
T
98919930 8

UNITED STATES REPORTS

VOLUME 202

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1905

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
21 MURRAY STREET, NEW YORK
1906

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

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

*Retired May 28, 1906.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

MONDAY, MAY 28, 1906.

It is ordered that the following correspondence be spread upon the record:

SUPREME COURT OF THE UNITED STATES.

May 28, 1906.

DEAR BROTHER BROWN: We cannot allow your active participation in the work of the court to terminate with the adjournment of to-day without the expression of our sincere regret.

You came here with high reputation, justly deserved by a distinguished career of many years as a district judge of the United States, to which you have added in the fruits of over fifteen years of eminent judicial labors in this place.

Of those who were on this bench when you took your seat, Bradley, and Lamar, and Blatchford, and Field, and Gray have passed on, and you have witnessed the coming and the going of Shiras and Jackson, one of whom happily survives.

In a certain sense, what shadows we are, and what shadows we pursue, but not in every sense; for what has been worthily accomplished will still live and the memory of the just judge will not perish.

We assure you that those of us who have been longest with you, as well as those of a briefer association, alike concur in that affectionate regard and that deep respect which your amiable disposition and the great assistance in the administration of justice which your experience, learning, and ability have enabled you to render have inspired.

We hope that the light which has come to pass at the evening-time of a well spent life may long shine upon you, and that our fraternal intercourse may be continued for many years.

Very cordially, yours,

MELVILLE W. FULLER,
JOHN M. HARLAN,
DAVID J. BREWER,
E. D. WHITE,
R. W. PECKHAM,
JOSEPH MCKENNA,
OLIVER WENDELL HOLMES,
WILLIAM R. DAY.

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C., *May* 28, 1906.

MY DEAR BRETHREN: I thank you for your graceful and generous expressions of esteem. One of the most delightful experiences of my life has been the cultivation of the friendly companionships of the last fifteen years, which I would gladly continue, were it not that impaired eyesight and the inertia which comes with three score and ten admonish me that my duty to the country, to you, and to myself demands a relinquishment of the burden I have borne for thirty-one years, half of which have been spent in your company. While my resignation necessitates a severance of our official relations, I hope these relations may continue socially so long as our lives are spared to us.

I rejoice that I am leaving the court at a time when it has never stood higher in the estimation of the people, nor when more important cases have been, and still are being, presented for its consideration. The antagonisms, sometimes almost fierce, which were developed during the earliest decades of its history, and at one time threatened to impair its usefulness, are happily forgotten; and the now universal acquiescence in its decisions, though sometimes reached by a bare majority of its members, is a magnificent tribute to that respect for the law inherent in the Anglo-Saxon race, and contains within itself the strongest assurance of the stability of

our institutions. The services rendered by the Supreme Court in this connection have been of incalculable value.

Again thanking you for your kindly interest in my welfare, I remain, with profound respect,

Most sincerely, yours,

HENRY B. BROWN.

SUPREME COURT OF THE UNITED STATES.

CHIEF JUSTICE'S CHAMBERS.

May 29, A. D. 1906.

By reason of a vacancy occurring on the final adjournment of the October Term, A. D. 1905, a new allotment having become necessary in vacation:

It is Ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, Oliver Wendell Holmes, Associate Justice;
For the Second Circuit, Rufus W. Peckham, Associate Justice;
For the Third Circuit, Edward D. White, Associate Justice;
For the Fourth Circuit, Melville W. Fuller, Chief Justice;
For the Fifth Circuit, Edward D. White, Associate Justice;
For the Sixth Circuit, John M. Harlan, Associate Justice;
For the Seventh Circuit, William R. Day, Associate Justice;
For the Eighth Circuit, David J. Brewer, Associate Justice;
For the Ninth Circuit, Joseph McKenna, Associate Justice.

MELVILLE W. FULLER,
Chief Justice.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1905.

LOUISIANA *v.* MISSISSIPPI.

IN EQUITY.

No. 11, Original. Argued October 10, 11, 12, 1905.—Decided March 5, 1906.

The act of Congress admitting Louisiana having given that State all islands within three leagues of her coast, and the subsequent act of Congress admitting Mississippi having purported to give that State all islands within six leagues of her shore, and some islands within nine miles of the Louisiana coast being also within eighteen miles of the Mississippi shore, although the apparent inconsistency is reconcilable, the basis of a boundary controversy involving to each State pecuniary values of magnitude, exists; and such a controversy between the two States in their sovereign capacity as States and having a boundary line separating them justifies the exercise of the original jurisdiction of this court.

As the act admitting Mississippi was passed five years after the act admitting Louisiana, Congress could not take away any portion of Louisiana, and give it to Mississippi. Section 3, Art. IV of the Constitution does not permit the claims of any particular State to be prejudiced by the exercise of the power of Congress therein conferred.

Acts of Congress passed at different times for the admission of different States where their respective subjects are not identical with or similar to each other do not form part of a homogeneous whole, of a common system, so as to allow a claimant under the later act to claim that it changed the earlier act by construction, and the rule of *in pari materia* does not apply.

The term *thalweg* is commonly used by writers on international law, in the definition of water boundaries between States, meaning the middle or deepest or most navigable channel and while often styled "fairway" or "midway" or "main channel;" the word has been taken over into various languages and the doctrine of the *thalweg* is often applicable in respect of water boundaries to sounds, bays, straits, gulfs, estuaries and other arms of the sea, and also applies to boundary lakes and land-locked seas whenever there is a deep water sailing channel therein.

The "maritime belt" is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States.

As between the States of the Union long acquiescence in the assertion of a particular boundary, and the exercise of sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule may be in respect of the acquisition by prescription of large tracts of country claimed by two States.

The real, certain and true boundary south of the State of Mississippi and north of the southeast portion of the State of Louisiana, and separating the two States in the waters of Lake Borgne, is the deep water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass between Cat Island and Isle à Pitre to the Gulf of Mexico.

THE State of Louisiana by leave of court filed her bill against the State of Mississippi, October 27, 1902, to obtain a decree determining a boundary line between the two States and requiring the State of Mississippi to recognize and observe the line so determined.

The bill alleged:

"1st. That the State of Louisiana was admitted into the Union of the United States of America by the act of Congress, found in chapter 50 of the United States Statutes at Large, volume 2, page 701, approved April 6th, 1812, and therein the boundaries of the said State of Louisiana, in the preamble of said act, were described as follows:

" 'Whereas, the representatives of the people of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the 30th day of April, 1803, between the United States and France contained within the following limits, that is to say: Beginning at the mouth of the

river Sabine, thence by a line drawn along the middle of said river, including all islands to the 32d degree of latitude; thence due north to the northernmost part of the 33d degree of north latitude; thence along the said parallel of latitude to the Mississippi river; thence down the said river to the river Iberville, and from thence along the middle of said river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico; thence bounded by said gulf to the place of beginning, including all islands within three leagues of the coast,' etc.

"2d. That according to the foregoing description, the eastern boundary of the State of Louisiana was formed by the Mississippi river, beginning at the northeast corner of said State and extending south to the junction of the said river, with the river Iberville (now known as Bayou Manchac) and thence extending eastwardly through the lower end of the Amite river, through the middle of Lake Maurepas, Pass Manchac, and Lake Pontchartrain, and in order to reach the Gulf of Mexico its only course was through the Rigolets, into Lake Borgne, and thence by the deep water channel through the upper corner of Lake Borgne, following said channel, north of Half Moon Island, through Mississippi Sound to the north of Isle à Pitre, through the Cat Island channel, southwest of Cat Island, into the Gulf of Mexico, which said eastern boundary of the State of Louisiana is more fully shown on diagram No. 1, made part of this bill;

"3d. That by the act of Congress, found in the United States Statutes at Large, vol. 2, p. 708, chapter 57, approved April 14th, 1812, additional territory was added to the then existing State of Louisiana, which additional territory was described in the following language:

"'Beginning at the junction of the river Iberville with the Mississippi river; thence along the middle of the Iberville and of the river Amite and Lakes Maurepas and Pontchartrain to the eastern mouth of Pearl river; thence up the eastern branch of the Pearl river to the 31st degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence

down the said river to the place of beginning, shall become and form a part of the State of Louisiana; '

"4th. That the effect of this legislation, as to the eastern boundary of the State of Louisiana, was to retain the Mississippi river as the original eastern boundary, as far south as the

DIAGRAM No. 1.

31st degree of north latitude. The change then moved the eastern boundary eastward along the 31st degree of north latitude to the Pearl river, whence it then ran south down the said river, through its eastern branch, till it entered the northern corner of Lake Borgne, where the State's eastern boundary then joined and followed the boundary line originally fixed in the act of April 6th, 1812, and followed, as heretofore stated,

the deep water channel through the upper corner of Lake Borgne, north of Half Moon Island, eastward through the deep water channel along the Mississippi Sound till it reached the Cat Island channel north of Isle à Pitre, and southwest of Cat Island, whence passing through Chandeleur Sound, northeast of

DIAGRAM No. 2.

Chandeleur Islands, it entered the Gulf of Mexico, and ran south around the delta of the Mississippi river and then north and westward to the point where the Sabine river enters the Gulf of Mexico, as will be more fully seen from the diagram No. 2, made part of this bill;

"5th. That the territory lying adjacent to, and to the eastward of the State of Louisiana is the State of Mississippi, which

latter State was admitted into the Union of the United States of America by the act of Congress, found in the United States Statutes at Large, volume 3, chapter 23, page 348, approved March 1st, 1817, whereby the inhabitants of the western part of the then Mississippi Territory were authorized to form for themselves a state constitution and to be admitted into the Union, the boundaries of the then to be created State being described as follows:

"'Beginning at the river Mississippi at a point where the southern boundary line with the State of Tennessee strikes the same; thence along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line to the northwest corner of the county of Washington (Alabama); thence due south to the Gulf of Mexico; thence westwardly, including all islands within six leagues of the shore to the most southern junction of Pearl river with Lake Borgne; thence up said river to the 31st degree of north latitude; thence west along said degree of latitude to the Mississippi river; thence up the same to the beginning;'

"6th. That by the said act, Congress intended that the southern boundary line of the State of Mississippi, beginning at the point dividing it from the State of Alabama, should run westwardly till it joined the Louisiana eastern boundary line, and that in doing so, the said southern boundary would in effect start westward from a point eighteen miles south of the coast line, and include in its westwardly direction the western end of Petit Bois Island, all of Horn Island, Ship Island and Cat Island, and the smaller islands north of these, those islands being the ones contemplated in the act of Congress, as being within eighteen miles of the southern coast line of Mississippi, and that the said southern boundary of Mississippi, extending in its westwardly direction through the Gulf of Mexico, would gradually approach the coast line, and meet the eastern boundary line of Louisiana, just as the said eastern boundary line of Louisiana emerges from the Cat Island channel into the Gulf of Mexico, and thence follow and become the same as the

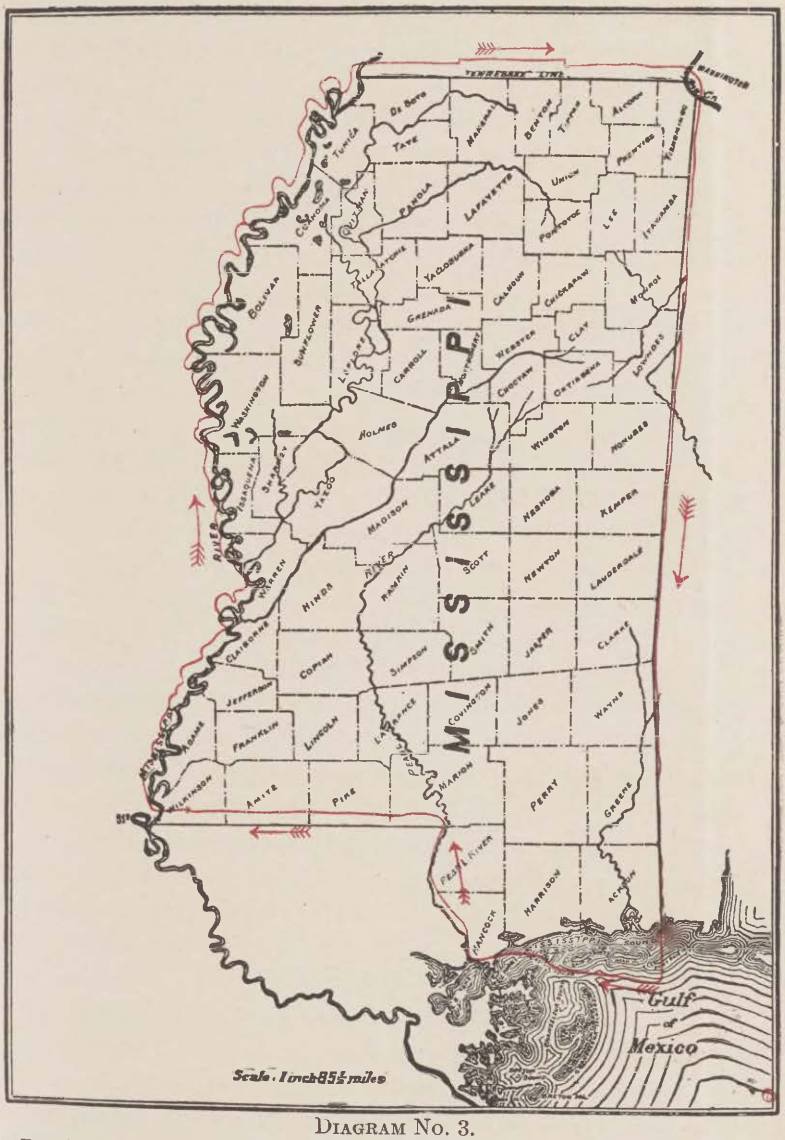

DIAGRAM No. 3.

Louisiana boundary line extending westwardly to the south of Cat Island, through Mississippi Sound to the north of Half Moon or Grand Island to the most southern junction of the

east branch of Pearl river with Lake Borgne, being identical with the Louisiana eastern boundary, and thence extending up the channel of Pearl river;

"7th. That the islands included between the shore line and the southern boundary of the State of Mississippi are the islands heretofore described, viz: the western end of Petit Bois Island, with all of Horn Island, Ship Island and Cat Island, and the small islands north of them, those islands being large, and well known to Congress at the time of the passage of the act, all of which islands and the southern boundary of the State of Mississippi will more fully appear from the diagram No. 3, made a part of this bill;

"8th. That the islands contemplated in the act of Congress of 1812, creating the State of Louisiana, and intended to be embraced within the State of Louisiana, as provided by the clause, 'Thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast,' were all of the other islands, except those heretofore named as going to the State of Mississippi, as all other islands, and all other mainland, are south and west of the boundary line thus passing from Pearl river through the deep water channels in Lake Borgne, and Mississippi Sound, through the deep water channel, southwest of Cat Island to the eastward of the Chandeleur Islands, and thence south, taking in the delta of the Mississippi river, and extending westward along the Gulf coast, including all islands along the coast, to the Sabine river, where the State of Louisiana is thence bounded on the westward by the State of Texas, all of which will more fully appear from diagram No. 2, heretofore referred to;

"9th. Now your orator avers that there has developed in recent years in the waters south of the State of Mississippi and east of the southern portion of the State of Louisiana a considerable growth of oysters, and an industry of large proportions, in the handling of the said bivalves, either in their fresh or in a canned condition, has resulted therefrom;

"10th. That the State of Mississippi has, by legislative

APPROXIMATE LOCATION
of the

OYSTER BEDS
OF ST. BERNARD PARISH
LOUISIANA.

From a reconnaissance
made by the U.S. Fish Commission Steamer Fish Hawk
Lieut. Franklin Swift U.S.N., Commanding
Feb. 1898.

Scale.

Note.
The Soundings are shown in black and give depths in feet.
Densities are shown in blue figures.
Dense growths of oysters are shown thus
Scattered " " " " "
Very " " " " "

Diagram No 4

enactments, regulated the oyster industry in the waters of said State, and permits the dredging of oysters on the natural oyster reefs in waters of the said State, as will more fully appear from the statutes of said State to which reference is made;

"11th. That the State of Louisiana has by legislative enactments regulated the oyster industry in the said State of Louisiana, and prohibits the dredging of oysters on the natural reefs in the waters of said State, as will more fully appear from the statutes of said State to which reference is made;

"12th. That the provisions of the laws of the said two States differ considerably in many other respects.

"13th. That the existence and location of the natural oyster reefs in the waters of the parish of St. Bernard in the State of Louisiana which adjoins the State of Mississippi is shown by the map made from a reconnaissance by the United States Fish Commission steamer 'Fish Hawk,' in February, 1898, as will more fully appear from diagram No. 4, now made part of this bill;

"14th. Now your orator avers that the boundary line dividing the two States in the waters thereof has been clearly defined by the acts of Congress creating the States of Louisiana and Mississippi, as will be seen from the diagram No. 5, made up from the boundary descriptions taken from the acts of Congress creating the said States of Louisiana and Mississippi, which diagram is also made part of this bill;

"15th. That the said boundary line in the waters between said States has never been designated by buoys or marks of any kind by either State, nor designated in any manner, except by the United States Government in so far as it has buoyed the deep water channel, extending from the mouth of the Pearl river through the upper corner of Lake Borgne north of Half Moon Island, eastward to the Cat Island Pass, north of Isle à Pitre, and southwest of Cat Island, which buoys were placed by the Coast Survey of the United States Government;

"16th. That owing to the differences in the laws of the States of Louisiana and Mississippi, regulating the oyster industry of

the respective States, the said statutes providing penalties for the violation thereof, much confusion has resulted and a great public demand has arisen in Louisiana to definitely mark the

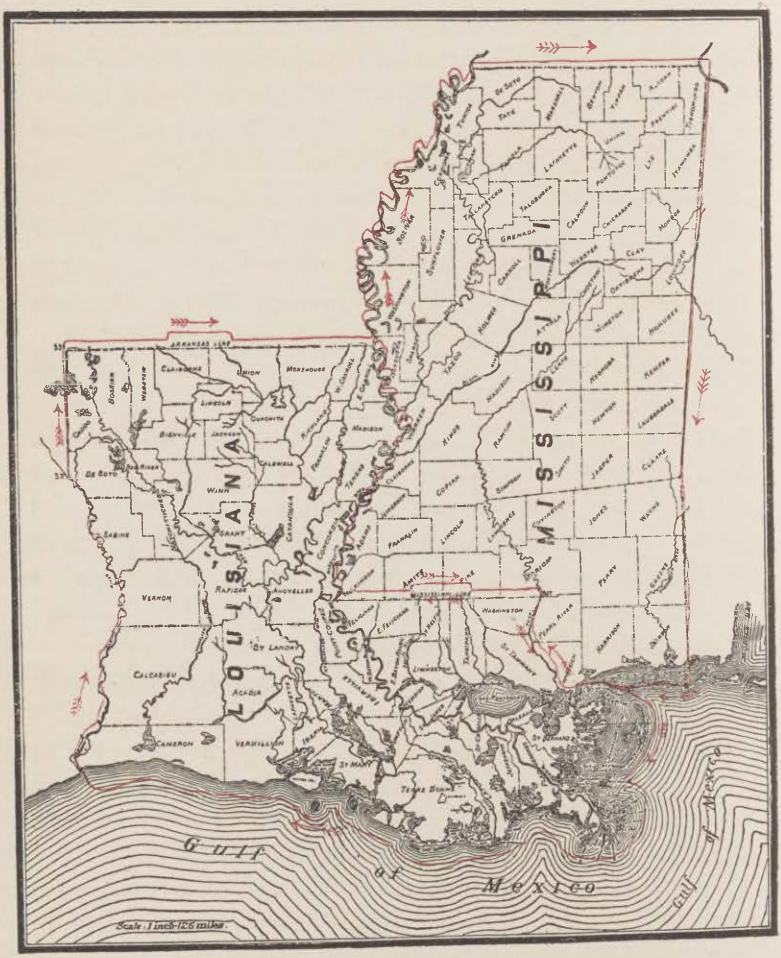

DIAGRAM No. 5.

boundary line dividing the two States in the waters thereof; that citizens of the State of Mississippi, in violation of the laws of the State of Louisiana, have been fishing oysters with dredges

on the natural reefs in the waters of the State of Louisiana, said fishermen claiming that they were in the waters of the State of Mississippi and consequently not violating the laws of the State of Louisiana."

The bill then set forth that "to avoid an armed conflict between the sheriff and officers of the parish of St. Bernard in the State of Louisiana, and the sheriff and officers of the county of Harrison in the State of Mississippi," a meeting of citizens of Louisiana was called by the Governor of that State, which met in New Orleans, and resulted in the appointment by the Governor of commissioners on the part of Louisiana "to consider the determination of the water boundary line between the two States, and arrange for its easy location and identification by a proper system of buoys," and to request that the Governor of Mississippi appoint like commissioners on the part of that State, which appointment was made.

The joint commission met and considered the subject, and subsequently the Mississippi commission reported its inability to agree with the Louisiana commission, stating, among other things, "It is apparent that the only hope of settlement is a friendly suit in the Supreme Court of the United States, and we respectfully suggest that course."

The bill continued:

"24th. That the eastern water boundary line as claimed by your orator, viz: a line beginning at the most southern junction of the channel of the east branch of the Pearl river with Lake Borgne and thence eastward following the deep water channel to the north of Half Moon Island, through the Mississippi Sound channel, to Cat Island Pass, northeast of Isle à Pitre into the Gulf of Mexico, thereby dividing the waters between the two States, agrees, and is in accord, with the acts of Congress creating respectively the State of Louisiana and the State of Mississippi as already shown by diagram No. 5; that any other boundary than the deep water channel as aforesaid would cause the limits of the two States to conflict and overlap, and that it is not to be presumed that the Congress of the United States

intended to, or would, establish, in its description, a boundary for the State of Mississippi, conflicting with the already existing Louisiana eastern boundary, when there is a construction of the wording of the two acts, in fact the only construction that suggests itself, that shows a boundary readily ascertained, harmonizing with the words of the acts as they now read, and clearly defining the limits of the two States in the waters between them.

"25th. Your orator further avers that the use of the word 'westwardly' in the description of the southern boundary of the State of Mississippi, as that southern boundary line extends westwardly from the Alabama state line to the Louisiana eastern boundary line, shows that it was not the intention of Congress to have it run direct or due west throughout the whole course, and that it was evidently the intention of Congress, in giving to the State of Mississippi the islands north of that westwardly drawn line, that the eighteen-mile limit shall gradually decrease as it approached the Louisiana line on the east till it met and followed it to its source. If the Mississippi line ran parallel to the southern coast of Mississippi, at a distance of eighteen miles from such coast line following the meander of the coast, and thence joined at right angles a line emerging from the mouth of Pearl river, such line would not only include Grassy, Half Moon, Round, Le Petit Pass Islands and Isle à Pitre, already belonging to Louisiana as being within nine miles or three leagues of the Louisiana shore line, but such line would also include part of the mainland of the State of Louisiana as will be seen from the following diagram (No. 6) made a part of this bill and it certainly could not have been the intention of Congress to take away from the State of Louisiana any islands or mainland already belonging to it and to give them to the State of Mississippi, as such a proceeding, without the consent of the legislature of the State of Louisiana, would be a violation of sec. 3 of art. IV of the Constitution of the United States.

"26th. Your orator avers that the marsh lands claimed by

the State of Mississippi to be islands are in truth, with the exception of the Isle à Pitre, Grassy, Half Moon, Round and Le Petit Pass Islands, low lying marsh lands forming part of the mainland of the State of Louisiana; that said swamp or marsh lands and islands have been known as and called since time immemorial 'the Louisiana marshes; ' that they were approved to the State of Louisiana by the Commissioner of the General Land Office on May 6, 1852, as will appear from a certified copy of said record of approval from the United States Land Office made a part of this bill, marked Exhibit (G,) and where not since sold by the State of Louisiana to private purchasers have always stood on the books of the register of the Louisiana state land office as state lands, to be offered for sale, until recently transferred by the State of Louisiana to the board of commissioners for the Lake Borgne basin levee district by the provisions of act No. 14 of the legislature of the State of Louisiana for the year 1892, for the purpose of enabling the said levee board, by the proceeds of sale of said lands to secure the funds to aid in the building of levees in that levee district, to protect the lands from overflow.

"27th. That parts of said disputed territory claimed by the State of Mississippi to be islands within eighteen miles of its shore line are in fact part of the mainland of the State of Louisiana, and therefore belong to and form part of said State of Louisiana, but if your honors should feel that any part of this disputed area was islands by reason of the presence of shallow water, then as islands they are within the nine-mile limit of distance from the shore line of the State of Louisiana and therefore belong to and form part of the State of Louisiana by that second provision of the act of Congress giving Louisiana all islands within three leagues of its shore line.

"28th. Your orator further avers that where contiguous States or countries are separated by water it is, and always has been, the custom to regard the channel as establishing the boundary line of such States, and that the State of Mississippi has itself recognized this principle in the description of

its territorial limits as found in the second article of its own constitution adopted November, 1890, in the following words:

* * * * * * * *

"29th. Your orator avers that as heretofore stated the Congress of the United States, as well as the various departments of the United States Government having authority in the premises, have themselves recognized the boundary line contended for by the State of Louisiana by reason of the fact that the United States Government has confirmed to the State of Louisiana the lands composing Half Moon Island which is just south of the deep water channel," [by sections and townships as set forth,] and also "the lands forming what is commonly known as Isle à Pitre," [by sections and townships as stated,] all of them "recognized as belonging to and forming part of the State of Louisiana by the said United States Government and have always heretofore been so recognized by the people of the said two States; that the lands forming the Isle à Pitre were sold by the State of Louisiana," &c., &c., "and said lands have been assessed on the assessment rolls of the parish of St. Bernard, State of Louisiana, and taxes thereon have been paid to the State of Louisiana for the past 35 years, and said lands have never been assessed on the rolls of, nor have any taxes ever been paid to, the State of Mississippi and that this is the case with all other lands and islands now claimed by the State of Mississippi, but which in truth and fact belong to the State of Louisiana.

"30th. Your orator therefore further avers that all constituted authorities competent to create, adopt or consider the said boundary line have declared the water boundary line claimed by the State of Louisiana, viz: the deep water channel running from the most southern junction of the eastern mouth of Pearl river, through Lake Borgne, north of Half Moon Island, through Mississippi Sound, north of Isle à Pitre and southwest of Cat Island, through Cat Island Pass, through Chandeleur Sound northeast of Chandeleur Islands, to the Gulf

of Mexico, to be the true water boundary between the said States."

The bill prayed that it be adjudged and decreed "that the boundary line dividing the States of Louisiana and Mississippi, in the waters between the said States to the south of the State of Mississippi and to the southeast of the State of Louisiana is the deep water channel, commencing at the most southern junction of the eastern mouth of Pearl river with Lake Borgne, thence by the deep-water channel through Lake Borgne, north of Half Moon Island, through Mississippi Sound, north of Isle à Pitre, through Cat Island Pass Channel, southwest of Cat Island, through Chandeleur Island Sound, northeast of the Chandeleur Islands, to the Gulf of Mexico, as is delineated on the original map submitted by the Louisiana Boundary Commission to the Mississippi Boundary Commission and now made part of this bill, marked Exhibit 'E;' that the said deep water channel be located throughout its course and permanently buoyed at the joint expense of the two States; that the State of Mississippi and its citizens be perpetually enjoined from disputing the sovereignty and ownership of the State of Louisiana in the said land and water territory south and west of said boundary line," and for costs and general relief.

[Exhibit "E" is not reproduced in the printed record, but is to be found in the Louisiana Atlas of Maps, p. 60. It consists of Coast Survey Charts Nos. 189, 190 and 191, showing the coast from Mobile to Lakes Borgne and Pontchartrain, with boundary lines added in red ink. The maps given in this statement are sufficient to supply the lack of this particular exhibit.]

The State of Mississippi, by leave, filed a demurrer to the bill, which was by stipulation submitted to the consideration of the court on printed arguments, and was subsequently overruled.

Thereupon the State of Mississippi on leave filed her answer and cross bill.

The State denied articulately nearly every material allegation of the bill and therefore the accuracy of the diagrams or maps attached thereto, and asserted the true boundary to be as set forth in her cross bill. And while she admitted "that the deep water channel out of the mouth of Pearl river through the upper course of Lake Borgne and on into the Gulf, as stated in the bill, has been marked by buoys by and under the direction of the United States Government for navigation and commercial purposes," she denied "that said marking of the deep water channel was ever intended to fix in any manner whatsoever any part of the boundary line between said States," and further denied "the correctness of complainant's statement that where contiguous States or countries are separated by water, the channel of the waters dividing said States constitutes a boundary line, and defendant specifically denies that such rule is applicable to this case."

The cross bill averred that the southern boundary line of the State of Mississippi was fixed by the act of Congress, approved March 1, 1817, 3 Stat. 348, c. 23, § 2.

That by that act Mississippi was given "all lands under the waters south of her well-defined shore line to the distance of six leagues from said shore at every point between the Alabama line and the most eastern junction of Pearl river with Lake Borgne, including all islands within said limit," and "all territory within said limits, not being a part of the mainland of the State of Louisiana, became, was and is a part of the territory of the State of Mississippi."

That the acts of 1812, creating the State of Louisiana, failed "to describe the water line from the most eastern mouth of Pearl river to the Gulf of Mexico," and hence Louisiana proposed, "without authority in law to follow the deep water channel from the mouth of Pearl river to the Gulf of Mexico, that is, as far south as that point in the sea where the waters of Chandeleur Sound merge into the waters of the Gulf of Mexico."

That the act creating the State of Mississippi was the organi-

zation of a state government in the western part of Mississippi Territory; that the southern part of the territory of Mississippi was added thereto by an act of Congress approved May 14, 1812, which provided: "That all that portion of territory lying east of Pearl river, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is, hereby annexed to the Mississippi Territory; to be governed by the laws now in force therein, or which may hereafter be enacted, and the laws and ordinances of the United States, relative thereto, in like manner as if the same had originally formed a part of said Territory; and until otherwise provided by law, the inhabitants of the said district hereby annexed to the Mississippi Territory, shall be entitled to one representative in the General Assembly thereof." 2 Stat. 734.

That this act and the act admitting the State of Mississippi "recognized the fact that the boundary line of the State of Louisiana embraced no island in the waters to the east of said State and to the south of the Mississippi mainland, or shore, and within six leagues of the Mississippi shore; that the said Louisiana acts are not in conflict with the aforesaid Mississippi acts, the boundaries of Louisiana only embracing such islands, as clearly shown by said acts creating and admitting her, as were within the Gulf of Mexico and also within three leagues of her Gulf coast, that is to say, within the Gulf of Mexico proper and to the south of said State of Louisiana as contemplated by Congress; that the said line from the mouth of Pearl river to the Gulf of Mexico dividing the Territory of Mississippi from the State of Louisiana was never defined until the passage of the act creating the State of Mississippi, when, for the first time, the southern boundary of the Mississippi Territory, the western part of which was, by said act, made the State of Mississippi, was accurately defined and established as herein stated; that the line above described and defined by the said Mississippi acts, includes no islands which are within three leagues of the Louisiana mainland and also in the Gulf of Mexico as the limits

of the Gulf of Mexico are defined by the said State in her original bill herein."

That the State of Louisiana "claims title and sovereignty over some of the islands belonging to the State of Mississippi by virtue of certain alleged action of certain officers of the United States Government and local officers of the State of Louisiana," but the claim "is not well founded because of the matters herein set forth and because said islands and territory have not been susceptible to actual use and occupation and because said claim is in violation of sec. 3, art. IV, of the Constitution of the United States. . . ." But if the court should adjudge said islands and territory approved by the aforesaid officials to the State of Louisiana to belong to said State, then cross-complainant prayed that the claim of title of Louisiana thereto "be restricted to the real lands or islands so lost to the State of Mississippi, and be in no case permitted to affect any lands under the waters, or any of the public oyster reefs thereunder."

It was then alleged that Mississippi had "exercised sovereignty and jurisdiction over said waters within eighteen miles of her shore aforesaid," and that by her statutes as codified in 1857 had asserted such jurisdiction.

And that by the legislation of Congress and the State, the " 'Mississippi Sound' was recognized as a body of water, six leagues wide, wholly within the State of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from 'the Gulf of Mexico.' "

The cross bill further averred that Congress "in the early history of the Republic, in dealing with the Gulf coast or shore," was not perfectly familiar with the line, and by several acts "creating the Gulf States, respectively, treated the said Gulf coast or shore as a line running generally from east to west," and said States were, in the contemplation of Congress, "so formed and bounded as to give to each State jurisdiction over the waters adjacent to its shore or coast for a certain specified distance southward from its mainland line; that it was

not intended to give to any State jurisdiction over waters adjacent to and immediately south and in front of any other State or Territory." But that the deep water channel line contended for by Louisiana would take nearly all of the Hancock County water front, much of that of Harrison County, and possibly some of that of Jackson County, over all which Mississippi had exercised jurisdiction since her admission.

Reference was then made to the organization of Hancock and Jackson Counties in December, 1812, and of Harrison County in 1841; and to certain sections of the Revised Code of Mississippi of 1880 and a codification of 1892, making a general reference to islands within six leagues of the Mississippi shore; and it was charged that during all this time the government of the Mississippi Territory and that of the State of Mississippi had exercised full and complete jurisdiction and sovereignty over the waters in the "Mississippi Sound" as a part of the three counties aforesaid.

The prayer was that it be decreed "that the boundary line dividing the States of Mississippi and Louisiana is the line which, beginning at a point six leagues due south of that point on the shore where the Alabama and Mississippi line enters the Gulf of Mexico, runs westwardly with the meanderings of the shore six leagues always therefrom until said line reaches and touches the real mainland of Louisiana about two miles due west of the 'Indian mound' and 'Lake of the Mound,' and thence in an almost due northward direction along and on the high tide mark of the said Louisiana mainland to Mississippi Sound at or near Nine Mile Bayou, and thence further along said mainland at the high tide mark westwardly to that point due south of the middle of the most southern, or eastern junction of Pearl river with Lake Borgne, and thence from said point due north to the said Pearl river; that the said line be located and permanently buoyed at the joint expense of the two States; that the full title and sovereignty over all the islands and the land under the waters north and east of the said line so established be decreed and adjudged to be in the

State of Mississippi, and that the State of Louisiana and her citizens be perpetually enjoined from disputing such title and sovereignty of the State of Mississippi therein," and for costs and general relief.

The following "Exhibit Map" was attached:

The State of Louisiana filed replication, and also an answer to the cross bill, the allegations of which were in substance denied.

As to the act of May 14, 1812, the State said that it could not and did not change the boundaries of Louisiana, and, that, in fact, the southern portion of the Mississippi Territory as claimed was not then in possession of the United States, and did not extend south of the thirty-first degree of north latitude; that February 12, 1812, an act was passed "authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi Territory and west of the river Perdido," but that this was not published until 1818; nor were the resolution of January 15 and act of March 3, 1811, on the relations of the United States to Spain, published until after April 20, 1818. 3 Stat. 471, 472.

The cause being at issue, much evidence, documentary and otherwise, was taken, and the case was argued October 10, 11 and 12.

Mr. John Dymond, Jr., *Mr. Francis C. Zacharie* and *Mr. Walter Guion*, Attorney General of the State of Louisiana, with whom *Mr. Alexander Porter Morse* and *Mr. Albert Estopinal, Jr.* were on the brief, for complainant:

The authority for bringing the suit is found in the act of the legislature of Louisiana, No. 65 of 1884 and in No. 26 of 1904, besides the general authority vested in the Governor and state officers to defend and protect the interests and property of the State. There exists a controversy between the two States of great magnitude and involving great financial interests.

The ownership of all the land that had not been previously sold by the State and the ownership of all of the water area in the disputed territory, being the bottoms of navigable waters of the State, was vested in and claimed by Louisiana in her sovereign capacity and no individuals had any private rights therein. This water area had a positive value of great magnitude. The State, under her oyster law was vested with the ownership of these oyster water bottoms, and authorized to

rent them for the purposes of oyster cultivation for which she received a direct rental through her oyster commission of one dollar per acre per annum and a further revenue of two cents per barrel from each barrel of oysters gathered, either from these leased bedding grounds, or from the natural oyster reefs, which were also her property in absolute ownership. The State can rent them for $200,000 per annum and they are therefore worth in the neighborhood of $5,000,000.

The control and possession of a considerable part of these waters had become the subject of violent controversy and had reached the point of an armed conflict and could only be settled by resorting to this court. The jurisdiction is clear under the previous rulings. *Rhode Island* v. *Massachusetts*, 12 Pet. 719; *The Wheeling Bridge Case*, 13 How. 589; *South Carolina* v. *Georgia*, 93 U. S. 381; *Louisiana* v. *Texas*, 176 U. S. 1; *New Jersey* v. *New York*, 5 Pet. 284; *Missouri* v. *Illinois*, 180 U. S. 208; *Kansas* v. *Colorado*, 185 U. S. 125.

The State of Louisiana by the words of the law owns the peninsula of St. Bernard in its entirety and the islands in dispute, together composing the disputed area. Act of April 6, 1812, and act of April 14, 1812. The act grants all islands within three leagues of the coast and Louisiana therefore owns the islands and waters lying north of the St. Bernard peninsula and within nine miles from its coast. Mississippi's claim to islands and territory eighteen miles from her shore is based on a later act approved December 10, 1817. Congress could not take away territory previously ceded to Louisiana and grant it to Mississippi.

Further, it is a general rule, that where there are two conflicting titles, the elder shall be preferred. Broome's Legal Maxims, 7th Am. ed. p. 355, with authorities in note 5. And this principle has been frequently applied by this court in cases of boundaries between States where the grants to the colonies prior to the establishment of our Government have seemed to conflict. No court acts differently in deciding on boundary between States, than on lines between separate tracts of land,

and the rules and principles of equity equally apply between States, as between individuals. *Rhode Island* v. *Massachusetts*, 12 Pet. 658.

Louisiana's title to the disputed area is also established by the fact that the said area is south of and on the Louisiana side of the deep water channel boundary line and as this deep water channel sailing line is the correct water boundary between the States at this point all land and water south of it is the property of the State of Louisiana.

This deep water sailing channel line claimed by Louisiana as the proper boundary between the two States exists to-day and is shown on the United States Coast and Geodetic Survey of that section.

The deep water channel is a boundary created by nature and the soils separated by it and forming the limits of the two States are of natural geological difference. Nature made the deep water channel her boundary in this area and the subsequent enactments of man were but a confirmation of this basic principle. *Indiana* v. *Kentucky*, 136 U. S. 479. On the Mississippi side the islands and shores are of sea sand formation while those on the Louisiana side are alluvial.

The deep water sailing channel line is the boundary that was recognized by England, France and Spain in their ancient treaties affecting their separate interests in this country.

The adoption by the Congress of the United States, in the creation of the State of Louisiana, of the line extending down the Mississippi river to the river Iberville and thence through the middle of Lakes Maurepas and Pontchartrain to the sea, as one of the boundaries of that State was not a new line established for the first time but was in fact an affirmation of an ancient line which in its extension to the open sea must follow the deep water channel. The treaty of peace between England, France and Spain adopted February 10, 1716, article VII, treats of the subject of the boundary line separating the dominions of England and France in the New World, and follows the middle of the Iberville. See also treaty of February 10, 1763,

between the same nations using practically the same language; treaty of September 3, 1783, between England and Spain; treaty of St. Ildefonso, October 1, 1800, between France and Spain, and finally the cession of Louisiana to the United States by France, April 30, 1803.

The deep water channel was in fact recognized by the Congress of the United States in its legislation and in the treaties referring to this section of the country, as the proper boundary, and according to which it divided it up. Act of March 28, 1804; act of February 20, 1811, using the same language employed in the treaties, "the middle of the river" Iberville.

The first extension of the territory of Mississippi south of 31° of north latitude was by act of May 14, 1812, over one month after the creation of the State of Louisiana and at that time the territory affected was not in the possession of the United States. See act of February 13, 1813. But the State of Mississippi was not created until 1817 when for the first time is mentioned the islands within six leagues of the shore.

The deep water sailing channel is the proper boundary line between the two States recognized by all rules of international law. "Coast" is the seaboard of a country and includes bordering islands. 6 Am. & Eng. Ency. of Law, 171; *The Anna*, C. Rob. 373.

Mr. Justice Story in *Thomas* v. *Hatch*, 3 Sumn. 178, defined "shore" to be the space between the margin of the water at a low stage, and the banks to be what it contains in its greatest flow; Lord Hale defined it as synonymous with flat; Mr. Justice Parker does the same in 6 Massachusetts, 436, 439, and Chief Justice Marshall described the shore of a river as bordering on the water's edge. *Alabama* v. *Georgia*, 23 How. 513.

"Thalweg" a term now universally used by international law-writers to define water boundaries between States and Nations, is a German word composed of two separate words, "thal," a valley, and "weg," way, meaning the middle or the deepest or most navigable channel. An English equivalent may be "fairway" or "midway" or "main channel."

Where a navigable river forms the boundary of coterminous States, the middle of the channel—the *filum aquæ* or *thalweg*—is generally taken as the line of their separation. 1 Halleck's Int. Law, Baker's ed. p. 145, citing Gundling, Jus Nat., p. 248; Wolfius, Jus Gentium, §§ 106–109; Stypmannus, Jus Marit., etc., cap. V, n. 476–552; Merlin, Repertoire, voc. "alluvium"; Rayneval, Droit de la Nature, tome I, p. 307; De Cussy, Droit Maritime, liv. I, tit. II, § 57; Rayneval, Inst. du Droit Nat., liv. II, ch. XI; Pothier, Œuvres de, tome X, pp. 87,88; Voet, ad Pandects, tome I, pp. 606, 607; Heineccius, Recitaciones, lib. II, tit. I, §§ 356–369; Las Siete Partidas, pt. III, tit. XXVIII, L. 31; Gomez, Elementos, lib. II, tit. IV, § 3; Febrero Mexicana, tome I, p. 161; Sala Mexicana, tome II, p. 62; Justinian, Inst., lib. II, tit. I, Nos. 20–24; De Camp's Manuel des Prop. Riv., *passim;* Chardon, Droit a' Alluvion, *passim;* Grotius, De Jur. Bel. ac. Pac., lib. VII, ch. III, § 17; Ortolan Domaine International, Nos. 85–93; Heffter, Droit International, No. 69, note; Gunther, Europ. Volkerrecht, tit. II, p. 57; Pestel, Commentarii de Repub. Batav. No. 268; Bowyer, Universal Public Law, ch. XXVIII; Riquelme, Derecho Pub. Int., lib. I, tit. I, ch. IV; Bello, Derecho Internacional, pt. I, cap. III; Pando, Derecho Internacional, p. 99; Almeda, Derecho Publico, tome I, p. 199; Cushing, Opinions U. S. Att'ys Gen'l, vol. VIII, p. 175; Crittenden, Opinions U. S. Att'ys Gen'l, vol. V, pp. 264, 412; Puffendorf, De Jur. Nat. et Gent., lib. IV, ch. V, § 8; Wolfius, Jus Gentium, §§ 108, 109; Proudhon et Dumay, Domaine Public, tome IV, ch. LVI, sec. 7. See also Baker's Int. Law, p. 68; Bowen's Int. Law, p. 10; Creasy, Int. Law, p. 221, citing Halleck, p. 138, Twiss, p. 201; Grotius, Lib. II, ch. III, sec. 18; Klubn, sec. 133; Twiss, Law of Nations, citing Grotius, lib. II, ch. III, § 8; Puffendorf, lib. IV, ch. V, § 8; Hall, Int. Law, citing Grotius, lib. II, ch. III, § 18, Wolfius, Jus Gentium, §§ 106, 107, Vattel, liv. LIV, ch. XXII, § 266, De Martens, Precis, No. 39, the Twee Gebroeders, 3, Rob. 339, 340; Bluntschli, §§ 297, 298, 301; Twiss, I, §§ 143, 144; Droit des Gens, Rivier, sec. 14; Droit des Gens,

De Martens, vol. 1, No. 39; Droit International, Fodéré, § 657; *Devoe Mfg. Co.*, 108 U. S. 401; Moore, Int. Arb., vol. 1, p. 229, where the decision of the San Juan water boundary dispute is found; the boundaries of the various bordering States on the Danube, State Papers, 1878, 1879, vol. 70, p. 514 *et seq.;* the Detroit river boundary, Gannett's Boundaries, 3d ed. p. 12; the Alaskan boundary case, Foreign Relations, 1903, p. 544.

Louisiana's title to the disputed territory is confirmed by prescription, usucaption, acquiescence, and specific acknowledgment by the State of Mississippi.

The surveys of this territory were made by the United States Government about the year 1842 and all lands to the channel were credited to Louisiana.

Under the Swamp Land Acts of 1849 and 1850 all lands selected by Louisiana south of the channel were approved by the Government and portions of them were subsequently sold by Louisiana to individuals at different times down to 1894.

The disputed territory has always been subject to the sovereignty of Louisiana and has yielded taxes to her exclusively according to the assessments laid by her officers.

All of the Departments of the Government in interpreting the acts of Congress have accredited the disputed territory to Louisiana.

The State of Mississippi has recognized the disputed territory as being the property of the State of Louisiana, and her present boundary pretension is but a matter of recent creation after long years of recognition of, and acquiescence in, Louisiana's ownership and sovereignty.

It was only after the oyster fishermen of Mississippi by their wasteful system of fishing had either fished up or destroyed all of the Mississippi oysters of any value that these fishermen began to invade Louisiana waters in search of them. Until recent years the Louisiana fisheries were open to all, but are now closed to all except her citizens. It was the exercise of this right that incurred Mississippi's displeasure and brought about this suit. That State made no claim to the territory under the

Swamp Acts and it was granted to Louisiana by the Government.

In 1839 a survey of the Mississippi coast was made pursuant to an act of its legislature. This survey and the report accompanying the same show the deep water channel and credit the territory south of it to Louisiana. The official maps made and supplied by the State to county officers pursuant to the acts of 1866 and 1871 are to the same effect. See also map published by the board of immigration and agriculture of Mississippi under act of 1882.

The doctrine of ownership by prescription is fully sustained by the writers on international law and by the decisions. Pradier Fodéré, tome II, p, 337, citing and reviewing all the authorities; the Delagoa Bay dispute, State Papers, vol. 66, 1874, 1875, p. 554; the Great Britain-Venezuela dispute, Moore's Int. Arb. vol. 5, p. 5017; *Keyser* v. *Coe*, 9 Blatch. 32; *Rhode Island* v. *Massachusetts*, 4 How. 638; *Missouri* v. *Kentucky*, 11 Wall. 403; *Kentucky* v. *Indiana*, 136 U. S. 511; *Virginia* v. *Tennessee*, 148 U. S. 522.

