAW, 14, 15.

USAGE.
See CONSTITUTIONAL LAW, 9.

VENDOR AND VENDEE.
See BANKRUPTCY.

VESSELS.
See MARITIME LAW.

WAIVER.
See INSURANCE.

WATERS.
See CONSTITUTIONAL LAW, 7;
MUNICIPAL CORPORATIONS, 1, 2, 3.

WILLS.
See WORDS AND PHRASES.

WITNESSES.

1. *Examination by Federal grand jury; presentment or indictment as essential prerequisite; sufficiency of summons.*

Under the practice in this country the examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment, but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and if so they may indict upon such evidence. In summoning witnesses it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify without indicating the nature of the charge against them, or laying a basis by a formal indictment. *Hale* v. *Henkel*, 43.

2. *Immunity from prosecution.*

The examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso to the general appropriation act of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the Anti-trust Law. The word should receive as wide a construction as is necessary to protect the witness in his disclosures. *Ib.*

3. *Operation of interdiction of Fifth Amendment.*

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away. A witness is not excused from testifying before a grand jury under a statute which provides for immunity, because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea. The law takes no account of the practical difficulty which a party may have in procuring his testimony. *Ib.*

4. *Compulsory testimony before Federal grand jury; scope of immunity affecting.*

A witness cannot refuse to testify before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, because the immunity does not extend to prosecutions in a state court. In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty. *Ib.*

5. *Benefit of Fifth Amendment; personal nature of.*

The benefits of the Fifth Amendment are exclusively for a witness compelled to testify against himself in a criminal case, and he cannot set them up on behalf of any other person or individual, or of a corporation of which he is an officer or employé. *McAlister* v. *Henkel*, 90; *Nelson* v. *United States*, 92; *Hale* v. *Henkel*, 43.

6. *Production of books and papers—Setting up Fifth Amendment—Application of statutory immunity.*

A witness who cannot avail himself of the Fifth Amendment as to oral testimony, because of a statute granting him immunity from prosecu-

tion, cannot set it up as against the production of books and papers, as the same statute would equally grant him immunity in respect to matters proved thereby. *Hale* v. *Henkel*, 43.

7. *Self-incrimination—Distinction between individual and corporation—Right of officer of corporation to plead its criminality as ground for refusal to produce its books.*

While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. There is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State; and an officer of a corporation which is charged with criminal violation of a statute cannot plead the criminality of the corporation as a refusal to produce its books. *Hale* v. *Henkel*, 43; *Nelson* v. *United States*, 92.

8. *Officers of corporation deemed in possession of books of corporation.*

Documentary evidence in the shape of books and papers of corporations are in the possession of the officers thereof, who cannot refuse to produce them on the ground that they are not in their possession or under their control. *Nelson* v. *United States*, 92.

9. *Right to object to materiality of evidence.*

Witnesses cannot take objections to materiality of evidence in order to be relieved from testifying. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. *Ib.*

See CONSTITUTIONAL LAW, 15; EVIDENCE; CONTEMPT OF COURT; JURISDICTION, A 2.

WORDS AND PHRASES.

1. *Explanation as to use and meaning of word.*

Remote explanations as to the use and meaning of a word will be rejected when the will offers upon its face a different and more obvious one. *Rodriguez* v. *Vivoni*, 371.

2. *Meaning of words "sucesion legitima" in will of Porto Rican.*

The words *sucesion legitima* in the will of a Porto Rican held to mean "issue," and not "lawful heirs." *Ib.*

"Proceeding." See WITNESSES, 2.

WRIT AND PROCESS.

See CONSTITUTIONAL LAW, 11, 14, 15; HABEAS CORPUS; CONTEMPT OF COURT; WITNESSES, 1.