Mr. Hannis Taylor, *Mr. J. N. Flowers* and *Mr. Monroe McClurg*, with whom *Mr. William Williams*, Attorney General of the State of Mississippi, was on the brief, for defendant:

The action of Congress from 1812 to 1819 in carving out of the Louisiana Purchase and the Mississippi Territory the States of Louisiana, Mississippi and Alabama, giving each a portion of the sea front shows the execution of a common design. The different acts so far as they may be in apparent conflict, must be construed together. 26 Am. & Eng. Ency. of Law, 2d ed. 620; *Alexander* v. *Alexandria*, 5 Cranch, 8; *Patterson* v. *Winn*, 14 Pet. 366; *United States* v. *Freeman*, 3 How. 563; *Converse* v. *United States*, 21 How. 463; *United States* v. *Walker*, 22 How. 299; *Ryan* v. *Carter*, 93 U. S. 78; *Vane* v. *Newcombe*, 132 U. S. 220.

In connection with the foregoing the court must apply the equally important rule that, where a particular construction of

a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 37; *Wilson* v. *Rousseau*, 4 How. 646, 680; *Bloomer* v. *McQuewan*, 14 How. 539, 553; *Blake* v. *National Banks*, 23 Wall. 307, 320; *United States* v. *Kirby*, 7 Wall. 482, 486; *Knowlton* v. *Moore*, 178 U. S. 77. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter. *United States* v. *Kirby*, 7 Wall. 482.

In order to understand the controlling reason underlying the three acts in question considered as one connected whole, there must be taken into consideration the physical conformation and relative extent of the sea front, which they attempted to apportion, as equally as possible, among the States of Louisiana, Mississippi and Alabama. It is well settled that courts will take judicial notice of the prominent geographical facts and features of the country. *The Apollon*, 9 Wheat. 362; *The Montello*, 11 Wall. 411. A court will also take judicial notice of the positions of islands off the coast of a State. *State* v. *Wagner*, 61 Maine, 178. The court has therefore complete judicial knowledge of the geography of the sea front in question, and of the positions of the islands adjacent thereto, to whose partition the three related acts must be applied. To the States of Mississippi and Alabama were given, in identical language, all islands "within six leagues of the shore," and to Louisiana "all islands within three leagues of the coast," the conclusion is irresistible that the wider zone of islands given to the States first named was intended to compensate for the fact that the latter has more than four times as long a sea front as both combined. Everything indicates the intention of Congress to give to each of the three States in question the islands directly

in front of it; and to the first two a zone of islands twice as wide as that given to the latter for the reason stated. The rule of construction which provides that statutes shall be so construed that they shall not "produce inequality and injustice" is based upon the assumption that legislatures always intend by their acts to establish equality and justice. In this case full justice and equality could not be accorded either to Mississippi or Alabama, even by the grant of the wider zones of islands, because of the far more extended sea front of Louisiana.

There is a well defined international rule which provides that where there is more than one channel in a river dividing coterminous States, the deepest channel is the mid-channel or thalweg for the purposes of territorial demarcation. Grotius, De Jure Belli ac Pacis, II, c. 3, sec. 17; Vattel, Droit des Gens, Bk. I, c. XXII, sec. 26. This general rule has no application to a case governed by a special rule established by convention, or by a special right based on prior possession. Twiss, Int. Law, p. 127; 1 Halleck, Int. Law (Baker's ed.), p. 171. It appears from these authorities that the rule in question is confined to the mid-channel or thalweg of rivers, or to a mid-channel which forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. The moment the sea is reached, or a body of water which is a part of the sea, the rule is at end.

The attempt to extend the rule beyond the estuaries of the river into the open sea, that is, into the open waters of the Gulf of Mexico, cannot be supported either by reason or authority. Not by reason, because the wide expanse of water, unconfined between banks, utterly fails to serve as a boundary; not by authority, because there is no precedent for such an extension of the rule in any work on international law.

Whenever it is necessary for two contiguous States to run a water boundary through an archipelago of islands off their coasts it is only possible to do so by convention, as international law provides no rule upon the subject. For that reason

Great Britain and the United States, in the famous treaty of 1846, stipulated that the line between them should be continued westward along the forty-ninth parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of said channel and of Fuca's Straits to the Pacific Ocean." The Emperor of Germany was called upon, as arbitrator, to decide "whether the boundary line which, according to the Treaty of Washington of June 15, 1846, after being carried westward along the forty-ninth parallel of northern latitude to the middle of the channel which separates the continent from Vancouver's Island is thence to be drawn southerly through the middle of the said named channel and of the Fuca Straits to the Pacific Ocean, should be drawn through the Rosario Channel as the Government of Her Britannic Majesty claims, or through the Haro Channel as the Government of the United States claims." There was no pretense of the existence of any such general rule of international law or "custom" as complainant claims in this case. Only the conventional rule laid down in the treaty was contended for by either side, and its construction was the only subject of the award.

By the express terms of the acts, Congress established a definite land boundary for the State of Louisiana. A special rule having been thus established by competent authority, a general rule, even if such a one existed could not be invoked. General rules of international law are never applied under such circumstances. See Grotius, De Jure Belli ac Pacis, II, c. 3; Bluntschli, XV, 2; Martens, Precis, sec. 119, p. 320; Calvo, Droit Int., I, sec. 19, p. 109; Phillimore, Int. Law, I, pp. 44, 45 (2d ed. London); 1 Twiss, Law of Nations, pp. 130, 131; Lawrence's Wheat., p. 28; 1 Halleck, Int. Law, (Baker's ed.), p. 50; Lorimer, Ins. of Int. Law, I, p. 43.

Physical geography simply reproduces the actual coast lines of maritime States, as they are defined by nature at the point of contact of the sea with the land, while the political coast line, superimposed upon it by operation of international law,

is vastly shorter by reason of the fact that the artificial and imaginary line cuts across the heads of bays and inlets. The natural coast line, as known to physical geography, exists primarily for the purposes of boundary. The artificial coast line, as known to international law, exists only for the purposes of jurisdiction. Rivier, Principes du Droit des Gens, vol. I, pp. 145, 146, 170.

Both in their popular and technical senses "coast" and "shore" are identical and convertible terms. 4 Am. & Eng. Ency. of Law, 2d ed. p. 818. See *United States* v. *Pacheco*, 2 Wall. 587; Farnham on Waters, vol. 2, p. 1463 and vol. 1, p. 227. The word "shore" is also used in admitting Alabama.

An island is a body of land surrounded by water. 17 Am. & Eng. Ency. of Law, 2d ed. p. 530. A body of land continually covered by water is not an island. *Weber* v. *Pere Marquette Boom Co.*, 62 Michigan, 626. It does not lose its character by being almost submerged at high tide. *De Guyer* v. *Banning*, 167 U. S. 723. As to erosion and submergence, see *Widdicombe* v. *Rosemiller*, 118 Fed. Rep. 295. It is necessary that a strip of navigable water should separate it from the mainland. *Dumphry* v. *Williams*, 2 Pugsley (N. B.), 350; *King* v. *Young*, 76 Maine, 76; *American River Water Co.* v. *Amsden*, 6 California, 443; *Attorney General* v. *Woods*, 108 Massachusetts, 436; *Grand Rapids* v. *Powers*, 89 Michigan, 94; *Bamphrey* v. *State*, 52 Minnesota, 181.

The business of a cartographer, or map-maker, is to describe land forms, not to settle titles of particular sovereignties to particular parts of the earth's surface. The value of every map depends upon two factors: first, the completeness of the data out of which it is constructed; second, the skill of the cartographer in working such data into an harmonious whole. Early maps, which are necessarily based upon incomplete data, are almost invariably misleading guides. For that reason, international jurists generally regard such maps as of little or no value in boundary controversies. The great English jurist, Sir Travers Twiss, in speaking of the uselessness of maps in the

investigation of boundary questions, has even regretted that they are ever appealed to at all. See Greenhow's History of Oregon and California, p. 437, note; *United States* v. *Texas*, 162 U. S. 1.

There is nothing in the Swamp Land Act to give color to the idea suggested in the bill, that Congress, as well as the various departments of the United States Government, having authority in the premises, have themselves recognized the boundary line contended for by Louisiana by reason of the fact that the United States Government has confirmed to the State of Louisiana the lands composing Half Moon Island, etc. So far from there being the slightest foundation of truth for that suggestion the fact is that the act in question undertook to give to complainant as a donation certain lands which, by her application for them, she admitted belonged, not to her, but to the United States.

If defendant's contention is sound that the islands in question were conveyed to her by an express grant upon her admission to the Union in 1817, then the subsequent act of March 2, 1849, purporting to donate certain swamp and overflowed lands to complainant can have no possible operation for the simple reason that the United States had, at the date of said act, neither title nor interest. Grants made by a legislature are not warranties; and if the thing granted was not in the grantor at the time of the grant, no estate passes to her grantee. *Rice* v. *Minn. & N. W. R. R. Co.*, 1 Black, 358; *Polk* v. *Wendal*, 9 Cranch, 87. If that be true, then the *ex parte* proceeding of the Secretary of the Interior in 1852 was simply null and void as an attempt to take away a part of the domain of a State without the consent of its legislature. Art. IV, § 3, Const. U. S.

The doctrine of acquiescence does not apply to wild and unsettled lands such as were those in dispute. The assertion of sovereignty by Louisiana practically dates from the act of its legislature of 1902 relating to the dredging of oysters. Mississippi has never acquiesced in the claims of Louisiana but on

the contrary has exercised sovereignty over the disputed territory in many ways, *e. g.*, its courts in 1821 convicted for robbery; an inquest was held upon a body found in the waters of Isle à Pitre in 1886; in 1893 an arrest was made for violations of oyster laws in these waters. The legislature in 1857 passed an oyster and game law covering the territory in question, which was embodied in the Revised Statutes of the State for 1871, 1880 and 1892.

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

The demurrer was overruled because the court was of opinion that the bill presented a *prima facie* case of justiciable controversy between the State of Louisiana and the State of Mississippi as to the boundary line between them, and we are clear that the proofs establish the existence of such a controversy as to fully sustain our jurisdiction.

It is apparent that the enforcement of the oyster legislation of the two States led to a conflict between the authorities of both, which involved a dispute as to the true boundary line.

In 1886 the State of Louisiana passed an act vesting the power to control the oyster industry in the hands of the officials of the parishes of the State in their several localities, along general lines laid down in the law. Laws Louisiana, 1886, Act No. 106. This was followed by the acts of 1892 (No. 110), 1896 (No. 121), and 1900 (No. 159). By the act of 1896 non-resident oyster fishermen were prohibited from fishing oysters in Louisiana waters, and the dredging of oysters was also prohibited, in this particular differing from the laws of Mississippi, which permitted it. By a concurrent resolution of 1900 a Legislative Commission was created to investigate and report on the oyster industry of the State.

In January, 1898, the parochial authorities of the parish of St. Bernard equipped and sent out an official expedition to exclude from the oyster waters of the parish any non-resident

oyster fishermen who might be found fishing therein. Non-resident Mississippi oystermen were found fishing oysters there, and they were notified that they must stop fishing and move out of those waters. These Mississippians then complained to the Mississippi authorities and a conference ensued between representatives of the parish of St. Bernard and the county of Hancock. In January, 1901, at the instance of the Louisiana Legislative Commission appointed under the act of 1900, and of committees appointed from the police juries of the Louisiana parishes of St. Bernard and Plaquemines, a meeting of the state officials of Louisiana was held in New Orleans to consider the subject of the dispute with the State of Mississippi, and the invasion by non-residents of the Louisiana oyster waters. This meeting resulted in the appointment by the Governor of Louisiana of a commission of five members, and an official communication from the Governor of Louisiana addressed to the Governor of Mississippi requesting the latter to appoint a similar commission to see if it were possible to effect an amicable settlement of the dispute between the two States. This Mississippi commission was accordingly appointed, and the two commissions held a joint conference in New Orleans in March, 1901. Louisiana presented at the conference a map showing the Louisiana contention as to the boundary, which is the map attached to the bill and marked Exhibit E. The Mississippi commission reported that it was impossible to effect an amicable extra-judicial settlement of the dispute, and that the only hope of settlement was a friendly suit in the Supreme Court of the United States. This report was submitted by the Mississippi commission to the Governor of Mississippi and was transmitted to the legislature of that State. At this session the State of Mississippi passed a new law controlling her oyster waters and oyster industry. Laws, 1902, c. 58. This act created a state oyster commission, vested with entire control of the Mississippi oyster industry. It took the control of the industry out of the hands of the coast county authorities and centralized it in this state department, which was authorized to establish a

system of patrol of the Mississippi oyster waters and to maintain patrol boats to sustain the oyster laws in her territory. In July, 1902, the State of Louisiana followed the example of the State of Mississippi and adopted an act, Acts 1902, No. 153, creating a state oyster commission of Louisiana as a state department vested with full control of the oyster industry of Louisiana, and authorized to establish patrol boats and maintain an armed patrol on the Louisiana oyster waters to protect her rights in the oyster industry therein. In view of the danger of an armed conflict, the Oyster Commissions of both States, in September, 1902, adopted a joint resolution establishing a neutral territory between the two States "pending the final decision by the Supreme Court of the United States in the boundary suit to be instituted," to remain a common fishing ground. This *modus vivendi* did not include all of the disputed territory, but the waters of Mississippi Sound between the deep water channel and the north shore line of the Louisiana marshes were embraced by it.

In the following October this bill was filed. Louisiana appeared through her Governor and her Attorney General, and the action of the Governor in instituting the suit was subsequently approved, ratified and confirmed by the legislature.

The facts that the act of Congress admitting the State of Louisiana gave that State all islands within three leagues or nine miles of her coast, and that the subsequent act of Congress admitting the State of Mississippi purported to give that State all islands within six leagues or eighteen miles of her shore, and that some islands within nine miles of the Louisiana coast were also within eighteen miles of the Mississippi shore, furnished the basis for a boundary controversy, although, in our judgment, the apparent inconsistency is reconcilable, as hereinafter explained. And that controversy involved to each State pecuniary values of magnitude, as is shown by the evidence on both sides. We think that there existed between the two States, in their sovereign capacity as States, a controversy affecting the boundary line separating them in the locality in

question of a character to justify the exercise of our original jurisdiction within the rules laid down in *Missouri* v. *Illinois*, 200 U. S. 496; *S. C.*, 180 U. S. 208; *Pennsylvania* v. *Wheeling Bridge Company*, 13 How. 518, 589; *Louisiana* v. *Texas*, 176 U. S. 1; *Kansas* v. *Colorado*, 185 U. S. 125.

2. The State of Louisiana was admitted into the Union by the act of Congress approved April 6, 1812, 2 Stat. 701, c. 50, which commenced as follows:

"*Whereas*, the representatives of the people of all that part of the territory or country ceded under the name of 'Louisiana' by the treaty at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: Beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along said parallel of latitude to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence, bounded by the said Gulf, to the place of beginning, including all islands within three leagues of the coast; . . . "

Map or diagram No. 1 (*ante* p. 4), given in the opening statement, shows the limits as thus defined.

By an act of Congress approved April 14, 1812, 2 Stat. 708, c. 57, additional territory was added to the State of Louisiana, described thus:

"All that tract of country comprehended within the following bounds, to wit: Beginning at the junction of the Iberville, with the river Mississippi; thence along the middle of the Iberville, the river Amite, and the Lakes Maurepas and Pontchartrain to the eastern mouth of the Pearl river; thence up the eastern branch of Pearl river to the thirty-first degree of north latitude; thence along the said degree of latitude to the river Mississippi; thence down the said river to the place of be-

ginning, shall become and form a part of the said State of Louisiana, and be subject to the constitution and laws thereof, in the same manner, and for all intents and purposes, as if it had been included within the original boundaries of the said State."

This added territory is shown on map or diagram No. 2 (*ante* p. 5). The eastern boundary of Louisiana was thereby moved eastward from the Mississippi to Pearl river, and Louisiana was given the country south of the thirty-first degree of north latitude, and north of the boundary formed by the river Iberville, the middle of Lakes Maurepas and Pontchartrain and the Rigolets.

The river Iberville is called on this map Bayou Manchac, and is still known by that name. The Rigolets is a gut connecting the waters of Lakes Pontchartrain and Borgne, both of which are bodies of salt water and were originally arms of the sea. In order to reach the open waters of the Gulf of Mexico from the middle of Lakes Maurepas and Pontchartrain the line ran through the Rigolets into Lake Borgne, and after the addition to the State by the act of April 14, 1812, the eastern boundary line of Louisiana entered Lake Borgne to the south by Pearl river as well as the Rigolets. To get from Lake Borgne into the open water of the Gulf of Mexico beyond Chandeleur Islands and around to the western boundary of Louisiana, it was necessary, as Louisiana contends, to follow the deep water channel north of Half Moon or Grand Island, through Mississippi Sound, and thence by the pass between Cat Island and Isle à Pitre, north of the Chandeleur Islands, into the open Gulf. Many maps are given in the record, some made at dates long prior to the admission of Louisiana as a State, some at that time, and some within a few years thereafter, and all show the St. Bernard peninsula to be geographically a true part of the State of Louisiana, or of an area of country that was to form the State, and that the said peninsula projected itself as a well-defined arm of land out into the waters of the Gulf, branching off as a projection from the main body of land com-

posing the State, and forming a part of it. We observe that on many of these early maps the term "peninsula" is applied to this projection, and that designation is sufficiently accurate for the purpose of description.

November 14, 1803, President Jefferson sent a communication to Congress, in which, among other things, he said:

"The object of the following pages is to consolidate the information respecting the present State of Louisiana, furnished to the Executive by several individuals among the best informed on the subject.

"Of the province of Louisiana no general map, sufficiently correct to be depended upon, has been published, nor has any been yet procured from a private source. It is, indeed, probable that surveys have never been made upon so extensive a scale as to afford the means of laying down the various regions of a country which in some of its parts appears to have been but imperfectly explored. . . .

"St. Bernardo.

"On the east side of the Mississippi, about five leagues below New Orleans, and at the head of the English Bend, is a settlement known by the name of the Poblacion de St. Bernardo, or the Terre au Bœufs, extending on both sides of a creek or drain, whose head is contiguous to the Mississippi, and which flowing eastward, after a course of eighteen leagues, and dividing itself into two branches, falls into the sea and Lake Borgne. This settlement consists of two parishes, almost all the inhabitants of which are Spaniards from the Canaries, who content themselves with raising fowls, corn and garden stuff for the market at New Orleans. The lands cannot be cultivated to any great distance from the banks of the creek, on account of the vicinity of the marsh behind them, but the place is susceptible of great improvement, and of affording another communication to small craft of from eight to ten feet draught, between the sea and the Mississippi."

"Country from Plaquemines to the sea, and effect of the hurricanes:

"From Plaquemines to the sea is twelve or thirteen leagues. The country is low, swampy, chiefly covered with reeds, and having little or no timber, and no settlement whatever. It may be necessary to mention here, that the whole lower part of the country, from the English Turn downwards, is subject to overflowing in hurricanes, either by the recoiling of the river, or reflux from the sea on each side; and, on more than one occasion, it has been covered from the depth of two to ten feet, according to the descent of the river, whereby many lives were lost, horses and cattle swept away, and a scene of destruction laid. The last calamity of this kind happened in 1794, but fortunately they are not frequent. In the preceding year the engineer who superintended the erection of the fort at Plaquemines was drowned in his house near the fort, and the workmen and garrison escaped only by taking refuge on an elevated spot in the fort, on which there were notwithstanding two or three feet of water. These hurricanes have generally been felt in the month of August. Their greatest fury lasts about twelve hours. They commence in the southeast, veer about to all the points of the compass, are felt most severely below, and seldom extend more than a few leagues above New Orleans. In their whole course they are marked with ruin and desolation. Until that of 1793, there had been none felt from the year 1780."

This communication was, of course, before Congress when the act of 1812, admitting Louisiana, was approved, and the peninsula was clearly recognized as forming part of the parish of St. Bernard, as was its marshy character and that of the adjoining parish.

By the act of Congress, approved March 1, 1817, 3 Stat. 348, c. 23, the inhabitants of the western part of the then Mississippi Territory were authorized to form for themselves a state constitution and to be admitted into the Union with the following boundaries: "Beginning on the river Mississippi at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear

creek; thence by a direct line to the northwest corner of the county of Washington; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi river; thence up the same to the beginning."

The people in convention, August 15, 1817, formed a constitution and state government (approved subsequently by popular vote), and the State was admitted by resolution December 10, 1817, 3 Stat. 472.

The State of Alabama was admitted by the act of March 2, 1819, 3 Stat. 489, c. 47, which provided: "That the said State shall consist of all the territory included within the following boundaries, to wit: Beginning at the point where the thirty-first degree of north latitude intersects the Perdido river; thence, east, to the western boundary line of the State of Georgia; thence along said line, to the southern boundary line of the State of Tennessee; thence, west, along said boundary line, to the Tennessee river; thence, up the same, to the mouth of Bear creek; thence, by a direct line, to the northwest corner of Washington county; thence, due south, to the Gulf of Mexico; thence, eastwardly, including all the islands within six leagues of the shore, to the Perdido river; and thence, up the same to the beginning."

The islands, marsh or otherwise, claimed by Louisiana in this case were all within three leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana act, yet Mississippi claims thereunder the disputed territory, as being islands within eighteen miles of her shore. If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that State and give it to the State of Mississippi. The rule, *Qui prior est tempore, potior in jure*, applied, and section three of article IV of the Constitution does not permit the claims of any particular State to be

prejudiced by the exercise of the power of Congress therein conferred.

But it is said that the act admitting Louisiana, the act admitting Mississippi, and the act admitting Alabama must be construed as *in pari materia;* and, being so construed, that Congress must be held to have had in view in the three acts a division of the coast along the Gulf of Mexico so as to equalize the water frontage of Mississippi, Louisiana, and Alabama.

We do not regard these acts as *in pari materia* in any proper sense. They provided for the admission of three separate States, and the subject of each was not only not identical with, but not even similar to, that of the others. They did not form part of a homogeneous whole, of a common system, so as to allow a claimant under the later act to successfully contend that it changed the earlier act by construction or effected such change because declaratory of the meaning of the prior act.

And assuming for the sake of argument that the Louisiana and Mississippi acts were irreconcilably inconsistent, but remembering that when Louisiana was admitted into the Union, the territory now composing the coast counties of Mississippi, that is, below the thirty-first degree of north latitude, was not actually a part of the Mississippi Territory but was in dispute between the United States and Spain, the theory of any preconcerted design in regard to the water front of the two States is too unreasonable to be entertained.

In the treaty of peace between England, France and Spain of February 10, 1716, Article VII, on the subject of the boundary line separating the dominions of England and France in the New World, provided: "That for the future the confines between the dominions of His Brittanic Majesty and those of His Most Christian Majesty in that part of the world shall be fixed irrevocably by a line drawn along the river Mississippi from its source to the river Iberville, and from thence by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain to the sea." According to this treaty England retained the port of Mobile and its river and everything east

of the Rigolets. The Island of Orleans, formed by the river Iberville, Lakes Maurepas and Pontchartrain, the Rigolets, the Gulf of Mexico and the Mississippi river, remained the property of France. In the treaty of February 10, 1763, practically the same language is used in describing the boundary line separating the British from the French territory, and by the twentieth article the cession to England of Florida by Spain and all that Spain possessed on the continent of North America was provided for. By the treaty of September 3, 1783, between England and Spain, England retroceded East and West Florida to Spain. By the treaty of St. Ildefonso of October 1, 1800, Spain ceded to France "the colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other States." April 30, 1803, France ceded to the United States "the colony or province of Louisiana," using the same description as used by Spain in ceding the territory to her, and stating in Article II "In the cession made in the preceding article are included the adjacent islands belonging to Louisiana. . . ."

There is nothing in any of these transfers to raise a doubt that the peninsula of St. Bernard was part of the Island of Orleans and that this Island of Orleans was in fact formed by the extension to the sea of the boundary line coming down through the middle of Lakes Maurepas and Pontchartrain and so finding its way to the sea by the deep water channel.

March 26, 1804, an act of Congress was approved, dividing the country acquired as Louisiana from France into two parts, providing:

"That all that portion of the country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi Territory and of an east and west line to commence on the Mississippi river, at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a Territory of the United

States under the name of the Territory of Orleans; the government whereof shall be organized and administered as follows:

* * * * * * * *

"SECTION 12. The residue of the Province of Louisiana, ceded to the United States, shall be called the District of Louisiana, the government whereof shall be organized and administered as follows: . . ."

Congress manifestly regarded the lands to the east, that were south of the Mississippi Territory, and which form the disputed area of to-day, as part of the original Island of Orleans, included in the treaty of April 30, 1803; and these were given to the Territory of Orleans, whose southeastern boundary was the original southeastern boundary of the Island of Orleans. At that date the Mississippi Territory did not extend south of the thirty-first degree of north latitude and its domain did not reach the shore of Mississippi Sound, so called.

February 20, 1811, 2 Stat. 641, c. 21, an act of Congress was approved "to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such State into the Union, on an equal footing with the original States, and for other purposes." The description of the limits was as follows: "Beginning at the mouth of the river Sabine, thence, by a line to be drawn along the middle of the said river, including all islands to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence bounded by said Gulf, to the place of beginning: including all islands within three leagues of the coast," etc.

The eastern boundary thus described is a water boundary, and, in extending this water boundary to the open sea or Gulf of Mexico, we think it included the Rigolets and the deep water sailing channel line to get around to the westward. A little

over one year later Louisiana was created a State by the act of Congress of April 6, 1812, with this identical eastern boundary line; and the addition of territory by the act of April 14, 1812, did not affect the deep water sailing channel line as a boundary.

April 7, 1798, 1 Stat. 549, c. 28, an act was approved "for an amicable settlement of limits with the State of Georgia, and authorizing the establishment of a government in the Mississippi Territory," which read in part: "That all that tract of country bounded on the west by the Mississippi; on the north by a line to be drawn due east from the mouth of the Yasous to the Chatahouchee river; on the east by the river Chatahouchee; and on the south by the thirty-first degree of north latitude, shall be, and hereby is constituted one district, to be called the Mississippi Territory." This was in conformity with the treaty between Spain and the United States of October 27, 1795. Maps of that date, and subsequently, show that the admitted rights of the United States did not at the time extend south of the thirty-first degree of north latitude at that point.

By an act of January 15, 1811, the President of the United States was authorized, among other things, in the event that any foreign government attempted to occupy the same, to take possession of the country lying east of the river Perdido, and south of the State of Georgia and the Mississippi Territory. The river Perdido is in the State of Alabama, east of the State of Mississippi, and flows into the Gulf of Mexico between Mobile Bay in Alabama and Pensacola Bay in Florida. A few days later, and on March 3, 1811, an act of Congress was approved, providing that the act of January 15, 1811, and this act, should not be published until the end of the next session of Congress, unless with the consent of the President.

By resolution approved January 15, 1811, it was specifically declared that the United States could not without serious inquietude see any part of the territory adjoining the southern border of the United States pass into the hands of any foreign power, "and that a due regard to their own safety compels

them to provide, under certain contingencies, for the temporary occupation of the said territory." 3 Stat. 471.

May 14, 1812, an act of Congress was passed, 2 Stat. 734, c. 84, to enlarge the boundaries of the Mississippi Territory, which used the following language: "That all that portion of the territory lying east of Pearl river, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is hereby annexed to the Mississippi Territory," etc. The country described was not at the time in the possession of the United States, and on February 12, 1812, Congress passed an act "authorizing the President of the United States to take possession of a tract of country lying south of the Mississippi Territory and west of the river Perdido," which act referred to the tract as "not now in the possession of the United States." 3 Stat. 472. But it was not until the enabling act in respect of Mississippi, approved March 1, 1817, that the language was used: "Thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river and Lake Borgne," etc.

The claim of Mississippi is that the disputed area is composed of islands, and as those islands are within eighteen miles of her shore, that they were given to her by the act of March 1, and the resolution of December 10, 1817. It is true there are some islands in that area, such as Grassy, Half Moon, Petit Pass and Isle à Pitre, all of which are between the deep water channel on the north and the main coast line of St. Bernard peninsula on the south.

The contention of Louisiana is that these islands were previously given to her by the act of April 6, 1812, more than five years prior to the admission of Mississippi, and that her title thereto, even if the acts were in conflict, is superior to that of the State of Mississippi; and she also contends that the islands belong to her because they are south of the deep water sailing channel line, which she submits is the true boundary line between the two States. Mississippi denies that the peninsula

of St. Bernard and the Louisiana Marshes constitute a peninsula in the true sense of the word, but insists that they constitute an archipelago of islands. Certainly there are in the body of the Louisiana Marshes or St. Bernard peninsula portions of sea marsh which might technically be called islands, because they are land entirely surrounded by water, but they are not true islands. They are rather, as the Commissioner of the General Land Office wrote the Mississippi land commissioner in 1904, "in fact, hummocks of land surrounded by the marsh and swamp in said townships. . . ."

And when the Louisiana act used the words: "thence bounded by the said Gulf to the place of beginning, including all islands within three leagues of the coast," the coast referred to is the whole coast of the State, and the peninsula of St. Bernard formed an integral part of it. Lake Borgne and Mississippi Sound are bodies of salt water and as such parts of the sea or Gulf, and as the coast of Louisiana began along the north shore of the peninsula, it is not to be supposed that the islands referred to by Congress in the Louisiana act were solely those islands to the south of that State.

The contention of Mississippi is based upon an assumed inconsistency between the Louisiana and the Mississippi acts, but we think upon a true interpretation, in the light of the facts, that no such inconsistency can be imputed. The maps show that there is a chain, not of alluvial but of sea sand islands running from the west shore of Mobile Bay in the State of Alabama, westward to and inclusive of Cat Island in the State of Mississippi. This chain forms the southern boundary of Mississippi Sound, and the islands are all relatively the same distance from the shore of the States of Mississippi and of Alabama. They, beginning at the eastern end, are Dauphin, Petit Bois, Horn, Ship and Cat Islands, and there are some other islands lying within this chain. If Congress referred to these islands as being thus within six leagues of the shore, when the act creating the State of Mississippi was passed, it follows that there would be no conflict with prior existing boundaries of

the State of Louisiana, particularly if the deep water sailing channel line be taken as the correct boundary between the States. And when Congress created a separate territorial government for the eastern part of Mississippi Territory and called it Alabama, by the act of March 3, 1817, it used the same language concerning the western and southern boundary of the Territory: "thence due south to the Gulf of Mexico, thence eastwardly, including all islands within six leagues of the shore to the river Perdido and thence up same to the beginning." It seems obvious to us that it was to this chain of islands that Congress referred when it admitted Mississippi into the Union, and that it had no intention whatsoever of giving Mississippi any claim of ownership in the sea marsh islands, which had been previously granted to the State of Louisiana.

We are of opinion that the peninsula of St. Bernard in its entirety belongs to Louisiana; that the Louisiana Marshes at the eastern extremity thereof form part of the coast line of the State; and that the islands within nine miles of that coast are hers, except as restricted by the deep water sailing channel regarded as a boundary. Cat Island, for instance, is within the nine miles, but it is north of the deep water channel, is not alluvial, and is conceded by both States to belong to Mississippi.

3. That there is a deep water sailing channel line emerging from the mouth of Pearl river, and extending east between Lower Point Clear and Grand Island, is shown by the numerous maps, surveys and sketches in the record. It separates into two branches, one of them passing betwen Cat Island and Isle à Pitre.

Among the maps put in evidence by Louisiana is one prepared by George Gauld, M. A., for the British Admiralty in the year 1778, and, from the relative depths of water given, the existence of this same channel, extending out into the Gulf, southwest of Cat Island, is shown and is the same as noted on maps of subsequent years.

February 14, 1839, an act of the legislature of Mississippi was

approved, providing for a survey of the Mississippi coast. The survey and report are given in full in the record, and the deep water channel above referred to is traceable in detail on the sketch. The channels indicated on this survey and on the United States Coast and Geodetic Survey map are the same channels. It may be noted, in passing, that the body of water now known as "Mississippi Sound," is not so designated on this sketch, and the first map which uses this name, to which our attention has been called, was issued in 1866.

Louisiana lies between the States of Mississippi to the east and Texas to the west. The southern portion of Louisiana is geologically of an alluvial formation, containing the delta of the Mississippi river. The peninsula of the parish of St. Bernard is practically a part of this delta formation.

Mississippi's mainland borders on Mississippi Sound. This is an inclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them six miles wide. Such openings occur between Cat Island and Isle à Pitre; between Cat and Ship Islands; between Ship and Horn Islands; between Horn and Petit Bois Islands; between Petit Bois and Dauphin Islands; and between Dauphin Island and the mainland on the west coast of Mobile Bay. The maps show all this, and, among others, reference may be made to Jeffrey's map of 1775, given in the record, and which in reduced form is reproduced from Jeffrey's Atlas of 1800 as the frontispiece of vol. II Adams' History of the United States.

Now to repeat, the boundary of Louisiana separating her from the State of Mississippi to the east is the thread of the channel of the Mississippi river, and this extends south until it reaches the thirty-first degree of north latitude and then runs directly east along that degree until Pearl river is reached; thence south along the channel of that river to Lake Borgne. Pearl river flows into Lake Borgne, Lake Borgne into Mississippi Sound and Mississippi Sound into the open Gulf of Mexico,

through, among other outlets, South Pass, separating Cat Island from Isle à Pitre.

If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

The term "thalweg" is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled "fairway" or "midway" or "main channel," the word itself has been taken over into various languages. Thus in the treaty of Luneville, February 9, 1801, we find "le Thalweg de l'Adige," "le Thalweg du Rhin," and it is similarly used in English treaties and decisions, and the books of publicists in every tongue.

In *Iowa* v. *Illinois*, 147 U. S. 1, the rule of the thalweg was stated and applied. The controversy between the States of Iowa and Illinois on the Mississippi river, which flowed between them, was as to the line which separated "the jurisdiction of the two States for the purposes of taxation and other purposes of government." Iowa contended that the boundary line was the middle of the main body of the river, without regard to the "steamboat channel" or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between States is the middle of the main channel of the river.

Mr. Justice Field, delivering the opinion of the court, said:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on inter-

national law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, 'a line drawn along the middle of the river Mississippi from its source to the river Iberville,' as there used, is meant along the middle of the channel of the river Mississippi."

This judgment related to navigable rivers. But we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. 1 Martens (F. de), 2d ed. 134; Hall, § 38; Bluntschli, 5th ed. §§ 298, 299; 1 Oppenheim, 254, 255.

Thus Martens writes: "What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry."

So Pradier Fodéré says (Vol. II, p. 202), that as to lakes, "in communciation with or connected with the sea, they ought to be considered under the same rules as international rivers."

The same view is confirmed by decisions of this court and of many arbitral tribunals.

In *Devoe Manufacturing Company*, 108 U. S. 401, the question at issue was in regard to the boundary line between New York and New Jersey under an agreement between the two

States. The jurisdiction of the State of New Jersey was claimed "to extend down to the bay of New York, and to the channel midway of said bay," and this court sustained the claim. See *Hamburg American Steamship Company* v. *Grube*, 196 U. S. 407.

In the San Juan Water Boundary controversy between the United States and Great Britain, Emperor William I gave the award in favor of the United States, October 21, 1871, by deciding "that the boundary line between the territory of Her Brittanic Majesty and the United States should be drawn through the Haro Channel;" and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister, and the British representative, the boundary line was said to be prolonged until "it reaches the center of the fairway of the Straits of San Juan de Fuca." The fairway was the equivalent of the thalweg.

Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the treaty of Ghent, the deep water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

So in the *Alaskan Boundary* case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line and included Wales Island, to the north of which the channel passed. This sustained the American contention in regard to the thalweg and the island lying south of it.

But counsel contend that the rule "as to the flow of the midchannel or thalweg of the river Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain expires by its own limitation when such midchannel reaches Lake Borgne, which in contemplation of the rule is the

open sea, and part of the waters of the Gulf of Mexico." This contention is inconsistent, as matter of fact, with the allegation of the cross bill that "the Mississippi Sound was recognized as a body of water six leagues wide, wholly within the State of Mississippi from Lake Borgne to the Alabama line, separate and distinct from the Gulf of Mexico," and with Mississippi's Exhibit Map A presenting her claim, while the record shows that the strip of water, part of Lake Borgne and Mississippi Sound, is not an open sea but a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth.

The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester* v. *Massachusetts*, 139 U. S. 240; *McCready* v. *Virginia*, 94 U. S. 391.

In *Manchester* v. *Massachusetts*, the court said: "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit."

Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States require no special consideration here. The facts render such discussion unnecessary.

Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi,

to be "natural appendages of the coast on which they border, and from which indeed they are formed." *The Anna* (1805), 5 C. Rob. 373.

As to these particular waters, the observations of Mr. Hall, 4th ed. p. 129, are in point: "Off the coast of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific, are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. The entrance to these interior bays or lagoons may be wide in breadth of surface water, but it is narrow in navigable water."

He then states the specific case of the Archipiélago de los Canarios on the coast of Cuba, and says: "In cases of this sort the question whether the interior waters are, or are not, lakes enclosed within the territory, must always depend upon the depth upon the banks, and the width of the entrances. Each must be judged upon its own merits. But in the instance cited, there can be little doubt that the whole Archipiélago de los Canarios is a mere salt water lake, and that the boundary of the land of Cuba runs along the exterior edge of the bank."

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary.

4. Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international

rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. *Virginia* v. *Tennessee*, 148 U. S. 503; *Indiana* v. *Kentucky*, 136 U. S. 479; *Missouri* v. *Kentucky*, 11 Wall. 395; *Rhode Island* v. *Massachusetts*, 4 How. 591.

The Louisiana Enabling Act of February 20, 1811, provided that all the waste and unappropriated lands in said State should be and remain the property of the United States Government. In the disputed area of to-day are included lands and waters located in various townships, all of which are enumerated in the southeastern land district of Louisiana, east of the Mississippi river. The lands in these townships were surveyed by the Government about the year 1842, all of them as being in and forming a part of the State of Louisiana. By the Swamp Land Grants of 1849 and 1850, the United States granted to certain States the swamp and overflowed lands within their respective limits, in order that these lands might be reclaimed, protected from overflow, and brought into use. Louisiana made application to the United States for the approval to her of these lands as being part of her territory and situated within her limits. They all lay south of the deep water channel and were all approved to the State of Louisiana May 6, 1852. They were then offered by the State through the register of the state land office for sale and many sales of them were made from time to time to individuals and patents issued therefor in various years from 1853 to 1894. In 1892, in furtherance of the better protection of the lands of the parishes of St. Bernard and Plaquemines from overflow, the legislature of Louisiana adopted an act which created a Lake Borgne Basin Levee Commission, and provided a board of commissioners therefor as a department of the state government, and the register of the state land office was authorized to transfer all of the unsold lands to the board, which was done in April, 1895. The board was authorized by law to sell these lands and also to levy taxes to be used in establishing a protective levee system in the district. The board made sales of a considerable number of acres

to different individuals from September 16, 1898, to March 7, 1902. Isle à Pitre was composed of certain enumerated sections of township ten, south of range twenty east, and these lands were approved to Louisiana by the Commissioner of the General Land Office of the United States May 6, 1852, as forming part of that State, and they were subsequently patented, sold and conveyed to various individuals, the chain of title extending from 1852, a period of over fifty years. The lands forming Isle à Pitre have been paying taxes to the State of Louisiana for years. Political and police control and jurisdiction by the parish of St. Bernard officials were exercised over the disputed area, and many instances are given of police control and jurisdiction by Louisiana officials over this general territory. This territory consisted, as heretofore stated, of what was known as the Louisiana Marshes, and it is admitted that they have immemorially been known by that name, though some of the witnesses for Mississippi said that they were also known as Grand Marshes, admitting, however, that they were quite as frequently called the Louisiana Marshes.

Some other matters may properly be referred to as showing the general understanding of and acquiescence in the boundary asserted by Louisiana.

In January, 1901, the Superintendent of the Coast and Geodetic Survey was applied to by a member of the House of Representatives from Mississippi for information in regard to the boundary line between Louisiana and Mississippi in the present disputed area, and Hodgkins, an assistant in the Department, a well-known expert in such matters, made a report January 30, 1901, which, after considering the subject in all its phases, showed that the correct boundary between the two States in the locality is the deep water sailing channel line contended for by Louisiana.

The United States Geological Survey published in the year 1900 a bulletin devoted to a discussion of the boundaries of the States and Territories, and giving a history of changes as they may have occurred. The third edition was published in

1904. Gannett's Boundaries, 58th Congress, 2d Session, H. R. Doc. 678.

In the opinion of that Bureau, Louisiana was originally bounded by the deep water channel, and is the owner of the area in dispute to-day, according to the report and the accompanying sketches.

In 1897, Louisiana requested the United States Commission of Fish and Fisheries to make an investigation and report upon certain technical matters in connection with the oyster industry of that State, which investigation was made in February. 1898, by the United States Fish Commission steamer "Fish Hawk." A map was made of the area investigated in St. Bernard parish, and that map is given in the opening statement as Diagram No. 4. Louisiana's ownership was clearly recognized.

The General Land Office of the United States began as early as 1842 a detailed survey of the land forming the disputed area, of which township plats appear in the record. The survey gave the location of Marsh Island, Half Moon or Grand Island, an unnamed island, Petit Pass Island, and Isle à Pitre and the sections and townships comprised in these islands. They were all designated as being in the southeastern land district of Louisiana, east of the Mississippi river.

When, as we have said, Louisiana, in the year 1852, selected these and other lands within her state limits as enuring to her under the Swamp Land Grants, the General Land Office, on May, 6 1852, recognized the correctness of the claim to the lands and approved and patented them to her as a State. Mississippi also applied for the land enuring to her under the provisions of those grants, and received her swamp lands, but the State never selected and never had approved to her, as is shown by the books of the State Land Office of Mississippi, any of the lands in the disputed area of to-day; but it appeared that the State did have in her Land Office books a record of the lands forming St. Joseph's Island, which lay immediately north of the deep water channel, and did not extend south of that channel.

The General Land Office of the United States in all of the maps it has caused to be made of Louisiana and Mississippi has been consistent in its recognition of the ownership by Louisiana of the disputed area. See maps of Louisiana, 1879, 1886, 1887, 1896; and of Mississippi in 1890.

As before stated, in 1839, an engineer and surveyor made a report and sketch of the coast of Mississippi under the authority of that State. This showed the territory lying south of the deep water channel in outline to be a peninsular formation. The report referred to Horn, Petit Bois, Cat and Ship Islands as belonging to Mississippi, all of which are east of the disputed territory; and the territory southwest of the deep water channel, or South Pass, was described as the Louisiana Marshes. The official maps of Mississippi recognized Louisiana's ownership of the disputed territory. The state map of October 26, 1866, which was approved by Governor Humphrey and also by Governor Alcorn, did this; and other maps, as the official map of Mississippi, published under an act of the legislature of that State on March 8, 1882; Rand & McNally's sectional map of Mississippi, compiled from the records of the office of the Surveyor General of the Board of Immigration and Agriculture, Jackson, Mississippi; and the Railroad Commissioners' map of Mississippi gave like recognition. The only exception seems to be a map of the Railroad Commission, issued in 1904, two years after this suit was instituted, wherein on the eighteen-mile theory, Mississippi for the first time cartographically extended her claims into the St. Bernard, Louisiana, peninsula.

The record contains much evidence of the exercise by Louisiana of jurisdiction over the territory in dispute, and of the general recognition of it by Mississippi as belonging to Louisiana. Apparently Louisiana had exercised complete dominion over it from 1812 with the acquiescence of Mississippi, unless the fact that the latter made a general reference to islands within six leagues of her shore in her code of 1880 indicated otherwise. But the evidence fails to satisfy us that she attempted any physical possession or control until after 1900. The few in-

stances referred to as showing that Mississippi asserted rights in the disputed area are of little weight and require no discussion.

Our conclusion is that complainant is entitled to the relief sought.

Decree accordingly.

LOUISIANA *v.* MISSISSIPPI.

DECREE. IN EQUITY.

No. 11, Original. Decree entered April 23, 1906.

Defining the boundary line between the States of Louisiana and Mississippi under the opinion in this case. *Ante*, p. 1.

PER CURIAM: This cause came on to be heard on the pleadings and proofs and was argued by counsel. On consideration thereof it is found by the court that the State of Louisiana, complainant, is entitled to a decree recognizing and declaring the real, certain and true boundary south of the State of Mississippi and north of the southeast portion of the State of Louisiana, and separating the two States in the waters of Lake Borgne and Mississippi Sound, to be, and that it is, the deep water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass between Cat Island and Isle à Pitre, to the Gulf of Mexico, as delineated on the following map, made up of the parts of charts Nos. 190 and 191 of the United States Coast and Geodetic Survey, embracing the particular locality:

And it is ordered, adjudged, and decreed accordingly.

It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and citizens, be and they are


Louisiana
and
State
of
Mississippi
between
Boundary
Line
1803
Purchase
Gulf Pass
Grand Bayou
Grand Bayou Pass
Henderson's Pt.
Henderson's Handkerchief Shell Bank Light
Shell Bank Channel
Shell Bank Pass
Gat Island
Gat Island Light
Gat Island Pass
Gat Island Channel
Mississippi Sound
Malheureux Pt.
Bilisi Pass
South Bayou
Three Mile Bay
Johnson Bay
Bay Rigolets
Rigolets
West Kuraka Bay
Kuraka Bay
Goodwin Bay
Pass Marianne
Pass Christian
Chain
Magnetic Compass
Annual Decrease

hereby enjoined and restrained from disputing the sovereignty and ownership of the State of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map.

And that the costs of this suit be borne by the State of Mississippi.

IOWA *v.* ILLINOIS.

IN EQUITY.

No. 2, Original. Decree entered April 23, 1906.

The boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river.

THIS cause came on for final decree and was submitted on the following stipulation:

"And now comes the State of Iowa, complainant in this cause, and also comes the State of Illinois, defendant in this cause, and severally and jointly move the court to vacate and set aside so much of the interlocutory order entered in this cause on the third day of January, A. D. 1893, as orders 'that a commission be appointed to ascertain and designate at said places the boundary line between the two States, said commission consisting of three competent persons to be named by the court, upon suggestion of counsel, and be required to make a proper examination and to delineate on maps prepared for that purpose the true line as determined by this court and report the same to the court for its further action'; and also the interlocutory order entered in this cause on the seventh day of March, A. D. 1893; and also that part of the interlocutory order entered in this cause on the tenth day of April, A. D. 1893, which was not set aside and vacated by the interlocutory order

entered in this cause on the fifteenth day of January, A. D. 1894; and that that part of the interlocutory order entered in this cause on the third day of January, A. D. 1893, whereby it was 'ordered, adjudged, and decreed by this court that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river,' be declared the final order, judgment, and decree of this court in this cause.

"CHAS. W. MULLAN,
"*Attorney General of Iowa.*
"W. H. STEAD,
"*Attorney General of Illinois.*"

PER CURIAM: In consideration whereof and of the decision of this court reported 147 U. S. 1, it is ordered, adjudged and decreed that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river.

OREGON *v.* HITCHCOCK.

IN EQUITY.

No. 16, Original. Argued April 5, 6, 1906.—Decided April 23, 1906.

In the absence of any act of Congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, or of any act of Congress assuming full responsibility in behalf of its wards, the Indians, affecting their rights to such lands, this court has no jurisdiction of an action brought by a State against the Secretary of the Interior and Commissioner of the General Land Office to enjoin them from patenting to Indians lands within that State, claimed by the State under the swamp land acts.

The fact that the action is brought by a State against the Secretary of the Interior, who is a citizen of a different State, does not give this Court jurisdiction as the real party in interest is the United States.

It is not the province of the courts to interfere with the administration of the Land Department, and until the land is patented inquiry as to equitable rights comes within the cognizance of the Department and the courts will not anticipate its action.

By leave of court the State of Oregon filed an original bill against Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, to restrain the defendants from allotting or patenting to any Indians or other persons certain lands within the limits of the Klamath Reservation, which it is alleged were on March 12, 1860, swamp and overflowed lands, and praying a decree establishing the title of the State of Oregon to such lands and declaring that the title is subject only to such right of temporary and terminable occupation as may exist in the Indians at present occupying the said reservation, and is not to be defeated by any allotment, patent, agreement or other arrangement. To this bill the defendants filed a demurrer, partly on jurisdictional grounds and partly on the merits.

For a clear understanding of the questions presented the allegations in the bill must be stated. It is alleged that the defendant Hitchcock is a citizen of the State of Missouri, the defendant Richards of the State of Wyoming; that by an act of Congress, approved February 14, 1859, 11 Stat. 383, Oregon was admitted into the Union; that by an act approved September 28, 1850, 9 Stat. 519, Congress granted to the State of Arkansas and other States all lands, within their respective limits, which at the date of the act were "swamp and overflowed lands," and by reason thereof unfit for cultivation; that by an act of March 12, 1860, 12 Stat. 3, the provisions of the last-named act were extended to the State of Oregon; that on February 14, 1859, as well as on March 12, 1860, the United States owned in fee simple a large region and body of land lying within the boundaries of the State of Oregon, which said body of land was neither reserved nor dedicated to any public

use and was free from any claim of title or possession, saving and excepting a right to temporary use and occupation belonging to certain Indian tribes; that within this large body of lands were three tribes or bands of Indians—the Klamaths, the Modocs and the Yahooskins—few in number, that number being estimated by the officials of the United States in charge at from 1,200 to 1,500; that they were all in a savage state, uncivilized, without a fixed place of abode and roaming from place to place within the region; that they had no other kind of tenure or title than that which they and their ancestors held from time immemorial and before the settlement of white men in the territory; that on October 14, 1864, 16 Stat. 707, a treaty was negotiated between the United States and these tribes of Indians, by which they ceded to the United States their right, title and claim to all these lands, except a certain specified and smaller tract within the original out-boundaries, which was created a reservation for their use; that said reservation was continued in the occupation of the Indians according to the aboriginal usages and customs of said Indians and of Indians generally, without any claim or pretense of permanent title or individual right to the lands, or any of them, and without any steps taken towards conferring the ultimate title upon them until after the year 1899, when the defendant Hitchcock, Secretary of the Interior, directed and caused a large portion of the lands to be surveyed and divided into numerous definite lots or tracts, for the purpose and with the intention of allotting such tracts to the individual members of the tribes, to be by them held in severalty, and the further purpose of issuing and delivering to each of them a patent declaring that the United States holds the tract allotted in trust for the Indian and his heirs for a period of twenty-five years, and that at the expiration of such period it will convey the tract to him or his heirs discharged of the trust and free from all incumbrances; that in this the defendant Hitchcock was assuming and professing to act under the authority of the act of Congress of February 8, 1887, 24 Stat. 388; that within the reservation made by the

treaty of 1864 were large tracts, which had been and were on March 12, 1860, swamp and overflowed lands and unfit for cultivation, and hence under the act of March 12, 1860, had become the property of the State, subject only to the right of occupancy on the part of the Indians; that in the year 1902, before any patents were issued and while the surveying and allotting were in progress, the State caused an examination to be made for the purpose of ascertaining the tracts which on March 12, 1860, were swamp and overflowed lands, and a list prepared of them, which list is attached to the bill as an exhibit; that it presented and filed that list with the surveyor general of the United States for the State of Oregon, together with evidence tending to prove that all of the tracts within the list had been and were on March 12, 1860, swamp and overflowed lands and rendered thereby unfit for cultivation, which evidence was found and certified by the surveyor general to be sufficient. That thereupon the State selected and claimed said tracts as granted to it by the act of Congress of March 12, 1860, and applied to the proper officers of the United States to inquire into and consider the claims of the State; that this application and the evidence was submitted to the defendant Richards, as Commissioner of the General Land Office, and on November 18, 1903, the Acting Commissioner denied and rejected the claim upon the sole ground that the lands, whether swamp and overflowed or not, were not granted to the State of Oregon by the act of Congress. From this decision an appeal was taken to the Secretary of the Interior, and the decision of the Land Office affirmed.

Mr. Charles A. Keigwin, with whom *Mr. Andrew M. Crawford* and *Mr. William B. Matthews* were on the brief, for complainant:

The objection taken by the demurrer to the jurisdiction of the court is met by the decision in the recent case of *Minnesota* v. *Hitchcock*, 185 U. S. 373. The statute of 1901 was necessary only because of the difficulty of making the Indians parties,

which would have defeated the original jurisdiction of this court. The statute was passed to enable the United States to be the defendant on account of its absence of interest in the suit and not on account of the immunity of the Government from suit.

Nor is a statute or other express warrant necessary to enable a suit affecting the interest of the Government to be maintained against its officers. The immunity of the sovereign from suit does not extend to those who act for it; and the concern of the sovereign in the subject matter of a controversy does not preclude the jurisdiction of the courts. While the State may not be directly sued, the acts of those who assume to act for the State may be examined, and such acts may be enjoined even when taken or proposed to be taken by direct authorization of the sovereign. Even the fact that the State has the entire ultimate interest in the controversy, and is solely to be affected by the judgment, does not prevent the maintenance of the action against the proper officers of the State. *Osborn* v. *United States Bank*, 9 Wheat. 738; *United States* v. *Peters*, 5 Cranch, 115; *Davis* v. *Gray*, 16 Wall. 203; *Allen* v. *R. R. Co.*, 114 U. S. 311; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayres*, 123 U. S. 443; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Rolston* v. *Crittenden*, 120 U. S. 390; *Reagan* v. *Loan and Trust Co.*, 154 U. S. 362; *Ex parte Tyler*, 149 U. S. 164.

Where a Federal officer is made defendant, it is no objection to the jurisdiction that the controversy involves the property or otherwise concerns the interest of the United States; nor is it necessary, the case being of the character in which a state officer might be sued, that the Government should consent to the suit being brought. *United States* v. *Lee*, 106 U. S. 196; *Meigs* v. *McClung*, 9 Cranch, 11; *Grisar* v. *McDowell*, 6 Wall. 363; *Brown* v. *Huger*, 21 How. 305; *United States* v. *Schurz*, 102 U. S. 378; *Noble* v. *Logging Co.*, 147 U. S. 165.

In cases where jurisdiction is asserted on the ground of diverse citizenship, the Federal courts look only to the citizen-

ship of the parties named on the record, without regard to their relationship to the cause or to the citizenship of those who, though not parties, are the real parties in interest. *Childress* v. *Emory*, 8 Wheat. 642; *Rice* v. *Houston*, 13 Wall. 66; *Bonnafee* v. *Williams*, 3 How. 574; *Dodge* v. *Tulleys*, 144 U. S. 451; 1 Foster's Federal Practice, 3d ed. § 19. The same rule applies where the defendant is sued in a purely official capacity and the real interest is in the State of which he is an officer. *Davis* v. *Gray*, 16 Wall. 203.

With respect to the suggestion that the jurisdiction might be ousted if one of the defendants should, in the progress of the suit, be succeeded by a citizen of the complainant State, the rule seems to be settled, that, if the jurisdiction is properly acquired by reason of the diverse citizenship of the original parties, it is not defeated by such a change of parties as brings citizens of the same State upon opposite sides of the record. 1 Foster's Federal Practice, § 19; *Stewart* v. *Dunham*, 115 U. S. 61; *Phelps* v. *Oakes*, 117 U. S. 236; *Anderson* v. *Watt*, 138 U. S. 707; *Tug River Co.* v. *Brigel*, 86 Fed. Rep. 818.

As a second additional ground of jurisdiction the present cause is within that clause of the Constitution which extends the judicial power of the Federal courts "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." In this case, the State claims the land under one of the laws of the United States, the swamp land grant of Congress, and the defendants assert their right to control and dispose of the lands as the property of the United States in virtue of an act of Congress passed in 1848, of a treaty made with the Indians in 1864, and of a statute enacted in 1887. There can be no question of the fact that the case is within the class defined in the last quoted clause of the Constitution.

The general rule that until patent is issued the courts will not interfere with the Land Department does not apply to a case like this. Upon the averments of the bill, and upon the law applicable to the facts stated, the State of Oregon has in the

lands a vested title such as is recognized and protected by the courts. Though the legal title remains in the United States, it so remains only for the purpose of being transferred to the State; and though the legal title is under the control of the Secretary of the Interior, the equitable title in the State is one which that officer is bound to respect, and which he cannot arbitrarily destroy or impair. *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Brown* v. *Hitchcock*, 173 U. S. 473, 478.

The duty of the courts in a proper case, to respect an equitable title is equally clear. The State being entitled to have the lands patented, she is, so far as her right to be protected is concerned, in as favorable a situation as if patents had been, as they should be, issued. *Simmons* v. *Wagner*, 101 U. S. 260; *Stark* v. *Starr*, 6 Wall. 402.

So, universally, the right conferred by a complete entry, wanting only patent to consummate legal title, is property; the land is not subject to other entry, and it is taxable as private property. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Railway Co.* v. *Prescott*, 6 Wall. 603; *Railroad Co.* v. *Price Co.*, 133 U. S. 496; *Cornelius* v. *Kessel*, 128 U. S. 456. See also *French* v. *Fyan*, 93 U. S. 169; *Barney* v. *Dolph*, 97 U. S. 652.

Mr. F. W. Clements, Assistant Attorney, and *Mr. A. C. Campbell*, Special Assistant to the Attorney General, with whom *Mr. F. L. Campbell*, Assistant Attorney General, was on the brief, for defendants:

The case does not belong to that class wherein this court has original jurisdiction. The judicial power belonging to the United States is conferred by Article III of the Constitution, and its limits are defined by the second section.

The mere fact that the State is the complainant is not conclusive. Taylor's Jurisdiction Supreme Court, § 30; *Minnesota* v. *Hitchcock*, 185 U. S. 373, where jurisdiction was conferred by special act of Congress. See also *California* v. *Southern Pacific Co.*, 157 U. S. 229.

But if it were conceded that the United States is the real party in interest and would be directly affected by the decree, the court is without jurisdiction because the Government cannot be made a party defendant in any court without its consent, and consent has not been given in an action such as is here under consideration. *United States* v. *Lee,* 106 U. S. 196.

If it be conceded that the doctrine is limited, or that it has no application to a case like the one at bar, or that the defendants as officers of the Government are the proper parties to the action, this court, although it might have appellate, would not have original, jurisdiction. In such case the proper forum for the institution of the suit would be the Supreme Court of the District of Columbia. *United States* v. *Schurz,* 102 U. S. 378; *Union River Logging Company,* 147 U. S. 165; *Brown* v. *Hitchcock,* 173 U. S. 473. An injunction against individuals as officers of the Government is limited to a suit such as is authorized by law and where the act enjoined is purely ministerial in character. Taylor's Jurisdiction of Supreme Court, § 48; *In re Ayers,* 123 U. S. 443. The acts here sought to be restrained are not ministerial in character. *Mississippi* v. *Johnson,* 4 Wall. 475; *United States* v. *Schurz,* 102 U. S. 378.

The complainant has no interest in the subject matter of the action. The lands are subject to allotment among the Indians. Neither have the defendants any interest in the subject matter of the action as individuals. *Minnesota* v. *Hitchcock, supra.*

Persons whose interests would be affected by a decree are not made parties. If made parties the jurisdiction of the court would be defeated, if otherwise it had jurisdiction.

The allottee Indians are interested parties and will be materially affected by a decree in favor of the State; therefore they should be made parties. *Shields* v. *Barrow,* 17 How. 130; *Chadbourne's Executors* v. *Coe,* 10 U. S. App. 78. As the allottees are residents of Oregon and citizens thereof, *Matter of Heff,* 197 U. S. 488, if they are made parties the jurisdiction of the

court would for that reason, be ousted. *California* v. *Southern Pacific Company*, 157 U. S. 229; *Minnesota* v. *Northern Securities Company*, 184 U. S. 199, 245.

The legal title to the lands involved is in the United States. The State admits they are burdened with the Indian right of occupancy. It is settled law that until the Indian right of occupancy to lands has been extinguished the Indian Bureau, of which the Secretary of the Interior is the head, has jurisdiction and control over the lands so occupied. *United States* v. *Thomas*, 151 U. S. 577. Until the legal title to the land passes from the Government inquiry as to all equitable rights comes within the cognizance of the Land Department. *Brown* v. *Hitchcock*, 173 U. S. 473; *Humbird* v. *Avery*, 195 U. S. 480, 502.

The State admits in the bill of complaint that there has been no finding by the Land Department, of which the Secretary of the Interior is the head, that the lands were swamp or overflowed in character on March 12, 1860. Until such finding is made and patent issued the grant is in process of administration. *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, 591; *New Orleans* v. *Paine*, 147 U. S. 261, 266.

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

The question of jurisdiction of course precedes any inquiry into the merits. By sec. 2 of art. III of the Constitution and sec. 687, Rev. Stat., this court has original jurisdiction of a suit brought by a State against citizens of other States. *Pennsylvania* v. *Quicksilver Company*, 10 Wall. 553; *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, 287, and cases cited in the opinion; *California* v. *Southern Pacific Company*, 157 U. S. 229, 258; *Minnesota* v. *Hitchcock*, 185 U. S. 373. But the contention is that the United States is the real party in interest as defendant, that it cannot be sued without its consent, and that it has given no consent. While the nominal defendants are

citizens of a State other than Oregon, yet they have no interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real, substantial defendant. It is further said that if there is any other interest adverse to the plaintiff it belongs to the Klamath Indians, who are not made parties, and that the rule in equity is not to determine a suit without the presence of the parties really to be affected by the decree. *California* v. *Southern Pacific Company, supra.*

The question of jurisdiction in a case very similar to this was fully considered in *Minnesota* v. *Hitchcock, supra.* There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the "Red Lake Indian Reservation." This suit is brought by a State against the same officers, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

"Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

It is true in that case we sustained the jurisdiction of this court, but we did so by virtue of the act of March 2, 1901, 31 Stat. 950, which was held to be a consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians, its wards, were concerned. But neither of the two facts deemed essential to the maintenance of that suit appear in this. There is no act of Congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, and there is no act of Congress assuming full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. It is unnecessary to repeat all that was said in that opinion in reference to these matters. It is sufficient to refer to it for a full discussion of the question.

Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States. *New Orleans* v. *Paine*, 147 U. S. 261, 266; *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, 591; *United States* v. *Thomas*, 151 U. S. 577; *Brown* v. *Hitchcock*, 173 U. S. 473; *Humbird* v. *Avery*, 195 U. S. 480, 502, 503.

For these reasons the demurrer is sustained and the bill is

Dismissed.

HAZELTON *v.* SHECKELLS.[1]

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

No. 225. Argued April 12, 1906.—Decided April 23, 1906.

Every part of the consideration for a contract goes equally to the whole promise, and if any part of it is contrary to public policy the whole promise falls.

A contract to deliver property at an agreed price within the duration of a specified session of Congress, it being understood that a part of the consideration is that the person to whom the property is to be conveyed is to endeavor to sell it to the United States and to procure legislation to that end—he not being under obligation to take and pay for the property—is void as against public policy and specific performance will not be enforced.

THE facts are stated in the opinion.

Mr. Heber J. May for appellant:

The appellant is entitled to a decree of specific performance in equity. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Tyler* v. *Savage*, 143 U. S. 79, 95; *Lewis* v. *Cocks*, 23 Wall. 466, 470; *Buzard* v. *Houston*, 119 U. S. 347, 352; *Insurance Co.* v. *Bailey*, 13 Wall. 616, 621; *Drexel* v. *Berney*, 142 U. S. 241, 252; *Cathcart* v. *Robinson*, 5 Pet. 264; *Bayse's Executors* v. *Grundy*, 3 Pet. 210.

The controversy here is solely between the appellant and appellee, and no third person can be affected by its settlement in equity, and equity will look through the form of the transaction and adjust the equities of the parties. *Drexel* v. *Berney*, 122 U. S. 241, 254; *Smith* v. *Felton*, 43 N. Y. 419; *Willard* v. *Tayloe*, 8 Wall. 557; *Hodges* v. *Kowing*, 58 Connecticut, 12.

[1] Originally docketed as *Hazelton* v. *Miller*.

The attempt of the appellee to arbitrarily avoid the performance of his agreement comes clearly within the doctrine of this court laid down in *Union Pacific Ry. Co.* v. *Chicago &c. Ry. Co.*, 163 U. S. 564, 600. The exercise of jurisdiction by courts of equity prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach.

The rule laid down in the text-books upon the subject is in consonance with the decisions, and both justify a court of equity in exercising jurisdiction. Story's Equity Jur. § 746.

Compensation for damages would not be adequate relief. Snell's Equity, p. 461; Willard's Eq. p. 279.

The contract was not against public policy. The case presented is different from that in *Tool Co.* v. *Norris*, 2 Wall. 45, and that in *Marshall* v. *B. & O. R. R. Co.*, 16 How. 314. There was nothing in the nature of contingent compensation or for the performance of any services before Congress, and the case falls within the class of those held valid in *Taylor* v. *Bemiss*, 110 U. S. 42; *Stanton* v. *Embrey*, 93 U. S. 546, and *Nutt* v. *Knut*, 200 U. S. 12.

The allegations of the bill, which are admitted by the demurrer, show that neither the committees of Congress nor Congress itself, was misled by anything the appellant did in the transaction with them, nor was there any attempt on the part of appellant to mislead them. His labors, performed partially at their request, undoubtedly served to furnish reliable information in fixing the location and purchase of the site for a hall of records, and aided in the passage of statutes upon the subject which are well guarded in their provisions, and the very provisions of which repel the suggestion of fraud or misguidance in their enactment. 32 Stat. 1039, 1212, § 16. The statutes, as the result of the transaction, are beneficial to the interest of the United States and not injurious to it. There was no design to prejudice the public interest, and such design must clearly appear to warrant a court in denouncing a contract void. *Richardson* v. *Mellish*, 2 Bing. 229, 243; *Nichols* v. *Cabe*,

3 Head (Tenn.), 92, 96; *Hertz* v. *Wilder*, 10 La. Ann. 199; Greenhood on Pub. Pol., rule 129, p. 116. See also *Richardson* v. *Dubuque and Sioux City R. Co.*, 26 Iowa, 191, 202; *Kellogg* v. *Larkin*, 2 Pinney (Wis.), 123; *Swann* v. *Swann*, 21 Fed. Rep. 299.

The objection that a contract is void by reason of public policy is not entertained out of regard for the party making it, but to promote the public interest. Greenh. Pub. Pol. 126; *Kelton* v. *Milliken*, 2 Cold. (Tenn.) 410, 415; *Stillman* v. *Looney*, 3 Cold. 20, 22; *Kimbrough* v. *Lane*, 11 Bush (Ky.), 556, 564; *Summerlin* v. *Livingston*, 15 L. & Am. 519.

It must be found that the agreement here, or the allegations of the bill, make out such a case as will avoid the transaction for the sake of public policy; or to avoid injury to the public, without reference to the conduct of individuals. *Shrewsbury & Birmingham R. Co.* v. *London &c. R. Co.*, 4 Delg. M. & G. 115, 135; *Simpson* v. *Lord Howden*, 1 R. Cases, 326, App. 335.

But, even if this contract can be construed to be one for the performance of service before a legislative body or its committees for a contingent compensation, it is not against public policy and it is valid and binding upon the appellee.

In *Lyons* v. *Mitchell*, 36 N. Y. 235, it is said that it is allowable to employ counsel to appear before the legislature itself, to advocate or oppose a measure in which the individual has an interest, for an honest purpose, avowed to the body before which the appearance is made, and by the use of just argument and sound reasoning. See also *Trist* v. *Child*, 21 Wall. 441, 450; *Howland* v. *Coffin*, 47 Barb. 653, where it is said that where an agent is employed to negotiate with the Government, it would be presumed that it was the contemplation of the parties that he should use only proper methods in transacting the business.

Interested claimants, whose interests are to be affected by legislation, may, both morally and legally, for the protection and advancement of their own interests, use all means of persuasion which do not come too near bribery or corruption; but the promise of any personal advantage to a legislator would be

void. 2 Parsons Contracts 6th ed. 919; *Marshall* v. *B. & O. R. R. Co.*, 16 How. 314; *Harris* v. *Roof*, 10 Barb. 489; *Coppeck* v. *Bower*, 4 M. & W. 361; *Fuller* v. *Dame*, 18 Pick. 472; *Hatzfield* v. *Gulden*, 7 Watts, 152; *Gulick* v. *Ward*, 5 Halst. 87.

This court has uniformly held contracts with attorneys for contingent fees to prosecute claims against the Government, either in courts, before the departments, or before Congress, valid where the contracts provided for and the services rendered were only legitimate professional services, and has consistently drawn the distinction between that class of contracts and contracts that contemplate the use and exercise of personal influence or lobby services, or where such influences or services have been rendered. *Wylie* v. *Cox*, 15 How. 416; *Marshall* v. *B. &. O. R. R. Co.*, 16 How. 335; *Tool Co.* v. *Norris*, 2 Wall. 45; *Trist* v. *Child*, 21 Wall. 441; *Wright* v. *Tibbets*, 91 U. S. 252; *Stanton* v. *Embrey*, 93 U. S. 548; *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Taylor* v. *Bemiss*, 110 U. S. 42; *Ball* v. *Halsell*, 161 U. S. 80; *Spalding* v. *Mason*, 161 U. S. 375; *Nutt* v. *Knut*, 200 U. S. 12; *Kansas Pacific Ry.* v. *McCoy*, 8 Kansas, 359; *McBratney* v. *Chandler*, 22 Kansas, 482.

The agreement is not objectionable on the ground of want of mutuality. If it were, it was cured by the election of the appellant to purchase under the contract within the time specified therein, and having notified the appellee of such election and tendered him the purchase money, a contract of sale between the parties was thereby perfected, and a court of equity will decree the specific execution thereof. *Young* v. *Paul*, 10 N. J. Eq. 401, 406; *Richards* v. *Green*, 26 Connecticut, 536; *McFarson's Appeal*, 11 Pa. St. 503; *Smith and Fleck's Appeal*, 69 Pa. St. 474; *Grove* v. *Hodges*, 55 Pa. St. 504, 516, 517; Fry on Spec. Perf. §§ 297, 298, 299; Waterman on Spec. Perf., 267, 268, note 1; *Willard* v. *Tayloe*, 8 Wall. 557; *Brown* v. *Slee*, 103 Wisconsin, 828; *Watts* v. *Kellar*, 56 Fed. Rep. 1; 22 Am. & Eng. Ency. of Law 1st ed., 910–913, 925, par. 3; *Brewer* v. *Herbert*, 30 Maryland, 301; *Sedgwick* v. *Stanton*, 14 N. Y. 289; *Raymond* v. *San Gabriel Co.*, 53 Fed. Rep. 885.

The wife was not a necessary party. There is nothing in the record to show that the defendant has a wife, much less that she has refused to sign a deed. It is a simple case of repudiation. *Barbour* v. *Hickey*, 2 App. D. C. 207, has no application here. At that time the wife was compelled to separately acknowledge the deed. This has been abolished. Section 493, Code D. C. See *Young* v. *Paul*, 10 N. J. Eq. 401.

No relief is or could be sought against her. She is not a party to the contract. Fry on Spec. Perf. § 299; *Wood* v. *Griffith*, 1 Swanst. 55; 2 Story, Eq. Jur. § 779; *Clark et al.* v. *Reins*, 12 Gratt. 98; *Cady* v. *Gale*, 5 W. Va. 547, 565. It is true that the deed prepared for the defendant to sign contains the surname of his supposed wife, but it was not necessary to make and tender any such deed. *Willard* v. *Tayloe*, 8 Wall. 572.

Mr. J. J. Darlington for appellee:

The agreement sued upon, not being mutually enforcible, was not one to be specifically enforced in equity. *Marble Company* v. *Ripley*, 10 Wall. 359. No attempt is made to sustain the burden which the law casts upon an attorney, dealing with his client, to show that the contract was in all respects a fair one, and that the latter's interests were fully protected. *Gibson* v. *Jeyes*, 6 Ves. 268; *Savery* v. *King*, 5 H. L. C. 655; *Hunter* v. *Atkins*, 3 Myl. & K. 113, 135; *Dunn* v. *Record*, 63 Maine, 17; *Burnham* v. *Hezelton*, 82 Maine, 495.

The jurisdiction for specific performance extends only to cases in which "the specific thing or act contracted for, and not mere pecuniary compensation," is the remedy or redress necessary to the complainant's relief. Adams Eq. *83.

A contract, not to prosecute before Congress, acting in a *quasi* judicial capacity, a claim of right, but to seek to obtain from it, in its purely legislative capacity, and for a contingent compensation, a contract of purchase or other advantage or benefit to which the other party to the contract has no legal claim, is against public policy and void.

Of the many instances in which this court, and other courts, have sustained agreements for contingent fees for services before Congress and before the departments, the cases, without exception, involved contracts for the prosecution of claims for the collection of debts. They are, without exception, cases for the prosecution of legal causes of action, tried before courts wherever there were courts possessing the jurisdiction to try them, and before Congress and the departments, where, because of the absence of such jurisdiction in the courts, those bodies were appealed to in a *quasi* judicial capacity, not to make laws, but to pass upon the merits of money demands, and to award execution or provide for their payment to the extent that they were found just and legal. See *Ball* v. *Halsell*, 161 U. S. 80. A claim is "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." *Priggs* v. *Pennsylvania*, 16 Pet. 615, and a contingent fee contract with relation to it is legal.

Any agreement for a contingent fee, to be paid on the passage of a legislative act, would be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object. It matters not that nothing improper was done, or was expected to be done, by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the Government. *Clippenger* v. *Hepbaugh*, 5 W. & S. 315; *Marshall* v. *B. & O. R. R. Co.*, 16 How. 314; *Wood* v. *McCann*, 6 Dana (Ky.), 266.

The law meets even the suggestion of evil, and strikes down the contract from its inception. *Tool Company* v. *Norris*, 2 Wall. 45; *McMullen* v. *Hoffman*, 176 U. S. 648.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill for the specific performance of a contract dated

December 11, 1902, to sell for nine thousand dollars, at any time during the then present session of Congress, "and such additional time as may be necessary for settlement under appropriation by that Congress," part of a lot in a square which Congress now has voted to acquire for the erection of a hall of records. The bill was brought against one Miller. Recently Miller's death was suggested and his heirs and devisees were substituted, but for convenience Miller will be referred to as the defendant.

The contract provided that if Hazelton should "fail to take advantage of and accept this offer as above within the time mentioned, then this agreement shall be null and void." The bill alleges that a part of the consideration for the contract "was services rendered both before and after the making of said contract, by the plaintiff in bringing the property to the attention of the committees of Congress as a suitable and appropriate site for a hall of records." It sets forth that the plaintiff, before and after the same date, expended much time, labor and money in rendering those services, and what they were, viz., collecting and printing facts for the information of the committees and members of Congress, making briefs and arguments, and drawing a bill for the purchase or condemnation of the square. The bill passed at the session named in the contract. After its passage the plaintiff negotiated, and finally, in August, 1903, concluded a sale of the property in question for $14,395.50, subject to examination of the title and arrangements for payment. It is alleged that the time for settlement under the appropriation has not expired. The bill further alleges that the defendant has notified the plaintiff that he does not intend to keep his contract, but means to convey directly to the United States, and to demand the full price agreed upon by the Government. The defendant has tendered a deed to the United States, which has not been accepted. The plaintiff has offered to the defendant a deed to be executed by the latter and his wife, and tendered $9,000, but the defendant has refused to execute the same. There was a general

demurrer to the bill, and this was sustained by the Supreme Court of the District and the Court of Appeals, and the bill was dismissed. The plaintiff appealed to this court.

We assume that the bill sufficiently shows an acceptance of the defendant's offer within the time, although it does not allege it in terms. We assume also that the consideration is alleged sufficiently, subject to the question whether it is one upon which a contract lawfully may be based. But the court is of opinion that that question must be answered in the negative. Every part of the consideration goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise falls. *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. 235, 250; *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. D. 549; *Woodruff* v. *Hinman*, 11 Vermont, 592; *Clark* v. *Ricker*, 14 N. H. 44; *McMullen* v. *Hoffman*, 174 U. S. 639; *Bishop* v. *Palmer*, 146 Massachusetts, 469, 474. According to the bill, and no doubt according to the fact, a part of the consideration was services, as we have quoted, and therefore it is not true, as argued, that the plaintiff could have demanded a conveyance on tendering the nine thousand dollars alone. But the services contemplated as a partial consideration of the promise to convey were services in procuring legislation upon a matter of public interest, in respect of which neither of the parties had any claim against the United States. An agreement upon such a consideration was held bad in *Tool Co.* v. *Norris*, 2 Wall. 45. Of course we are not speaking of the prosecution of a lawful claim.

It will be noticed further that the conveyance was in substance a contingent fee. The plaintiff was not bound to accept it and naturally would not do so unless he could agree as he did with the Government for a larger price. The real inducement offered to him was that he would receive all that he could persuade the Government to pay above the sum named. It is true that if we take the inartificial statements of the bill literally the part of the consideration which we are discussing was the services, not a promise to render them. The promise to

convey did not become binding until the services were rendered, and, when rendered, according to the allegations of the bill they were legitimate. We assume that they were legitimate, but the validity of the contract depends on the nature of the original offer, and whatever their form the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding it was cut down to what was done and was harmless. The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear. In its inception the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. *Marshall* v. *B. & O. R. R.*, 16 How. 314, 335, 336.

The general principle was laid down broadly in *Tool Co.* v. *Norris*, 2 Wall. 45, 54, that an agreement for compensation to procure a contract from the Government to furnish its supplies could not be enforced irrespective of the question whether improper means were contemplated or used for procuring it. *McMullen* v. *Hoffman*, 174 U. S. 639, 648. And it was said that there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. 2 Wall. 55. In *Marshall* v. *Baltimore & Ohio R. R.*, 16 How. 314, 336, it was said that all contracts for a contingent compensation for obtaining legislation were void, citing, among other cases, *Clippinger* v. *Hepbaugh*, 5 W. & S. 315, and *Wood* v. *McCann*, 6 Dana (Ky.), 366. See also *Mills* v. *Mills*, 40 N. Y. 543. There are other objections which would have to be answered before the bill could be sustained, but that which we have stated goes to the root of the contract and is enough to dispose of the case under the decisions heretofore made.

Decree affirmed.

PEREZ *v.* FERNANDEZ.

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

No. 1. Argued April 29, 1904.—Decided April 23, 1906.

The policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, has been to secure to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law, and it was the intention of Congress in sec. 34 of the Foraker act of April 12, 1900, to require the United States District Court for Porto Rico, in exercising the jurisdiction of a Circuit Court in analogy to the powers of those courts in the United States, to adapt itself, in cases other than of equity and admiralty, to the local procedure and practice of Porto Rico. And so held in regard to administering the remedy of attachment.

The Porto Rican system in force when the Foraker act was passed, and binding until changed or amended, provided a statutory method for recovery of damages by reason of an attachment wrongfully issued and vacated, by the assessment thereof and judgment therefor in the attachment suit itself, which method was exclusive and precluded the recovery of such damages by separate suit at common law; and the District Court of Porto Rico has no jurisdiction of such an action. In such a case it could proceed in accordance with the local law, as nothing in the general law of the United States or provisions as to jury trials in civil causes in Circuit Courts of the United States is inconsistent with the enforcement by the District Court of the United States of Porto Rico of special statutory proceedings in assessing damages in attachment proceedings.

Where the jurisdiction of the court from which the record comes fails, the objection can be raised in this court, if not by the parties, then by the court itself.

An action at law was begun November 18, 1901, in the United States District Court for the District of Porto Rico by the defendant in error, José Perez y Fernandez, against José Antonio Fernandez y Perez, to recover in an action for "tresspass upon the case for wrongful attachment." The declaration contained the usual averments of a declaration in a common law action and averred that the attachment had been issued maliciously

and without probable cause, and levied upon a certain two-story house then belonging to the defendant in error, in Mayaguez, Porto Rico. One Rafael Diaz Aguerria was made co-defendant, and it was averred that the attachment was issued in a suit brought by Fernandez as attorney in fact and agent of Aguerria, who authorized and ratified the acts complained of. It appeared that the defendant in error Perez had owed about 6,000 pesos to one Claudio Barro, who died, leaving a will in which Rafael Diaz Aguerria was named as executor. The will was probated in Spain, and Aguerria qualified there as executor of the estate. Perez, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for 20,000 pesos. The suit in which the attachment was issued was begun January 2, 1900, by the filing of a declaration to recover on certain notes, and was brought in the name of Aguerria as executor of the last will and testament of Claudio Barro. The action was begun in the military court established by the authority of the United States after the cession of Porto Rico, called the United States Provisional Court for the Department of Porto Rico, which court was succeeded by the United States District Court. On the date of the beginning of the suit an affidavit for attachment was filed, which was sworn to by Fernandez, plaintiff in error, purporting to have the power of attorney of Rafael Diaz Aguerria, executor of the last will and testament of Claudio Barro, the ground alleged being that the affiant had reason to believe that the defendant intended to and would fraudulently part with or conceal his property before judgment could be recovered against him, so that the judgment could not be satisfied out of the property. The summons was issued, and a writ of attachment was levied upon the premises of the defendant in error, and notice posted thereon. Further proceedings were arrested by an injunction proceeding in the United States court, brought by Jacinto Perez Barro, heir of Claudio Barro, deceased, upon the ground that Aguerria, plaintiff in the attachment proceeding, suing as executor of the will probated in Spain, had not taken out ancillary letters in

Porto Rico. The action for malicious attachment was joint in form and the summons was returned as to Aguerria that the marshal was unable to find him within his district. The declaration averred that he was a resident of Porto Rico, but he was never served with summons in this case. Fernandez demurred to the declaration, averring that it appeared on its face that he was acting as the duly authorized agent of Aguerria, and was neither principal nor party plaintiff to the action against Perez, the defendant in error. This demurrer was overruled, and no exception taken to such action by Fernandez. Afterwards the general issue was filed, the case was tried to a jury without objection and upon a charge of the court, substantially leaving to the jury the question whether Fernandez had caused the attachment to issue and be levied maliciously and without probable cause, to the injury of the standing and credit of the defendant in error as a merchant. A verdict was returned in favor of the defendant in error for the sum of $7,000, upon which a motion for a new trial was overruled and judgment entered.

Mr. James S. Harlan, with whom *Mr. John Maynard Harlan* was on the brief, for plaintiff in error:

The lower court in the consideration of the case assumed jurisdiction on the theory that the pleadings presented a right at common law which it could properly proceed to try according to the common law. No such right existed under the local law apart from and independently of the original attachment proceeding, and the right to enforce such a demand existed only as an incident to and as a part of the original action in attachment, that remedy being exclusive of all other remedies.

It follows that the lower court assumed jurisdiction in this case of a cause of action that was not authorized by the local system of laws and that could not have been enforced in the local courts. It therefore had no legal existence, and could not be enforced in the United States District Court for the District of Porto Rico, for the jurisdiction of that court is concur-

rent with that of the local courts. Aside from its special jurisdiction in equity and admiralty, and in controversies involving Federal questions, it could not take cognizance of any right or claim that was not cognizable under the local law in the local courts or enforce any remedy not enforceable by the local courts.

If, therefore, the lack of jurisdiction was complete, it is clear that this court may now consider the question of jurisdiction and should reverse the judgment of the court below upon the ground that that court assumed jurisdiction where none existed and granted a remedy without legal warrant. *Campbell* v. *Porter,* 162 U. S. 478; *Nigh* v. *Dovel,* 84 Ill. App. 228; *Thompson* v. *Railroad Companies,* 6 Wall. 134; *Allen* v. *Pullman Co.,* 139 U. S. 658; *Parker* v. *Ormsby,* 141 U. S. 81; *Mansfield &c. Ry.* v. *Swan,* 111 U. S. 379; *United States* v. *Huckabee,* 16 Wall. 414; *Fiester* v. *Shepard,* 92 N. Y. 251; *Fowler* v. *Eddy,* 110 Pa. St. 117; *Fairfax Mfg. Co.* v. *Chambers,* 75 Maryland, 604; *Forsyth* v. *Hammond,* 142 Indiana, 505. Independent civil actions based on torts are practically unknown in the civil law. The criminal laws usually provide money compensation for the injured party as well as punishment for the guilty one. Sanchez, Roman Civil Law of Spain, vol. 4, p. 1017; Falcon, Civil Code, p. 429; Penal Code Porto Rico, arts. 16, 613, 627. See article by Judge Lobinger, Review of Reviews, September, 1905.

The damages awarded in this action of trespass on the case could have been assessed in the original attachment proceeding.

The Spanish law in relation to provisional seizures or attachments is found in title XIV of the Code of Civil Procedure.

But, unlike attachment proceedings as commonly established by legislation in the United States, the Spanish law, in force in Porto Rico at the time involved in this record, provides, in case the attachment is vacated for any cause, for an adjudication, in the action itself, of the claim of the defendant for damages arising out of the wrongful attachment. Title XIV of

the Code of Civil Procedure contains complete provisions for such an adjudication. Articles 1409–1415. Before this judgment could be executed it would be necessary to resort to the procedure established in articles 927 *et seq.*, under which by proper statements or pleadings and counter pleadings an issue is arrived at and set for hearing, witnesses are called, evidence introduced, and the court after due consideration of the record finds whether any damage has been suffered and, if so, to what amount. This finding becomes a part of the final judgment in the attachment suit.

The procedure bears a strong analogy to a suit in equity with a reference to a master to determine and liquidate the amount to be paid. This having been determined, a final decree is then entered embracing the amount so arrived at.

Such a preliminary finding on the law and the facts by a court in chancery is not, generally speaking, a final order and cannot be appealed from; it only becomes final when the master or the court has taken the necessary testimony to ascertain the amount due and has embodied it in the final decree. So there are repeated decisions by the Supreme Court at Madrid in which it is held that the preliminary order vacating the attachment and ordering the plaintiff to pay the costs and to indemnify the defendant for his losses and damages, is not final, and cannot be appealed from until the amount of the losses and damages has been ascertained in accordance with the procedure established in articles 927 *et seq.* of the Code of Civil Procedure. Decision of December 4, 1901, 92 Jurisp. Civil, 550; Decision of October 20, 1899, 88 Jurisp. Civil, 130; Decision of December 3, 1892, 72 Jurisp. Civil, 494; Decision of November 6, 1888, 64 Jurisp. Civil, 538; Decision of April 24, 1863, 8 Jurisp. Civil, 267.

The mode provided in title XIV for ascertaining losses and damages in the attachment proceeding itself was exclusive under the law then in force of every other mode. Navarro, Comentarios á la Ley de Enjuiciamiento Civil, pp. 411, 412. No

decision and no authority under the civil law of Spain can be found authorizing an independent proceeding.

The question of the constitutional right of trial by jury is not involved. The Federal court has no jurisdiction to grant an attachment except in accordance with local law. Waples on Attachment, p. 325; *Bates* v. *Days*, 17 Fed. Rep. 167.

The United States District Court for the District of Porto Rico, so far as the local laws are concerned, occupies exactly the position of a Circuit Court of the United States sitting in a State. It is therefore just as much bound as is a Circuit Court of the United States to the observance, with respect to the local laws of the island, of section 721 of the Revised Statutes; and to the observance of section 914, which requires Federal courts to conform "as near as may be" to the practice, pleadings, forms, of the courts of record of the State in which they sit. *Nudd* v. *Burrows*, 91 U. S. 426, where the reasons for the provision are set forth. See also *Indianapolis &c. R. R. Co.* v. *Horst*, 93 U. S. 291; *Lewis* v. *Gould*, 13 Blatch. 216; *Sears* v. *Eastburn*, 10 How. 187; *B. & O. R. R. Co.* v. *Hamilton*, 16 Fed. Rep. 181.

Even the tribal laws and customs of our American Indians have been accorded the dignity of being respected by the Federal courts. *Mackey* v. *Coxe*, 18 How. 100; *Davison* v. *Gibson*, 56 Fed. Rep. 443.

The record shows a fundamental error has been committed. The proposition is that the court had no such jurisdiction as it exercised, that it could grant no such remedy and that the whole proceeding was erroneous from its inception to its conclusion and this court may examine the laws of Porto Rico and determine whether the trial court had jurisdiction. *Harvey* v. *Commonwealth*, 20 Fed. Rep. 411.

Mr. Frederic D. McKenney, with whom *Mr. Francis H. Dexter*, *Mr. Wayne MacVeagh* and *Mr. John Spalding Flannery* were on the brief, for defendant in error:

No objection to the jurisdiction of the trial court nor any

objection whatever to the charge of the court to the jury was interposed by either party. Unless want of jurisdiction in the trial court by reason of the subject matter of the controversy appears from the face of the record, the judgment under review must be sustained. *Hunt* v. *Hunt*, 72 N. Y. 225.

The question thus presented is one of power in the trial court to act judicially upon the subject matter in suit, and it may be conceded that this court can properly consider and determine the contention of plaintiff in error that a civil action like the present one was at the date of the attachment and the commencement of this action unknown to and unauthorized by the laws and jurisprudence of Porto Rico. *United States* v. *Perot*, 98 U. S. 428; *United States* v. *Chaves*, 159 U. S. 459.

Civil actions for the recovery of damages for injuries to persons and property caused by the fault or negligence of another have been recognized both by the Roman and by the civil law from early times. Such actions have been administered in the peninsula since the establishment of the Spanish monarchy, and have always occupied an important place in the jurisprudence of that nation. Such actions were countenanced in the Law of the Twelve Tables and in the Justinian Codes, upon which the Spanish system of laws was largely founded.

The body of laws called "Las Siete Partidas" were in force in Porto Rico until 1889, when by royal decree the Civil Code since in force was extended to that province. The Code of Civil Procedure, likewise so extended, became effective in said province Jaunary 1, 1886.

Law I of Las Siete Partidas (tit. XV, part 7) declares that damage is the loss of or detriment to one's property or person caused by the fault of another. Law III declares that damages may be recovered from the tort feasor or from the one whose fault caused the damage; also from the person who ordered or advised the commission thereof.

The Civil Code, which supersedes the Partidas, though preserving the general features of the former legislation, gives much evidence of having been influenced both in its form and

principles by the Code Napoleon. For example, article 1902 of the Civil Code, which directly pertains to this discussion, reads: "He who, by an act or omission, causes damage to another, fault (*culpa*) or negligence intervening, shall be obliged to repair the damage so done," while the corresponding articles of the Code Napoleon read as follows: "Art. 1382. Every act whatever of man which causes damage to another obligates him by whose fault it has happened to make reparation.

"Art. 1383. Every person is responsible for the damage which he causes not only by his act, but also by his negligence or by his imprudence."

Similar provisions are also to be found in the Civil Codes of Belgium, articles 1382 and 1383; Netherlands, articles 1401 and 1402; Austria, article 1295; Switzerland, canton of Vand, articles 1037 and 1038; Chile, article 2314; Guatemala, articles 2276 and 2277; Uruguay, article 1280; Argentina, article 1109.

Wherever the civil law system prevails practically identical provisions will be found, for all civil law codes find a common origin in the Law of the Twelve Tables and the Justinian Codes.

Upon the articles above mentioned many commentators have shed light both as to their scope and meaning. See Don Leon Bonel y Sanchez, Codigo Civil Español, vol. IV, p. 894 *et seq.* Toullier, Le Droit Civil Français, vol. 6, p. 94.

The administration of the civil law in Spain and her dependencies in regard to actions for torts, did not at the time of the institution of this suit greatly differ from that administered in other civil law countries, and apart from methods of procedure did not greatly differ from that in vogue in common law countries.

In the administration of civil law generally there is a well-recognized distinction between the word "délit" (a wrong) when used in connection with civil and as used in criminal complaints. Aubry and Rau, under the title "Des Délits," Cours de Droit Civil Français, vol. 4, § § 443, 445. See also Laurent, Cours Elémentaire de Droit Civil, vol. 3, p. 207. See

also Decision of March 23, 1882, vol. 48, Jurisp. Civil, p. 394; Decision of June 14, 1886, vol. 60, Jurisp. Civil, p. 120; Deccionario &c., Alcubella, vol. 1, p. 122.

Admitting that the Spanish law in force in Porto Rico at the time of the levying of the attachment made ample provision in cases of wrongful attachment for the assessment of damages in the attachment proceedings itself, articles 1409–1415 of the Code of Civil Procedure, and that in case of dispute as to the fact of damages or the amount thereof, specifically provided for the method of their ascertainment by articles 927 *et seq.* of the same Code, it is submitted that these articles of the Code of Civil Procedure have no bearing upon the present case for two reasons: 1. Because the plaintiff in error, Fernandez, was not a party plaintiff in the attachment proceeding. 2. Because the United States Provisional Court for Porto Rico, in which the attachment proceedings were had, was without judicial power or authority to adjudicate in conformity with the provisions of the Spanish Code of Civil Procedure, damages against Fernandez.

The United States Provisional Court for Porto Rico was established by General Orders, No. 88. By article II the judiciary power of said Provisional Court was extended "to all cases which would be properly cognizable by the Circuit or District Courts of the United States under the Constitution, and to all common law offenses within the restrictions hereinafter specified." Article IV thereof is as follows: "The decisions of said court shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules and records shall conform as nearly as practicable to those reserved and kept in said Federal courts."

Article V declares that "the jury may be introduced or dispensed with in any particular case, in the discretion of the court;" and article VI declares that "the judges of the Provisional Court shall be clothed with the powers vested in the judges of the Circuit or District Courts of the United States." Both Aguerria and Fernandez were subjects of Spain—the for-

mer a citizen of Spain, the latter seemingly a resident of Porto Rico. Whatever might have been the regular procedure, so far as the recovery of damages is concerned, had Fernandez, acting for his principal, Aguerria, resorted to the proper insular court in connection with the attachment proceedings against Perez, and however Perez might then have been bound by the forms and methods of procedure provided by the articles of the Code above quoted governing the assessment of costs and damages, it is certain that the methods of procedure so provided neither helped nor hindered the parties to the action in the Provisional Court, for in the very authority which established that court it was expressly declared that "its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in said Federal courts."

It is certain that there is no procedure known to the Circuit and District Courts of the United States by which Federal judges sitting therein are required or authorized to determine and assess damages alleged to have been suffered by reason of the wrongful suing out of an attachment, for an attachment proceeding is not a case of equity nor of admiralty nor maritime jurisdiction, and section 648 of the Revised Statutes of the United States, which but restates a provision of the Judiciary Act of 1789, provides that the trial of issues of fact in the Circuit Courts shall be by jury except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and except the parties or their attorneys of record waive a jury. Section 649.

By the act of April 12, 1900, the Provisional Court above referred to was abolished, and the District Court of the United States for the District of Porto Rico was declared to be its successor and authorized to take jurisdiction of all cases and proceedings pending therein. Section VIII of said act provides that the laws and ordinances of Porto Rico in force shall continue except as "altered or modified by military orders and decrees in force when this act shall take effect and so far as

the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable."

The local law and practice cannot be recognized as a rule of procedure in the courts of the United States where its adoption would be repugnant to the Federal Constitution or impair the effect of any Federal legislation. *Virginia Coupon Cases,* 114 U. S. 303; *Luxton* v. *North River Bridge Co.,* 147 U. S. 338.

Whenever Congress has legislated upon any matter of practice, and prescribed a rule for the government of its own courts, it is to that extent exclusive of the state legislation on the same subject. *Southern Pac. Co.* v. *Denton,* 146 U. S. 209. See also *Shepard* v. *Adams,* 168 U. S. 625.

If it be true that the Porto Rican procedure required a defendant in attachment proceedings to demand the liquidation of his damages by the trial judge in that action on pain of losing all right to indemnification, it is nevertheless true that section 914, Revised Statutes of the United States, does not require any such procedure to be followed in the Federal court for Porto Rico, for to do so would be to deny the right of trial by jury except in certain cases.

The Law of Civil Procedure as adopted for Porto Rico in 1885, §§ 939, 940, corresponds with the Law of Civil Procedure of Spain and with §§ 1409 and 1413 in force in Porto Rico at the time of the attachment. Construing these laws Navarro in his Commentaries states that the person concerned shall "institute the ordinary suit" (p. 253). See also Decisions of November 26, 1857 and April 7, 1868; Derecho Procesal de España, Pozo, vol. 2, p. 188; Decision of July 6, 1885, 58 Jurisp. Civil, p. 265; Decision of July 21, 1893, 73 Jurisp. Civil, p. 954.

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

This case was argued orally and upon briefs at the October term, 1903, of this court. After the case had been argued

and submitted, on December 5, 1904, an order was entered as follows:

"No. 6. *José Antonio Fernandez y Perez, Plaintiff in Error,* v. *José Perez y Fernandez.* Counsel are requested to submit additional briefs on these points:

"1. Can this court, on the record of this case, properly consider and determine the contention of the plaintiff in error that a civil action like the present one was, at the date of the attachment and the commencement of this action, unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

"2. Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

"3. Under the law of civil procedure as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages? "

Our views in this case will be practically in answer to these questions.

The case affords a striking illustration of the difficulty of undertaking to establish a common law court and system of jurisprudence in a country hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence. The action in this case was begun and tried upon pleadings and under principles which are controlling in a State following the common law, having its origin in England, and the case was submitted to the jury upon general principles governing such actions for the recovery of damages for the seizure of property upon writs of attachment issued maliciously and without probable cause. The action proceeded in all respects in form and substance as it would had it been begun and prosecuted in a common law State.

Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the

enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. *Kepner* v. *United States*, 195 U. S. 100, 122. This policy has been followed in dealing with the Porto Ricans. President's Message, December 5, 1899; Walton's Civil Law in Spain and Spanish America, 594. The new civil government was established by the act of April 12, 1900, commonly known as the Foraker Act. 31 Stat. 77. Section 8 of that act provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. . . ."

The first inquiry then to which we shall direct attention concerns the law in force at the time of the passage of this act in Porto Rico, governing the issuing of attachments and the recovery of damages for wrongfully causing the same to issue and be levied. The additional briefs filed by counsel upon both sides in this case since the order of the court of December 5, 1904, above quoted, exhibit commendable zeal and industry in investigating this question and bringing to the attention of the court the Spanish treatises and cases throwing light upon the subject. Upon behalf of the defendant in error it is insisted that the action is governed by article 1902 of the Civil Code of Porto Rico, which provides: "Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

War Department Translation of the Civil Code in force in Cuba, Porto Rico and the Philippines, 244. Much discussion is had in the briefs as to the meaning of this section, and whether the term "fault"—"culpa" in the Spanish jurisprudence—is broad enough to include actions brought to recover for conduct which is alleged as malicious, as distinguished from those where the basis of the recovery is a careless act or omission which does not have for its motive the intention to cause damage.

In the view we take of this case we do not find it necessary to consider the authorities cited, or the views pressed pro and con as to whether a malicious act, such as is complained of in this case, is within the terms of this article of the Code. The references to sections of the Code of Procedure show a comprehensive system specially provided for the issuing of attachments and the recovery of damages where the same were wrongfully procured to be allowed. The subject of attachment of property is treated in title XIV, Law of Civil Procedure, War Department translation, article 1395 *et seq.* Unlike ordinary American procedure, an attachment is issued by order of the judge and certain grounds are recognized. They are summarized as follows: "If the debtor be a foreigner; or if, being a citizen, he has no known domicil, or does not own real estate, or does not have any place of business at which the payment of the debt may be demanded. It may also be ordered, without any such attendant condition, if he has disappeared from his home or place of business, leaving no one in charge, or if he conceals himself, or if there be reasonable grounds for believing that he will conceal or undersell his property to the prejudice of creditors." Art. 1398. If it shall turn out that the attachment was wrongfully procured, ample provisions are made for the adjudication and recovery of damages in the action. See articles 1409–1415, which are set forth in the margin.[1]

[1] ART. 1409. A person who has requested and obtained a provisional seizure for an amount of more than 1,000 pesetas must request the ratification thereof in an executory action or in the declaratory action which may be

The theory of these sections of the Code is that when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out in the statute to ascertain the loss and damages

---

proper, filing the corresponding complaint within twenty days after the levying of the attachment. Upon the expiration of this period without the action having been instituted or a ratification of the seizure having been requested, the latter shall be null *de jure*, and shall be without effect at the instance of the defendant without the plaintiff being heard. A petition for a rehearing may be made against this ruling, and if it should not be granted, an appeal for a stay and review of the proceedings may be interposed.

ART. 1410. Notwithstanding the provisions of the foregoing article, if the debtor should be included in any of the cases of article 1398, the provisional seizure may also be ordered after the institution of the action, a separate record being made thereof. The provisions contained in articles 1399 to 1410, inclusive, shall be applicable to this case, and after the attachment has been levied the proceedings thereupon shall be continued as prescribed for incidental issues. When an attachment is vacated by a final ruling, because it is not included in any of the cases of said article 1398, the plaintiff shall be taxed all the costs and be adjudged to indemnify the defendant for any losses or damages he may have suffered, which shall be recovered in the manner prescribed in article 1415.

ART. 1411. When the provisional seizure becomes of no effect by reason of its having become null *de jure*, in accordance with Article 1409, the surety shall be ordered cancelled in the same ruling, if any should have been furnished, or what may be proper shall be ordered for vacating the attachment and cancelling the cautionary notice, in a proper case, and all costs shall be taxed against the plaintiff, who shall also be adjudged to indemnify the defendants for any losses and damages he may have incurred. If the attachment should be vacated for any other reason, the ruling thereupon shall also determine what may be proper according to the cases with regard to costs and the indemnification of losses and damages which may have been suffered.

ART. 1412. If the acknowledgment of a signature or of the written evidence of a debt should not be made or be delayed through the fault of the debtor, and if the filing of the complaint and the ratification of the attachment should depend thereupon, the time lost in obtaining said acknowledgment shall not be included in the period of time prescribed in article 1409.

ART. 1413. If the owner of the property seized should request it, the attachment creditor must file his complaint within the period of ten days, unless any of the circumstances mentioned in the foregoing article is attendant. Should he not do so, the attachment shall be vacated, and the costs, losses, and damages shall be taxed against him.

ART. 1414. After the provisional seizure has been levied the debtor may

which the defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indemnify the defendant for such losses and damages. And these losses and this recovery are adjudicated in the manner pointed out in articles 927 *et seq.* of the Code of Civil Procedure. These articles are found in title VIII of that Code, entitled "Execution of Judgments." The defendant in the attachment having been declared entitled to recover damages, proceedings follow for the purpose of ascertaining the amount thereof. Section 927 *et seq.* provide for the manner of making up an issue, taking testimony and hearing witnesses, and, upon final order or decree made by the court, an appeal can be prosecuted. This full and comprehensive statutory method of ascertaining and adjudging the damages to be recovered in cases where attachments are wrongfully issued and vacated for any cause, would seem to preclude the application of general provisions of the Code giving a right of recovery for acts of fault or negligence.

We are not cited to any decision of the Supreme Court of Spain expressly adjudicating this matter, but are referred by counsel on both sides to a treatise on the law of civil procedure, "Commentarios á la Ley de Enjuiciamiento Civil," p. 412, by Señor José Maria Manresa y Navarro, said to be a text-writer of the highest authority in Spain. The English translation of his text is given as follows: "We do not think that this rule [relating to independent actions for damages under the mortgage law] is applicable to attachments, because on the motion to vacate an attachment no discussion or proof of the

---

object thereto and request that it be vacated, with indemnification of losses and damages, if not included in any of the cases of article 1398. He may make this petition within the five days following that of the notice of the ruling ratifying the seizure, or before that time, if he should deem it proper, and it shall be heard and determined in a separate record in accordance with the procedure prescribed for incidental issues.

ART. 1415. In cases in which there is an adjudication of losses and damages, as soon as the ruling thereupon becomes final, they shall be recovered according to the procedure established in Articles 927 *et seq.*

existence of losses and damages is allowed, and because the law itself provides, in addition to this, that, when by final order of the court, an attachment is vacated, the plaintiff be adjudged to pay the defendant his losses and damages, they being ascertained in the manner provided in article 1417,[1] that is, according to the procedure in article 928 *et seq.* Such a proceeding permits of a discussion, if the issue is made, not only of the amount but of the existence of losses and damages. It follows that the court can decide on both questions without the necessity of a new suit, which is precisely what the law has sought to avoid." This seems to be a direct authority for the proposition that this plan of recovery of damages for wrongful attachments is exclusive. In the absence of authority to the contrary, and in view of the plain provisions of the Code, we accept it as properly declaring the existing law upon the subject. We reach the conclusion that the Porto Rican system in force at the time of the passage of the Foraker Act, and binding until changed or amended, provided in the state of affairs shown by this record, a recovery for damages in the method pointed out in the attachment suit, by the special statutory method provided for, and not otherwise.

The difference between the liability of one wrongfully levying an attachment at common law and the assessments of costs and damages under these provisions of the Porto Rican Code is not one of form merely. The former action is substantially one for malicious prosecution, and can be maintained only upon proof of malice and want of probable cause. Under the Code remedies given in Porto Rico the court is required to assess damages, although malice or want of probable cause in suing out the attachment may not be expressly shown. The remedy given seems to cover all cases, where the attachment is vacated, irrespective of the motive in suing it out.

This brings us to briefly inquire as to the nature and extent of the jurisdiction and practice of the United States courts in Porto Rico. Section 34 of the Foraker Act established a

[1] Art. 1415, Porto Rican Code.

United States District Court for Porto Rico and gave to it, in addition to the ordinary jurisdiction of a District Court of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and provides that it shall proceed therein in the same manner as a Circuit Court, the intention of Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both District and Circuit Courts of the United States in the States. Section 914 of the Revised Statutes of the United States provides: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." The act of August 13, 1888, 25 Stat. 433, provides that the Circuit Courts of the United States shall have original jurisdiction concurrent with the courts of the several States in suits at common law and in equity. We think it was the intention of Congress in the Porto Rican act to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the States, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law.

In the Revised Statutes of the United States, section 915, it is provided as to attachments: "In common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof;

and such Circuit or District Courts may from time to time, by general rules, adopt such state laws as may be in force in the States where they are held in relation to attachments and other process: *Provided,* That similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy." By analogy it would seem that the District Court of Porto Rico, exercising the jurisdiction of a Circuit Court in its practice as to the issuing of attachments, is to adapt itself to the local practice recognized and established in Porto Rico. Circuit Courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the State in which the courts are held. *Bates et al.* v. *Days,* 17 Fed. Rep. 167.

It is further objected on the part of the defendant in error that Porto Rican procedure can have no application to this action against Fernandez, because he was not a party plaintiff to the attachment suit, and the statute provides that the costs of the attachment and damages shall be assessed against the plaintiff in the action. We do not perceive that this fact affects the determination of the question as to the proper remedy in such cases. There is nothing in this action to show that Fernandez was not authorized to bring the suit and take out the attachment in behalf of the plaintiff in that suit, in which event Aguerria would be liable for the acts of his agent in that behalf. Nor is there any reason why Fernandez might not be made a party to the attachment proceeding if damages were to be assessed against him alone.

It is further objected that the United States court has no method by which it can assess these damages in the manner required in the Porto Rican Code. In giving the remedies provided therein and assessing the damages we see no reason why that court cannot adapt itself to the requirements of the local code and administer the remedies therein provided. In *Traction Company* v. *Mining Company,* 196 U. S. 239, it was held

that the Federal court might follow the methods required by the Kentucky statute in administering the local law for the condemnation of property, so far as required to meet the needs of justice. In that case the local law required the appointment of appraisers by the court to assess compensation for the property taken. Speaking of the judicial power of a Circuit Court of the United States administered in such courts it was held: "In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the state courts must take care, not to infringe any right secured by the Constitution and the laws of the United States." In view of the provisions of the Foraker Act, continuing local laws in force, this reasoning has application to the powers of the United States court in that territory. There can be no difficulty in exercising the attachment remedies provided in the Porto Rican Code, if the attachment shall turn out to have been wrongfully issued, and making an assessment of damages in the manner provided in that Code. The procedure is simple and easily administered. Nor is there anything in that special procedure encroaching upon the right to a jury trial, secured by the Federal Constitution, in suits at common law where the value in controversy exceeds twenty dollars. If it be assumed—a point which it is not necessary to decide—that that part of the Constitution is applicable and in force in Porto Rico, the proceeding is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized.

Nor would the general provisions of the Revised Statutes, § 648, providing for a jury trial as to issues of fact in Circuit Courts, except in cases of admiralty and equity jurisdiction, prevent the enforcement of the express provisions of the Porto Rican Code as to assessment for damages for wrongful attachment.

Section 8 of the Foraker Act, as we have seen, continues in force the laws and ordinances of Porto Rico, except as modified by military orders and decrees in force, so far as the same are not inconsistent or in conflict with the statutory laws of the United States, which by section 14 of the act, when not locally inapplicable, with certain exceptions, are declared to be in force and effect in Porto Rico as in the United States. The general provisions as to jury trials in civil causes in Circuit Courts of the United States are not inconsistent with the enforcement of a special statutory proceeding as to the assessment of damages in attachment proceedings, as to which the United States has no special statutory procedure, and enforces in that respect the requirements of the local law.

If we are right in holding that the Porto Rican law and practice as to attachments and the recovery of damages in respect thereto are controlling in a Federal court in that territory, and a common law action for a wrongful and malicious attachment was unknown to the Porto Rican procedure, the court had no jurisdiction of the action. The record shows that practically no exception was taken in the record and proceedings in the trial court, but it is familiar law that this court will of its own motion inquire into the jurisdiction which it has and as well that of the court below, without any special exception being taken. If, as illustrated in the brief for counsel for the plaintiff in error, a Circuit Court of the United States should undertake to entertain a bankruptcy proceeding or an admiralty cause, its proceedings would be void for want of jurisdiction. So, in the present case, there being no such common law action enforceable under the Porto Rican procedure, a court of that district would have no jurisdiction to entertain the suit. Where the jurisdiction fails the objection can be raised in this court; if not by the parties, then by the court itself. *Parker* v. *Ormsby* 141 U. S. 81; *Mansfield &c. Railway Co.* v. *Swan,* 111 U. S. 379; *Thompson* v. *Railway Companies,* 6 Wall. 134.

We, therefore, reach the conclusion that the United States

District Court had no jurisdiction of this action, and consequently the proceedings had therein were null and void.

Judgment reversed.

MR. JUSTICE WHITE dissenting.

As it is conceded that the question upon which the judgment is now reversed was not saved in the court below, I am constrained to dissent. In my opinion the error, if any, was a mere question of mode of procedure, involving no want of jurisdiction *ratione materiæ*, even conceding that the presence of a question of such a character would authorize this court to reverse—in the absence of any exception in the court below—or any reference to the question in that court.

MR. JUSTICE MCKENNA concurs in this dissent.

UNITED STATES *v.* CHEROKEE NATION.

EASTERN CHEROKEES *v.* CHEROKEE NATION AND UNITED STATES.

CHEROKEE NATION *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 346, 347, 348. Argued January 16, 17, 18, 1906.—Decided April 30, 1906.

Under sec. 68 of the Cherokee Act of July 1, 1902, 32 Stat. 726, as construed by the act of March 3, 1903, 32 Stat. 996, and the agreement of December 19, 1891, providing for the sale of the Cherokee outlet, the Court of Claims had jurisdiction of all claims of the Cherokee Indians against the United States, and the claims were to be reopened and reëxamined *de novo*, and the court and the accountants were to go behind statutory and treaty bars and receipts in full, and were to consider any alleged and declared amount of money promised but withheld under any treaty or law.

The United States, as stated in the Slade & Bender account made under the agreement of December 19, 1891, and as found by the Court of Claims, is liable to the Cherokee Nation for $1,111,284.70, the amount paid for the removal of the Eastern Cherokee Indians to the Indian Territory, improperly charged to the treaty fund.

The question whether interest should be allowed on this fund having been submitted, under the Eleventh Article of the Cherokee Treaty of 1846, to the Senate of the United States, and that body having by resolution

found that interest should be allowed at five per cent from June 12, 1838, until paid, the amount of interest was one of the subjects of difference referred to the Court of Claims under the act of July 1, 1902, and that court had jurisdiction to allow interest, and correctly awarded it at the rate, and from the time specified, in the Senate resolution.

The term, Cherokee Tribe or any band thereof, as used in the act of July 1, 1902, means the Cherokee people as a people, and not the Cherokee Nation as a body politic, and the Court of Claims correctly decided that the amount awarded to the Cherokee Nation be paid to the Secretary of the Interior to be by him received and distributed to the persons entitled thereto, but such distribution should be made as to the Eastern Cherokees as individuals whether East or West of the Mississippi, parties to the treaties of 1835, 1836 and 1846, exclusive of the Old Settlers.

The Eastern and Emigrant Cherokees are not entitled to their demand of one-fourth of the entire sum awarded, but only to *per capita* payment with the Eastern Cherokees.

SECTION 68 of the act of Congress of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," 32 Stat. 716, 726, reads as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and

process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

February 20, 1903, the Cherokee Nation filed a petition in the Court of Claims asking judgment on an account rendered by Slade & Bender, pursuant to the treaty of March 3, 1893 (27 Stat. 640), with interest.

March 3, 1903, an act was approved entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," 32 Stat. 982, 996, containing the following provisions:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July first, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi river, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: *Provided*, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document numbered three hundred and nine of the second session of the

Fifty-seventh Congress; and if said claim shall be sustained in whole or in part the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi river constitute a part of the Cherokee Nation, or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to as "the award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893."

March 14, 1903, a petition was filed on behalf of all the Eastern Cherokees, both west and east of the Mississippi river, alleging in substance that there was due to the Eastern Cherokees, upon the account of Slade & Bender, the sum of $1,111,284.70, with interest from June 12, 1838, as an award against the United States or, if the court should not hold said account as an award, the sum of $1,761,447.27, with interest at 5 per cent from the same date, together with interest on the income annually accruing, at the rate of five per cent per annum until paid, by virtue of the treaties of 1828 (7 Stat. 313), and the treaty of 1835–36, commonly known as the "treaty of New Echota." But at the trial of the case no contention was made for this larger amount.

March 20, 1903, a petition was filed on behalf of certain Eastern Cherokees, living east of the Mississippi, amended September 3, 1903, when petitioners took the title of the Eastern and Emigrant Cherokees, asserting their claim to a *pro rata* share of—

"That portion of the removal and subsistence fund improperly taken by the United States from the five million fund on account of removal of Eastern Cherokees, as found

by the expert accountants, Messrs. Slade & Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi river, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty, proclaimed May 23, 1836, this sum so misapplied amounting, in accordance with said accounting, to $1,111,284.70 with interest at 5 per cent per annum from the date of said wrongful taking, June 12, 1838, to date."

The three petitions were consolidated and heard as one case, and although in effect the proceedings were in equity, findings of fact and conclusions of law were filed.

Among the facts found were these:

"XVIII.

"By section 14 of the act of Congress entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1889, and for other purposes,' approved March 2, 1889 (25 Stat. 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson and Warren G. Sayre such commissioners.

"By virtue of the authority contained in an act of the Cherokee National Council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

"'To meet and enter into negotiations with the above-named

commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled.'

"By said act of Congress it was made the duty of said commissioners appointed by the President to report all agreements resulting from such negotiations to the President, to be by him reported to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners on the part of the Cherokee Nation to report all their proceedings in full to the National Council for its approval and ratification. Ex. Doc. 56, 52d Cong., 1st sess., 17.

"At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the 'Cherokee Outlet,' the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as 'a condition precedent to any agreement for the sale of the land' that some adjustment of such contentions should be made.

"On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by article I of which it was agreed that—

"The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order, dated August 10, 1860, the tract of land

embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less.'

"By article 2 that—

"For and in consideration of the above cession and relinquishment the United States agrees:'

"First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

"Second. That a certain article of the antecedent treaty of July, 1866, should be abrogated and held for naught.

"Third. That the judicial tribunals of the Cherokeee Nation should have exclusive jurisdiction in certain cases.

"Fourth. That—

"The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the National Council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years, 1817, 1819, 1825, 1828, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its National Council conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be ren-

dered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its National Council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.'

"Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

"Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee National Council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas river.

"Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the National Council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893, 27 Stat. 640.

"Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

"'As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

"'The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because

the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

"'Whatever that construction is, the Indian must abide by. There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate "lands" from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected.' Sen. Ex. Doc. 56, 52d Cong., 1st sess., pp. 11, 12.

"Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, made the following explanation and comment on the fourth section of article 2, to wit:

"'The fourth section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to properly prepare the same. On this provision of the agreement the commissioners say:

"'The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly no harm can come from restating the account. If it has not been done properly no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for legal discharge of the old ones.'

"'This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it.

"'In your reference of the matter to this office you said:

"'Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions."

"'In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose.' Senate Ex. Doc. No. 56, 52d Cong., 1st sess., p. 8.

"This report of the Commissioner was, on or about February 8, 1892, referred by the Secretary of the Interior to the Assistant Attorney-General for the Interior Department 'for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the questions of law relating to the subject,' and on or about February 25, 1892, said officer reported thereon, as appears

in said Senate Executive Document 56, Fifty-second Congress, first session, saying, among other things:

"'The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. . . . The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. . . .

"'The considerations for said cession, as contained in article 2, are set forth under six subdivisions. . . .

"'The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all money agreed to be paid to the Indians or which they may be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory Congress shall make the necessary appropriation to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

"'I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting.

"'The Commissioner of Indian Affairs asks for a special appropriation of $5,000 to enable him to make the accounting.'

"All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893, 27 Stat. 641, in the following language, to wit:

"'Which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred

to being commonly known and called the "Cherokee Outlet;" and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and to acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows: . . . (Amendments not important here.) . . .

"'And the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States; provided that the money hereby appropriated shall be immediately available, and the remaining sum of eight million three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal instalments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated; * * *

* * * * * * * *

"'The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands; * * *

* * * * * * * *

"'And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be and treated as a part of the public domain.'

"XIX.

"By said act of March 3, 1893, ratifying said agreement for the purchase of the 'Cherokee Outlet' the Congress also provided as follows:

"'The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said Nation, as required in the fourth subdivision of article 2 of said agreement.'

"Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its National Council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its National Council above referred to, did notify the Secretary of the Interior of the acceptance of said Nation of said account as so stated by Messrs. Slade and Bender, and did request said Secretary of of the Interior to notify the Congress of the United States of

such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

'"SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat. 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee National Council accepting such accounting.

"'The Speaker of the House of Representatives.' House Ex. Doc. No. 182, 53d Cong., 3d sess.

"XX.

"The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing finding, is in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

"'The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

Under the treaty of 1819:	
Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "school" fund..... (With interest from February 27, 1819, to date of payment.)	$2,125 00

Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.. (With interest from June 12, 1838, to date of payment.)	1,111,284 70
Under treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation.. (With interest from January 1, 1874, to date of payment.)	432 28
Under act of Congress, March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund..... With interest from July 1, 1903, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.'	20,406 25

"'Washington, D. C., April 28, 1894.

(Signed) JAS. A. SLADE.

JOS. T. BENDER.'

"XXI.

"In arriving at the item of $1,111,284.70 the accountants among other tabulations made the following statement of the account.

"'Figuring upon the basis stated in the ninth article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067 the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

For improvements.....		$1,540,572 27
For ferries.....		159,572 12
For spoliations.....		264,894 09
For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items.....	$335,105 91 1,047,067 00	1,382,172 91
For debts and claims upon the Cherokee Nation.....		101,348 31
For the additional quantity of land ceded to the Nation.....		500,000 00

For amount invested as the general fund of the Nation.....	500,880 00
For subsistence furnished after expiration of one year, under agreement that it should be charged to treaty fund....	172,316 47
	4,621,756 17
For lands and possessions.....	5,000,000 00
For spoliations.....	264,894 09
Balance of $600,000 applicable to removal.....	335,105 91
Appropriation of June 12, 1838.....	1,047,067 00
	6,647,067 00
From which deduct charges as above.....	4,621,756 17
Balance to be distributed per capita.....	2,025,310 83
Deduct amount actually distributed as already explained...	914,026 13
Balance due	1,111,284 70

"The sum of $914,026.13, actually distributed to the Eastern Cherokees in 1852, out of the above balance of $2,025,310.83, was appropriated as follows:

Amount found due by Treasury officials, under article 9, 1846, in the report of the Auditor and Comptroller of December 3, 1849.....	$627,603 95
Erroneous charge corrected by act of February 27, 1851....	96,999 42
Erroneous charge account subsistence, corrected by Congress, September 30, 1850.....	189,151 24
	914,026 13

"This amount of $914,026.13 was distributed solely to 14,098 Eastern Cherokees in the West and 2,133 Eastern Cherokees who remained East.

"Interest on the above sum of $914,026.13 at 5 per cent from June 12, 1838, was also appropriated by Congress and distributed per capita to said Eastern Cherokees in the same payment. The balance to be distributed per capita according to the above report and which was not distributed, to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 per capita, excluding interest,

they should have received the further sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total per capita of $124.78.

"The settlement made with the Old Settlers was as set forth in Finding XVII.

"XXII.

"'Neither the whole or any portion of the various sums with interest found and stated by the concluding schedule of the so-called Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation, or to any officer, agent, or other person acting in its behalf.

"With the exception of the provision contained in the act of March 2, 1895, making appropriations for the legislative, executive, and judicial expenses of the Government, directing the Attorney General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States Court of Claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

"Acting under said direction of March 2, 1895, above referred to, the Attorney General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender. Said communication of the Attorney General was, on December 2, 1895, by the Congress referred to the Committee on Indian Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session."

May 18, 1905, the court "adjudged, ordered, and decreed

that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1. The sum of	$2,125 00
With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.	
Item 2. The sum of	1,111,284 70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	
Item 3. The sum of	432 28
With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.	
Item 4. The sum of	20,406 25
With interest thereon from July 1, 1903, to date of payment.	

"The proceeds of said several items, however, to be paid and distributed as follows:

"The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the 'Cherokee school fund' now in the possession of the United States and held by them as trustees.

"The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said Nation entitled to receive it.

"The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee national fund,' now in the possession of the United States and held by them as trustees.

"The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903, 32 Stat. 996, shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi river, or to the legal representatives of such individuals.

"So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same, upon the making of an appropriation by Congress to pay this judgment.

"The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States."

The facts are stated *in extenso* in the report of the case, 40 C. Cl. 252, occupying some forty pages.

Mr. Louis A. Pradt, Assistant Attorney General, for the United States.

Mr. Frederic D. McKenney and *Mr. Charles Nagel,* with whom *Mr. Edgar Smith* was on the brief, for the Cherokee Nation.

Mrs. Belva A. Lockwood for the Eastern and Emigrant Cherokees.

Mr. Robert L. Owen and *Mr. William H. Robeson,* with whom *Mr. Robert V. Belt, Mr. James K. Jones, Mr. Mathew C. Butler* and *Mr. John Vaile* were on the brief, for the Eastern Cherokees.

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

Of the four items of the amounts allowed, only one, that for $1,111,284.70, need be considered here.

1. The correctness of the account is conceded, and the question is whether the United States were properly held liable therefor. The Court of Claims ruled that the account rendered by Slade and Bender under the agreement between the United States and the Cherokee Nation, ratified by Congress, was neither an award nor an account stated, but that the United States were nevertheless liable in the circumstances for the balance found.

The case is thus put by Chief Justice Nott:

"But while the account was neither an award nor an account stated, it must be conceded that the scope of the accounting was intended to be as broad as the causes of action secured by the agreement to the Cherokee Nation 'the right within twelve months to enter suit against the United States in the Court of Claims for any alleged or declared amount of money promised but withheld by the United States from the

Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting.' That is to say, the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld' 'under any of said treaties or laws.' This meant that there were to be no technical defenses set up, no pleas of *res judicata*, no releases or relinquishments, compromises or settlements; or it meant nothing. . . .

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe) that all of their claims and rights and equities were to be reopened and reëxamined *de novo;* and that upon the faith of that belief they made a cession of the Outlet.

"In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered until the purchase money is paid or secured or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale

and delivery and non-payment of the purchase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account 'without delay;' if the Cherokee Nation accepted it, the amount was to be appropriated by Congress; such 'appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' If the Cherokee Nation did not accept the accounting, or regarded it as incorrect or unjust, and carried it into the courts and recovered a judgment, Congress was to appropriate 'at the its next session after such case shall be finally decided.' Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it.

"The court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894), the 'twelve months' of the agreement, within which

the Nation must consider it and enter suit against the other party in the Court of Claims, began to run, and with the Nation's acceptance of the account (December 1, 1894) the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

Weldon, J., concurred with the Chief Justice in a separate opinion. Peelle, J., concurred in the judgment, but rested his conclusion on the ground that the United States were liable "to pay the expense of removal" of the Eastern Cherokees from their eastern home to the Indian Territory, under the treaties of 1835–36 and 1846, 7 Stat. 478; 9 Stat. 871, and therefore to pay this conceded balance. The various treaties from 1817 down, the legislation, accountings, and proceedings were duly considered in arriving at the result reached. Wright, J., dissented.

We agree that the United States were liable, and think the liability might well be rested on both grounds, that is, that failing one it could be sustained on the other, but we do not deem it necessary to set forth in our own language what has already been so well stated by Chief Justice Nott and Judges Weldon and Peelle.

2. Recovery of the item of $1,111,284.70 was adjudged

"with interest thereon at the rate of five per cent from June 12, 1838, to date of payment," and it is contended that the Court of Claims erred in this allowance of interest.

Under the eleventh article of the treaty of 1846 the Cherokees agreed to submit to the Senate of the United States, as umpire, the question whether interest should be allowed on the sums found due them. The Senate of the United States, as umpire, on September 5, 1850, found that interest should be allowed, in the following resolution: "Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, 1838, until paid."

The Cherokees who had emigrated prior to 1835, with accessions to that date, were known as the "Old Settlers," or "Western Cherokees," and in the case of the *United States* v. *Old Settlers*, 148 U. S. 427, this court said in respect of the claim for interest:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed, at the rate of five per centum per annum, upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

"Under section 1091 of the Revised Statutes, no interest can 'be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest;' and in *Tillson* v. *United States*, 100 U. S. 43, it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for

in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. 9 Stat. 556, c. 91.

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of $4,179.26, which stands upon different ground."

The Congress of the United States on numerous occasions had recognized the force of the decision of the Senate and made appropriations accordingly, appropriating the funds due as interest.

On September 30, 1850, Congress appropriated to the Eastern Cherokees, in reimbursing an amount improperly charged the treaty fund for subsistence, the sum of $189,422.76, with the provision:

"That interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of the fifth of September, eighteen hundred and fifty." 9 Stat. 544, 556.

On February 27, 1851, Congress, in appropriating the amount of the *per capita* then conceded to be due the Eastern Cherokees, to wit, $724,603.37, provided as follows:

"And interest on the above sum, at the rate of five per centum per annum, from the twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated." 9 Stat. 570, 572.

Congress on September 30, 1850, in appropriating the amount of the *per capita*, then conceded to be due the Old Settlers, provided:

"That interest be allowed and paid upon the above sums

due respectively to the Cherokees and Old Settlers, in pursuance of the above-mentioned award of the Senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six." 9 Stat. 544, 556.

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself" in 1846, and in the "agreement itself" in 1891, and is the same in principle as in the case of the Old Settlers.

3. Was the recovery given proper destination by the decree?

We refer to the same item, as there is really no controversy over the other three items, and the criticism as to the payment of item three is not material. If no proper agent of the Cherokee Nation to receive the $432.28 can be found, it may be received by the United States as trustee.

The jurisdictional act of March 3, 1903, provided that "both the Cherokee Nation and said Eastern Cherokees, so-called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned;" and authorized the court "to render a judgment in favor of the rightful claimants, and also to determine, as between the different claimants to whom the judgment so rendered equitably belongs, either wholly or in part."

In the petition filed by the Cherokee Nation in this case it is declared that the Cherokee Nation is "a body politic," and "is, as such, the 'Cherokee tribe' mentioned in section 68 of the act of Congress aforesaid [July 1, 1902, 32 Stat. 726], and authorized thereby to bring this proceeding." But the language of the section is that jurisdiction is conferred to adjudicate "any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," and even if it were conceded that the Cherokee Nation could be treated as a body politic, not as a body corporate, but in the sense of a governmental community, we should say "the Cherokee tribe or any band

thereof" means the Cherokee people as a people, or any band thereof, and not the Cherokee Nation as a body politic.

It should be observed that the term "Cherokee Nation" has been used as representing the people themselves; the government of the Cherokees; and the Government as trustee for all of its people, or for some of them as their rights might appear.

In the treaty of July 2, 1791, the "Cherokee Nation" was described as "all the individuals comprising the whole Cherokee Nation of Indians." In the treaty of 1835 these Indians are referred to as the "Cherokees" and as "The Cherokee Nation." In the treaty of 1846 as "The Cherokee Nation," "The Cherokee People," and "The Cherokees."

Under the first article of the treaty of 1846 the lands of the Cherokee Nation belonged to the whole Cherokee people. The lands sold east of the Mississippi river belonged to the Cherokee people as then existing as communal property. The Western Cherokees, so called, that is to say, the Old Settlers, were paid for their interest in those lands as communal owners. 148 U. S. 427. They were paid individually, a community within a community.

Mr. Chief Justice Nott treats of this matter thus:

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and headmen have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration *per capita*. In the present case the Cherokee Nation takes the place, so far as communal ownership is in-

volved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the Nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita*. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the Nation, and the Nation properly made no distinction when parting with the Outlet but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the non-fulfillment of the treaty of New Echota. As to these Eastern non-resident Cherokee aliens the Nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners."

And after referring to the present status of the Cherokee Nation as about to terminate, the Chief Justice says:

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person who should not be entrusted with the

receipt and distribution of the moneys belonging to other persons."

The Court of Claims decreed that after deducting counsel fees, costs and expenses, the sum of $1,111,284.70, with interest, should be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes of paying costs and expenses as stated, and then distributing the remainder "directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi river, or to the legal representatives of such individuals."

The eighth finding of fact was as follows:

"The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called 'Western Cherokees.' After the removal, under the treaty of 1835–36, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term 'Western Cherokees' was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as 'Old Settlers.'

"The Cherokees who were domiciled east of the Mississippi river at the time of the making of the treaty of 1835–36, according to the census just then completed, were thereafter known as 'Eastern Cherokees,' the great body of whom subsequently, in 1838, moved to the lands west of the Mississippi."

So far as the "Old Settlers" are concerned, they have been fully paid and cannot be allowed to participate in this distribution. There had been a settlement with these Cherokees, which was reopened in the *Old Settlers* case, and they were allowed to assert any and all claims on their part against the United States. Judgment was thereafter rendered as to a portion of these claims in their favor, 148 U. S. 427, which judgment was thereafter paid in full by the United States, so that these Old Settlers have no standing in this action. And,

indeed, they never had nor asserted any interest whatever in the claim herein involved and are not claimants. In the settlement of 1851, the cost of removal with which they were charged, did not diminish the five million dollar treaty fund but came entirely from the $600,000 added to that fund by the third supplemental article of the treaty of New Echota, and the payment that was made to them pursuant to the fourth article of the treaty of 1846 was not a third of the residuum of the treaty fund, but a sum equal to one-third. It was the Eastern Cherokees only who were interested in that residuum, and so article nine of that treaty provided for payment to the Eastern Cherokees of that balance, and for a fair and just settlement of all moneys due to the Cherokees and payment of the same *per capita* to the Eastern Cherokees. The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees.

The act of February 27, 1851, appropriating the amount due on the accounting under article nine of the treaty of 1846, provided that it should be in full satisfaction of all claims and demands of the Cherokee Nation and that a receipt in full should be given. The receipts as given were signed by the individual Eastern Cherokees.

We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to "the Eastern and Western Cherokees," are perhaps liable to misconstruction, although limited to those "who were parties either to the treaty of New Echota as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi river." This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississ-

ippi, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers.

In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with the Court of Claims in the allowance of fees and costs.

It is true that in the replication of the Cherokee Nation to the petition of the Eastern Cherokees this paragraph occurs:

"It denies that the Cherokee Nation in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to, and for their exclusive use and benefit; and further denies that if it had collected or hereafter shall collect such moneys, the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees exclusively or otherwise."

It is also true that by the acts of June 7, 1897, June 28, 1898, and July 1, 1902, the Cherokee Nation was practically incapacitated from acting as trustee, and by section 63 of the Cherokee allotment act, 32 Stat. 725, c. 1375, it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six." But by joint resolution of March 2, 1906, Congress provided as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

Nevertheless, taking the entire record together, the various treaties, and acts of Congress, and of the Cherokee Councils, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs.

4. The Eastern and Emigrant Cherokees, in respect of whom it is stated in their petition, "That they number about 4,500

persons, more or less, all Eastern Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay, and Macon Counties, North Carolina, some in north Georgia, northern Alabama, and eastern Tennessee, together with about 1,500 emigrants, portions of their various families, gone West, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina, and others of the same class, whose names or those of whose ancestors may be found on the rolls of 1835 and 1838," asked that one-fourth part of the whole sum recovered be set apart for them as their distributive share. But we think they are only entitled to receive the *per capita* payment with the Eastern Cherokees, and should obtain that payment accordingly.

The result is, that with the modification of the second subdivision of the fourth paragraph of the decree, relating to the $1,111,284.70 with interest, above indicated, the decree of the Court of Claims is

Affirmed.

WHITNEY, WARDEN OF THE IDAHO STATE PENITENTIARY *v.* DICK.

SAME *v.* SAME.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 494, 557. Submitted April 3, 1906.—Decided April 30, 1906.

Final orders of the Circuit Court of Appeals may be brought to this court, of right, only where the matter in dispute exceeds $1,000, and there is no appeal where, as in a *habeas corpus* proceeding, no amount is involved.

The Circuit Court of Appeals is a court created by statute and is not endowed with any original jurisdiction; and as there is no language in the statute which can be construed into a grant of power to issue a writ of *habeas corpus*, unless it be one in aid of a jurisdiction already existing,

that court is not authorized to issue original and independent writs of *habeas corpus*.

Although the Circuit Court of Appeals may possess the power, which has been exercised by this Court, to issue independent writs of certiorari, and although it may sometimes be proper in special cases to end litigation by summary process, yet as a rule the ordinary procedure for attacking a judgment in a criminal case is by writ of error, and, where the only question is whether the Federal courts have jurisdiction to punish the crime charged, in this case selling of liquor in the Indian country, and there is no necessity of prompt action to uphold National authority the writ of certiorari should not have been issued.

On May 16, 1905, the respondent in these two cases was convicted in the District Court of the United States for the District of Idaho, Northern Division, on the charge of unlawfully and feloniously introducing intoxicating liquors into the Nez Perce Indian Reservation, and sentenced to pay a fine of $100 and be confined in the penitentiary for the term of one year and ten days. On July 21, 1905, a bill of exceptions was duly prepared and signed. Thereafter, without suing out a writ of error, respondent applied to the Circuit Court of Appeals of the Ninth Circuit for writs of *habeas corpus* and of certiorari. It does not affirmatively appear that any writ of *habeas corpus* was issued, the record in the Court of Appeals reciting:

"The petition in the above-entitled matter for a writ of *habeas corpus* and a writ of certiorari having been duly submitted to the court, and the petition for a writ of certiorari therein having been granted and a writ of certiorari having been issued, directed to the honorable the United States District Court for the District of Idaho, and requiring the said District Court to certify to this court a transcript of the record and proceedings in the suit therein of the *United States* v. *George Dick*, and the return to the said writ of certiorari having been filed, the matter was duly argued and submitted to the court for consideration and decision upon the said return and upon the briefs of counsel for the respective parties.

"On consideration whereof, and the court being of the opinion that the United States District Court for the District of

Idaho did not have jurisdiction of the offense charged in the indictment found against the petitioner in the suit of the *United States* v. *George Dick*, it is ordered and adjudged that the petitioner, George Dick, be discharged from imprisonment."

From this order of discharge, Whitney, as Warden of the Idaho state penitentiary (the respondent named in the petition for a *habeas corpus*), perfected an appeal to this court, and that appeal is case No. 494. Subsequently he applied for a writ of certiorari, to review the decision of the Court of Appeals, which was allowed, and that is case No. 557. The record in case No. 494 was directed to stand as the return to the writ of certiorari. Both the appeal and the certiorari were taken by the Warden, appearing by the United States Attorney for the District of Idaho, under the direction of the Attorney General of the United States.

The Solicitor General for appellant and petitioner:

The jurisdiction of the Federal courts to issue writs of *habeas corpus*, except so far as the original jurisdiction of this court is concerned, is purely statutory. *Ex parte Bollmann*, 4 Cranch, 93, 94; *Ex parte Dorr*, 3 How. 104, 105; *Ex parte Parks*, 93 U. S. 22; *Ex parte Hung Hang*, 108 U. S. 552; *In re Burrus*, 136 U. S. 586, 589 *et seq.*; *Ex parte Caldwell*, 138 Fed. Rep. 487; 2 Story on Const. § 1341; Cooley's Const. Lim., *345, *349.

The several statutes on the subject have been embodied in ch. 13, Rev. Stat. §§ 751, 752; Judiciary Act of 1891, 26 Stat. 826; § 716, Rev. Stat. The language of the act of 1891 is restrictive and § 716, Rev. Stat., cannot be regarded as authorizing the Circuit Court of Appeals to issue writs of *habeas corpus*. See 2 Foster's Fed. Prac. § 366; *In re Boles*, 48 Fed. Rep. 75; *In re Nevitt*, 117 Fed. Rep. 448.

At any rate the writ was improvidently issued. *Riggins* v. *United States*, 199 U. S. 547.

Mr. Frank E. Fogg for appellee and respondent:

The legislation embraced in §§ 716, 751, 752, 753, Rev. Stat.,

is comprehensive and brings the writ of *habeas corpus* within the jurisdiction of every court and every judge of the United States. *Ex parte McCurdle*, 6 Wall. 318; *Ex parte Caldwell*, 138 Fed. Rep. 488. See also *In re Heff*, 197 U. S. 488; *In re Levitt*, 117 Fed. Rep. 448; *In re Burkirk*, 72 Fed. Rep. 14.

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

The first question is, of course, one of jurisdiction. Final orders of the Circuit Court of Appeals may of right be brought to this court only where the matter in dispute exceeds in value one thousand dollars. As there is no amount in controversy, the appeal was unauthorized and must be dismissed. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58. But by certiorari the judgment of the Court of Appeals is properly before us. *In re Chetwood, Petitioner*, 165 U. S. 443, 462.

Had the Court of Appeals jurisdiction to issue separately either a writ of certiorari or one of *habeas corpus*, or the two jointly? And first, as to the writ of *habeas corpus*. Undoubtedly that writ is one of high privilege. We are not confronted with the case of a failure by Congress to make any provision for it. Under section 751, Rev. Stat., the Supreme, Circuit and District Courts may issue writs of *habeas corpus*, and by section 752 like power is given to the several justices and judges of said courts for the purpose of inquiry into the cause of restraint of liberty. Thus adequate provision has been made for securing to everyone entitled thereto the writ of *habeas corpus*. So when Congress passes an act establishing a new court there is no constraining presumption that it must intend to give to that court jurisdiction in *habeas corpus*. The Court of Appeals act (26 Stat. 826) does not in terms grant authority to issue the writ. It is silent on the subject, and in order to sustain its jurisdiction we must write something into the statute which Congress itself did not put there. In this we are speaking of the writ of *habeas corpus* as an original

and independent proceeding, for by section 12 of the act "The Circuit Court of Appeals shall have the powers specified in section 716 of the Revised Statutes of the United States." Section 716 provides that "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Cases may arise in which the writ of *habeas corpus* is necessary to the complete exercise of the appellate jurisdiction vested in the Circuit Court of Appeals. But it is unnecessary to speculate under what circumstances such an exigency may exist, for the writ asked for here was an independent and original proceeding challenging *in toto* the validity of a judgment rendered in another court. There was no proceeding of an appellate character pending in the Court of Appeals for the complete exercise of jurisdiction in which any auxiliary writ of *habeas corpus* was requisite. Appellate proceedings are, generally speaking, initiated by appeals and writs of error, and for these the Court of Appeals act specifically provides. The writ of *habeas corpus* is not the equivalent of an appeal or writ of error. It is not a proceeding to correct errors which may have occurred in the trial of the case below. It is an attack directly upon the validity of the judgment, and, as has been frequently said, it cannot be transformed into a writ of error. It is doubtless true that if the language of the Court of Appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of *habeas corpus*, the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *Ex parte Bollman*, 4 Cranch, 75. The fourteenth section of the original judiciary act contained this language: "That all the beforementioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary

for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." And the question presented was whether the grant of power to issue a writ of *habeas corpus* was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice Marshall, delivering the opinion of the court, partly on the grammatical construction of the section and partly on the significance and importance of the writ itself. But in the Court of Appeals act there is no mention of *habeas corpus*, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing.

It will be borne in mind that the Circuit Court of Appeals, which is a court created by statute, *Kentucky* v. *Powers*, 201 U. S. 1, 24, is not in terms endowed with any original jurisdiction. It is only a court of appeal. Section 2 of the act says that it "shall be a court of record with appellate jurisdiction, as is hereafter limited and established." Section 6 provides that it "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases," etc. By section 10 "whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination." Sections 4, 13 and 15 name the courts whose judgments may be reviewed in the Courts of Appeals. Obviously the Courts of Appeals are simply given appellate jurisdiction over certain specified courts. It follows that they are not authorized to issue original and independent writs of *habeas corpus*.

Have they jurisdiction to issue writs of certiorari? As we have seen, the procedure prescribed by the statute for bring-

ing to the Courts of Appeals those final decisions of courts which they are authorized to review is appeal or writ of error, and that in this country is the ordinary method by which review is obtained in an appellate court. Especially is this true of the Federal procedure, the only instance in which certiorari is named as the writ for the removal of cases from a lower to a higher court being in the authority given to this court to bring up cases from the Courts of Appeals by certiorari. Inasmuch as appeal and writ of error are specifically prescribed in the Court of Appeals act as the process to bring up final decisions to that court for review, the authority to issue a certiorari must be found in the grant of power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the usages and principles of law." That certiorari may be used to bring up portions of a record not originally returned to a Court of Appeals is undoubted, for it may be necessary for the complete exercise of its appellate jurisdiction, but not otherwise, for every case of which that court may take jurisdiction can be carried up by appeal or writ of error. Of course, if in the case at bar the writ of *habeas corpus* was not or could not rightfully be issued, then certiorari cannot be sustained as auxiliary process, but must stand or fall as an independent proceeding.

It may be said that the power of this court to issue original and independent writs of certiorari has been upheld under the authority given by section 716. A reference to some of the decisions may be well. See generally *Ex parte Vallandigham,* 1 Wall. 243, and cases cited in the opinion; *Ewing* v. *City of St. Louis,* 5 Wall. 413; *Ex parte Lange,* 18 Wall. 163.

Fowler v. *Lindsey,* 3 Dall. 411, was the case of an application before judgment to remove certain actions from the Circuit Court to this court on the ground that a State was the real party in interest, and it was said by Mr. Justice Washington (p. 413):

"But as it is proposed to remove the suits under considera-

tion from the Circuit Court into this court, by writs of certiorari, I ask whether it has ever happened, in the course of judicial proceedings, that a certiorari has issued from a superior, to an inferior, court, to remove a cause merely from a defect of jurisdiction? I do not know that such a case could ever occur."

In *American Construction Company* v. *Jacksonville Railway*, 148 U. S. 372, where an application was made for mandamus and certiorari, Mr. Justice Gray, speaking for the court, after quoting section 716, said (p. 380):

"Under this provision, the court might doubtless issue writs of certiorari, in proper cases. But the writ of certiorari has not been issued as freely by this court as by the Court of Queen's Bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler* v. *Lindsey*, 3 Dall. 411, 413; *Patterson* v. *United States*, 2 Wheat. 221, 225, 226; *Ex parte Hitz*, 111 U. S. 766. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton* v. *Petit*, 7 Cranch, 288; *Ex parte Gordon*, 1 Black, 503; *United States* v. *Adams*, 9 Wall. 661; *United States* v. *Young*, 94 U. S. 258; *Luxton* v. *North River Bridge*, 147 U. S. 337, 341."

In *In re Chetwood, Petitioner*, 165 U. S. 443, Mr. Chief Justice Fuller said (pp. 461, 462):

"By section 14 of the Judiciary Act of September 24, 1789, 1 Stat. 81, c. 20, carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;' and under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Construction Company* v. *Jacksonville Railway*, 148 U. S. 372, 380. And although, as ob-

served in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac., *398; Bac. Ab., Certiorari."

And in *In re Tampa Suburban Railroad Company,* 168 U. S. 583, it was held that "a writ of certiorari, such as is asked for in this case, will be refused when there is a plain and adequate remedy, by appeal or otherwise."

This court has never decided that certiorari was to be resorted to in place of a writ of error whenever it suited the convenience of parties. There must be "circumstances imperatively demanding" a departure from the ordinary remedy by writ of error or appeal. In the case at bar the indictment charges the introduction of liquor into the Indian country. It is not questioned that this is a criminal offense under the laws of the United States, but it is contended that the place of the alleged offense was not Indian country. The trial court ruled that it was. This ruling was excepted to, a bill of exceptions prepared and signed and the case put in proper condition for review in the Court of Appeals on writ of error. There was no necessity for a certiorari.

Apparently the thought of petitioner was to get rid of the case at once and entirely. It was not a new trial or any mere correction of errors, but a termination of the litigation which induced this proceeding rather than a writ of error. It was a short way of disposing of the entire matter—the same reason that has so often prompted writs of *habeas corpus.* We have repeatedly held against such procedure. While undoubtedly the power exists, and it may sometimes be proper for a court to put an end to the litigation by some short summary process, yet as a rule the orderly way is to proceed by writ of error. The latest expression of the views of this court is to be found

in *Riggins* v. *United States*, 199 U. S. 547. To that and the cases cited in the opinion we refer, saying that in the case at bar there is no special reason why the ordinary procedure should not obtain. It will be borne in mind that the act with which the respondent was charged was not done under or by virtue of the authority of the Constitution or laws of the United States, and therefore his prompt release is not necessary in order to uphold the national authority. It was not an act to be commended, and the only question is whether its punishment was within the jurisdiction of the Federal courts, and that question, under the circumstances, should have been settled in the ordinary way.

For these reasons the decision of the Court of Appeals is *reversed, and the case is remanded with instructions to quash the writ of certiorari and dismiss the petition.*

FIRST NATIONAL BANK OF BALTIMORE *v.* STAAKE.

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

No. 213. Argued March 15, 16, 1906.—Decided April 30, 1906.

Under § 67*f* of the bankruptcy law of 1898 attachments obtained within four months of filing the petition on property which in the absence of the attachments would pass to other persons, and to which the bankrupt has only a bare legal title, may be preserved for the general benefit of the estate, and whatever the trustee realizes thereon may be distributed among the body of the creditors. The lien is valid, but it loses its preferential character in favor of the attaching creditor by the institution of the bankruptcy proceedings.

The extent to which the bankruptcy court shall recognize the rights obtained by creditors upon property attached as property of the bankrupt, but which has been conveyed by unrecorded contract, and the extent to which liens obtained by prior judicial proceedings shall be recognized are wholly within the discretion of Congress.

THIS writ of certiorari was allowed to review an order of the Circuit Court of Appeals affirming a decree of the District Court in favor of Staake, as trustee in bankruptcy of the estate of Chester R. Baird, bankrupt, subrogating him to the rights of certain creditors, and authorizing him to enforce their attachment liens with like force and effect as the attaching creditors, one of which was the First National Bank of Baltimore, might have done had not the bankruptcy proceedings intervened.

The facts of the case are substantially as follows: Chester R. Baird, doing business under the name of C. R. Baird & Co., and owning certain real estate in Virginia known as the West End Furnace Company, sold the same, December 7, 1899, to the Roanoke Furnace Company, subject to certain encumbrances, executed a contract in writing, and received from the Furnace Company the entire consideration, namely, $500,000, in the capital stock of the Furnace Company. Under this contract of sale the Furnace Company took immediate possession, but no deed to the company was made until November 5, 1900, when a deed was executed and recorded.

Meantime, however, and on October 26, 1900, nine different attachments, among them one by the petitioning bank, were sued out of the Hustings Court for the city of Roanoke, amounting to over $40,000, against Baird as a non-resident, and were levied upon the furnace property. Under the provisions of the law of Virginia the attachments, having been levied before the deed of the furnace property had been executed and recorded, the attaching creditors acquired, as against Baird and the Furnace Company, a lien on the properties attached.

Within four months after the levy of the attachments, namely, December 24, 1900, Baird was adjudicated a bankrupt in the District Court for the Eastern District of Pennsylvania, and on January 2, 1901, the District Court for the Western District of Virginia assumed ancillary jurisdiction of such property as was located in Virginia. On December 29, 1900, the Roanoke Furnace Company was also adjudicated a

bankrupt. On March 26, 1901, Staake was appointed trustee of Baird's estate, and on June 29, 1901, John M. N. Shimer was appointed trustee of the Roanoke Furnace Company.

It was further agreed that the deed of November 5, 1900, from Baird to the Roanoke Furnace Company was a valid conveyance to a purchaser in good faith for a then fair consideration, and was not affected by the bankruptcy proceedings.

The proceedings in question here were instituted by a petition filed by Staake, entitled both in the cases of Chester R. Baird and the Roanoke Furnace Company, averring that under the laws of Virginia the rights of the attaching creditors were superior to those of the Furnace Company, and that as to them the property attached was the property of Baird; but that, by reason of his insolvency and of the fact that these attachments had been levied within four months preceding the filing of the petition in bankruptcy, such attachments were null and void, unless the court should order them preserved for the benefit of the estate. He therefore prayed that they be decreed null and void as regards plaintiffs, but that they be preserved for the benefit of petitioner.

The bank demurred to this petition, and also answered denying that its attachment was null and void, and also denying the right of the court to enter an order preserving the attachment for the benefit of the petitioner; and alleging that respondent is entitled to the benefit of the attachment, said property when sold by an interlocutory order having realized enough to pay said attachment, as well as all prior liens.

Shimer, trustee for the Roanoke Furnace Company, also answered, praying that, if the attachment be continued for the trustee of Baird, the petitioner should be required to abate a large claim which he filed against the estate of the Roanoke Company, by the amount of said attachments.

Upon a hearing before the District Court that court overruled the demurrer to Staake's petition, and authorized him to enforce the attachment liens for the benefit of the estate.

126 Fed. Rep. 845. The Court of Appeals affirmed this action, 133 Fed. Rep. 717, and the bank petitioned this court for a writ of certiorari, which was granted.

Mr. S. Hamilton Graves for petitioner in this case; *Mr. William Gordon Robertson* and *Mr. Holmes Conrad*, with whom *Mr. Edward W. Robertson* was on the brief, for petitioners in *McHarg* v. *Staake, post*, p. 150, argued simultaneously herewith.

Mr. Albert G. Dickson, Mr. John Dickey, Jr., and *Mr. S. Griffin*, with whom *Mr. H. Gordon McCouch* and *Mr. Samuel W. Cooper* were on the brief, for the respondents in this case and in *McHarg* v. *Staake, post*, p. 150, argued simultaneously herewith.

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

At the time these attachments were levied, the title to the property in question stood in the name of Baird, and the attaching creditors by their levies secured a preferential lien upon the property, not only as against Baird, but also as against the Furnace Company, which received a deed to the property November 5, 1900, after the attachments had been levied. These attachments, however, were annulled by the filing of a petition in bankruptcy against Baird within four months after the attachments were levied, and if the case stood upon this fact alone there could be no doubt that the property would pass to the trustee of the Furnace Company, discharged of the lien of the attachments. We are not concerned here with any conflicting rights of the two trustees, Staake and Shimer, since they were both appointed receivers of the Roanoke Furnace Company, and the only claim made by Shimer now is that, if the attachments be continued, the petitioner Staake be required to abate his claim against the

estate of the Furnace Company by the amount of these attachments. It is therefore unnecessary to consider whether, if the attachments were annulled, the property would pass unencumbered to the trustee of the Furnace Company, since, as stated by the District Judge, the demurrer to the petition is intended merely to raise the question whether the trustee of Baird's estate or the attaching creditors shall have the benefit of the attachments.

This depends upon the peculiar terms of section 67 of the Bankrupt Act, which provides as follows:

"SEC. 67*f*. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, *unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate;* and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Section 67*c*, which also treats of liens created by attachments on mesne process and provides for their dissolution, in the last clause declares that—

"* * * if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the

holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

This section (67*f*) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is, "for the benefit of the estate"—in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors.

The first provision contemplates the attachment of property to which the bankrupt has the complete, legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien

in favor of the attaching creditors, by the institution of proceedings in bankruptcy.

In the present case Baird had contracted to convey the property to the Roanoke Furnace Company, possession had been taken and the consideration paid, but the deed was not actually executed and recorded until after the attachment had been levied. Hence, under the Virginia statute, the validity of which is not questioned, the lien of the attachment took precedence of the deed, and would have remained a prior lien, had it not been for the institution of the bankruptcy proceedings within four months. This dissolved the attachment, and had the case rested here the property would have apparently passed to the Furnace Company, or to its trustee in bankruptcy, Shimer; but at this point the court, under the second proviso of 67*f*, interposed and recognized the lien of the attachment, not, however, solely for the benefit of the attaching creditors, but for the benefit of Baird's estate. Shimer made no objection, and the court declined to express an opinion as to his rights.

This is one of the very contingencies provided for by the second clause of the section, which apparently vests in the court a certain discretion with regard to the preservation of the right acquired under the attachment or other lien. In this case the court recognized the validity of the lien, the trustee of the Furnace Company making no objection to this; but the attaching creditors insist that, as the lien was acquired for their own benefit, they should not be required to share with the general creditors of Baird's estate.

Their argument is based upon the theory that the second clause was not intended to apply to liens acquired upon the estate of third parties, but to property which would have passed to Baird's trustee had the attachment not been levied. In other words, that the bankruptcy court has nothing to do with the property, since it really did not belong to the bankrupt, and would have passed to his vendee if the attachments had not been levied upon it. Indeed the opinion especially

finds that "had valid attachments not been levied, the property would have passed to the trustee of the Roanoke Furnace Company."

To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition, but at the same time preserved to the general body of creditors, as against third parties (such as purchasers under an unrecorded deed), such liens as attaching creditors had secured upon property which would have passed to the subsequent purchaser in case the attachment had not been levied. It is true that the attaching creditors are thereby deprived of the fruits of their diligence, but the same thing would have happened had the attachment been levied upon property to which the bankrupt had the whole and undisputed title, or of which he had made a fraudulent conveyance. As remarked by the District Judge, "In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the *pro rata* benefit of all the creditors."

Section 67*f* is merely carrying out the general purposes of the act, of securing to the creditors the entire property of the bankrupt, reckoning as part of such property liens obtained by attaching creditors against real estate which had been transferred to another, though no deed had been actually executed and recorded.

The argument that section 67*f* in question here refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, we think is unsound, since that contingency is amply provided for by the prior clause of the section annulling all such liens, and providing

that property affected thereby shall pass to the trustee as a part of the estate. Under the argument of the attaching creditors in this case, the subsequent clause would be entirely unnecessary. This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt, if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken doubtless this property would have been sold for the benefit of the attaching creditors.

The general rule relied upon by the bank in this case, that the words "property of the bankrupt" mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title, is perhaps justified by our decision in *Hewitt* v. *Berlin Machine Works*, 194 U. S. 296. But the extent to which the bankruptcy court shall recognize the rights obtained by creditors upon property attached as the property of the bankrupt, though in fact such property had been conveyed by an unrecorded contract, is a matter solely within the discretion of Congress. The liens acquired in this case were liens upon property, which as to attaching creditors was the property of the bankrupt, and Congress may lawfully insist that it shall be reckoned as a part of his estate, and pass to the trustee. As remarked by the Court of Appeals: "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which although valid as to the bankrupt, are invalid as to creditors."

If the interest of Baird in this property were sold solely for the benefit of the attaching creditors, it would obviously result in a preference to those creditors over the general creditors of his estate, and in fraud of the bankruptcy act, which is designed to secure equality among all creditors.

The judgment of the Court of Appeals is

Affirmed.

McHARG, RECEIVER, *et al.*, *v.* STAAKE.[1]

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

No. 214. Argued March 15, 16, 1906,—Decided April 30, 1906.

PER CURIAM: As the facts in this case are practically the same as those set forth in the preceding and the legal principles are identical, this is also

Affirmed.

MR. JUSTICE HARLAN, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented in both cases.

SAWYER *v.* UNITED STATES.

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

No. 553. Argued April 4, 5, 1906.—Decided April 30, 1906.

The passage of the act of July 20, 1840, 5 Stat. 394, and of § 800, Rev. Stat., granting peremptory challenges to the Government in criminal cases, has not taken away the right to conditional or qualified challenges when permitted in the State, and where it has been adopted by the Federal court as a rule or by special order. The exercise of the right is under supervision of the court which should not permit it to be used unreasonably or so as to prejudice defendant. It is not an unreasonable exercise of the privilege where, notwithstanding its exercise, neither the Government nor the defendant exhausted all of their peremptory challenges.

Where defendant takes the stand in his own behalf he waives his constitutional privilege of silence and the prosecution has the right to cross-

[1] This case was argued simultaneously with *First National Bank* v. *Staake;* for names of counsel see p. 144, *ante.*

examine him upon his evidence in chief with the same latitude as though he were an ordinary witness as to circumstances connecting him with the crime, and even if, as claimed in this case, the subject matter of the cross-examination has no tendency to connect the witness with the crime if it is plain that there is no injury the exception is not available.

While a remark by the District Attorney in summing up that "a man under such circumstances who could drink a cup of coffee ought to be hung on general principles," is improper, if, on protest of defendant's counsel, the court stops the District Attorney, who apologizes and withdraws the remark, an exception by defendant is frivolous and the court is not open to censure for so describing it.

There is no reversible error in the court stating in a trial for murder of several persons that defendant was not charged with the murder of a person whose name is stated in the bill as having been murdered, the court also saying that if he was so charged there was no evidence to support the charge.

THE writ of error in this case brings before this court a judgment of conviction of murder, rendered in the Circuit Court of the United States for the Eastern District of North Carolina.

The plaintiffs in error were indicted at the fall term, 1905, of the United States District Court for the Eastern District of North Carolina, Wilmington Division, for the murder, by shooting, on the twenty-eighth day of October, 1905, of E. R. Rumill, captain; John T. Hall, mate; John Falbe, cook; C. L. Smith, engineer, and John S. Coakley, seaman, committed on the high seas and within the jurisdiction of the court wherein the indictment was found, and on board of the American vessel called the Harry A. Berwin. The indictment alleged that after the shooting the deceased were thrown into the sea. Upon the trial of the plaintiffs in error in November, 1905, in the United States Circuit Court for the Eastern District of North Carolina, to which court the indictment had been duly transferred for trial, they were convicted of the murder of the first four named in the indictment. The court told the jury that the defendants were not charged with killing Coakley, and if charged in the bill there was no evidence to support the charge.

There is no question made as to the sufficiency of the indictment or of the jurisdiction of the court.

It appeared on the trial that the plaintiffs in error were part of the crew, and, together with one Henry Scott, who was also one of the crew, were the only living persons found on the Berwin, when they were arrested by the crew of a small boat, that was put off from a schooner called the Blanche H. King, which was then proceeding on a voyage up the coast from Brunswick, Georgia, to Philadelphia, Pennsylvania, and had arrived at a point about thirty-two miles southwest from Cape Fear bar. The attention of Captain John W. Taylor of the schooner was directed about nine o'clock in the evening in the month of October, 1905, to a vessel just ahead of him, on account of the manner in which she was carrying her lights, and because she was right in the track of his own vessel. He sent a small boat, manned by several seamen, to the vessel (which proved to be the Berwin), and the boat brought back the plaintiffs in error and Scott, who, on being brought to the deck of the vessel and telling their story, were put in irons by direction of the captain, who then steered his vessel for the nearest port, which was Southport, North Carolina, where the men were delivered to the Federal authorities. Upon the trial of the indictment which was found against the plaintiffs in error, the man Scott was called as a witness, and swore to the murder by the plaintiffs in error while the vessel was at sea, and on or about October 28, 1905.

Scott was subsequently indicted alone for the murders, and was also convicted, the plaintiffs in error being witnesses against him, and they testified that he committed the murders. He has been reprieved by the President, so that he may be again used as a witness against the plaintiffs in error in case of a new trial being granted to them.

Mr. Corcoran Thom, with whom *Mr. George Roundtree* and *Mr. Henry P. Blair* were on the brief, for plaintiffs in error:

If the English practice with respect to challenges was ever

adopted in this country, it was not applicable after the passage of the acts of March 3, 1865, and June 8, 1872, in the United States courts. *United States* v. *Butler*, 1 Hughes, 457; *Seely* v. *State*, 1 Georgia, 213.

The practice in North Carolina does not govern in the Federal courts under the crimes act. *United States* v. *Shackelford*, 18 How. 588.

The cross-examination was allowed upon subjects in no way connected with the examination-in-chief and the accused was prejudiced by the attempt to impeach his character. Greenleaf on Evidence, § 445; *Fitzpatrick* v. *United States*, 178 U. S. 304.

So long as the cross-examination is carried on with reasonable fairness, to test the credibility of the witness, it is permissible, but the moment questions are asked concerning facts touching the witness's character, which are irrelevant to the facts in issue, for any other purpose than to affect his credibility or which manifestly do not bear on the subject of credibility, the right of cross-examination is abused, and on objection should be restrained within legitimate limits. *Buel* v. *State*, 104 Wisconsin, 132. See also *Baily* v. *State*, 67 Mississippi, 133; *State* v. *Carson*, 66 Maine, 116; *People* v. *Pinkerton*, 78 Michigan, 110; *State* v. *Gotfreedson*, 24 Washington, 398; *State* v. *Hale*, 156 Missouri, 102; *Saylor* v. *Commonwealth*, 97 Kentucky, 184; *Nix* v. *State*, 74 S. W. Rep. 764; Thompson on Trials, § 653; *Bullock* v. *State*, 65 N. J. L. 557; *State* v. *Barker*, 68 N. J. L. 19.

The latitude of cross-examination in North Carolina seems to be broader than in most other jurisdictions in America, *State* v. *Pancoast*, 35 L. R. A. 518, 519, and yet in *State* v. *Traille*, 121 N. Car. 674, it is definitely stated that such questions as those which were put to Adams on cross-examination must be confined solely to contradiction or impeachment and are not to affect the guilt or innocence of the accused.

It is error to allow the cross-examination of an accused who has taken the stand in his own behalf which could serve no other purpose than to prejudice him before the jury. *Allen*

v. *United States*, 115 Fed. Rep. 3; *Howard* v. *People*, 96 Illinois, 492; *Gifford* v. *People*, 83 Illinois, 210; *Buel* v. *State*, 104 Wisconsin, 132; *People* v. *Molineaux*, 62 L. R. A. 345, 347, notes. Even if such questions which had been put to Adams on cross-examination were answered in the negative, it is still error to allow the questions to be propounded. *Bates* v. *State*, 60 Arkansas, 450; *Gale* v. *People*, 26 Michigan, 161; *People* v. *Wells*, 100 California, 459. It can hardly be controverted that any other witness would not be allowed to testify as to the matter concerning which Adams was cross-examined. *Smith* v. *United States*, 161 U. S. 85. See also *Morrison* v. *Pettybone*, 87 Fed. Rep. 320.

The words of the district attorney complained of were prejudicial to the defendants and the comments of the court only served to disparage counsel for defendant in the minds of the jury.

The Solicitor General for the United States:

The right of the prosecution to stand jurors aside temporarily has always been widely recognized. It originated with the Statute of 33d Edw. I, which took away the unlimited peremptory challenges by the Crown and required the prosecution to challenge for cause, although the cause need not be shown until the panel was gone through. If the panel is exhausted before the jury is complete, jurors set aside must be called and must serve unless challenged by either side. *United States* v. *Marchant*, 12 Wheat. 480; *United States* v. *Wilson*, 1 Baldw. 82; *United States* v. *Douglass*, 2 Blatchf. 207; *State* v. *Benton*, 19 N. Car. 196. The rule is not changed by the allowance of peremptory challenge to the prosecution. *Warren* v. *Commonwealth*, 1 Wright, 45; *Haines* v. *Commonwealth*, 100 Pa. St. 317; *Smith* v. *Commonwealth*, 100 Pa. St. 324; *Rudy* v. *Commonwealth*, 128 Pa. St. 500; *Commonwealth* v. *O'Brien*, 140 Pa. St. 555; *State* v. *McNinch*, 12 S. Car. 89; *State* v. *Stephens*, 13 S. Car. 285. The principle has been firmly established in North Carolina from an early day. *State* v. *Craton*, 6 Ired. 164; *State* v. *Arthur*, 13 N. Car. 217; *State*

v. *Benton*, 19 N. Car. 196; *State* v. *Bone*, 52 N. Car. 121; *State* v. *Jones*, 88 N. Car. 1671; *State* v. *Gooch*, 94 N. Car. 982; *State* v. *Hensley*, 94 N. Car. 1021; *State* v. *Sloan*, 97 N. Car. 499. The Federal practice in this respect should conform to state law. *United States* v. *Shackleford*, 18 How. 588; *Lewis* v. *United States*, 146 U. S. 370, 379; *Pointer* v. *United States*, 151 U. S. 396, 407.

The rule is reasonable and is subject to the discretion of the court to prevent the right from being exercised unreasonably. It was not exercised unreasonably in this case; defendants were in no way prejudiced; neither the Government nor the defense had exhausted their peremptory challenges when the jury was impaneled; the prisoners obtained a trial by a fair and impartial jury from those who remained on the panel, which is all they were entitled to. *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, and cases cited; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Brown* v. *New Jersey*, 175 U. S. 172, 175.

The challenge to the array came too late. Such objections must be made before the jury is impaneled. *United States* v. *Butler*, 1 Hughes, 457; *Gropp* v. *People*, 67 Illinois, 154; *Mueller* v. *Rebhan*, 94 Illinois, 147; *Goodman* v. *Goetz*, 36 N. Y. 731; *Jackson* v. *State*, 4 Tex. App. 292; *State* v. *Douglass*, 63 N. Car. 500. In cases where jurors have been summoned irregularly it has been held that challenge to the array is not tenable where there was a plea of not guilty, where defendants have not exhausted their peremptory challenges, and where no positive injury has resulted. *United States* v. *Cornell*, 2 Mason, 91; *Commonwealth* v. *Seybert*, 4 Pa. Co. Ct. Rep. 152; *Goodland* v. *LeClair*, 78 Wisconsin, 176; *People* v. *Burgess*, 153 N. Y. 561; *Wilhelm* v. *People*, 72 Illinois, 468; *People* v. *Madison Co.*, 125 Illinois, 334; *State* v. *McElmurray*, 3 Strobh. L. (S. Car.) 337; *Franklin* v. *State*, 34 Tex. App. 89; *State* v. *Clyburn*, 16 S. Car. 375; *State* v. *Price*, 10 Rich. (S. Car.) 356; *State* v. *McQuaige*, 5 S. Car. 429.

The court performed its whole duty in the matter of the objectionable remarks of the district attorney by interposing

and admonishing him. 1 Thompson on Trials, § 964; *Graves* v. *United States*, 150 U. S. 118; *Hall* v. *United States*, 150 U. S. 76. There are many cases showing the indulgence extended by courts to extravagant declamation and exaggeration by counsel in argument, and the rule is clear that to justify reversal the remarks must be plainly improper and of a material character. *Cross* v. *State*, 68 Alabama, 476; *Pierson* v. *State*, 18 Tex. App. 524; *House* v. *State*, 19 Tex. App. 227; *Shuler* v. *State*, 105 Indiana, 289; *State* v. *Griffin*, 87 Missouri, 608; *Polin* v. *State*, 14 Nebraska, 540; *Combs* v. *State*, 75 Indiana, 215; *State* v. *Stark*, 72 Missouri, 37. See also *State* v. *Horner*, 139 N. Car. 606.

The cross-examination of defendant Adams was proper on either of these grounds: it was clearly within the scope of the direct examination; it tended to impeach his veracity, and to show general bad character. A defendant in his witness character is on the same footing as any other witness. While in general the cross-examination of a defendant witness in a criminal case is restricted to the matter of the examination-in-chief and to matter affecting his credibility, there are authorities to the effect that a witness who is a party subjects himself to especial latitude in cross-examination, the course and extent of such cross-examination being committed to the control of the court in the exercise of a sound discretion, which is not reviewable on appeal. The rule appears to be applicable both in civil and criminal cases. *Storm* v. *United States*, 94 U. S. 76; *Rea* v. *Missouri*, 17 Wall. 532; *Davis* v. *Coblens*, 174 U. S. 719; *Blitz* v. *United States*, 153 U. S. 308; *Allen* v. *United States*, 115 Fed. Rep. 3, 11. The decisions are conflicting throughout the many jurisdictions in the United States, but the weight of authority commits the control and scope of cross-examination to the discretion of the court, and permits a witness to be impeached on cross-examination, always by questions going to his veracity, generally by questions directed at his reputation in allied respects, often by general character, and sometimes by specific instances of

misconduct. 2 Wigmore on Evidence, §§ 889–891, 922–924; see also §§ 983, 987; vol. 3, § 2277; *State* v. *Pancoast*, 35 L. R. A. 518, 527, 533. The law of North Carolina admits great latitude on cross-examination; bad character may be shown, and specific instances of misconduct. *State* v. *Efler*, 85 N. Car. 585, citing *State* v. *Boswell*, 2 Dev. 209; *State* v. O'Neale, 4 Ired. 88; *State* v. *Dove*, 10 Ired. 469; *State* v. *Parks*, 3 Ired. 296; *State* v. *Thomas*, 98 *N. Car.* 599; see also *State* v. *Stallings*, 2 Hayw. 300; and the law in that State is important and persuasive, if not controlling. *Fitzpatrick* v. *United States*, 178 U. S. 304.

But there are two reasons why the cross-examination here does not constitute reversible error: the answers to the particular questions were all in the negative, and were conclusive on the prosecution. *State* v. *Pancoast*, 35 L. R. A. 533, citing Rice on Ev. § 222. See also *People* v. *Jackson*, 3 Park. Cr. 391; *Oxier* v. *United States*, 38 S. W. Rep. 331; *Newcomb* v. *Griswold*, 24 N. Y. 298; 1 Starkie on Ev. 190. Counsel did not follow their objection to the questions by requesting the court to charge the jury, if the testimony were admitted, that it could only be considered by them on the question of veracity; defendants must be held to have waived further objection by not taking this course, and the court was not bound to give instructions upon that particular question since they were not requested. *Commonwealth* v. *Kneeland*, 20 Pick. 206, 222; *Hodge* v. *State*, 85 Indiana, 561; *Powers* v. *State*, 87 Indiana, 144, 153; *Edwards* v. *State*, 47 Mississippi, 581, 589; 2 Thompson on Trials, §§ 2339, 2341, 2343.

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

The first question to be noticed in this case arises by reason of these facts: When the case was called for trial the clerk proceeded to call the names of the jurors, and the record shows that:

"While the jury was being impaneled several jurors were called, and as each juror appeared he was told by the district attorney to stand at the foot of the panel, without any challenge on the part of the Government and without an opportunity given to defendants to accept, challenge for favor or cause, or to peremptorily challenge any and all of said jurors so stood aside.

"To each and to every action in this respect on the part of the Government the defendants promptly and in due time objected, but the court overruled the objections, saying the state practice would be followed, and there was no United States statute on the subject; to which ruling of the court the defendants, by their counsel, then and there duly excepted, and the exceptions were allowed. It appeared that neither the Government nor the defense had exhausted all their peremptory challenges when the jury was impaneled."

The inquiry is, whether the court had the power to permit such conditional challenge by the Government?

The origin of this practice is stated by Mr. Justice Field in delivering the opinion of the court in *Hayes* v. *Missouri*, 120 U. S. 68, 71. It is there said:

"Originally, by the common law, the Crown could challenge peremptorily without limitation as to number. By act of Parliament passed in the time of Edward the First, the right to challenge was restricted to challenges for cause. But, by a rule of court, the Crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the Crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them."

The question here involved was not directly before the court in that case, but the accuracy of the statement is not questioned. It is not disputed that the practice has prevailed in

the State of North Carolina ever since the foundation of the State, and it has also prevailed in South Carolina and Pennsylvania.

In 1790 Congress provided for granting certain peremptory challenges to the defendant (1 Stat. 119), but no peremptory challenge was allowed to the Government.

While the Government was thus situated in regard to peremptory challenges the case of *United States* v. *Marchant*, 12 Wheat. 480, came before the court. The question directly involved was whether persons jointly charged in the same indictment for a capital offense had a right by law to be tried separately without the consent of the prosecutor, and it was held that persons so jointly charged had not that right, but that such separate trial was a matter to be allowed in the discretion of the court. In the course of the opinion, however, which was delivered by Mr. Justice Story, it was stated as follows:

"But a still more direct conclusion against the right may be drawn from the admitted right of the Crown to challenge in criminal cases, and the practice under that right. We do not say that the same right belongs to any of the States of the Union; for there may be a diversity in this respect as to the local jurisprudence or practice. The inquiry here is, not as to what is the state prerogative, but, simply, what is the common law doctrine as to the point under consideration. Until the statute of 33 Edw. I, the Crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the Crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the Crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (Pl. Cr. b. 2, ch. 43, s. 2, s. 3), 'if the King challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge, till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And

if the defendant, in order to oblige the King to show cause, presently challenge, *touts paravaile;* yet it hath been adjudged, that the defendant shall be first put to show all his causes of challenge before the King need to show any.' And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times.

"This acknowledged right of peremptory challenge existing in the Crown before the statute of 33 Edw. I, and the uniform practice which has prevailed since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner; and that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial he could at any time be defeated by the Crown of such choice, by its own admitted prerogative."

It is true that the matter involved in the *Marchant* case did not call for this statement, as the direct question was not in issue. It was made argumentatively, as one reason for denying the right claimed by defendant in that case. Subsequently the Circuit Court of the United States in Pennsylvania, in 1830, followed the views expressed in the *Marchant* case. *United States* v. *Wilson and Porter*, 1 Bald. 78. In that case the right was claimed by the district attorney and denied by counsel for defendant, but was allowed by the court upon the ground that it considered the opinion of the Supreme Court as a recognition of the qualified right of the United States to challenge, and directed the juror to be put aside until the panel was exhausted, declaring that if that should happen and the juror be again called the United States could not then challenge him without showing cause.

Again, in the case of *United States* v. *Douglass*, 2 Blatch. 207, which was decided in 1851, this qualified right of challenge was conceded to exist by Mr. Justice Nelson, who presided on

the trial in that case, but was denied by District Judge Betts, who sat with him. The case was tried in the Southern District of New York, in which State no such right of conditional challenge existed. A motion for a new trial was made before the same court, and Judge Nelson said in his opinion, in denying the motion, that "this qualified right of challenge without cause is the settled doctrine of the common law, and has been recognized by the Supreme Court of the United States in the case of *United States* v. *Marchant*, 12 Wheat. 480, and has been practiced upon in some of the circuits." The judge then said that the doubt as to the right of the Government arose by reason of the passage of the act of July 20, 1840, 5 Stat. 394, providing for the designation of jurors to serve in the Federal courts, and empowering those courts to make rules and regulations for conforming the designation and impaneling of jurors to the laws and usages of the States as they may exist at the time. A rule to that effect had been adopted in the Southern District of New York. The justice further stated in his opinion that the act of 1840 applied only to the mode and manner of drawing or selecting the jury—that is, by ballot, lot or otherwise—as prescribed by the state laws, and that it did not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause; and that those questions stand upon the common law, except where regulated by the act of Congress. Judge Betts, in his opinion, which is set forth in the report, held that no such right existed, certainly not in the States where such practice was not recognized.

In 1855 the case of *United States* v. *Shackelford*, 18 How. 588, came before the court. It arose on a certificate of difference of opinion between the judges holding the Circuit Court of the United States for the District of Kentucky. The question was whether the defendant, who was indicted for a misdemeanor, was entitled to any peremptory challenges, and, as the judges were divided in opinion, they certified the question of difference to this court. Mr. Justice Nelson, in delivering the opinion of the court, stated that the power conferred upon

the Federal courts under the act of 1840, *supra*, enabled those courts to adopt rules and regulations for conforming the designation and impaneling of jurors to the laws and usages in force at the time in that State, and that by virtue of that act the courts were enabled to adopt those laws and usages in respect to challenges of jurors, whether peremptorily or for cause, and in cases both civil and criminal, with the exception therein stated. It was further held that, as the act of 1790, 1 Stat. 112, 119, gave persons indicted for treason a certain number of peremptory challenges, etc., that act expressly recognized the right of peremptory challenge, and the right should be regarded as excepted out of the power of the courts to regulate the subject by rule or order under the aforesaid act of 1840. Mr. Justice Nelson further observed as to the common law that it "gave to the King a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn." Continuing, he said:

"The court is of opinion that the right of challenge by the prisoner recognized by the act of 1790 does not necessarily draw along with it this qualified right, existing at common law, by the Government; and that, unless the laws or usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the state law."

In the case before us the laws or usages of the State permitted this qualified right of challenge by the Government. No case in this court has been cited, nor have we found one, that decides the question now before us. Those which we have referred to, whether of this court or the Circuit Courts of the United States, were at any rate decided before the passage of the act of Congress of 1865, 13 Stat. 500, amended in some particulars by the act of 1872, 17 Stat. 282. These statutes gave peremptory challenges to the Government, and the ques-

tion now presented is whether after Congress has dealt with the subject of such challenges the former qualified right of challenge on the part of the Government still exists in those States where such practice obtains, and the practice has been adopted by a rule of court in the courts of the United States. Section 800 of the Revised Statutes of the United States in substance reproduces the act of 1840, above referred to, so that the subject must be considered with reference to that section as well as the statute which gives challenges to the Government.

The question arose in *United States* v. *Butler*, 1 Hughes, 457, 467. The trial was held before Chief Justice Waite and Judge Bond in the United States Circuit Court for the District of South Carolina in April, 1877. Upon the impaneling of the jury a juror was called and was examined on his *voir dire*, and was then told by the counsel for the Government to stand aside. The defense objected, and insisted that the prosecution must either exercise the right of challenge or waive it entirely and at once. The court held that this rule was in force when the Government had no right of peremptory challenge, but as the right of peremptory challenge had been given to the prosecution it should be given the same right with the defense and should exercise the right at once or not at all.

This decision of the Federal Circuit Court is the only one brought to our attention that has been decided since the passage of the acts of Congress, giving the right of peremptory challenge to the Government. It was by virtue of the act of 1840, already mentioned (Rev. Stat. § 800), that the Federal courts have been enabled to adopt the laws and usages of the State in respect to the challenging of jurors, whether peremptorily or for cause. *United States* v. *Shackelford*, 18 How. *supra*.

When the Federal statute granted the right to a certain number of peremptory challenges to the defendant in criminal cases, it was said that such right must be regarded as excepted out of the power of the court to regulate the same by rule or

order under the act of 1840. As the statute prescribed the number of challenges to the defendant, the court could not, therefore, proceed under the act of 1840, and by rule or order prescribe any other number, or none at all, in accordance with the practice of the state courts in that respect. The Federal statute was held to be exclusive of any other regulation on the subject, because to give any other number of challenges to the defendant would be inconsistent with the provisions of the Federal statute, even though the matter of peremptory challenge was provided for by the state practice. In such a case the power to provide by rule of court was to be regarded as excepted from the provisions of the act of 1840.

But, in giving by statute the right of peremptory challenge to the Government in certain cases, it does not necessarily affect the exercise of the power of the Government to challenge in this qualified manner. A conditional or qualified right of challenge is not inconsistent with the existence of the right of peremptory challenge given by statute. The two may co-exist, and the Government may exercise the right of peremptory challenge given by statute and in the same case exercise the qualified or conditional challenge, as in the case at bar.

It was stated in the opinion in the *Shackleford* case that unless the laws or usages of the State (adopted by rule by the Federal courts under the act of 1840) allowed it, the right should be rejected, and the practice conformed in that respect to the state law. But in North Carolina the state law permits such qualified right of challenge, and the court in this case made the order to follow the state practice, there being no United States statute on the subject.

In Pennsylvania, which is one of the States where the practice has always obtained, the Supreme Court held that a statute, giving peremptory challenges, does not take away this right of the Government. *Haines* v. *Commonwealth*, 100 Pa. St. 317, 322; *Commonwealth* v. *O'Brien*, 140 Pa. St. 555, 560.

To the same effect are the decisions in North Carolina. The

right remains notwithstanding the enactment of a law giving peremptory challenges to the State. *State* v. *Benton*, 19 N. Car. 196, 203; *State* v. *Hensley*, 94 N. Car. 1021, A. D. 1886.

The courts of Georgia and Florida are of a different opinion. *Sealy* v. *State*, 1 Georgia, 213; *Mathis* v. *State*, 31 Florida, 291, 315.

We are of opinion that the passage of the acts of Congress, granting peremptory challenges to the Government, has not taken away the qualified right of challenge under discussion in this case. As we have said, there is certainly nothing in the statute granting peremptory challenges to the Government to prevent its exercise of the other kind of challenge when permitted in the State, and where it has been adopted by the Federal court as a rule, or by special order as in this case. The exercise of this right is under the supervision of the court, and it ought not to be permitted to be exercised unreasonably, or so that the interests of the defendant might be unduly prejudiced. The court should take special care to that end.

In this case it appears that neither the Government nor the defendants had exhausted all their peremptory challenges when the jury was obtained. We think it plain that the Government's right of qualified challenge was not unreasonably exercised, and the rights of the plaintiffs in error suffered no injury by the course permitted by the court.

Another question argued arises upon the cross-examination by the district attorney, of the plaintiff in error Adams, who voluntarily became a witness on the trial on his own behalf and in behalf of his fellow-plaintiff in error. The cross-examination referred to the conduct of the witness on a previous voyage and on a different vessel, in regard to which nothing had been said on the examination of the witness in chief.

It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would

be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. *Fitzpatrick* v. *United States*, 178 U. S. 304.

It is contended on the part of the plaintiffs in error that within this rule the cross-examination was improper, as the subject matter of the cross-examination had no tendency to connect the prisoner with the alleged crime for which he was on trial.

The district attorney on his cross-examination began with questions relating to the experience which the witness had had as a seaman, and asked him in regard to the vessels that he had sailed on. It appeared that he had been one of the crew, among others, of the schooner Benefit, for some fifteen months, whose captain was a man named Falkner. He was then asked if during the latter part of the fifteen months he was on the schooner he did not have trouble and try to create insubordination on board that vessel. This question was duly objected to by counsel for defendants, and the objection overruled by the court and an exception allowed. He answered that he was not logged, and then stated that the trouble arose from the cook giving them molasses to make tea, which he said was not right, and he and three other men went to the captain and asked him if he thought it was right, and the captain said they did not have sugar and would have to use molasses. The witness took the tea and threw it overboard; that he never went among the men and tried to create dissatisfaction among them; that the captain never threatened to put him in irons, and when he left the Benefit he shipped on another vessel named the Benj. Russell, where he stayed for over three months.

It is unnecessary in this case to inquire whether the cross-examination was within the prescribed limits, because the witness denied that he had had any trouble, or that he had ever tried to create any trouble, or that there was any insubordination on his part on board the vessel named. What he said in regard to the facts showed that there was neither trouble nor

insubordination. The Government made no attempt to contradict the evidence of the witness on this subject, and hence there could have been no harm arising from the cross-examination. There are some state authorities which hold that the error, if any, is not cured by answer of the witness denying the charge. But we think the better rule is where, as in this case, it is plain that there is no injury, the exception is not available.

The plaintiffs in error also ask for a new trial because of the remarks made by the district attorney in summing up to the jury, and the action of the court thereon.

In the course of his remarks, and in speaking of the fact that during the time these murders were being perpetrated, one of the plaintiffs in error had testified that he drank some coffee, the district attorney said, "A man under such circumstances who would drink coffee ought to be hung on general principles." This remark the counsel for the plaintiffs in error objected to, and, after hearing counsel on the objection, the court directed the district attorney to confine himself to a proper argument, and thereupon the district attorney expressed his regret if he had made an improper argument, and withdrew the remark.

When the objection was first made by counsel for the plaintiffs in error the court asked if he wanted to cut the district attorney off from making any argument, but thereupon the court immediately directed the district attorney to confine himself to a proper argument, as above stated.

Counsel for the plaintiffs in error objected to both the remarks of the district attorney and the comments of the court as made, and counsel asked to be allowed to file an exception. Upon this request the court replied, "I will give counsel the benefit of his statement that he has made an exception which the court considers frivolous."

The remark of the district attorney was not appropriate argument and should not have been made, but we see nothing more that could have been done than was done by the court as soon as the objection was made by the counsel for the plain-

tiffs in error. Counsel in summing up to a jury are under some excitement, and may naturally make a remark or statement which is improper. But there is not on that account any ground laid for setting aside a verdict where, as in this case, the court held it was improper, and the counsel withdrew and apologized for it. *Dunlop* v. *United States*, 165 U. S. 486, 498. Under such circumstances it does seem as if the exception were frivolous, and the court in stating its opinion to that effect is not open to censure.

The error assigned that the court said the plaintiffs in error were not charged with the murder of Coakley, when in fact the bill contained his name, has not been pressed, and we think there is no merit in it. The court said that if charged in the bill there was no evidence to support such charge. Certainly no harm was thereby done the plaintiffs in error.

Upon full consideration of all the objections urged by counsel for the plaintiffs in error, we think no ground appears for granting a new trial. The judgment is

Affirmed.

MR. JUSTICE WHITE dissented.

UNITED STATES v. MILLIKEN IMPRINTING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 227. Argued April 16, 17, 1906.—Decided April 30, 1906.

A corporation having a contract with the Government to imprint revenue stamps received notice as to renewal which, among other things, stated that no application for such contracts would be considered from persons not already having one; the corporation applied for and obtained a renewal and the contract when delivered contained no provision for not giving contracts to persons not then engaged in imprinting stamps;

during its life a similar contract was given to such a person and the corporation sued in the Court of Claims for reformation of its contract on ground that the omission was mutual mistake and also for loss of profits on business diverted to such person. The Court of Claims took jurisdiction and awarded damages. *Held*, by this court in reversing the judgment on the merits:

While reformation of the contract is not an incident to an action at law, and can only be granted in equity; under § 1 of the act of March 3, 1887, 24 Stat. 505, the Court of Claims has jurisdiction to reform a contract, and of the money claim under the contract as it should have been drawn.

On the evidence in this case there was no mutual mistake justifying the reformation of the contract.

THE facts are stated in the opinion.

Mr. Louis A. Pradt, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

The Court of Claims was without jurisdiction in equity. *Harvey* v. *United States*, 105 U. S. 679; *Jones* v. *United States*, 131 U. S. 1. Its jurisdiction in equity is derived from special statutes. *District of Columbia* v. *Barnes*, 197 U. S. 146.

There was an entire failure of proof of mistake. The purpose of an action for reformation of a contract on the ground of mistake is not to interpret the written contract, but to correct it so that it shall truly state the agreement of the parties. And since in such an action the court is simply called upon to declare the true and complete contract of the parties, which the written contract, through mistake, does not fully set forth, it is clear that the mistake alleged must be mutual. *Alabama Midland Ry. Co.* v. *Brown*, 98 Alabama, 648; Pomeroy's Eq. Jur. §§ 870, 1376; *Maher* v. *Hibernian Insurance Co.*, 67 N. Y. 290.

The evidence of this mutual mistake must be clear and convincing—"the strongest possible." Pomeroy's Eq. Jur. § 850; 1 Story's Eq. Jur. § 152; *Phœnix Fire Ins. Co.* v. *Gurnee*, 1 Paige Chancery Rep. 279; *Newton* v. *Holley*, 6 Wisconsin, 604. The mistake must be established beyond reasonable doubt. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 490; *Stockbridge Iron Co.* v.

Hudson Iron Co., 102 Massachusetts, 49, *Meade* v. *West Chester Fire Ins. Co.*, 64 N. Y. 455; 1 Story's Eq. Jur., 13th ed., 153.

At most, the proof shows only a one-sided mistake and this is not ground for reforming a contract. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 491.

Mr. Malcolm Lloyd, Jr., and *Mr. David Milliken* for appellee:

The Court of Claims has jurisdiction in equity. *South Boston Iron Works* v. *United States*, 34 C. Cl. 200; *District of Columbia* v. *Barnes*, 197 U. S. 146.

A contract may be reformed and enforced as reformed, in the same action. *Harvey* v. *United States*, 105 U. S. 671; *Avery* v. *Eq. Assn. Soc'y*, 52 Hun, 392; *Maher* v. *Ins. Co.*, 67 N. Y. 283; *Jaye* v. *Ins. Co.*, 55 N. Y. 657; *West* v. *Suda*, 69 Connecticut, 60.

A bill or complaint which asks the rectification of a mistake in a written contract and the enforcement of the instrument as reformed states but one cause of action. *Harvey* v. *United States*, 105 U. S. 671; *Avery* v. *Ins. Co.*, 52 Hun, 392; *Maher* v. *Ins. Co.*, 67 N. Y. 283; *Jaye* v. *Ins. Co.*, 55 N. Y. 657; *West* v. *Suda*, 69 Connecticut, 60; *Hutchinson* v. *Ainsworth*, 73 Colorado, 452; *Franklin Ins. Co.* v. *McGea*, 4 Greene (Iowa), 229; *McClurg* v. *Phillips*, 49 Missouri, 315; *Mayer* v. *Van Cullam*, 7 Abb. Pr. (N. Y.) 222; Pomeroy on Remedies, § 459.

The written application in connection with the proposal and the acceptance of that application constitutes the contract between the parties. *Hearne* v. *Ins. Co.*, 20 Wall. 488; *Equitable Ins. Co.* v. *Hearne*, 20 Wall. 494; *Harvey* v. *United States*, 105 U. S. 671; *Garfield* v. *United States*, 93 U. S. 242.

There was in the first written draft agreed upon by the claimant and defendant, the contract between them. *Palmer* v. *Hartford Ins. Co.*, 54 Connecticut, 510. Where the agreement, as reduced to writing, omits terms or stipulations contrary to the common intention of the parties, the instrument will be corrected or reformed, so as to make it conform to their real intent. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488; *Hunt*

v. *Rousmainer*, 1 Pet. 1; *Andrews* v. *Essex Ins. Co.*, 30 Mason, 10; *Oliver* v. *Mutual Ins. Co.*, 2 Curtis, 277; *Van Tuye* v. *Ins. Co.*, 55 N. Y. 657; 2 Pomeroy's Eq. Jur. § 849; 1 Story's Eq. Jur. § 152.

The real question is, not what the real instrument was intended to mean or how it was intended to operate, but what it was intended to be. *Tillis* v. *Smith*, 108 Alabama, 264; *Connor* v. *Armstrong*, 86 Alabama, 265; *Midland R. R. Co.* v. *Brown*, 98 Alabama, 647; *Parker* v. *Parker*, 88 Alabama, 362.

The mistake is documentary and indisputable. This court will not review the finding of the Court of Claims in this respect. *United States* v. *Smith*, 94 U. S. 214.

Mr. Justice Holmes delivered the opinion of the court.

This is a petition praying for the reformation of a contract and for damages for breach of the same as reformed. The Court of Claims granted the prayer and made a decree for damages, 40 C. Cl. 81, whereupon the United States appealed to this court.

The contract is an elaborate and formal instrument, dated June 19, 1899, under the seal of the petitioner and executed on behalf of the United States by the Commissioner of Internal Revenue. It is unnecessary to state its terms. Members of a partnership subsequently incorporated as the petitioner had a contract of like sort expiring July 1, 1899. On or about April 25, 1899, they received from the Commissioner of Internal Revenue the following communication bearing that date:

"*To contractors for imprinting stamps:*

"In awarding contracts for imprinting stamps on checks, drafts, and other instruments for the year commencing July first, 1899, it has been determined to add the following provisions to contracts in addition to these now contained in the existing contracts for imprinting stamps.

"Each contractor will be required to pay salaries aggregat-

ing thirty-four hundred dollars ($3,400) per annum for one Government stamp agent and two counters, payable monthly.

"As compensation in full for imprinting stamps, the contractor shall charge all persons requiring the same the sum of eighty cents per thousand stamps imprinted, when imprinted upon sheets containing five or more stamps, and one dollar per thousand stamps when imprinted upon sheets containing less than five stamps to the sheet. In order to secure absolute uniformity in prices these charges shall be rigidly adhered to, and any evasion or attempted evasion of the express terms hereof shall be deemed a violation of the terms of the contract.

"No application for contract to imprint stamps for period named will be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government.

"Each application for contract must be accompanied by the guarantee of at least two responsible persons, that in case contract is entered into and accepted, bond will be furnished in the sum of twenty-five thousand dollars ($25,000) for the faithful performance thereof.

"The Commissioner reserves the right to reject any or all applications and to cancel any contract wherever and whenever it shall appear to the interests of the public and the Government to do so.

"Applications will be received at the office of the Commissioner of Internal Revenue, Washington, D. C., until 12 m., May 25, 1899, such applications to be carefully sealed and marked 'Applications for contract for imprinting internal revenue stamps' and addressed to the Commissioner of Internal Revenue.

"G. W. Wilson,
Commissioner."

On May 25, 1899, the firm wrote to the Commissioner stating that they then had the privilege to imprint stamps, etc.,

and "would most respectfully make application to you for a contract to continue the same for the period of one year, commencing July 1, 1899, and in accordance with your official communication, dated April 25, 1899, we to pay salaries aggregating thirty-four hundred dollars for one Government stamp agent and two counters, and to receive as compensation for imprinting stamps the sum of eighty cents per thousand when imprinted upon sheets containing five or more stamps and one dollar per thousand when imprinted upon sheets containing less than five stamps per sheet." They added that they attached a guarantee to furnish the required bond and referred to letters accompanying the original application. This letter now is denominated an acceptance of what is called the offer of April 25, above set forth. The alleged mistake is the omission, from the formal contract, of the paragraph in that communication, to the effect that no application will be considered from any person not now engaged in printing stamps under contract with the Government, and the following one limiting the time for applying to May 25. After May 25 an application was accepted from the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the Government on April 25. The damages awarded were the profits which would have been made by the petitioner had it not lost the customers who went to the corporation last named.

The Government objects at the outset that the Court of Claims has no jurisdiction in equity, and that, although the petitioner's demand is for money under a contract as it should have been drawn, yet in this suit that demand is incident to the reformation asked, which certainly is true. Reformation is not an incident to an action at law, but can be granted only in equity. When relief is granted also on the contract as reformed it means only that the court of equity sees fit to go on and finish the whole case. But we are of opinion that the court was warranted in taking jurisdiction under a fairly liberal interpretation of the act of March 3, 1887, c. 359, § 1,

24 Stat. 505. That section gives the Court of Claims jurisdiction of "all claims founded . . . upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." A claim for money upon a contract, which would be like a right of action at common law but for the need of help from equity to establish the contract, seems to us to fall within these words, in their obvious, literal sense. *District of Columbia* v. *Barnes*, 197 U. S. 146, 150, 152; *South Boston Iron Works* v. *United States*, 34 C. Cl. 174, 200.

We come then to the merits. It is unnecessary to consider whether the Court of Claims ought to have made the findings of fact required in an ordinary case. We leave that question where we find it. *District of Columbia* v. *Barnes*, 197 U. S. 146, 150; *Harvey* v. *United States*, 105 U. S. 671, 691. For we are of opinion that the United States was entitled to a ruling as matter of law that there was no evidence which would warrant a decree for the petitioner; and therefore it would be a useless form to send the case back for findings to be made.

The petitioner's case depends on the assumption that the communication of April 25 was an offer and that the letter of May 25 was an acceptance. But obviously this is a mistake. The former is a notice, not an offer. Its very first words, "In awarding contracts," contemplate the necessity of further action on the Commissioner's part. The clause which it is said should have been inserted speaks of an "application for contract," the right to reject applications is reserved in terms and directions are given for sending them and as to the time within which they will be received. In like manner the letter of May 25 purports to "make application to you for a contract," and refers to recommendations, thus showing that it was understood that the Commissioner might refuse what was asked. No preliminary agreement was made

and there was no new contract until the instrument sought to be reformed was signed. It is true that Milliken, the president of the petitioner in the court below, says that he was informed by the Commissioner that his application was accepted and his contract would be renewed. But he goes on to say that he then called on the chief of the stamp division, was informed by him that it had been decided that the application of any person who had a contract would be granted, and received blank copies of the contract to be executed, so that the acceptance was contemporaneous with the delivery of the instrument informing the petitioner of the terms. There is no room for the application of *Harvey* v. *United States,* 105 U. S. 671, and similar cases, upon which the petitioner relies. The only effect of the testimony is to confirm by the conduct and language of the parties the interpretation of the previous communications, which does not need that confirmation to be plain. It should not pass unmentioned that the communications were between the Commissioner and the firm, and therefore not even with the same person that brings the present suit.

In strictness it is not necessary to go further. For the parol testimony which we shall mention amounts to nothing, except upon the footing that there was a preliminary written agreement. But it is proper to add that it is doubtful, at least, whether the two letters bear the interpretation which the petitioner now puts upon them. It is plain that not all the paragraphs of the notice to contractors after the first were provisions to be added to future contracts. That which follows the one in question was on the face of it simply information as to what the applicants must do. The last paragraph, fixing the time within which applications would be received, also obviously was a self-protecting notice only, and although the petitioner does set it up as properly a term of the agreement, the averment is only by way of make-weight to what mainly is relied upon, and we hardly think that it needs discussion. The communication was a general form to instruct

and direct applicants for contracts. The most natural meaning of the clause principally in question was simply to give notice that applications from persons not already engaged in imprinting stamps would not be considered and thereby to limit the applications sent in. It is not natural to read it as intended to contract the Government out of its right to employ new persons in case a need to do so should arise.

The petitioner's letter also in its most natural interpretation would confine the changes in the contract to the requirements concerning salaries and the rate of compensation. It is true that it contains the general words, "and in accordance with your official communication dated April 25, 1899," but it goes on to show what it regards as the elements of that communication material to the contract by the following words. It mentions salaries and the rate of compensation, nothing else. The words quoted are not an independent clause but they qualify the next phrase "we to pay salaries," etc. On these two letters, even if they had made a contract, which they did not, the Government hardly could have been held to the disputed terms. It may be mentioned further that Milliken testified that when he wrote that letter he did not consider the clause in question to relate directly to the subject matter of the contract, and although at a later date he stated that he desired to modify his testimony, the only intelligible modification, if it be called one, is that his testimony related to the time when he wrote the letter, not to the time when he received the contract to be signed.

After what we have said but a few words need be added with regard to the parol evidence offered. Milliken says that when he received the blanks he said to the chief of the stamp division that he presumed the only changes from the former contract were those contained in the letter of April 25, was answered, "That is all," and thereupon afterwards executed the contract without reading it. If this were undisputed and had come from anyone authorized to bind the Government, still, whatever effect, if any, it might have upon an undisclosed

insertion, it would afford no ground for complaint at an omission, especially an omission of the paragraph we have discussed. The answer was true in letter and spirit, and in no degree warranted the inference that the blanks contained the disputed clause. The petitioner executed those blanks without any ground whatever for assuming that they contained anything which they did not, even if Milliken had been right in what he says he supposed to be the import of the notice of April 25.

Finally, there is not a particle of evidence that the contract was not drawn just as the United States, through its representative, the Commissioner of Internal Revenue, intended that it should be, and for this reason again reformation must be denied. It is true that Milliken testifies that the Secretary of the Treasury admitted to him that the contract with the American Imprinting Company was in violation of the contract with the petitioner. But it is left doubtful, at least, whether the Secretary knew anything about what contract was intended to be made. The act of March 3, 1899, c. 424, 30 Stat. 1090, 1091, authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to procure certain stamps by contract, to be awarded under such terms, restrictions, and regulations as might be prescribed by the former with the approval of the latter. But that it not sufficient to warrant an assumption that the Secretary gave directions or had knowledge as to the intended form of the contract. Moreover, so far as appears, the Secretary did not suggest or admit that there was any mistake in the form of the instrument. It would seem that Milliken exhibited to him the notice of April 25 as containing the Government's agreement, and that the Secretary fell in with Milliken's interpretation of the paper, but refused to do anything until the Commissioner of Internal Revenue returned. For all the reasons which we have stated, we are of opinion that the United States is entitled to a decree as matter of law.

Decree reversed.

In re LINCOLN, PETITIONER.

PETITION FOR A WRIT OF HABEAS CORPUS.

No. 21, Original. Submitted April 23, 1906.—Decided May 14, 1906.

Where petitioner's term of imprisonment has expired, but under the sentence he is still subject to confinement until a fine of $100 and costs has been paid, and nothing in the record shows whether such fine has been collected on execution as authorized by the sentence, but if not collected or collectible the petitioner can shortly be discharged on taking the poor debtor's oath, the case is practically a moot one, upon which the time of this court should not be spent.

Conceding the full jurisdiction of this court in *habeas corpus*, and although the writ has been granted, in view of the special circumstances therein involved, in a case similar in some respects to the one at bar, it is a question in every case whether the exercise of that jurisdiction is appropriate. The ordinary procedure for correction of errors in criminal cases by writ of error should be pursued unless special circumstances call for a departure therefrom; and so *held* in regard to a petition for *habeas corpus* of one convicted in a District Court of the United States for selling liquor to Indians in Indian country who could and should have proceeded by writ of error from the Circuit Court of Appeals.

THE petitioner was convicted in the District Court for the District of Nebraska on an indictment charging that he did "wrongfully and unlawfully introduce into Indian country, to wit, into and upon the Winnebago Indian Reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the Winnebago Indians, certain spirituous, vinous, malt and other intoxicating liquors."

Upon this conviction he was sentenced to pay a fine of $100 and the costs of prosecution and to be imprisoned in the jail of Douglas County, Nebraska, for the term of sixty days and until said fine and costs were paid. The imprisonment commenced on February 19, 1906. Without pursuing his remedy by writ of error the petitioner on April 2, 1906, filed in this court his application for a writ of *habeas corpus*, alleging that the United States has no police power or jurisdiction over the Winnebago Reservation, and that the law under which the

indictment was drawn is unconstitutional and void in so far as it applies to the said Winnebago Reservation, and that the United States District Court was wholly without jurisdiction in the premises. The indictment was found under the act of Congress of January 30, 1897. 29 Stat. 506. April 30, 1906, the case was submitted on petition, return and a stipulation of facts.

Mr. Thomas L. Sloan and *Mr. Williamson S. Summers* for petitioner.

The Solicitor General for respondent.

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

The sixty days named as the term of imprisonment had expired before the case was submitted, and indeed had almost expired before the application was made for the writ. There is nothing to show whether the fine and costs have been collected upon execution, as the sentence authorizes. If not so collected and if they cannot be collected, then, though possibly still in jail, he can shortly be discharged on taking the poor debtor's oath. Rev. Stat. § 1042. This section authorizes a discharge after a confinement of thirty days on account of the non-payment of fine and costs. So that within ninety days from February 19, the time the sentence took effect, the petitioner can secure his discharge either by paying the fine and costs or by taking the poor debtor's oath, as above stated.

In *Ex parte Baez*, 177 U. S. 378, which was an application for a writ of *habeas corpus*, it appeared that before a return to the writ could be made, or other action taken, the restraint of which the petitioner complained would terminate, and it was held that the application for the writ should be denied. Indeed the case at bar in principle is not unlike *Mills* v. *Green*, 159 U. S. 651; *New Orleans Flour Inspectors* v. *Glover*, 160 U. S. 170; *Kimball* v. *Kimball*, 174 U. S. 158, and *Jones* v. *Montague*,

194 U. S. 147, in each of which intermediate the ruling below and the time for decision here events had happened which prevented the granting of the relief sought, and the appeals or writs of error were dismissed on the ground that this court did not spend its time in deciding a moot case.

While the full jurisdiction of this court in *habeas corpus* may be conceded, there is in every case a question whether the exercise of such jurisdiction is appropriate. In *Ex parte Royall*, 117 U. S. 241, Royall, who was held under state process for trial on an indictment charging an offense against the laws of the State, filed his petition in *habeas corpus* in the Circuit Court of the United States praying release from that custody. The Circuit Court refused to order his discharge, and from its ruling he appealed, and at the same time filed an original petition in this court. *Ex parte Royall*, 117 U. S. 254. The question was fully considered and it was held that while the Federal courts, Circuit and Supreme, had jurisdiction in the premises, there was a discretion whether in any case a writ should be issued, Mr. Justice Harlan speaking for the court, saying (p. 251):

"That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the Gen-

eral Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority."

And again, after commenting on the relations of state and national courts (p. 252):

"That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

The propositions thus laid down have been upheld by repeated decisions of this court. *Ex parte Fonda*, 117 U. S. 516; *In re Duncan*, 139 U. S. 449; *In re Wood*, 140 U. S. 278; *Cook* v. *Hart*, 146 U. S. 183; *In re Frederich, Petitioner*, 149 U. S. 70; *New York* v. *Eno*, 155 U. S. 89; *Pepke* v. *Cronan*, 155 U. S. 100; *Andrews* v. *Swartz*, 156 U. S. 272; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Kohl* v. *Lehlback*, 160 U. S. 293; *Iasigi* v. *Van De Carr*, 166 U. S. 391; *In re Eckart, Petitioner*, 166 U. S. 481; *Baker* v. *Grice*, 169 U. S. 284; *Tinsley* v. *Anderson*, 171 U. S. 101, 104; *Fitts* v. *McGhee*, 172 U. S. 516; *Markuson* v. *Boucher*, 175 U. S. 184; *Davis* v. *Burke*, 179 U. S. 399; *Gusman* v. *Mar-*

rero, 180 U. S. 81; *Minnesota* v. *Brundage*, 180 U. S. 499; *Storti* v. *Massachusetts*, 183 U. S. 138.

In *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1; *Ohio* v. *Thomas*, 173 U. S. 276, and *Boske* v. *Comingore*, 177 U. S. 459, writs of *habeas corpus* were sustained, but in each of these cases the act charged against the petitioner was one for which he was amenable alone to the laws of the United States, or he was exercising some authority under those laws, and so they all come within the exceptions noted in *Ex parte Royall*, *supra*.

While the same reasons do not apply when the petitioner is in custody by virtue of the process of a Federal court, yet a writ of *habeas corpus* is not to be made use of as a writ of error (*Crossley* v. *California*, 168 U. S. 640; *Whitney, Warden, &c.*, v. *Dick*, *ante*, p. 132), the ordinary procedure for the correction of errors in criminal cases is by writ of error, and that method should be pursued unless there be special circumstances calling for a departure therefrom. *Ex parte Mirzan*, 119 U. S. 584; *In re Huntington*, 137 U. S. 63; *In re Lancaster*, 137 U. S. 393; *In re Chapman*, 156 U. S. 211; *Riggins* v. *United States*, 199 U. S. 547. Several of these cases, it is true, were applications for *habeas corpus* prior to final decisions in the lower courts, and the refusal of the writs was based partly, at least, upon the proposition that the orderly administration of justice would be better subserved by declining to exercise our jurisdiction until the conclusion of the proceedings below. In *Ex parte Mirzan*, however, this court declined to issue a writ of *habeas corpus* after a conviction, holding that it might be issued by the proper Circuit Court, and that application should be made to that court except in cases where there were some special circumstances making immediate action by this court necessary or expedient. In the case at bar if there was any error in the proceedings of the trial court it could have been corrected by writ of error from the Court of Appeals, and no reason is given why that remedy should not have been pursued, except the request of the district judge who decided the

case. Reference is made to a decision of the Court of Appeals of the Eighth Circuit, *In re Boyd*, 49 Fed. Rep. 48, but that only announced the doctrine of some of the cases cited above, that ordinarily prior to final judgment a writ of *habeas corpus* ought not to be issued.

It is true that we issued a writ of *habeas corpus* in a case in some respects like the present, *Matter of Heff*, 197 U. S. 488, and it is relied upon by petitioner as authority for this application, but it was shown in that case that there was a direct conflict between the state and local Federal courts in the precise point of law involved, each asserting jurisdiction over the same offense; that the Court of Appeals had already decided the question adversely to the contention of petitioner, so that a writ of error from that court would have accomplished nothing; and further, that the matter involved opened up inquiry into questions of great significance affecting the respective jurisdictions of the Nation and the States over large numbers of Indians. There were special reasons, therefore, for our issuing a writ of *habeas corpus* and investigating the matter in that case. But it does not follow from the action then taken that it is necessary or proper for this court to issue a *habeas corpus* in every case involving the question of the legality of a sale of liquor to Indians or the bringing of liquor into the Indian country. It is enough that the cases be disposed of in the orderly and customary mode of procedure. It may be assumed that the trial courts will follow the rulings of this court, and if there be in any case a departure therefrom the proper appellate court will correct the error. To permit every petty criminal case to be brought directly to this court upon *habeas corpus*, on the ground of an alleged misconception or disregard of our decisions, would be a grievous misuse of our time, which should be devoted to a consideration of the more important legal and constitutional questions which are constantly arising and calling for our determination.

For these reasons

The petition for a writ of habeas corpus is denied.

UNITED STATES *v.* CORNELL STEAMBOAT COMPANY.

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

No. 239. Argued April 20, 1906.—Decided May 14, 1906.

While a claim for salvage of Government property based on services rendered without request of any officer of the Government does not arise upon any contract, express or implied, it is properly one for unliquidated damages in a case not sounding in tort, in respect to which the claimant would be entitled to redress in the admiralty court if the United States were suable, and, under the Tucker Act, the Court of Claims, or the proper District Court where the claim is for less than $1,000, has jurisdiction of a suit therefor.

The successful salving of undelivered merchandise on which duties have been paid, but which the Secretary of the Treasury is authorized by §§ 2984, 3689, Rev. Stat., to refund if the goods were lost, entitles the salvors to recover from the Government a reasonable salvage, equal to that recovered on the private property saved at the same time, on the amount of duties which the Government would have been under obligation to refund had the merchandise been lost. In such a case it will be assumed that the duties will be refunded, and the claim therefor will be regarded as a liability, although § 2984 is permissive and not mandatory in form.

Although courts of admiralty have no general equity jurisdiction, and cannot afford equitable relief in a direct proceeding for that purpose, they may apply equitable principles to subjects within their jurisdiction.

THIS was a petition under what is known as the Tucker Act, defining the jurisdiction of the Court of Claims, to recover salvage upon the duties on 1,883 bags of sugar, cargo of the lighter Bangor.

The facts agreed upon and found by the court are substantially as follows:

The Steamboat Company, a New York corporation, and owner of the steam tug R. G. Townsend, at great risk and peril to the tug, saved a certain lot of 1,883 bags of sugar on board of a lighter called the Bangor, in the waters of the port

of New York, which was in danger of being destroyed by fire. The sugar had been imported from a foreign country, was subject to duty under the laws of the United States, and at the time of the fire had not been delivered to the consignees, and was still in the possession and control of the customs officers. The duties on this sugar amounting to $6,000 had been paid to the Government.

Petitioner filed a libel in the District Court against the cargo to recover salvage compensation for services rendered in saving the sugar. The case resulted in a decree awarding the petitioner salvage, amounting to ten per cent of the value of the property saved, viz., $1,274.03. 108 Fed. Rep. 277. In fixing this sum the District Court considered the invoice value of the sugar only, excluding salvage upon the duties saved to the United States by the salving services.

Upon these facts the District Court awarded the appellant ten per cent upon the amount of the duties saved to the United States, namely, $600, with clerk's fees, $3.60. 130 Fed. Rep. 480. The Circuit Court of Appeals affirmed this judgment, 137 Fed. Rep. 455, whereupon the United States applied for this writ of certiorari.

Mr. J. C. McReynolds, Assistant Attorney General, for the United States:

The District Court has no jurisdiction.

Unless granted by the Tucker Act the trial court was without authority to afford relief. Obviously the present controversy, if provided for at all, must be one arising out of contract, expressed or implied, or from damages, in respect to which respondent would be entitled to redress against the United States in a court of law, equity, or admiralty if suable as a private individual.

There was no contract, expressed or implied, between the Government and the respondent and no such thing is alleged in the petition. The services to the cargo were purely voluntary. The claim is not one in respect of which respondent

would be entitled to redress in a court of law, equity, or admiralty against a private individual. No recovery, either at law or in equity, is possible for purely voluntary services.

A proceeding in admiralty *in personam* against a private individual for salvage allowance is not permissible unless the service was performed "at his request and for his benefit," or unless in some way a proceeding *in rem* against the thing salved has become impossible—as, *e. g.*, by clandestine removal or destruction after delivery to the owner. Benefit, however great, from salving a cargo cannot support a claim *in personam* for the services rendered. Admiralty Rule 19; *The Sabine*, 101 U. S. 384, 389.

It follows that if the Government were subject to suit as an individual, respondent's claim for saving the cargo in question could not be enforced by a proceeding *in personam* against it.

Section 2984, Revised Statutes, specifies the sole method assented to by the Government for securing refund of duties paid upon merchandise afterwards destroyed. The courts have no jurisdiction of an original proceeding to enforce such a claim—whatever might be their power in a case where the Secretary should refuse to perform his duty.

The claim set up in the present proceeding must be regarded as under the revenue laws. Such claims are not within the jurisdiction of the courts, since those laws constitute a distinct and exclusive system of collection and redress. *Nichols* v. *United States*, 7 Wall. 122, 131; *D. M. Ferry & Co.* v. *United States*, 85 Fed. Rep. 550. See also *State Railroad Tax Cases*, 92 U. S. 614; *Auffmordt* v. *Hedden*, 137 U. S. 324; *Treat* v. *Staples*, 1 Holmes, 5; *S. C.*, 24 Fed. Cas. 14,162.

Upon the facts, respondent's claim is without merit. What respondent did was purely voluntary and such services, however meritorious or beneficial, create no obligation enforceable against the beneficiary either in law or equity.

The maritime law, for the purposes of public policy, and for the advantage of trade and commerce, imposes in cases of

salvage a *jus in re*, a liability upon the thing saved—a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of the sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. Kennedy on Civil Salvage, 6; *Falcke* v. *Scottish Imperial Ins. Co.*, 34 Ch. Div. 234, 248; *The Blaireau*, 2 Cranch, 240, 265; *The Emblem*, 8 Fed. Cas. 4434.

Salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued. *Cope* v. *Vallette Dry Dock Company*, 119 U. S. 625. The right does not arise on saving property of other kinds which may have been moored afloat, and have got adrift, such as a raft of timber, a buoy, or a floating dry dock. Carver's Carriage by Sea, 3d ed., § 322.

The foundation of the admirality jurisdiction in the awarding of salvage is the power of enforcing the maritime lien obtained on property saved by salvors. *The Cargo Ex. Schiller*, 2 L. R., P. D. 145, 149; *The Emblem*, 8 Fed. Cas. No. 4434; *The Independence*, 13 Fed. Cas. 7014; *The Sabine*, 101 U. S. 384.

Salving charges cannot be enforced for rescuing bills of exchange and other evidences of debt. *The Emblem*, 8 Fed. Cas. No. 4434. Salvage cannot be awarded for saving the United States mails because not subject to detention and sale. *The Merchant*, 17 Fed. Cas. No. 9435.

Mr. R. D. Benedict for respondent:

The United States Government is liable to pay salvage. In this the Government differs from an ordinary shipowner only in the form in which it must be sued, and in the fact that no attachment can be made of its vessel to which the service was rendered. But its liability to pay salvage—not compensation for work, labor and services, but salvage, with all that the word means—has been affirmed by the Supreme Court, by the

Court of Claims, by the Circuit Courts of Appeals for the Fourth and Second Circuits, by the Circuit Court for the District of Connecticut, and by the District Court for the Northern District of California, and has never been denied by any court. *The Davis*, 10 Wall. 15; *Gould* v. *United States*, 1 C. Cl. 184; *Bryan* v. *United States*, 6 C. Cl. 128; *McGowan* v. *United States*, 20 C. Cl. 147; *United States* v. *Morgan*, 99 Fed. Rep. 570; *Hartford & N. Y. Trans. Co.* v. *United States*, 138 Fed. Rep. 618; *Rees* v. *United States*, 134 Fed. Rep. 146.

The United States, in relation to the proprietorship of real or personal property, has, in its public capacity, like authority and remedies, and is subject to like liabilities in dealing with it through legal agencies or otherwise as natural persons. *Eight Hundred and Fifty-eight Bales of Cotton*, Bl. Pr. Cas. 325.

When the United States allows itself to be sued it must stand before the court like any other party before the court, affected by the same considerations as any other party. *Cook* v. *United States*, 10 Blatch. 59; *Eight Hundred and Fifty-eight Bales of Cotton, supra; United States* v. *Bostwick*, 94 U. S. 53, 66.

It is claimed that the suit for salvage cannot lie here, because the United States did not request the service. That proof of a specific request is not necessary is held in all the cases above cited, for in none of them was there proof of any specific request by the United States. The "implied contract growing out of the successful event of the service," *United States* v. *Morgan*, 99 Fed. Rep. 572, has always been held sufficient ground for the jurisdiction of the court to award salvage.

There is no merit in the claim that the Secretary of the Treasury might refuse to repay the duties under § 2984, Rev. Stat.

The supposition that the Government will not do justice is not to be indulged. *Gibbons* v. *United States*, 8 Wall. 269; *Supervisors* v. *United States*, 4 Wall. 435, 446; *Galena* v. *Amy*, 5 Wall. 708; *French* v. *Edwards*, 13 Wall. 511.

Permissive words will be construed to be mandatory in the interests of individuals. *Ralston* v. *Crittenden*, 13 Fed. Rep. 512; *New Orleans National Bank* v. *Merchant*, 18 Fed. Rep. 841; *National Bank of the Republic* v. *St. Joseph*, 31 Fed Rep. 216; *Provisional Municipality of Pensacola* v. *Lehman*, 27 Fed. Rep. 324, 332; *Little Rock* v. *United States*, 103 Fed. Rep. 324; *Village of Kent* v. *United States*, 113 Fed. Rep. 237. See also *People* v. *Supervisors*, 51 N. Y. 401; *Chinese Laborers' case*, 13 Fed. Rep. 291; *United States* v. *Kirby*, 7 Wall. 482.

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

This is practically a libel *in personam* for the salvage of government property, viz., of $6,000 duties collected by the Government upon a cargo of sugar saved from loss by fire, while on board a lighter in the harbor of New York.

The claim is prosecuted under what is known as the Tucker Act, 24 Stat. 505; Compiled Stat. 1901, pp. 752, 753, the first section of which declares that "the Court of Claims shall have jurisdiction to hear and determine . . . all claims founded upon the Constitution of the United States, or any law of Congress, . . . or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

By the second section concurrent jurisdiction with the Court of Claims was vested in the District Courts as to all claims not exceeding $1,000.

It is at least doubtful whether an ordinary claim for salvage can be said to arise upon contract, inasmuch as such services are rendered voluntarily, frequently in the absence of the owner of the property, and usually without a definite agreement for compensation. *The Liffey*, 6 Asp. M. L. C. 255;

Five Steel Barges, 15 P. D. 142. A claim for salvage may undoubtedly be founded upon an express contract, but where the services are rendered, as in this case, without request of an officer of the Government, and particularly where they are incidental to services rendered in the saving of private property, we do not think the claim can be said to arise upon any contract, express or implied, with the Government of the United States. But the claim may properly be said to be one for unliquidated damages in a case "not sounding in tort," in respect of which the party would be entitled to redress in a court of admiralty, if the United States were suable.

The Tucker Act also resolves any doubt which might arise as to the responsibility of government property for salvage service, since it was the very object of the act to give a direct recourse against the Government. Indeed, that question was settled by this court in 1869, in the case of *The Davis*, 10 Wall. 15, in which personal property of the United States, in transit from one port to another, was held liable to a lien for salvage services rendered in saving the property, following the rule laid down in England in *The Marquis of Huntly*, 3 Haggard, 246, and *The Lord Nelson*, Edward's Admiralty, 79. The same rule was adopted by Mr. Justice Story in *United States* v. *Wilder*, 3 Sumner, 308, although both in England and in this country vessels belonging to the United States, or to a foreign sovereign, and engaged in the public service, are exempt from seizure. *The Exchange*, 7 Cranch, 116; *The Charkieh*, L. R. 4 A. & E. 59; *The Constitution*, 4 P. D. 39; *The Parlement Belge*, 4 Asp. M. L. C. 234; *S. C.*, 5 P. D. 197.

The fact, however, that the property saved is not within the physical possession of the court, but is of an intangible nature, like freight or customs dues, does not prevent the maintenance of a libel *in personam* against the owner. Indeed, General Admiralty Rule No. 19 provides that "in all suits for salvage the suit may be *in rem* . . . or *in personam* against the party at whose request and for whose benefit the salvage services have been performed." In the case of freight the

practice is to require its payment into court. *The Leo,* Lush. 444.

At the basis of the claim in this case lies the proposition that, although the duties had been actually paid before the services had been rendered, the Secretary of the Treasury was *authorized* to refund duties upon so much of the sugar as would have been lost by the fire had not the cargo been rescued by the salvors. The obligation to refund such duties is contained in the following sections of the Revised Statutes:

"SEC. 2984. The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, . . . or while in custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part as the case may be."

Provision for such abatements or refunds is made in:

"SEC. 3689. There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively; and such appropriation shall be deemed permanent annual appropriations. . . . For refunding duties paid or accruing on goods, wares, or merchandise injured or destroyed by accidental fire or other casualty, while in the custody of the officers of customs, in any public or private warehouse, . . . or after their arrival within the limits of any port of entry of the United States, and before the same have been landed under the supervision of the officers of the customs."

It was held by both courts below, and we think properly, that, if the Government were liable to refund these duties in case the property had been destroyed by fire, it was under the came obligation to pay salvage on such duties, as it would have been had property of the Government of the same value been directly saved by the exertions of the salvors.

It is true that the language of section 2984 is permissive, and merely "authorizes" the Secretary of the Treasury to abate or refund duties collected upon merchandise injured or destroyed by accidental fire or other casualty, and does not in terms *require* that this shall be done. We do not find it necessary, however, to go deeply into the learning expended upon the distinction between permissive and mandatory clauses, or to determine whether in a particular case mandamus would or would not lie against the Secretary for refusing to refund or abate duties in that connection. *D. M. Ferry & Co.* v. *United States*, 85 Fed. Rep. 550. Under the circumstances of this case, as set forth in the petition and agreed findings of fact, we are entitled to assume that the Secretary of the Treasury would have refunded these duties in case of the accidental loss of this sugar by fire, since the authority to do so is found in section 2984, and the money is appropriated for such refunding by section 3689. In a particular case we can imagine that doubts might arise as to the propriety of such refunding, but where a plain case is made in the findings of fact, and is not disputed, it would be an imputation upon the good faith of the Secretary to assume that he would refuse to return the duties, notwithstanding the language of the statute may be construed as permissive merely. We think the petitioner is entitled to build his case upon this assumption. *Supervisors* v. *United States*, 4 Wall. 435; *Galena* v. *Amy*, 5 Wall. 704; *French* v. *Edwards*, 13 Wall. 506.

It is insisted, however, that the Government is under no greater liability to pay this claim than it would have been if the duties had not been paid, and that the law is well settled that when property is saved at sea and brought into port, it is

subject to duty like other property, that the Government owes nothing to the salvors, and by parity of reasoning that no insurer of goods saved, nor a creditor who has advanced money thereon, nor a seaman whose wages are preserved, can be made liable for salvage. The obvious reason for this is that the claim for salvage is founded upon the possession of the property saved at the time of the salvage service, and that the person incidentally benefited cannot be made liable under General Admiralty Rule 19, unless he has requested the salvage, or the service has been performed directly for his benefit. Interpreting this rule in the case of *The Sabine,* 101 U. S. 384, it was held that a libel would not lie *in rem* against the vessel and *in personam* against the consignee of the cargo. But the mere possession of property may be in itself not only the origin of a right but the creation of a liability—as, for instance, in cases of money had and received or property lawfully acquired but unlawfully detained. Had the duties upon these goods not been collected, the Government could not have been held liable, since the services would not have been performed for its benefit, although as a remote consequence therefrom it might have been advantaged.

The case of *The Five Steel Barges,* 15 P. D. 142, is authority for the proposition that the remedy *in personam* is not confined to the legal owner of the property saved, but extends to one who has a direct pecuniary interest in such property. This was an action against five barges, two of which belonged to the Government, with whom the defendants were under contract to build and deliver the barges. An action *in rem* was brought against the three barges, and an action *in personam* against the defendants, who had contracted with the Government and given it possession of the two barges. The court sustained the action *in personam,* thinking it "perfectly clear that an action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others and the lien lost." Continuing, the President of the court, Sir James Hannen, observed: "I think it exists in cases

where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved; that the owner of the property, who has had the benefit of it, shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had the benefit arising out of the saving of the property." This last sentence is particularly applicable to this case.

In the subsequent case of *The Port Victor*, 9 Asp. M. L. C. 163, the same court decided that where Government stores were being carried at the risk of charterers, these charterers were liable to pay salvage in a *personam* action apart from the liability of the stores *in rem*. The case was decided largely upon the authority of *The Five Steel Barges* and *Duncan* v. *Dundee, &c., Shipping Company*, in the Court of Sessions in Scotland, 4th Series, vol. 5, p. 742, and was affirmed by the Court of Appeals in an opinion by Lord Alverstone, 9 Asp. Mar. Cases, 182, in which great deference was shown to the decision of Sir James Hannen. See also Carver on Carriage by Sea, § 324*a*.

Although courts of admiralty have no general equity jurisdiction and cannot afford equitable relief in a direct proceeding for that purpose, they may apply equitable principles to subjects within their jurisdiction, and in the distribution of proceeds in their possession or under their control may give effect to equitable claims. 2 Parsons on Shipping, 344. Bearing in mind that the duties in this case had been actually collected, were in the hands of the Government and had been saved to it by the exertion of the salvors, who had been awarded salvage for saving the sugars upon which the duties had been

collected, a strong case is presented for the allowance of salvage, which should not be lost sight of in determining the principles applicable to the situation.

The case is clearly not one arising under the revenue laws as they are defined in *Nichols* v. *United States*, 7 Wall. 122, since the sections of the Revised Statutes above quoted are only incidentally involved.

The decree of the Circuit Court of Appeals is, therefore,

Affirmed.

MR. CHIEF JUSTICE FULLER dissented.

DARLINGTON *v.* TURNER.

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

No. 196. Argued March 6, 7, 1906.—Decided May 14, 1906.

Although the auditor and both courts below found that plaintiff in error's testator had been guilty of fraud and that his estate was liable, and under the general rule this court will not disregard a particular state of facts found by both courts below, still it can and will do so, when it is constrained to the conclusion that the premise upon which those courts acted is without any support in the evidence and rests upon a mere mistaken assumption; and so held in this case where the finding of fraud rested on the uncorroborated testimony of an interested witness who had been so discredited by uncontroverted evidence in regard to his own acts of omission and commission as to render it impossible to accept his testimony as establishing the alleged fraud of the deceased.

Where by the law of their domicil, as is the case in Louisiana, minors are represented by their father as administrator, with full power under that law to receipt for, and administer for their account, property bequeathed to them by a testator domiciled and dying in Virginia, a transfer of such property to the father as the administrator or representative of his minor children by a person having possession thereof in the District of Columbia, is valid and binding.

Under the circumstances of this case decedent's liability for an amount invested having been fixed with accuracy as to time and amount, and it

being impossible from the record to ascertain the ultimate fate of the investment, and whether it was so lost as to relieve decedent from responsibility, the court will hold the estate liable therefor with legal interest but subject to adjustment for admitted overpayments to one of the complainants.

In June, 1898, Philip A. Tracy died in the city of Washington, where he was domiciled. His will, executed in Washington on March 2, 1894, was duly probated in August, 1898. The will directed the executors to build a family monument, to cause to be inscribed thereon the names and the dates of the birth and death of the deceased, of his father and mother and of a brother and sister, in accordance with minute directions contained in a memorandum accompanying the will. A bequest of one thousand dollars was made to the Oak Hill Cemetery Company to perpetually care for the lot and the monument. In addition, after making several minor bequests, one of which was a gift of one hundred dollars to the Home for Incurables, two thousand dollars was given for a Sunday School building for the Trinity Episcopal Church in the city of Washington. The residue of the estate was bequeathed "to the trustees of the Epiphany Church Home in this city, to pay for the enlargement of the building now used as the home, or for the erection of another building for the same use and purpose." George W. Gray and J. J. Darlington, the executors named in the will, qualified.

Within one year, and before receiving notice of the claim which is the subject of this suit, the executors of Tracy had paid the debts, had discharged the minor legacies above referred to, and had in hand to be applied to the other provisions of the will forty-seven thousand dollars in money and securities and two unimproved lots in the city of Washington of small value. The further execution of the will was prevented by a demand to pay the claim which forms the basis of this suit, and upon refusal to do so on June 10, 1899, this bill in equity was filed to establish and enforce the claim. The complainants were Erle H. Turner and Wilmer Turner, and Ashby

and Lunette Turner; the last two, being minors, were represented by Wilmer Turner as their next friend.

It was in substance averred in the bill that Silas H. Turner, a paternal uncle of the complainants, died in Fauquier County, Virginia, on September 21, 1888, leaving a will by which he bequeathed equally to complainants, who were the children of Thomas M. Turner, all the property of which the testator died possessed, the will being as follows:

"WASHINGTON, D. C., April 30, 1888.

"I hereby give and bequeath to the four children of my brother Thomas M. Turner of Minden, Louisiana, all property real and personal, owned by me, or in which I have any interest at the time of my death, and appoint Philip A. Tracy to distribute the proceeds of the said property equally between them.

"S. H. TURNER.

"Witness: PHILIP A. TRACY.
"GEORGE G. FENTON."

It was also alleged that this will was admitted to probate in Fauquier County, Virginia, on or about November 28, 1888. It was then alleged that Philip A. Tracy was the confidential agent and trustee of Turner, deceased, and in that capacity had in his possession money which, as agent and trustee, Tracy had invested for the benefit of said Turner. It was charged that shortly before the death of Turner, Tracy had given Turner a memorandum or list, entirely in the handwriting of Tracy, stating the dates and amounts of the promissory notes held by Tracy, belonging to said Turner, and the names of the makers thereof, and that the said notes aggregated $28,972.10. This memorandum or list, alleged to be wholly in the handwriting of Tracy, was copied in the bill, and it was averred that after the death of Turner, Tracy had admitted the accuracy of said list and his possession of the notes which it embraced. It was then averred that the land records of the District of Columbia

disclosed that all the notes mentioned in the alleged memorandum or list and the accrued interest had been paid after the death of Silas H. Turner. It was averred that, with the exception of a sum of about fourteen hundred dollars, alleged to have been paid by Tracy to Erle H. Turner, no account had been rendered or distribution made by Tracy of the aforesaid property or of the proceeds thereof, and that, excluding the payment alleged to have been made, as above stated, to Erle H. Turner, "the entire trust fund, principal and interest and profits, had come into the possession of the defendants as executors of Tracy."

The paragraph of the bill immediately preceding the prayer was as follows:

"21. That the domicil and citizenship of the parents of complainants have always been since the birth of these complainants either in the State of Louisiana, which was their domicil, until about the — day of August, 1889, or in the State of Texas, which has been since and is now the domicil of said parents and of all complainants, except complainant Erle H. Turner, whose domicil is now Philadelphia, Pennsylvania. Complainants are informed and believe and therefore aver that by the laws of Louisiana and of Texas the parents of minor children are not of right guardians of the estate of such minors, and no person is authorized to receive or demand the estate of any minor domiciled in either of said States, except such persons as shall be duly appointed by a court of the States having competent jurisdiction; and that neither the father nor the mother of any of these complainants nor any other person has ever been appointed by any court guardian of either the person or estate of any one of these complainants, and no one of these complainants has now or has ever had a legal guardian of the person or estate, and at no time has there been any person in being competent in law to demand or receive, in their behalf, any estate for any of these complainants, until, by reason of reaching their majority, two of these complainants have become *sui juris*."

Discovery was prayed of a paper which had been written and left by Tracy, containing representations regarding the claim of complainants. In substance the prayer was for a discovery and account in the premises, and for a decree distributing among the complainants the sum which might be found due upon the account. There was also a prayer for general relief.

The answer of the executors of Tracy was in substance as follows: That Silas H. Turner and Tracy had business relations was admitted; but in the main all the material averments of the bill were alleged not to be within the knowledge of the executors, and proof of such averments was demanded. It was expressly averred, however, that Tracy, after the death of Silas H. Turner, had fully accounted for any property which he had in his possession, by a transfer and payment made to Thomas M. Turner, the father of the complainants, as their natural tutor and agent, they being then minors, as evidenced by a receipt signed by Thomas M. Turner, and dated November 30, 1888, which receipt was copied in the answer. Answering the paragraph of the bill calling for the discovery in respect to the paper left by Tracy regarding the claim of complainants, the defendants set forth that there came into their possession the following paper:

"WASHINGTON, D. C., —, 1898.

"To the executors of my last will and testament:

"Some time in 1871, Silas H. Turner of Virginia, whom I had known for a long time, of his own volition and without solicitation from me, came to the city and asked me to aid him in investing some twelve thousand dollars ($12,000) in real estate notes. I consented and in a few weeks the whole amount was invested, and he took the notes home with him. The interest was payable semi-annually, and, for a time, he sent me notes by mail about the time the interest was due so that it could be credited on the notes to satisfy the maker. This became irksome and, after a time, be brought me the notes, keeping a list of them, and asked me to keep them to

save him the trouble of sending them to me by mail whenever the interest was due. I kept the notes in an envelope with his name upon it, and about twice a year sent him a memorandum of interest paid, and when the amount reached several hundred dollars I would buy another note, and send him a memorandum of the same. Also when a note was matured and paid, I would buy another note, unless he needed the money, which he rarely did, and send him a memorandum of it. This condition continued until 1888, when he died in Virginia, leaving his entire estate to the three minor children of his brother then living in Louisiana. In his will he named me to settle up the estate and divide the money among the children; but, as the laws of Virginia require two witnesses to a will and says neither of them shall be an executor, I could not qualify, and, as the father, if appointed, could not have given the bond, I handed him the package of notes, advised him to deposit them in the Second National Bank of Washington, D. C., which he did, and agreed to look after them and have them all paid, he being out of the city. His other relations, a sister, some nephews and nieces were much displeased with the will, and threatened to attempt to have it set aside, but have not done so. The father, a good, honest man, took the money or most of it, went to Texas and bought a farm, and was doing well until the panic of 1893 came on. Since then they had a hard time, getting little or nothing for their farm products, and have written me some heartrending letters, wishing they had left the money here. The children are of age, but of course the father could not pay them their parts of the estate, and though not a word has been said about it, I thought perhaps after my death, if they hear of it in time, some of them might attempt to hold me responsible, and if they should make such an attempt I hereby authorize and direct my executors to employ the best counsel in the city to defend my estate in the District Courts and in the Supreme Court of the United States, if it be necessary to appeal the case to that court, and to pay all costs and lawyers' fees out of my estate.

I suppose some one would have to qualify as administrators under the will before any action could be taken. My turning the property over to the father helped to keep it in possession of those to whom it was left, and to discourage and shut out the dissatisfied relatives, for if any one had qualified the matter would have been open for a year, and they would undoubtedly have made an attempt to have the will set aside. This is a plain statement of the case, intended for the private ears of my executors."

Referring to the prayer for discovery in other respects, it was averred that the only papers concerning business dealings between Tracy and Silas H. Turner which had come into the possession of the executors were the receipt given by Thomas M. Turner, as already stated, the memorandum of Tracy addressed to his executors, and various letters and receipts signed by Erle H. Turner. The executors specially alleged that to their knowledge none of the proceeds of any of the notes referred to in the alleged memorandum or list averred in the complaint had ever come into the hands of the executors, and that they had no knowledge of any disposition made of any property belonging to Silas H. Turner which might have been in the hands of Tracy, except as shown by the receipt of November 30, 1888, signed by Thomas M. Turner as natural tutor and agent of his minor children. The laches of the complainants was expressly set up as depriving them of the right to any of the relief asked for. Denying knowledge of where Thomas M. Turner was domiciled at the time of the signing of the receipt, or the lawful powers of Turner as to signing the receipt, the court was asked to determine the rights of the executors in the premises.

After joinder of issue and the taking of general evidence the case was heard in the Supreme Court of the District.

In substance the court in its opinion declared that Tracy and Thomas M. Turner, the father of the complainants, had conspired to despoil them, they being then minors, of their rightful share of their uncle's estate; that the receipt given by

Turner to Tracy did not protect Tracy or his estate, because Turner had not qualified in accordance with the laws of Louisiana so as to entitle him to represent his minor children, but even if he had so qualified Tracy had no authority to pay from the fund in his hand except in the due course of administration. The court also observed that the words of the will appointing Tracy to distribute the proceeds of the property bequeathed equally between the four children of Thomas M. Turner imposed the duty upon Tracy of qualifying as executor, or, if he was unable or unwilling to do so, of applying to the court for the appointment of a suitable person. And the fraud and wrong of Tracy in turning over the property to the father was emphasized by the statement that Tracy wrote the will of the deceased and was then informed by the latter that his object was to prevent his estate from coming into the hands of the father of the children because of his spendthrift character. Although the court concluded that the estate of Tracy was liable, it did not fix the amount for which the estate was accountable, but referred the matter to an auditor to state an account and to take further evidence in respect to the expenditures properly chargeable against the share of each of the complainants upon the principles expressed in the opinion.

The auditor heard additional testimony bearing upon the expenditures made by Thomas M. Turner for the maintenance of his children out of the fund which he had received from Tracy. An account as of February 1, 1894, was stated to the court. On this account the receipt given by Thomas M. Turner was disregarded. The sum in the hands of Tracy and due to the estate of Silas H. Turner was fixed by the alleged list set out in the bill. The ground upon which this was done was thus stated by the auditor in his report:

"After the death of Silas Turner there was found among his papers an envelope or jacket indorsed 'Notes belonging to S. H. Turner 1888;' it contained a list, in the handwriting of Tracy, of the notes, giving the date, name of maker, and amount. The date of the last note on the list is given as

March 12, 1888. The aggregate principal of these notes is $28,972.10.

"Evidently all of these securities were in Tracy's possession as late as March 12, 1888.

* * * * * * * *

"It being conclusively shown that within six months before Turner's death Tracy had nearly $29,000.00 principal of securities in his possession as agent or trustee of Turner, the inevitable presumption of law is that of continued possession and accountability."

Making certain deductions and additions, which it is unnecessary presently to refer to, the auditor found the amount due from Tracy's estate on February 1, 1904, principal and interest, to be $48,601.44, which was attributed in varying proportions to the complainants, depending upon the amount which the report found each one of them was bound to contribute for maintenance or sums received out of the fund. The report was excepted to, exceptions were overruled, and a decree was entered adjudging the sums found due to the complainants in accordance with the report, giving the right to collect the deficiency out of further assets if any were discovered. An appeal was prosecuted. The Court of Appeals affirmed the decree, 24 App. D. C. 573, with a slight modification, rendered necessary by the allowance of an increased charge against Erle H. Turner. The Court of Appeals, in its opinion, in effect expressed views similar to those which had been stated in the opinion of the court below and in the report of the auditor. The receipt of Thomas M. Turner was disregarded. Taking into consideration the testimony, the paper alleged in the bill as a list was treated as being all in the handwriting of Tracy and as being but a single document, and, therefore, as fixing the amount for which the estate of Tracy was accountable.

Mr. Clarence R. Wilson and *Mr. Nathaniel Wilson* for appellants:

The payment of November 30, 1888, by Tracy to Turner

was made at the request and by reason of the representations of Turner and was, on Tracy's part, made in good faith and not with the purpose of personal profit. Turner was clerk of a court in Louisiana and his statements were made with apparent authority. There were no debts of the estate and there was no occasion for administration.

According to the laws of Louisiana, Thomas M. Turner, as father of the complainants, had the right to the possession and enjoyment of the estates of his minor children during their minority. Revised Civil Code of Louisiana, 1870, in force in 1888; Book I, tit. 7, ch. 5, under the heading "*Paternal authority;*" §§ 221–224; Book II, tit. 3; §§ 533, 540, 560, 589.

These provisions of the Code are construed and explained in the following cases: *Cleveland* v. *Sprowl*, 12 Rob. 172; *Handy* v. *Parkinson*, 10 La. Ann. 92; *Greenwood* v. *City of New Orleans*, 12 La. Ann. 426; *Snow* v. *Copley*, 3 La. Ann. 610; *Renfroe* v. *Gates*, 7 La. Ann. 569; *Succession of Allan*, 48 La. Ann. 1240.

A voluntary payment by a person having in his hands funds belonging to persons living in a foreign jurisdiction is valid, if, according to the laws of that jurisdiction, the person to whom the payment was made had the right to receive the money; and a receipt given by such person is a valid discharge and acquittance to the person so paying the money.

The principle, that administration when had at all must be had within the jurisdiction in which a testator's will is filed, or within the jurisdiction in which his property was situated, has no application to the present case.

Courts look with favor upon the private settlement of estates, where there are no debts or where the claims of creditors are satisfied. *Akin* v. *Akin*, 78 Georgia, 24; *McCracken* v. *McCaslin*, 50 Mo. App. 85; *Roberts* v. *Messenger*, 134 Pa. St. 298; *Foote* v. *Foote*, 61 Michigan, 181; *Filbey* v. *Carrier*, 45 Wisconsin, 469; *Burton* v. *Brugier*, 30 La. Ann. 479.

A voluntary payment to a foreign executor is a good discharge to the person making the payment, even as against a

subsequent demand by an executor appointed by the court in the jurisdiction in which the property was situated. *Doolittle* v. *Lewis*, 7 Johns. Ch. 45; *Williams* v. *Storrs*, 6 Johns. Ch. 353; *Parsons* v. *Lyman*, 20 N. Y. 103; *Bank* v. *Sharp*, 53 Maryland, 521; *Wilkins* v. *Ellitt*, 9 Wall. 740; *Rand* v. *Hubbard*, 4 Met. 252; *Hutchins* v. *Bank*, 12 Met. 421; *Stevens* v. *Gaylord*, 11 Massachusetts, 256; *Trecothick* v. *Austin*, 4 Mason, 6, 33; *Mackey* v. *Coxe*, 18 How. 104.

Mr. William G. Johnson for appellees:

The payment by Tracy to Turner was not a discharge, because a payment to anyone other than the party entitled or to his agent is no payment in law. Agency can only arise by contract or operation of law. The appellees made no such contract and could make none, because they were all minors and he had never been appointed their guardian, and his only relation to them was the natural one of father. The fact that Thomas M. Turner was the father of the complainants is immaterial. Payment to him was no better than to a stranger. *Dagley* v. *Tolferry*, 1 P. Wms. 285; *Cooper* v. *Thornton*, 3 Brown's Ch. Cas. 96; *Miles* v. *Kaigler*, 10 Yerg. 10; *Perry* v. *Carmichael*, 95 Illinois, 519. See also *Tripp* v. *Gifford*, 155 Massachusetts, 111; *P. C. C. & St. L. Ry.* v. *Haley*, 170 Illinois, 610.

Thomas Turner had no power under Louisiana laws to receive payment.

He was not a "natural tutor," as he describes himself in signing the receipt. At that time his wife, the mother of the children, was living and the parents were not divorced. During the marriage there cannot be a "natural tutor." *State* v. *Parish Judge of Orleans*, 6 La. Rep. 363.

Turner never complied with requirements of Louisiana law made a condition precedent to the right of possession. It is not, therefore, in the character of "tutor" that he could acquire any rights to the estate of his minor children, but this right is claimed for him as "usufructuary." Arts. 223, 224,

540, 557–560, La. Code. See also art. 3350 added by the act of 1869; *Succession of Arland*, 42 La. Ann. 548.

Louisiana laws have no application to property without the State. If Louisiana's laws of permission can have greater force in this District than in Louisiana, then, indubitably, her laws of prohibition upon those attempting to exercise authorities under them must have at least an equal force here with that which they possess in Louisiana.

According to the decisions of the highest court of that State, construing its own statutes, Thomas Turner, had he complied with all the prerequisites of the laws of Louisiana, would have been without power, under its laws, to receive property situated out of the State. *Moise* v. *Life Association*, 45 La. Ann. 737.

The laws of Virginia, the domicil of the testator, control and exclude the laws of Louisiana. *Harrison* v. *Nixon*, 9 Pet. 483. The common law of England is in force in Virginia. Va. Code, 1887, § 2. See also *Cooper* v. *Thornton*, 3 Brown's Ch. Cas. 96.

The right of usufructuary claimed for Thomas Turner, under the laws of Louisiana, in this case, is not an official character in which he is representative of the Louisiana legatees and claims the legacy in their behalf, but is a beneficial interest in himself, in right of his parentage, a part of the Louisiana law of domestic relations, applying to persons and property within the State, and can clearly have no application to property never in the State. *Texas and Pacific Ry. Co.* v. *Humble*, 181 U. S. 57.

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

As no reference was made to the subject in the opinions below and as we construe the argument at bar as not seriously pressing such question, we assume, for the purposes of the case, the right of the complainants to maintain under the averments of their bill a direct action or suit to recover the fund in con-

troversy. To come to the substantial merits we summarily dispose of certain preliminary contentions. First. We are of opinion that upon the pleadings and proof the Court of Appeals did not err in holding that such fiduciary relation existed between Silas H. Turner and Philip A. Tracy as made a court of equity the proper forum to seek relief. Second. We also think that under the circumstances of the case the contention that the bill should be dismissed because of the variance between the allegations and the proof is untenable.

In proper sequence the questions for decision are threefold: First. Was the transfer of the property of the estate of Silas H. Turner made as shown on the receipt given to Tracy by Thomas M. Turner as the representative of his minor children lawful and binding upon such minors? Second. If the payment referred to was binding did the receipt and the paper contemporaneously executed by Tracy, in connection with the proof, establish that he or his estate was liable for the value of the investment in real estate shown by the receipt and the paper in question to have been retained in the control of Tracy? Third. Did the receipt, if binding, and the paper in connection with it, embrace all the property held by Tracy as the trustee of Silas H. Turner, or, in other words, did Tracy at the time the receipt was given honestly account for the property in his hands, or did he fraudulently retain for his own benefit a large amount of property of the estate which should have been paid over and for which Tracy or his estate is therefor liable?

Whilst in logical order the questions for decision are as stated, we shall consider them inversely. In other words, we shall first dispose of the alleged fraudulent retention by Tracy of a large portion of the trust fund at the time he made the payment and transfer of property to Thomas M. Turner as the representative of his minor children. We do this because the charge of conspiracy and fraud as pressed, not only in the argument at bar, but in the opinions below, was treated as affecting the question of the binding nature of the transfer made by Tracy to Turner; and by first disposing of that branch of the case

we shall in a great measure disentangle the question of the binding efficacy of the transfer and payment to Thomas M. Turner from the alleged fraud.

It will be useful, before particularly considering the facts upon which the alleged fraud on the part of Tracy immediately depends, to state the antecedents of Tracy and of the two Turners, the dealings between them and the results which followed therefrom, so far as they are uncontroverted.

Philip A. Tracy was born in Fauquier County, Virginia, in 1835. He was living in Washington soon after the close of the Civil War, was a bookkeeper in a mercantile house, and later became an employé of the Post Office Department, and so continued, if not to, at least up to a short time prior to, his death. He never married. As far as it may be inferred from the testimony in the record, taking no present concern of the charges of fraud made in the bill, the conviction is irresistibly conveyed to our minds that Tracy was a reasonably intelligent, moral, industrious and circumspect person, of a religious tendency of mind, careful in money matters, particular as to details and of a kindly, though somewhat eccentric, nature.

Silas H. Turner was also a native of Virginia, and whilst little is shown by the record of his antecedents and character, it is established that he was also a man of thrift and of some business capacity, having been at one time a railroad agent, a dealer in merchandise and cattle, a clerk and an accountant, accustomed to the settlement of estates. Between Tracy and Turner there existed an association and friendship, taking its origin, if not in a boyhood acquaintance, at least one that related back to many years before the death of Turner. As a result of this friendship Turner, trusting in the capacity and integrity of Tracy, began in 1871 to confide his savings to the latter for investment. Tracy, loaning money upon the security of real estate, was first in the habit, when a loan was made, of sending the notes of the borrowers to Turner, who, as the interest payments were about to fall due, would send the notes to Tracy to have payments of interest credited thereon. After

a time this practice of sending and returning the notes became irksome, and Turner sent the notes to Tracy, who thereafter kept them in his custody. As money came into the hands of Tracy, either from the payments of principal or of interest upon the notes, he reinvested the money in other notes, sending Turner a memorandum of the new investments as made. There is nothing produced either from the papers of Tracy or of Turner showing that formal accounts were ever exchanged between the parties. Certain it is, that on April 30, 1898, Turner was in Washington and in personal communication with Tracy. At the desk of Tracy in the Post Office Department, at the request of Turner, the will probated as mentioned in the statement of facts was written by Tracy for Turner, and by the latter executed. How long Turner remained in Washington at this time the record does not disclose, nor does it accurately show his movements or exhibit any letters passing between Tracy and Turner from the time of the making of the will up to the death of Turner.

Some time during the summer of 1888 Turner—an ill man, suffering with Bright's disease—went to the residence of Mrs. Rust, a niece, living in Fauquier County, Virginia, near Warrenton, where he remained until his death on September 21, 1888. At his death Turner left surviving him a maiden sister, who lived in Frederick, Maryland, Miss Henrietta Turner; a brother Thomas M. Turner, living in Minden, Louisiana, and various nephews and nieces, children of deceased brothers and sisters.

Between Thomas M. Turner, the brother living in Louisiana, and Silas H. Turner, it would seem, there had been little or no intercourse for more than thirty years, Thomas having left Virginia when quite a young man. Notified of the serious illness of his brother, Thomas M. Turner, about a month and a half before the death of Silas, came to the house of Mrs. Rust and there remained until the death. Thomas M. Turner had had at that time quite a varied experience of men and affairs. Leaving Virginia as a youth he went to Memphis, Tennessee,

for the purpose of establishing a school. Not succeeding there he went to Missouri and became a bookkeeper for a commercial firm. At the outbreak of the war he joined the Confederate army. At its termination he established himself at Minden, Louisiana, and began merchandising, and also operated a steamboat landing. He married, bought a farm near the town of Minden, where he lived, and was for a year bookkeeper for a large business house; afterwards became a division superintendent of education; was subsequently a clerk of the state District Court—a court of unlimited general jurisdiction; was the parish treasurer and treasurer of the school board; for a time served as a justice of the peace, worked for lawyers in making up legal accounts, prepared the collectors' tax duplicates, etc.; afterwards became deputy clerk, and held the latter office at the time he was called to Virginia on account of the illness of his brother. At the time he came to Virginia he left at Minden his wife and five children, all minors and the issue of the marriage, the youngest being an infant, who lived but a comparatively short time. The names and dates of birth of the other children were as follows: Erle H., born on October 21, 1868; Wilmer, born on October 11, 1875; Ashby, born on February 3, 1880, and Lunette, born on December 19, 1882.

Omitting reference to the controverted question as to what passed between Silas and Thomas preceding the death of the former, certain it is that after the death of Silas there was found in a trunk belonging to him some few personal effects, the will which was afterwards probated, and an envelope containing papers—the so-called list set out in the bill and referred to in the report of the auditor and in the opinion of the Court of Appeals.

On September 28, 1888, Thomas M. Turner came to Washington, and in company with Eppa Hunton, Jr., Esq., a member of the Virginia bar, had an interview with Tracy. Whatever took place at this interview forms, we think, one of the principal controversies of the case, and we shall have occasion

hereafter to fully advert to it. Certain it is upon that day Turner received from Tracy in cash a little over four hundred dollars, and Turner returned to Virginia. From that time (September 28, 1888) up to November 26, 1888, except a letter written by Tracy to Turner on October 10, 1888, there is nothing in the record showing any relations between Tracy and Turner concerning the property in the hands of Tracy. On the date last named (November 26, 1888) Mr. Hunton offered the will of Silas H. Turner for probate in the County Court of Fauquier County; a commission was issued to take the testimony of Tracy and the other attesting witness to the will, and the commission was executed on November 28, in the city of Washington, immediately taken to Warrenton, and on the same day the will was admitted to probate.

The next day, after the probate of the will, Turner appeared in Washington and called upon Tracy. Tracy handed to Turner a list of the notes, cash and other property in his possession, which he proposed to turn over as belonging to the estate of Silas H. Turner. Turner took the list and examined it overnight, returned the next morning, received the notes and the additional cash mentioned in the receipt, and as to a piece of real estate specified in the list received the following certificate from Tracy:

"I hereby certify that I have invested three thousand six hundred dollars ($3,600.00) in ground on Maryland avenue between 9th and 10th streets N. E., at thirty-five cents per square foot, and that Silas H. Turner is entitled to one-half of the proceeds derived from the sale of the same, after deducting the cost of grading, subdividing and examining titles, etc.

"PHILIP A. TRACY."

The entire question of fraud on the part of Tracy depends upon the statements of Turner as to what took place between himself and Tracy when he gave the foregoing receipt, and as to the conduct of the latter concerning the so-called list which

has been previously referred to. This we shall consider when we come to the controverted questions.

At the suggestion of Tracy the notes covered by Turner's full receipt were placed in a bank at Washington for collection, Tracy introducing Turner to the bank and assisting him in opening the account. Turner went to Virginia, with some of the cash received paid the funeral expenses and the debts of his brother, took his sister and a niece with him to Louisiana, and from Louisiana he went to Texas with his family and also with the sister and niece just referred to. In Texas, Turner bought a lot in a town called Vernon, boarded his family until he built and furnished a house, bought and partially paid for a ranch consisting of six hundred and forty acres and equipped it with stock and machinery. In the summer of 1890 he brought this entire family to Virginia, leaving his son Erle H., who had then become of age, on the farm in Texas as manager. He bought, in his own name, a house and lot in Front Royal, Virginia, the possession of which he turned over to his niece, Mrs. Rust, telling her that it was hers, and that it was done in accordance with directions given before his death by his brother Silas. Whilst in Virginia he visited Washington and saw Tracy. In the fall of 1890 Turner went to Texas, leaving his family in Virginia. He remained in Texas but a short time, coming back to Virginia either in the late fall of 1890 or early winter of 1891. In February, 1891, he drew on the proceeds of the notes which had been deposited a check for the sum of forty-eight hundred dollars and carried the money away on his person, stating in his testimony that one reason why he did so was that he did not want the heirs in Virginia to know where the property was; that he was trying to keep it concealed as much as he could; that he was managing his own affairs and did not want anybody to know anything about it, and that he was trying to get the money away from Washington entirely. In April, 1891, Erle H. Turner, the son, left the farm in Texas and came to Virginia. He visited Washington with the father, who introduced him to Tracy. The

father paid the son out of the proceeds of the notes in bank twelve hundred dollars, and delivered to him two of the notes previously turned over by Tracy, which had not been collected, of the face value of $525. The father testified that this payment to the son was made on account of some small indebtedness which he owed the son for money received for safekeeping from him whilst a boy and in discharge of a debt which the father declared he owed the son for managing the farm, which it had been agreed was to be compensated for by a half interest in the proceeds of two crops. One of the crops had been harvested and the other was still on the land and ungathered when the settlement was made.

From the date of the delivery by Tracy to Turner of the notes to the time of the payment made to Erle H. Turner, as just stated, all the notes delivered by Tracy to Turner and deposited to the credit of the latter had been paid, principal and interest, except the two which were turned over to Erle H. Turner on the alleged settlement with the father. During this time the record shows letters written by Tracy to Turner of a friendly character, advising Turner concerning the progress of the collections, and suggesting business methods for overcoming difficulties which arose, without the slightest intimation in any of the letters that there was in Tracy's mind even an impression of a difference between himself and Turner, or that Tracy supposed that there was any claim against him resulting from the transfer which had been made to Turner on November 30, 1888, except as indicated on the receipt then signed by Turner and the accompanying certificate relative to the Maryland avenue lots.

As the consequence of the settlement made with Erle H. Turner, practically all that remained of the money coming from the proceeds of the notes delivered by Tracy to Turner had been checked out by Turner, and it is true to say that the record leaves no question that in effect substantially all the family living and traveling expenses, the disbursements for the residence lot in Texas, the cost of the erection and the

furnishing of the dwelling, the cost of the farm and of fencing, and for stock and machinery bought for use thereon, had been defrayed out of the fund transferred by Tracy, as also the cost of the Virginia residence bought for Mrs. Rust, and various gifts of money made by Turner to nieces and nephews.

Not only during the period whilst the notes were being collected by the bank for the account of Turner and he was drawing out the proceeds—indeed up to shortly before the bringing of this suit—Turner swore that he intentionally concealed from his wife and children, and from everybody concerned, the fact that his brother's will had been made in favor of the children, or that he had received under that will any property belonging to them. His testimony on this subject is so vital to the cause that we quote it.

On his direct examination he was interrogated and answered as follows:

"Q. You stated the other day that while you were East in the fall of 1888, at the time of your brother's death, you wrote home to your wife during that absence? A. Yes, sir.

"Q. I want to know whether or not you told your wife in any of your letters of the fact that your brother had left an estate? A. I think I did. I am not positive.

"Q. I want you to state whether or not you told her that he had by his will left the property to your children? A. I did not tell her that.

"Q. Was that omission intentional or accidental? A. It was intentional, sir.

"Q. After your return to Louisiana, after your brother's death, when did you and your family leave there? A. We left there in the summer of 1889.

"Q. Up to that time had you told anybody of the character and contents of your brother's will? A. No one, sir, except Mr. Hunton."

On cross-examination the witness testified as follows:

"Q. Did you within a few days after signing that write to your wife and tell her that your brother had left his property

to you? A. I don't think I did, sir. I can't say that I did. I have no memory of writing such a thing. I may have written to her that my brother had left property to us. I don't know what I wrote. It has been a long time, and I can't tell you.

"Q. Did you write to her in such a way as to conceal from her the truth, and intend to do so? A. I didn't intend that my children should know the property was left to them.

"Q. Why? A. Well, sir, it was my opinion that it would not be well for them to know it.

* * * * * * * *

"Q. When did your wife first know the terms of the will of your brother? A. I don't know, sir.

"Q. When did you first communicate to her the fact that you had obtained the property or the estate of your brother? A. I never communicated it to her, sir.

"Q. And she never knew it? A. I don't know whether she knew it or not, but I never told her.

"Q. Do you know that she did know at any time? A. I can't tell you, sir. I don't know that she did.

"Q. Did you intentionally conceal the fact from your wife that you had received the estate of your brother? A. I guess I did, sir, intentionally.

"Q. And never up to the present time have you ever told her that you did receive your brother's estate? A. Oh, I don't remember whether I had or not. I couldn't say positively, sir.

"Q. Have you any knowledge yourself as to the time, or any time before the bringing of this suit, when she knew that you had and had received your brother's estate? A. No, sir.

"Q. You cannot say? A. I can't say."

Erle H. Turner, the son, after his introduction to Tracy, evidently inquired from Tracy concerning the estate of Silas Turner, and he expressly declares that Tracy then informed him that the property had been left to the children, and also told him of the investment in his hands arising from the Maryland avenue lots. It is plainly to be inferred that Erle

Turner communicated this fact to his mother, and, whilst there is no direct proof as to her consequent interference, it is inferable that both the mother and the son questioned the right of Tracy to make further payments to Thomas M. Turner. Undoubtedly, shortly thereafter, Thomas M. Turner called upon Tracy to pay over the proceeds arising from the Maryland avenue lots investment, which Tracy refused to do because of legal advice which he had received, unless Turner would qualify as an administrator, which he declined to do. It is also inferable that Erle H. Turner at that time made some demand upon the father concerning the estate, since the latter gave to him an order on Tracy for about twenty-five hundred dollars, delivering to the son the certificate as to the investment in real estate, which had been made by Tracy and given to Turner at the time of the transfer on November 30, 1888. Erle H. Turner did not return to Texas, but remained East, occasionally visiting Washington and calling upon Tracy, receiving money from him and corresponding with him from time to time in the most friendly way.

Thomas M. Turner having exhausted the proceeds of the notes which he had received from Tracy, never again came in personal contact with the latter. He went to Texas, leaving his family in Virginia. In January, 1893, under a power of attorney, he sold the farm near Minden, which he had transferred in 1870 to his wife. The expressed consideration for the sale on behalf of the wife was one thousand dollars. In January, 1894, Turner went to Virginia and took his family back to Texas. In September, 1894, Turner and his wife executed and put of record a deed conveying to Wilmer, Ashby and Lunette Turner the Texas farm, and reciting as the consideration thereof "the sum of $6,400 to me in hand paid by Philip A. Tracy, executor of the last will and testament of my deceased brother, Silas H. Turner, in trust for the use and benefit of my children, viz., Wilmer Turner, Ashby Turner and Lunette Turner, minors, which said trust fund together with other similar trust funds was turned over to me without bonds and

have been used by me for my own use and benefit, said consideration being in payment of so much of said trust fund."

It appears that the land embraced in the farm had originally been acquired by the grantor of Thomas M. Turner as school land from the State of Texas. Turner failing to pay the sixty dollars interest due on deferred payments, the land became forfeited to the State. Subsequently Turner repurchased it from the State at a reduced value, viz., one dollar per acre. In August, 1895, having previously mortgaged the dwelling house property in Vernon, Turner and his wife conveyed said property to the mortgage creditor in cancellation of the then existing indebtedness. At about this time Mrs. Turner wrote Tracy, asking for money. Her letter is not in the record, but the reply of Tracy (copied in the margin [1]) clearly shows that the letter was a request from Mrs. Turner to him to pay the proceeds of the Maryland avenue lots referred to in the receipt and embraced by the certificate already referred to. A

---

[1] Washington, D. C., Aug. 21, 1894.

Dear Mrs. Turner: I was out of the city and, therefore, did not get your letter until yesterday. I could not comply with your request. There is no money in my hands belonging to the estate of S. H. Turner.

After you and Erle raised a fuss because he had not gotten his share, I became alarmed and consulted a lawyer, and he advised me not to turn over another dollar of the estate money until Mr. Turner qualified for the full amount of the estate. I informed your husband of the fact, and he declined to qualify (the bond would be over $50,000) and he and Erle agreed that I should invest the money so that it might be earning something while in my hands.

I then invested the money in what was then good real estate paper, but the panic came on last year, the endorser of the notes failed in business, and the land has depreciated in value, so that if it were sold now I do not think it would bring half the amount of the notes. I have over $1,400 of my money in the same land. If times should ever get good again (which I doubt) the land would be ample security for the notes. I have let Erle have some $600 of my funds since I invested the estate money, but I cannot see my way clear to increase the amount in such times as these. I was surprised at his coming North, without money, in such times as these. He and his father knew the condition of the estate money, and I had twice advised him not to come until times got better. He told me he had over $2,000 loaned out in Vernon, and that after July he would have money.

Yours truly, etc., PHILIP A. TRACY.

letter written by Tracy to Mrs. Turner five months afterwards manifests his kindly interest in the welfare of the family and renders greater the certitude that no thought was in Tracy's mind that the parties deemed that he had perpetrated a fraud upon them or that they had any claim upon him otherwise than in respect of the Maryland avenue lots investment. And this is entirely corroborated by the intimate and friendly letters written by Erle Turner to Tracy up to a short period before his death, which shows clearly that Erle Turner considered that Tracy was accountable only for the lots referred to, and that he, Erle Turner, had received more than his share of the same. One of such letters—omitting purely irrelevant matter—is copied in the margin.[1]

Evidently, in consequence of the legal advice given him at the time objection was made by Erle Turner and his mother to the payment of the proceeds of the Maryland avenue lots to the husband and father, Tracy, as his health became impaired, grew to have an anxiety concerning the technical legality of the transfer of property which he had made to Thomas M. Turner, as shown by the receipt of November 30, 1888; and as a consequence he had prepared the statement on that subject produced by his executors. From 1895 until the death of Tracy in June, 1898, the record does not contain even the slightest proof tending to show any demand made upon Tracy or a suggestion of liability concerning the fraud and wrong charged in the bill in this case. That bill, as we have seen, was only filed in 1899, after the death of Tracy.

In March, 1901, Thomas M. Turner, as shown by his testi-

---

[1] Phila., April 4th.

Dear Mr. Tracy: Yours rec'd. I wrote you a hurried note to tell you that I w'd send the receipt 7 A. M. to-morrow per instructions. I have not been well. . . . A friend of mine told me that as you had paid me more than ¼ of the balance left in your hands this should clear you, as the balance would go to the other children, so I just made the suggestion. . . .

Yours, & etc., E. H. TURNER.

P. S.—If you write or wire me hurriedly address for 2 weeks 1820 Susquehanna Ave. I am going to change my room soon but will let you know.

E. H. T.

mony, sold the Texas farm. The following is a statement made by Turner of the amount claimed to have been realized and the disposition made by him of such proceeds:

"I sold the place, and the consideration was $5,000. There was a deed of trust for $400 on the property, which the purchaser assumed. I owed the purchaser $205. That from the $5,000 left $4,395. I paid $200 in debts from that, which left $4,195. I owed my wife her home in Louisiana that I sold in 1893, I believe $1,000, and eight years' interest at 10 per cent, which is the legal rate in Texas. That made $1,800. I used of my wife's individual money, about the year 1870, $200. Interest on that to the present time would make altogether $680. That would be $2,480 that I paid my wife, that was due her. That left $1,715. I owe about $100 in small debts there that I will have to pay out of that, which would leave $1,615 now that is community property between myself and my wife. According to the laws of Texas she would be entitled to half of it and I half. I have that much in money."

Explaining why he appropriated for his own and his wife's benefit the proceeds of the sale, to pay his alleged debt, despite the conveyance of the farm previously made by himself and wife to the minor children, Turner declared that while it was the same farm yet that it had become forfeited to the State and he had reacquired it and regarded it as community property belonging to himself and his wife, although the money which had been originally used in buying and improving the farm had come from the proceeds of the estate of his brother and belonged to the children.

With these facts in mind we come more directly to consider the fraud alleged to have been committed by Tracy at the time he made the transfer of property and took the receipt of Thomas M. Turner. The principal ground upon which the auditor and both courts below rested their conclusion that Tracy had been guilty of such fraud was a discrepancy which it was assumed existed between a so-called list in Tracy's handwriting of notes in his hands, which list had been found

among the effects of Silas H. Turner at his death, and the correctness of which it was concluded was acknowledged by Tracy to Thomas M. Turner after the death of Silas H. Turner. In approaching the question of fraud we bear in mind the rule that where both courts below have found a particular state of facts, we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence. Now, coming to consider the evidence in the light of this rule, we are constrained to the conclusion that the premise upon which the courts below acted, that is, the existence of a list of notes left by Tracy, is without any support in the evidence, and, indeed, rests but upon a mere mistaken assumption.

True it is that an envelope was found among the papers of Silas H. Turner with an indorsement upon it in the handwriting of Tracy, reading as follows: "Notes belonging to S. H. Turner, 1888." True also is it that two sheets of paper were produced with memoranda of notes upon each in the handwriting of Tracy. But to assume that these two sheets were one list made by Tracy and possessed as one list by Turner at the time of his death is to disregard the uncontroverted fact that the two separate sheets did not in and of themselves, as they existed at the death of Silas H. Turner, necessarily import that they constituted a single document. To treat them as such a document would oblige us to disregard the uncontradicted testimony of Thomas M. Turner that he brought the two papers together so as to cause them to appear to be one after the death of Tracy, that he placed on the first sheet the pencil footing and the line above the same and on the second the carrying forward of the same footing as also the new footing and the line above the same, by which alone on the face of the sheets apparent unity was produced between them. We copy in the margin [1] the two sheets, with the

[1] S. H. Turner.

Nov. 18, '82.	(W. Z. Partello) paid	$0,000 00
Nov. 1, '79.	Susan W. McNamee	1,700 00

additions which, as above stated, were made after the death of Silas H. Turner.

So far as the face of these separate sheets as they stood at the death of Silas H. Turner indicate, they do not at all exclude the implication that the items on the second sheet were but the statement of reinvestments made by Tracy of money coming into his hands as the result of the payment to him of notes which were enumerated on the first sheet. Nor on the face of the papers does the fact that an envelope was produced with the words in the handwriting of Tracy written thereon "Notes belonging to S. H. Turner, 1888," necessarily give rise to a contrary deduction. For, *non constat* but that this envelope was marked by Tracy on delivering to Silas H. Turner the second sheet, or, that when it was marked, it contained

Jan. 19, '81.	Edwin F. Jones	1,000 00
April 7, '75.	J. H. Hollidge	800 00
March 22, '84.	John B. Taylor	1,000 00
March 22, '84.	John B. Taylor	1,000 00
July 12, '81.	Flora V. Andrews (2)	1,000 00
June 6, '85.	Jennie J. West	3,400 00
April 3, '85.	Caroline Isdell (2)	1,335 20
Dec. 15, '85.	Eliz. V. Lee	600 00
Dec. 15, '85.	Eliz. V Lee	600 00
Jan. 8, '86.	Mary J. Lewis (3)	1,200 00
Dec. 30, '85.	John L. Carusi	1,350 00
May 19, '86.	Julius Rehwold (4)	2,200 00
Dec. 24, '85.	Rufus A. Morrison	1,500 00
Oct. 30, '86.	John B. Avery (4)	800 00
Oct. 2, '86.	Thomas R. Benton (15)	1,800 00
June 1, '86.	G. H. La Fetra	1,036 90
April 18, 87.	L. A. Grant	300 00
Aug. 20, '85.	D. B. Groff	1,500 00
	(Footing in lead pencil)	24,122 10

Second sheet.

1888.	Am't for'd (in lead pencil)	24,122 10
Feb. 18.	C. W. Baldwin	2,500 00
Jan. 27.	A. H. Nixon (3)	1,350 00
Mar. 12.	D. B. Groff	1,000 00
		28,972 10

the first sheet exhibiting the property in the hands of Tracy at the beginning of the year 1888. When the course of business between the parties as stated by Tracy in the memorandum addressed to his executors is recalled, the greater probability is not only that the two sheets were not received by Silas H. Turner at one time, but that the second sheet was a mere memorandum of investments of items stated on the first sheet. The mode of dealing as stated by Tracy was this: He kept the notes belonging to Turner in an envelope. Periodically he would send a general statement to Turner, and when sufficient money was in his (Tracy's) hands arising from accumulations of interest or payment of a note, he would reinvest and send or give Turner a memorandum of the new investment. Now the condition of the first sheet justifies the presumption that it related to a general statement of the investments in the hands of Tracy at the end of the year 1887. The notes on this sheet, although grouped in disregard of chronological order, include notes dated from 1875 to and including 1887. On the other hand, the second sheet is but an enumeration of three notes executed in 1888, the last dated on March 12. This second sheet in no way corresponded, therefore, to a general statement between the parties, but is exactly responsive to the conception of a memorandum of reinvestments made in accordance with the custom described by Tracy. And by comparison of some of the items on the separate sheets cogency is added to the reasonable presumption that the second and separate sheet was but a statement of reinvestments made after January 1, 1888. Thus, on the first sheet is the following item: "Dec. 30, '85. John L. Carusi, 1350." Now if this note matured on December 30, 1887, and was paid shortly after its maturity, Tracy early in January, 1888, would have had that amount for reinvestment. Looking at the second sheet we find upon it an item showing an investment of precisely the amount of the principal of the Carusi note, as follows: "Jan. 27, 1888. A. H. Nixon (3) 1350.00."

As Turner and Tracy met in Washington on April 30, 1888, and in view of the reasonable probability that Turner must have been in possession of prior general statements of the investments made by Tracy, the inference is persuasive that the memoranda embraced on the second sheet may have been delivered by Tracy to Turner at that time.

It is insisted that as Thomas M. Turner testified that he exhibited the two sheets as one paper to Tracy, and that Tracy told him that he had all of the notes described on both of the sheets in his possession and that they were "as good as gold," therefore the sheets were proven to be one and the liability of the estate of Tracy to account on that hypothesis was established. But in view of the state of the uncontroverted proof which we have previously noticed concerning Turner and his acts of omission and commission, we are constrained to the conclusion that he has so discredited himself as to make it impossible for us to accept his uncorroborated statements as establishing the alleged fraud and dishonesty of Tracy; although in reaching this conclusion we do not exclude the possibility that Turner may have harbored a suspicion that Tracy had not fully accounted, and communicated his suspicions to others. And even putting out of view the acts of commission and omission of Turner and the consequent inability to rely upon his testimony as to the commission by Tracy of the alleged fraud, the unexplained failure of the complainants to make certain proof, and the proof as made, clearly demonstrate that Tracy could not have been guilty of the fraud charged against him, and we under separate headings state our reasons for this conclusion.

1. The interview between Tracy and Turner, at which the alleged admission by Tracy was made concerning the list and his possession of all the notes shown on the two sheets, was the one had a week after the death of Silas H. Turner, at which Thomas M. Turner testifies that Mr. Hunton, his counsel, was present and heard the alleged statement made by Tracy. Yet

the testimony of Mr. Hunton was not taken. Besides, the bill contained an express averment that the land records of the District of Columbia established that the notes embraced on the first sheet which were omitted from the receipt signed by Turner had been paid after the death of Silas H. Turner, but no proof on that subject was offered. On the contrary, it was stipulated on the taking of evidence that five of the notes which were on the first sheet had been paid and the releases of trust executed after March 12, 1888, the date of the oldest executed note shown on the second sheet of the list, and before the death of Silas H. Turner, a fact which clearly rebuts the presumption that Tracy could have admitted to Turner on September 28, 1888, that he possessed notes which were good as gold, although they were not then in existence.

2. The face of the receipt itself (which is copied in the margin),[1] considered in the light of the uncontroverted facts

---

[1] Full List of Notes and Cash in the Hands of Philip A. Tracy, Belonging to S. H. Turner, Deceased, Nov. 30, '88.

Date of Notes.					
Mar. 22, '84.	Two	notes of	John B. Taylor for $1,000 each		2,000
May 19, '86.	Two	" "	Julius Rehwold, $300 each..		600
" " "	Two	" "	" " $800.....		1,600
April 18, '87.	One	" "	Louisa A. Grant.....		300
Mar. 12, '86.	One	" "	Diller B. Groff.....		1,500
" " "	One	" "	" "		1,000
Dec. 15, '85.	Two	" "	Eliza U. Lee, $600 each.....		1,200
June 13, '88.	One	" "	Roth & Moore.....		325
Jan'y. 19, '81.	"	" "	Edwin F. Jones.....		1,000
Feb. 18, '88.	"	" "	Charles W. Baldwin.....		2,500
Jan'y. 27, "	Three	" "	Alban H. Nixon, $450 each..		1,350
July 12, '81.	Two	" "	Flora V. Andrews, $500 each.		1,000
Oct. 30, '86.	Three	" "	John B. Avey, $200 each....		600
" 22, "	Seventeen	" "	Thos. H. Benton, $120 each..		2,040
Aug. 25, '88.	One	" "	Frank W. Paige.....		3,000
Oct. 17, "	Three	" "	J. L. Burns, $462.50 each....		1,387.50
Nov. 6, "	One	" "	E. V. Jarvis.....		200
Nov. 19, "	Two	" "	C. S. McEwen (600 each)....		1,200
		" lots on Md. Ave. N. E.....			1,800

which we have stated, and other circumstances to which we shall advert, we think equally rebut the statements of Turner as to the alleged admissions of Tracy. It will be observed that the aggregate of both sheets of the so-called list was $28,972.10. The notes embraced upon the receipt given by Turner aggregated $22,802.50, a difference between the two footings of $6,169.60. Now, admitting that the two items of cash payments figuring in the receipt, amounting to $776.89, may be treated as interest, besides the notes, the receipt of Turner specified an investment of eighteen hundred dollars in the Maryland avenue lots, for which at the time Tracy delivered to Turner the certificate to which we have referred in stating the uncontroverted facts, and which Turner turned over to his son Erle. Deducting this eighteen hundred dollars, which Tracy admitted he owed, left only a difference of $4,369.60. How, under this condition of things, it could be found that Tracy admitted he was appropriating for his own benefit more than six thousand dollars we cannot conceive, since on the face of the transaction, under the most favorable view of the testimony for the complainants, Tracy was paying over or acknowledging his liability for everything but about four thousand dollars of notes. And yet more incredible does the theory of a fraudulent retention of over six thousand dollars by Tracy become when it is considered that Tracy permitted Turner to retain what would have been conclusive evidence of his fraud if the theory of the previous admissions of Tracy as to one list and its correctness, propounded by the complainants and found by the courts below, were true. If Tracy was infamous

Sept. 28,	Cash, T. M. T.	439.25
Nov. 30,	" " in full	337.64
	(In'st now due)	600
		$25,379.39

Nov. 30, '88.—Received the above-described notes and cash in full under the will of S. H. Turner, deceased.

T. M. Turner.
Natural Tutor and Agent for My Minor Children.

enough to conceive the spoliation which is charged to have been committed by him, it would be certainly fair enough to presume that he would have exercised reasonable precautions to destroy the evidence of his wrongdoing.

Moreover, a comparison of the receipt with the two sheets supports the conviction that the second sheet was but a statement of reinvestments, and therefore that it was impossible that Tracy should have admitted that he was in fact stealing from or denying his liability to the estate of his dead friend in respect to the sum which he was either actually paying over or admitting his responsibility for. Now, the receipt embraced all of the notes mentioned on the second sheet, aggregating $4,850. It embraced certain notes found on the first sheet, aggregating $11,600. The receipt also embraced notes not appearing on the first sheet—in other words, replacing those omitted (and included the Maryland avenue lots)—indicating by their dates that they were acquired after the date of the last investment appearing on the second sheet of the list, viz., March 12, 1888, and after April 30, 1888, when Silas Turner was in the office of Tracy and made his will. These last items aggregated $8,152.50. The total of the various items footed up $24,602.50. Now, this sum was slightly in excess of the notes shown on the first of the two sheets of the so-called list, going to demonstrate that the settlement between the parties was based, not upon any deduction of an impossible sum of six thousand dollars, but upon the fact that the second sheet represented reinvestments of items appearing on the first sheet. And the cogency of this conclusion becomes manifest when it is considered that there is not an iota of evidence tending to show where Tracy could have gotten the money to invest in the notes which he turned over, acquired after March 12, 1888, unless it was from collections of the notes appearing on the first sheet of the so-called list, which, in consequence of their payment, were represented in the receipt by the new investments.

3. That at the time the receipt was given there was some

conversation on the subject of a probable charge by Tracy for his services rendered to Silas H. Turner, we think persuasively appears. In May, 1892, after the refusal of Turner to qualify as administrator of the estate and the refusal of Tracy to turn over the proceeds of the Maryland avenue lots to Turner unless he did qualify, Tracy wrote Turner a letter which is copied in the margin.[1]

It is true that Turner, in producing the letter, whilst acknowledging its receipt, declared that it was the first he had ever heard of any such charge or intention to charge; but Turner in no way intimates that he took issue with Tracy, by letter or otherwise, concerning the right of Tracy to make the charge, a line of conduct wholly inexplicable if the theory of a fraudulent retention by Tracy of six thousand dollars had foundation in fact. Having regard to the context of Tracy's letter we consider it as implying an intention to deduct for the benefit of the sister of Silas H. Turner the sum of the charge which Tracy had made or then proposed to make from the proceeds of the investment remaining in his hands. And we

[1] Post Office Department, Office of the First Assistant Postmaster General.
Washington, May 7, '92.

Dear Turner: I wrote you some time ago, but have not received any reply to my letter. I was in Phila, a short time ago, and called to see Erle, but was told he had left there, and gone to Balto. The interest on the $2,600, in my hands has not yet been paid through I expect it soon. It is invested in good paper and is drawing 8% *per cent* though after the present notes are paid I do not think I can get over 6% for it.

As I am now all alone in the world and have not much use for much money I have thought something of transferring to Miss Henrietta a part or perhaps all of the commission I charged on your brother's estate (5%) as she was left out of the will, and is poor as I understand it, and getting along in years.

If you will confer with her upon the subject, and ask her to write to me, I think the arrangement can be arranged.

This amount of my charge for attending to the business for 16 years ($120 a year) will stand.

I would like to hear how your wheat turned out? How much did you make and how much did you get for it.

Yours, truly, &c., PHILIP A. TRACY.

P. S.—I have not been well since the death of my sister.—T.

may remark in passing that there is proof tending to show that Tracy subsequently made remittances to the sister in question.

4. As we have said in stating the uncontroverted facts, Turner came from Louisiana to the house of Mrs. Rust, where his brother Silas was lying dangerously ill, about a month and a half before the death of Silas. The proof leaves no doubt that whilst there he frequently met his niece, Mrs. Rust, and other Virginia relatives, and had ample occasion to be aware of their frame of mind. There is no proof whatever showing that Tracy, whose home was in Washington, had any connection whatever with the Virginia relatives of Silas Turner, or was in a position to form an opinion concerning the probable conduct of those relatives as to a contest of the will of Silas Turner. And yet Turner swears that one of the principal causes of his yielding to the fraud of Tracy was the danger which Tracy persuaded Turner would arise in consequence of the purpose of the Virginia relatives to contest the will. Further, although the first interview between Tracy and Turner after the death of Silas was on September 28, 1888, the settlement between Turner and Tracy was not had until more than two months thereafter, viz., November 30, 1888. Now the only explanation Turner gives for this delay is that Tracy told him at the interview on September 28, 1888, that he was about to absent himself on a two weeks' leave and upon his return would inform Turner and they would have a settlement, a reason wholly inadequate to explain the long delay between that and the next meeting. That Tracy expected to make a settlement and desired to keep in touch with Turner is shown by a letter written to Turner on October 10, 1888, from Old Point Comfort, advising Turner of his (Tracy's) whereabouts. Several of the Virginia relatives who were in contact with Turner during the considerable interval which elapsed between the first visit of Turner to Tracy and the final settlement testified to statements made in their presence by Turner, that he was awaiting the necessary papers from Louisiana showing his authority to represent his children, and that just before Turner

went to Washington to make the settlement with Tracy, Turner stated to them that he had the required authority. This shows that the matter of Turner's right to represent his children was, in all probability, the cause of the long delay in making the settlement, and is corroborated by a passage contained in a letter written by Turner to his daughter Wilmer in 1899, in which communication, referring to the occurrences at the final settlement with Tracy, Turner said:

"Tracy then informed me that as my brother owed no debts there was no use to have an administration; that he would not qualify as executor of the will, and that I need not delay to be appointed guardian for my children; that he would turn the notes over to me and I could place them in bank to be collected as they matured."

True it is that Turner testified that the words which he affixed to his name in signing the receipt describing his representative capacity, viz., "Natural tutor and agent for my minor children," were dictated by Tracy, but in view of the probable ignorance of Tracy of the Louisiana law and the experience and familiarity which Turner possessed on that subject, the statement cannot be accepted as true.

Considering all the evidence, our conclusion is that the proof not only completely fails to establish the commission of fraud or wrong by Tracy, but that on the contrary it clearly shows honesty and fair dealing on his part. Indeed, so far as concerns the transfer of property made to Thomas M. Turner without provoking an administration either in Virginia or in the District of Columbia, whatever may be its legal consequence, which we shall hereafter consider, we think the clear preponderance of the proof gives rise to the inference that that payment was made without administration because of Tracy's knowledge that there were no debts and because of the representations made by Turner that he was entitled under the law of Louisiana to receive the transfer on behalf of his minor children, and that if it were not made to him without legal proceedings there would be much unnecessary expense resulting

from a contest, and thus the purpose of the testator towards the beneficiaries of his will would be in part frustrated.

This brings us to consider the proposition of law whether the payment by Tracy to Thomas M. Turner, as the representative of his children, was adequate to prevent the estate of Tracy from being compelled to pay a second time.

It is undoubted that at the time of Silas H. Turner's death the children who were the beneficiaries under his will were minors and were domiciled with their father and mother, who were both alive and residing in the State of Louisiana. It is at once conceded that under the law of Louisiana a father or mother entitled to qualify as natural tutor (guardian) must be recognized by a court, and as a condition precedent to such recognition must have complied with the requirements of the law. Under the law of Louisiana such precedent requirements are the taking of the inventory, the recording of an abstract thereof and an oath of office. As it is established that Thomas M. Turner performed none of these requirements and was never recognized by a court as the natural tutor of his children, it is insisted that he was wholly without power to represent them or to receive the bequests made to them by the will of Silas H. Turner. But the proposition is inapposite and is based upon a misconception of the law of Louisiana resulting from the assumption that under that law the rules governing the qualification and appointment of natural tutors after the death of one of the spouses applies to the case of a father during marriage representing and acting for and on behalf of his minor children.

In the Civil Code of Louisiana of 1870, title 7, chapter 5, treating of father and child, it is provided as follows:

"ART. 221. The father is, during the marriage, administrator of the estate of his minor children.

"He is accountable both for the property and revenues of the estates, the use of which he is not entitled to by law, and for the property only of the estates, the usufruct of which the law gives him.

"This administration ceases at the time of the majority or emancipation of the children."

And in the same title and chapter it is further provided:

"ART. 223. Fathers and mothers shall have, during marriage, the enjoyment of the estate of their children until their majority or emancipation."

Moreover, in the same chapter, it is also provided:

"ART. 226. This usufruct shall not extend to any estate, which the children may acquire by their own labor and industry, nor to such estate as is given or left them under the express condition that the father and mother shall not enjoy such usufruct."

These provisions of the Code of 1870 have obtained in that State from an early date. The first of them was in the Code of 1825 as article 267, under the title treating of minors and their tutorship, and under the same title the provision was contained in the Code of 1808 in section 2 of Title 8, article 5. And as the inevitable result of these provisions of the code it has long been settled in Louisiana that the plenary power of the father as administrator, during marriage, of the estate of his minor children, born of the marriage, was wholly distinct from tutorship, did not depend upon previous judicial recognition, and was not subjected to the precedent requirements essential to give rise to tutorship. In *Cleveland, Tutrix,* v. *Sprowl, Administrator* (1845), 12 Rob. 172, the court said (p. 173):

"Now, it is well known, that no tutorship exists, during the marriage, over the children issued from it, but that a child remains under the authority of his father and mother until his majority or emancipation. Civ. Code, Art. 234. The father is, during the marriage, administrator of the estate of his minor children; he is accountable both for the property and revenues of the estates, the use of which he is not entitled to by law, and for the property only of the estates, the usufruct of which the law gives him; and such administration ceases at the time of the majority or emancipation of the

children. Art. 267. The natural tutorship only takes place after the dissolution of the marriage, by the death of either of the spouses, and belongs of right to the surviving one. Art. 268. Thus it is clear, that the legal mortgage resulting from the tutorship, is not applicable to the administration of the minor's property, given by law to the father, during the marriage. He is not a tutor; his duties and responsibilities are very different; and the law does not appear to have intended, that while the minor's estate remains under his father's administration during the marriage, his child should have a legal mortgage upon his father's property, as a security for the said administration."

As a result, it was expressly decided that neither the legal mortgage resulting from tutorship nor the security generally required by law from usufructuaries were applicable to a father as administrator of the estates of his minor children during the marriage. Our attention has not been called to nor have we been able to find any decision of the Supreme Court of Louisiana modifying in the slightest degree the principles thus announced. On the contrary, in *Gates* v. *Renfroe* (1852), 7 La. Ann. 569, whilst the subject was not directly at issue, the court in its opinion assumed the law of Louisiana concerning the power of the father in administering the estates of his minor children, as previously stated, to be elementary.

It is certain that the article relating to the power of the father to administer during marriage, which was originally enacted in the Code of 1808, was drawn from the Code Napoleon. We say this is certain, because not only did the article as enacted in the Codes of 1808 and 1825 exist in the Code Napoleon in absolutely identical words, but it was also in that code placed, as it was in the two earlier Louisiana codes, under the heading of minors and their tutorship. Code Napoleon, Art. 389.

The fact that the provision should more properly have been classed under the chapter of the code treating of paternal

authority has been recognized in France. In commenting upon this subject Demolombe says (vol. 6, No. 409):

"It is evident that this article appropriately belongs to the title treating of paternal power, because during the marriage tutorship does not exist. It is alone in virtue of the paternal power that the father (or the mother in the case of the father's incapacity) is charged with the administration of the goods belonging to his minor children."

The same commentator thus expounds the spirit of the article (Ib. No. 415):

"During the marriage the father and the mother are present and coöperating with each other, consulting with each other, supervising as it were each other with that instinctive tenderness which is the result of their relation to their offspring. This the law assumes to be an assured and certain security for the children founded at the same time upon both paternal and conjugal affection, of which the children are the pledge, and of which they are the most potent links for the perpetuation of the union. . . . Let us add that the conflicts between interests of the children and those of the parent which often arise from the death of one of the parents do not usually exist whilst both the parents are alive. These are the family considerations upon which the article is founded, and tradition plainly confirms them. Thus in our ancient jurisprudence the distinction between the legal administration of a father and tutorship was well established. The first rested upon an agency created by law alone, based upon the confidence which the law reposed in paternal affection, from which it resulted that the powers of administration given to the father were broader and more comprehensive than those which the law conferred upon a tutor. (Comp. Merlin, Rep. VII, V° Légitime Administration; Coquille, sur l'art 2, de la Coutume de Nivernais, de Lauriére sur Loisel Inst. Cout. livre 1, titre IV, régle 1.)"

And when the genesis of the enactment which passed from the Napoleon Code into the codes of Louisiana is considered the accuracy of the observations of the commentator just cited

is made clear. In the draft of the Napoleon Code which was first submitted the provision subsequently contained in article 389 of that code was not found. The enactment of the article into the code was the result of a recommendation by the Tribunat, its report on the subject expressly saying (Locré. Legislat. Civ. t. VII, p. 215):

"We think that the first article of the chapter should express in precise terms what during the marriage should be the authority of the father over the personal goods of his minor children. . . . Never up to this time has it been exacted that a father should be obliged to qualify as the tutor of his children before the dissolution of the marriage. If while the marriage exist the law did not make a distinction between the father and mother and a tutor in the proper sense of the word, it would follow that the father would be as to the personal goods of his minor children subjected during marriage to all the conditions and burdens which the law imposes upon a tutor. The father would then be as to his minor children under the supervision of an under tutor, would depend upon the advice of a family meeting, etc., etc., all of which would be repugnant to the accepted conceptions of paternal authority. It seems fitting that up to the dissolution of marriage the only title which the father should have is that of administrator, and it is for this reason that we recommend the adoption of the article."

And the views which were thus expounded have been substantially applied by the decided cases in France, and are concurred in by the practically unanimous opinion of the theoretical writers. The result of those decisions and the opinions of the writers on the subject adequately portray the plenary power conferred upon the father as the administrator of all the property of his minor children during marriage and the distinction between that authority and the narrower power as to the natural tutorship arising only after the dissolution of the marriage. The authorities will be found exhaustively collected in the notes to article 389 of the Napoleon Code in

the Fuzier-Herman edition of that code, published at Paris in 1885.

Much reliance in argument is placed upon the terms of article 3350 of the Louisiana Code of 1870, which reads as follows:

"ART. 3350. Before fathers and mothers, who by law are entitled to the usufruct of property belonging to their minor children, shall be allowed to take possession of such property and enjoy the fruits and revenues thereof, they shall cause an inventory and appraisement to be made of such property, and cause the same to be recorded in the mortgage book of every parish in the State where they or either of them have immovable property."

This article was not contained in any of the previous codes. Its origin is this: Prior to the Louisiana Constitution of 1868 the moneyed obligations of natural tutors towards their minor children, of husbands to their wives, and some other pecuniary obligations expressly provided for by law, were secured by what was known to the Louisiana law as legal and tacit mortgages. Those mortgages existed by operation of law and without registry. No such provision, however, ever obtained, as we have seen, concerning a father administering upon the estate of his minor children during the marriage. The Louisiana constitution of 1868 (art. 123), provided that all legal, tacit mortgages should cease after a specified date, and expressly imposed upon the legislature the duty of providing by law for a mode of registry in order to preserve existing and future mortgages of that character. By an act passed in 1869, entitled an act to carry out this article of the constitution and "to provide for recording all mortgages and privileges," the legislature sought to comply with this constitutional direction. Acts La. 1869, p. 114. The act in question contained specific directions for recording mortgages of the character referred to, the mode of registry which was adopted as to these mortgages being the making of an abstract of an inventory showing the amount of the minor's property, and the putting of the same of record. Section 12, the last section

of the act, contained the exact provision subsequently embodied when the Code of 1870 was adopted, in article 3350, except that section 12 of the act of 1869, moreover, had these words, which are not found in the article of the code referred to: "Which recordation shall operate a mortgage on such property until a final settlement of the administration of said property." In other words, when the Code of 1870 came to be adopted the compilers omitted the words of section 12 of the act of 1869 just quoted, but placed in the code the remainder of the section providing for the registry of an abstract of the inventory in the case stated. It is difficult to determine exactly the reason which impelled the compilers of the Code of 1870 to omit the provision as to mortgages found in section 12 of the act of 1869, conceding that that provision was constitutional despite the title of the act, and to reënact the remainder of the section providing for the registering of an abstract of an inventory in the case named, since by the omission of the provision as to mortgage no possible security could arise from the recording of an abstract of an inventory in the case provided for. For, certain it is that neither under the codes as they existed prior to 1870, nor in that code, was or is there any provision for a legal mortgage securing the minors against loss resulting from the enjoyment by either parent during marriage of a usufruct. The intention of the compilers of the Code of 1870 not to change the powers of administration of the property of his minor children, conferred upon the father by the prior codes, is expressly shown by the reënactment without change of those provisions, and is cogently exemplified by the further fact that in reënacting the provisions in question they were removed from the chapters of the code referring to tutorship and were transferred to the chapters of the code relating to paternal authority. As the full significance to be given to article 3350 is a question of local Louisiana law, which we are not called to decide, except so far as is essential to the determination of the case before us, we content ourselves with saying that we think it is clear that that

article in no way modifies or controls the full power of the father to administer during marriage the estates of his minor children, so well settled under the Louisiana law. In any event, we think that article 3350 simply implies that unless an inventory is made and an abstract recorded the usufruct which otherwise would exist shall not obtain. But giving this effect to the article in no way modifies the powers of administration conferred upon the father during marriage to which we have referred, because, as clearly pointed out by the authorities which we have previously cited, the administration is wholly independent of the usufruct and applies to the minor's property during marriage, whether or not there be a right of usufruct.

As then by the law of their domicil the minors were represented by their father as administrator, with full power under that law to receipt for and administer the property for their account, was the transfer of property made by Tracy in the District of Columbia to Thomas M. Turner, as the administrator or representative of his minor children, valid and binding? It is said that it was not because Turner, the testator, was domiciled in Virginia, and if the property had been administered upon in that jurisdiction, never mind what was the power of the father, under the law of Louisiana he would not have been entitled to receive or remove the property from the jurisdiction without an order made by a Virigina court and upon the giving of satisfactory security. But the property in question was in the District of Columbia, and in the absence of all showing that there were creditors in Virginia, the Probate Court of the District of Columbia would have had power under the circumstances disclosed, if administration had been had in the District, to direct the delivery of the property to the person lawfully entitled to represent the minors, without compelling the transmission of the funds to Virginia. Under these circumstances, we are of opinion that the payment in the District of Columbia to the father of the complainants as administrator of their estate, fully empowered to collect and

receive the same by the law of their domicil, is controlled by the cases of *Wilkins* v. *Ellett*, 108 U. S. 256; *S. C.*, 9 Wall. 740. It is, however, urged that although as a general principle the cases referred to are decisive of this, the terms of the will and the knowledge which Tracy had of the intentions of the testator, made the delivery by Tracy to the father of the children a violation of the terms of the will and operated a fraud upon the rights of the children, which, it is claimed, takes this case out of the general rule. The unsoundness of the first of these contentions, which rests upon the terms of the will, we think is demonstrated by its mere statement. The proposition is that the words of the will "and appoint Philip A. Tracy to distribute the proceeds of said property equally between them" (the minor children of Thomas M. Turner) implied a direction to Tracy to hold and administer the property for the benefit of the children, and not to pay it over to a lawfully appointed administrator or to one legally authorized to receive it. The second contention rests upon the assumption that as a matter of fact the proof establishes that Tracy had knowledge that the purpose of Silas H. Turner in making his will was to exclude the administration by Thomas M. Turner of the property bequeathed to his children, because Thomas M. Turner was a spendthrift and the testator lacked confidence in him. And this assumption of fact, as we have seen, was adopted by the trial court. Conceding for the sake of argument only that the existence of such knowledge on the part of Tracy would have caused it to be a fraud for him to turn over the property to the lawful administrator of the minors, we can find no reliable proof whatever in the record justifying the premise of fact upon which the contention is based. The sole and only possible basis for such an assumption is a statement made by Erle H. Turner in the course of his examination-in-chief, where, in purporting to give his recollection of a conversation had with Tracy, he said:

"Tracy himself wrote the will; and he said that he had suggested to uncle to leave it to my father, and if I remember,

his answer was no, he would spend it, or something like that; and then he suggested that he leave it to his children, and that idea suited uncle, and he wrote the will."

We shall not stop to point out the conflict between this statement made by Erle Turner and the intimate and friendly relations as exhibited by his correspondence, continuing almost up to the time of the death of Tracy, or the conflict between the statements and the various parts of his testimony and his letters. We do not pause to do these things, because in our opinion the proof introduced by both parties beyond question establishes that Silas H. Turner entertained no such feeling towards his brother as the quoted testimony of Erle Turner implies. Thus the complainants' own proof showed that Thomas M. Turner was summoned to the bedside of his dying brother and there remained for a month and a half; that during that time he was in constant and close relation with the brother, without the slightest intimation of any want of confidence between them. On the contrary, Thomas M. Turner made repeated statements and declaration in the course of his testimony, to the effect that his brother referred to the will, and informed him that he expected him to administer the property, etc. That Tracy regarded Thomas M. Turner as honest is demonstrated by his whole course of conduct, and is illustrated by his allusions to Thomas M. Turner in the memorandum which he left for the information of his executors.

The receipt being binding, the only question remaining for consideration is whether any liability rests upon the estate of Tracy growing out of the investment in real estate referred to therein. From an inspection of the receipt it will be seen that that subject was thus described: Lots on Maryland avenue N. E. $1,800; and as we have also previously stated at the time of the giving of the receipt Tracy delivered to Thomas M. Turner a certificate, which we have heretofore reproduced, and which, as we have said, Turner subsequently turned over to his son Erle.

The evidence shows that the investment in question was represented by shares of stock of the Mutual Investment Company, which had acquired square 937 in the city of Washington. On September 3, 1888, Tracy subscribed to twenty-five shares of the stock of the par value of $150 per share, making a total liability of $3,750. He had paid assessments aggregating only $85 per share, when, on February 6, 1890, the land was sold at a profit of sixty dollars on each share of stock. It may, of course, be presumed that during the interval between the subscription to the stock and the winding up of the venture Tracy retained possession of the balance, upon which he was liable on the subscription over and above the sums actually paid on assessment calls, so as to be ready to respond to calls up to the par value of the stock. Twelve of the subscribed shares would represent an investment of $1,800, the exact amount stated in the receipt. The profit on the twelve shares amounted to $720. This profit with the principal of the investment aggregated, therefore, on February 6, 1890, $2,520. Tracy, however, received but a trifling amount in cash, the greater part of the sum due him on the settlement being paid in notes of the purchaser of square 937, secured by trust deed. When the notes were paid, as shown in a letter written by Tracy to T. M. Turner on May 7, 1892, heretofore reproduced in the margin, the investment had realized $2,600. On account of the refusal of Tracy in the spring of 1891 to pay over this sum to Thomas M. Turner, then living in Texas, unless he qualified as administrator of the estate, Tracy invested the amount in real estate notes, which were in Tracy's possession on May 7, 1892. Thomas M. Turner testified that prior to the spring of 1891 Tracy told him that the estate had realized from the investment in the Maryland avenue lots the sum of $2,750, although he does not claim to have taken issue with the statement in Tracy's letter that the amount was $2,600. The auditor, however, fixed the amount at $3,069.65, and held the estate of Tracy liable to account for that sum from February 6, 1890.

It appears from statements in the record that following the panic of 1893 payments of interest on this loan ceased and the security became impaired, and, from passages in letters of Tracy, it may be conjectured the loan was secured by a second mortgage and a sale was had under the first mortgage, which failed to realize more than sufficient to pay the primary incumbrance. It being, however, impossible from the record to determine with precision the ultimate fate of the investment in question, and as the sum originally realized therefrom is fixed with sufficient accuracy and has not been accounted for, we think the estate of Tracy should be held liable as of February 6, 1890, for the sum of two thousand five hundred and twenty dollars with legal interest. From this amount, however, there is to be deducted the one-fourth proportion of Erle H. Turner, as the sums admitted to have been paid to him by Tracy on account of this asset exceeded his proportion of the principal and interest. In other words, therefore, the estate of Tracy will be held accountable to complainants other than Erle H. Turner in equal proportions for the sum of eighteen hundred and ninety dollars with legal interest thereon from February 6, 1890.

The decree of the Court of Appeals is reversed and the cause is remanded with directions to reverse the decree of the Supreme Court of the District of Columbia and to remand the cause to that court with directions to enter a decree in conformity with this opinion. The costs in this court as well as in both the courts below are to be paid by the complainants and before distribution of the sum for which the estate of Tracy is held accountable.

Mr. Justice Brown took no part in the consideration and decision of this case.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* MUGG.

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

No. 233. Submitted April 18, 1906.—Decided May 14, 1906.

One obtaining from a common carrier transportation of goods from one State to another at a rate specified in the bill of lading, less than the schedule rates published and approved and in force at the time, whether he does or does not know the rate is less than schedule rate, is not entitled to recover the goods, or damages for their detention, upon tendering payment of the amount specified in the bill of lading, or of any sum less than the published charges.

Whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the Interstate Commerce Law, the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee become entitled to the goods, only by payment or tender of such amount.

THE railroad company, plaintiff in error in this record, appealed to the Court of Civil Appeals of the Second Supreme Judicial District of the State of Texas from a judgment which had been rendered in favor of Mugg and Dryden, defendants in error herein. The appellate court certified to the Supreme Court of Texas the question of the liability of the railroad company, upon a statement of facts which correctly set forth the controversy, and which was as follows:

". . . The cause originated in the justice court, from which it was appealed to the County Court of Tarrant County, where a trial was had on the following statement of appellees' cause of action, to wit: 'Statement of plaintiff's cause of action. Damages in the sum of $140.18 as follows: By reason of defendant making and quoting to plaintiffs a rate of $1.25 per ton on two cars of coal and $1.50 per ton on one car of coal, in January and February, 1903, respectively, from Coal Hill, Ark., to Weatherford, Texas, on which rates so made and

quoted plaintiff relied in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiff freight at the rate of $2.75 per ton on said two cars, and $2.85 per ton on said one car, which said freight rate plaintiff was forced to pay and did pay under protest in order to obtain said coal and deliver the same in compliance with sales previously made. That plaintiff's loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiff the said rates, on which rate quoted defendant knew plaintiffs relied and based their sales of the said three cars of coal shipped and sold thereafter, and then forcing plaintiffs to pay a greater rate, amounting in the aggregate to the sum of $140.18, on said three cars of coal, thereby causing plaintiffs' loss and damage in the said sum.'

"To this pleading the appellant answered by general demurrer and general denial, and especially denied that it ever entered into any contract for the shipment of coal for appellees from Coal Hill, Ark., to Weatherford, Texas, at the rate alleged in appellees' statement; and further that if it ever quoted any such rate to appellees such quotation was a violation of the Interstate Commerce Act and was a lower rate than the interstate rate in effect at the time shipment was made, which had been duly published, printed, and posted in its depot and stations as required by the terms of the act; and further, that it collected from appellees the exact rate prescribed for such commodity under such act, and that such contract, if any was made, was in violation of law and void. Upon a trial without a jury judgment was rendered for the appellees for the amount sued for and all costs of suit.

"It is agreed by the parties that the rate charged and collected on the shipments of coal in controversy from Coal Hill, Ark., to Weatherford, Texas, as shown in appellees' statement of cause of action, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas and Pacific Railway Company

on file with the Interstate Commerce Commission, and posted in the stations of said railway company, as required by the Interstate Commerce Act. There is no assignment challenging the sufficiency of the evidence to support the material allegations of appellees' pleadings."

The Supreme Court of Texas having answered that the railroad company was liable "for damages occasioned by the misrepresentation of the rate of freight as shown by the statement of facts," 98 Texas, 352, the Court of Civil Appeals affirmed the judgment against the railroad company. Thereupon this writ of error was prosecuted.

Mr. John F. Dillon, Mr. Winslow S. Pierce, Mr. David D. Duncan and *Mr. Thomas J. Freeman,* for plaintiff in error:

There was no appearance for defendants in error.

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

This case is within the principle of and is ruled by the decision in *Railroad Co.* v. *Hefley,* 158 U. S. 98. Upon the authority of that case the Supreme Court of Alabama denied the liability of a railroad company in a case of similar character to that under review. *Southern Ry. Co.* v. *Harrison,* 119 Alabama, 539. The opinion of Chief Justice Brickell, so aptly reviewed and declared the effect of the decision in the *Hefley* case that we adopt the same in disposing of the present controversy. The Alabama court said:

"In *Gulf &c. Railroad Co.* v. *Hefley,* 158 U. S. 98, the plaintiff sued to recover damages for the refusal by the carrier to deliver goods consigned to him, after tender of payment of the stipulated charges named in the bill of lading. The goods, a lot of furniture, had been received by the carrier at St. Louis, Missouri, for transportation to Cameron, Texas, at a stipulated rate, specified in the bill of lading, of 69 cents per

hundred pounds, the charges amounting to $82.80, whereas the published schedule rate in force at the time was 84 cents, and the charges should have been $100.80; and the plaintiff, as in this case, was ignorant of the fact that the rate obtained was less than the schedule rate. It was held, in an opinion by Brewer, J., that the plaintiff was not entitled to recover. It is true that the only question discussed in the opinion was, whether or not the interstate act superseded the Texas statute, which prohibited a common carrier from charging or collecting from the owner or consignee of freight a greater sum than that specified in the bill of lading, and this question was decided in the affirmative. . . . But this was not the only effect of the decision, and it is by its effect on the rights of the parties to such a contract, by whatever process of reasoning the decision may be reached, that the state courts are bound. The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one State to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other States are bound, . . . "

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

SECURITY MUTUAL LIFE INSURANCE COMPANY *v.* PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

TRAVELERS INSURANCE COMPANY OF HARTFORD *v.* SAME.

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

Nos. 178, 184. Argued January 16, 1906.—Dismissed February 19, 1906.—Petitions for rehearing granted and cases decided May 14, 1906.

A writ of error having been dismissed, after full argument, as being a moot case, on mistaken assumption of fact justified by the record, and the petitions for rehearing showing facts on which substantial relief can be granted the application for rehearing is allowed and the case decided on the merits on the arguments already made.

A State has the power to prevent a foreign corporation from doing business at all within its borders unless such prohibition is so conditioned as to violate the Federal Constitution, and a state statute which, without requiring a foreign insurance company to enter into any agreement not to remove into the Federal courts cases commenced against it in the state court, provides that if the company does so remove such a case its license to do business within the State shall thereupon be revoked is not unconstitutional. *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, followed and held not to be overruled by *Barron* v. *Burnside*, 121 U. S. 186, or any other decision of this court.

THE facts are stated in the opinion.

Mr. Wm. Marshall Bullitt, with whom *Mr. F. W. Jenkins*, *Mr. Julien T. Davies* and *Mr. Charles S. Grubbs* were on the brief, for the Security Mutual Life Insurance Co.

Mr. Edmund F. Trabue and *Mr. John G. Johnson*, with whom *Mr. Wm. Bro. Smith*, *Mr. John C. Doolan* and *Mr. Attilla Cox, Jr.*, were on the brief, for the Travelers Insurance Co.

Mr. J. H. Hazelrigg, with whom *Mr. N. B. Hays*, Attorney General of the Commonwealth of Kentucky, and *Mr. H. R. Prewitt* were on the brief, for defendant in error.

Mr. Justice Peckham delivered the opinion of the court.

Motions for rehearing have been presented by plaintiffs in error. The cases were commenced in the proper state court in Kentucky, and were argued here on their merits in January of this term, and the writs of error were dismissed, 200 U. S. 446, because, as appeared from the record, only abstract questions remained to be decided, the licenses to do business within the State of Kentucky in both cases, which had been granted on July 1, 1904, for one year, having expired since issuing the writs of error.

In No. 178 the petition stated that the permission or authority to continue to do business in Kentucky had been renewed and extended from year to year by the State Insurance Commissioner, and that he had, on July 1, 1904, "continued the authority to the Security Mutual to transact the business of life insurance," as evidenced by the permit "for a period of one year from July 1, 1904." It was also averred that the permit had been revoked in September, 1904, and the company asked to have the revocation cancelled.

In No. 184 the petition stated that the company had been granted authority to transact business in the State of Kentucky for the period of one year then next ensuing, that is, from July 1, 1904. The petition showed that the permit had not then (October, 1904) been revoked, but it was alleged that the Superintendent of Insurance threatened to revoke it (on grounds substantially similar to those set forth in the *Security* case, in 200 U. S. *supra*, viz., the removal to a Federal court of a case commenced against the company in the state court), and an injunction was asked to prevent the revocation of the permit on that account.

On these motions for a rehearing it is now shown, what did

not appear in the records, that the permits in fact had been renewed for another year, from July 1, 1905, to July 1, 1906, for the purpose, as it would seem, of having the point involved reviewed by this court. Neither party adverted to this fact on the argument, and the cases were fully presented by counsel on both sides, on the merits, and the question treated as still existing.

As the dismissal was ordered on a mistaken assumption of fact, justified by the records, that the permits had expired by lapse of time and had not been renewed, the applications for rehearing are granted and the judgments of dismissal set aside, and the cases will be decided upon the arguments already made in full by counsel for both parties.

The facts upon the main question sufficiently appear in the report in 200 U. S. 446. The Court of Appeals of Kentucky held the statute valid. 26 Ky. Law Rep. 1239, dissenting opinion, 27 Ky. Law Rep. 77. See also 83 S. W. Rep. 611; 84 S. W. Rep. 527.

The matter to be now determined is whether a State has the right to provide that if a foreign insurance company shall remove a case to the Federal court, which has been commenced in a state court, the license of such company to do business within the State shall be thereupon revoked.

The statute under which the question arises is known as section 631 of the Kentucky Statutes, and reads as follows:

"Before authority is granted to any foreign insurance company to do business in the State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court

of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

A State has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are *Hooper* v. *California*, 155 U. S. 648; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 583; *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389, 395; *Hancock Mutual Life Insurance Company* v. *Warren*, 181 U. S. 73.

Having the power to prevent a foreign insurance company from doing business at all within the State, we think the State can enact a statute such as is above set forth.

The question is, in our opinion, settled by the decisions of this court. In *Insurance Company* v. *Morse*, 20 Wall. 445, a statute of Wisconsin, passed in 1870, in relation to fire insurance companies, after providing for certain conditions upon which the foreign company might do business within the State, continued:

"Any such company desiring to transact any such business as aforesaid by any agent or agents in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

While that statute was in force the Home Insurance Company of the State of New York established an agency in Wis-

consin, and, in compliance with the provisions of the statute, the company duly filed in the office of the Secretary of State of Wisconsin the appointment of one Durand as its agent, upon whom process might be served. The power of attorney was filed, containing the following agreement: "Said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts."

After doing business in the State for some time the company issued a policy to Morse, and a loss having occurred, Morse sued the company in one of the state courts of Wisconsin to recover the amount alleged to be due on the policy. The company entered its appearance in the suit and filed its petition to remove the case, which petition was in proper form, and was accompanied by the required bond and bail. Being presented to the state court of Wisconsin, in which the suit was brought, that court held that the statute justified the denial of the petition to remove the case into the Federal court, and a trial having been had in the state court, it gave judgment for the plaintiff on a verdict found in his favor. Upon a review of the judgment by the Supreme Court of Wisconsin it was affirmed. Thereupon the insurance company sued out a writ of error from this court, and the sole question was, whether the statute and agreement were sufficient to justify the state court in refusing to permit the removal of the case to the Federal court, and proceeding to judgment therein. This court held that the agreement was void, inasmuch as, if carried out, it would oust the Federal courts of a jurisdiction given them by the Constitution and statutes of the United States. It was said that the statute of Wisconsin was an obstruction to the right of removal provided for by the Constitution of the United States and the laws made in pursuance thereof, and that the agreement of the insurance company derived no support from the unconstitutional statute, and it was void as it would have been had no such statute been passed. The Chief Justice, with whom concurred Mr. Justice Davis, dissented, holding that, as

the State had the right to exclude foreign insurance companies from the transaction of business within its jurisdiction, it had the right to impose conditions upon their admission, which was a necessary consequence from the right to exclude altogether.

It will be seen the statute provided that in the power of attorney, appointing an agent for the company within the State, there should be an agreement that the company would not remove a case to a Federal court, and the statute was held to be void.

Subsequently the case of *Doyle* v. *Continental Insurance Company*, 94 U. S. 535, involving the same statute, came before this court. In that case the court reaffirmed the decision of the *Morse* case, *supra*, as to the invalidity of the agreement. But in distinguishing the two cases it was said in the course of the opinion that, as the State had the right to entirely exclude such company from doing business in the State, the means by which it caused such exclusion or the motives of its action were not the subject of judicial inquiry; that the conclusion reached in the *Morse* case that the statute of Wisconsin was illegal was to be understood as spoken of the provision of the statute then under review, viz., that portion thereof requiring a stipulation against transferring cases to the courts of the United States; that the decision was upon that portion of the statute only, and that other portions thereof, when presented, must be judged on their merits. The court further said that the *Morse* case had not undertaken to decide what the powers of the State of Wisconsin were in revoking a license previously granted, as no such question had arisen upon the facts therein, and was neither argued by counsel nor referred to in the opinion, but that in the case then before the court (that of Doyle) the point as to the power of the State to revoke a license was distinctly presented. It is stated in the opinion, as follows:

"We have not decided that the State of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep

offices, and issue policies in that State. On the contrary, the case of *Paul* v. *Virginia*, 8 Wall. 168, where it is held that such conditions may be imposed, was cited with approval in *Insurance Company* v. *Morse.*"

The opinion concludes as follows:

"It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the State of Wisconsin to enforce an agreement to abstain from Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the Federal court was void, whether made pursuant to a statute of the State providing for such agreement, or in the absence of such statute; but that the State, having power to exclude altogether a foreign insurance company from doing business within the State, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state to a Federal court, its right to do business within the State should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not.

The case of *Barron* v. *Burnside*, 121 U. S. 186, has been cited

as overruling the *Doyle* case, and as holding that a statute of the nature of the one in question here is void as a violation of the Federal Constitution. In that case a statute of Iowa was under consideration. It is set out in the report. The first section provides for an application by the foreign company to the Secretary of State, requesting that a permit may be issued to the corporation to transact business in the State. It also provides that the application shall contain a stipulation that the permit shall be subject to each of the provisions of the act. The third section provides that if any cases commenced in a state court were removed by the corporation into a Federal court, the corporation should thereupon forfeit any permit issued or authority granted to it to transact business in the State. The fourth section provides for punishing the agents, officers or servants of the corporation for doing business as such in the State, if the corporation had not complied with the statute and taken out and retained a valid permit to do business within the State. The corporation had not, in fact, taken out a permit. Barron, the plaintiff in error, was a servant of the corporation, and was engaged as engineer in running a train of the corporation, which started from Chicago and was running in the State of Iowa. He was arrested in Iowa for acting as the agent of the company in that State, while the company had no permit. Having been arrested, he applied to the Supreme Court of the State for a writ of *habeas corpus*, which was issued and a return made, and the case heard upon an agreed statement, containing the above facts. The state court upheld the validity of the statute, and the case was brought to this court by writ of error, where the judgment was reversed and the statute held invalid.

In the opinion delivered in this court it will be observed that the agreement or stipulation provided for in the statute was the material fact upon which the court proceeded, and it was held that the statute did require such agreement. The various requirements mentioned in the first section of the statute were referred to as forming in fact but one proceeding and as indis-

solubly bound up with the application for a permit that could not be issued, unless the stipulation was given which made the permit specially subject to each of the provisions of the act, including the provision not to remove. It is clear from the whole case that the stipulation not to remove was regarded as the material part, and the case was decided on that foundation. Mr. Justice Blatchford said:

"The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the Secretary of State, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the State, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal court."

For this reason the statute was held void.

Reference is then made in the opinion to the *Morse* case, 20 Wall. *supra*, wherein it was stated that agreements in advance to oust the court of a jurisdiction conferred by law were illegal and void, and that parties could not bind themselves in advance by such an agreement thus to forfeit their rights at all times and on all occasions, whenever the case might be presented.

The *Doyle* case, 94 U. S. *supra*, was also referred to, and Mr. Justice Blatchford said in regard to it as follows:

"The point of the decision seems to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment."

This is the language which it is contended overrules the *Doyle*

case. We do not think so. A reference to the *Doyle* case will show that the first part of the above-quoted statement is inaccurate, as the case does not seem to have been decided upon the proposition that an injunction was improper from a court of the United States to state officers. The *Morse* case was referred to and approved, and the court held there was nothing inconsistent between the two cases. The *Doyle* opinion proceeds upon that theory.

If it had been the intention of the court in *Barron* v. *Burnside* to overrule the *Doyle* case, it was easy to have said so. Instead of that, the opinion rests upon the ground of the agreement to be exacted as a condition of granting the permit, and that the statute was not separable into parts, and it was held that the requirement of such a stipulation was void. It was not held that such a statute as the one of Kentucky now under consideration was void. Such statute exacts no agreement or stipulation in any form or in any part of the statute.

In *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207, the same principle was stated, although the question was not directly involved, as the case was brought in the Federal court and the corporation contended it was not served with process in the proper district and that the court was on that account without jurisdiction. The court, per Mr. Justice Gray, in the course of the opinion, remarked that a statute requiring the corporation *as a condition precedent* to obtaining a permit to do business within the State, to surrender a right and privilege secured by the Federal Constitution and laws, was unconstitutional and void. (Page 207.) It was the same, in substance, as the Iowa statute, which was held void on account of the exaction of the agreement.

In *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, Justice Gray, in delivering the opinion of the court, again stated what was regarded as the holding in the two cases of *Insurance Co.* v. *Morse* and *Barron* v. *Burnside*, and said that "statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into

the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." It was the exaction of a stipulation or agreement that rendered the statute illegal.

It is also said in *Blake* v. *McClung*, 172 U. S. 239, 255, that a statute providing that a stipulation should be made that the company would not remove a case into a Federal court was void because it made the right to do business under the license or permit depend upon the surrender by the corporation of a privilege secured to it by the Constitution.

It is urged that the Iowa and Texas statutes do not require an agreement not to remove. But those statutes do require such agreement. The Iowa statute provided that the application for a permit should contain a stipulation that the permit should be subject to each of the provisions of the act, among which was one that the corporation should forfeit the permit if it should remove the case. This was held to be, in effect, a stipulation not to remove, exacted as a condition for granting the permit. And so the court said:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void." *Barron* v. *Burnside*, *supra*, page 200.

In other words, the statute was regarded as exacting an agreement in advance not to remove a case, and such being the fact it was held that the statute was void. The Texas statute is to the same effect as that of Iowa.

The most that can be contended for is that the *Barron* case holds that where the statute exacts a stipulation in advance, as a condition of granting a permit, and the statute is not separable into parts, the whole statute is void, and a provision for withdrawing the permit, if a case is removed, is not saved. That principle, as we have said, does not touch this case, as there is no exaction of a stipulation at any time.

It has not been decided that a statute which has no require-

ment for a stipulation or agreement not to remove is void, if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

Counsel for the companies, in their brief admit that the State "has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute of expulsion would not be affected by the motives of the State in so doing—even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the State any longer than it chose to allow; and the statute would not abridge any right of removal—for as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence."

Thus it is admitted that a State has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a State to enact in advance that if a company remove a case to a Federal court its license shall be revoked.

We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to re-

move a case into a Federal court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the *Doyle* case we think is good.

The orders heretofore entered dismissing the writs of error in these cases are set aside, and the judgments of the Court of Appeals of Kentucky are

Affirmed.

MR. JUSTICE DAY, with whom concurs MR. JUSTICE HARLAN, dissenting.

In view of the importance and far-reaching effect of the decision just announced, and being unable to concur therein, we have deemed it not improper to briefly state the grounds upon which our objection to the decision of the court rests.

Certain principles of constitutional law are firmly settled by the decisions of this court and need no citation of cases in their support. The Constitution of the United States and the laws passed in pursuance thereof are the supreme law of the land, and of controlling authority over all the people, and in all the States of the Union. It is equally well settled that the privilege of resorting to the Federal courts for litigation of rights in controversies between citizens of different States is created by and exercised under authority of the Constitution of the United States, which secures to citizens of another State, when sued by a citizen of a State in which the suit is brought, the absolute right to remove their cases into the Federal court upon compliance with the terms of the act of Congress enacted to effect that purpose. This principle was announced in terms in *Insurance Company* v. *Morse*, 20 Wall. 445, has never been questioned, and is affirmed in frequent decisions of this court. No state regulation in hostility to this principle can be recognized without endangering the supremacy of the National Constitution.

The Kentucky statute imposes but a single condition neces-

sary to be now considered upon the right of foreign corporations to do business in that State. It says in effect to a company not yet licensed to transact business within its borders, there is no objection to the company transacting business in this State; on the other hand, it is desirable that it shall do so, subject to the condition that the company cease to do business in the State and its license be revoked the moment it attempts to avail itself of its constitutional right to remove a controversy into the Federal court under the terms of the Federal statute passed to make the constitutional right effectual. From that time its further right to do business shall cease and determine and its license be revoked. To companies lawfully within the State, as are the appellants in these cases, it makes the like proposition: You may carry on your business, having complied with other conditions, but the moment you undertake to exercise the constitutional right of removal to a Federal court your license shall be revoked, and all authority to do business in the State shall cease. That this can be constitutionally done is affirmed in the decision of the court in these cases, because of the principle that the State, having the right to exclude foreign corporations from its borders, may do so for any reason, although such action, as in the present case, is based solely upon the denial of the right of removal in proper cases by a non-resident citizen, of cases coming within the act of Congress, to the Federal courts.

As a general proposition it is undoubtedly true that a State may prevent foreign corporations, at least those not engaged in interstate commerce, from doing business within its borders and may impose restrictions upon the right to transact local business as it may see fit. But this right in our opinion is not without limitation. It is the established doctrine of this court that a restriction of this power is found in the denial of the right to a State to impose a condition in direct conflict with the Constitution of the United States, in requiring a corporation, as a sole condition of doing business within the State, to surrender the right of removal created and enforced by the Federal Con-

stitution and laws in advance, or give it up after its admission to do business in the State.

The question came directly before this court in the case of *Insurance Company* v. *Morse*, 20 Wall. 445, in which it was held that a State might not require a foreign corporation, as a condition of doing business within its borders, to file an agreement that such company would not remove the suit for trial into a United States Circuit Court or other Federal court. The act was held to be repugnant to the Constitution of the United States and the laws passed in pursuance thereof, as it denied the right of removal secured to the citizens of another State by the Constitution and laws of the United States. The question arose again in the case of *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535. In that case it was held by the majority of the court, Mr. Justice Bradley, Mr. Justice Miller and Mr. Justice Swayne dissenting, that the State of Wisconsin might lawfully enact a statute providing that if any foreign insurance company should transfer a suit brought in the State to a Federal court its license to do business would be cancelled and revoked, and the doctrine was laid down that as a State had the right to exclude the company for any reason, the means by which it should cause such exclusion or the motives of her action were not the subjects of judicial inquiry. Thus the decisions of this court stood until the case of *Barron* v. *Burnside*, 121 U. S. 186, was brought to its attention, in which it was held that a statute of Iowa, requiring a foreign corporation, as a condition of doing business in the State, to stipulate that it would not remove cases into the Federal court, which it had the right under the laws of the United States to remove, was void. And the case of *Insurance Co.* v. *Morse*, *supra*, was approved, and *Doyle* v. *Continental Insurance Co.*, *supra*, qualified and explained. In this case Mr. Justice Blatchford delivered the unanimous opinion of the court. It is apparent from its perusal that the principle stated in *Insurance Co.* v. *Morse* and in the dissenting opinion in the *Doyle* case was recognized and affirmed, and the unqualified right of exclusion denied. After

showing that the right to remove was the creation of the Federal Constitution and laws and could not be impaired without deprivation of a Federal right, the ground of the decision was stated to be:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

And further, in speaking of the *Doyle* case:

"The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse,* must be regarded as not in judgment."

And that the court did not regard the right of a corporation in that respect as differing from that of an individual is shown in the observation:

"Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits."

In concluding the decision the court said:

"In all the cases in which this court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States. *La Fayette Ins. Co.* v. *French,* 18 How. 404, 407; *Ducat* v. *Chicago,* 10 Wall. 410, 415; *Insurance Co.* v. *Morse,* 20 Wall. 445, 456; *St. Clair* v. *Cox,* 106 U. S. 350, 356; *Phila. Fire Assn.* v. *New York,* 119 U. S. 110, 120."

It is thus apparent that the decision was made to turn, not upon the question of whether the agreement not to remove had been required in advance, or imposed as a condition of remaining in the State after entry therein, but rested upon the doctrine that, conceding the right of the State to exclude foreign corporations, its right to do business within the State could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured. The doctrine of *Barron* v. *Burnside* is in our judgment decisive of the contention made in the present case. If it be true, as specifically declared in that case, that the right to exclude a foreign corporation could not be made to depend solely upon the surrender by the foreign corporation of this constitutional right and privilege, it irresistibly follows that its application is fatal to the constitutionality of the statute here in question. The right of the insurance company under the present statute to do business within the State of Kentucky turns upon its willingness to surrender this privilege. If it will do so, it may continue to do business within the State; if it will not, its license will be revoked and its right to do local business destroyed. In short, it may continue to do business within the State, if it will consent to the surrender of a Federal right. We think this brings the case squarely within the limitations of the right of the State to exclude foreign corporations from its midst, and, to sustain the statute, permits a State, because of the exercise of a constitutional right, to close its gates to corporations equally entitled with private citizens in this respect to the protection given by the Constitution. The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all the States would nullify the supreme law of the land in some of its most essential provisions.

An examination of the decisions subsequent to *Barron* v.

Burnside, supra, is convincing to the effect that it has been accepted by the courts, National and State, as decisive of the proposition therein announced, that a state statute giving the right to do business or to terminate a business already instituted, upon the sole condition of the surrender of a Federal right, secured by the Constitution, is void and of no effect. The case, thus interpreted, has been cited and followed in subsequent cases in this and other Federal courts.

In *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, 207, Mr. Justice Gray, delivering the unanimous judgment of this court and referring to a statute of Texas similar to the one now under consideration, said: "That statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions," citing *Insurance Company* v. *Morse* and *Barron* v. *Burnside.* The same eminent judge, delivering again the unanimous judgment of this court in *Martin* v. *Baltimore & Ohio Railroad,* 151 U. S. 673, 684, and again citing the *Morse* and *Barron* cases, said: "The Baltimore and Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right under the Constitution and laws of the United States, when so sued by a citizen of this State, to remove the suit into the Circuit Court of the United States; and could not have been deprived of that right by any provision in the statutes of the State." Again, upon the authority of the same cases, including the *Denton* case, this court, by its unanimous judgment in *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100, 111, said: "So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the

State, have been adjudged to be unconstitutional and void." To the same effect was the case of *Blake* v. *McClung*, 172 U. S. 239, 255, 256, in which it was said, upon the authority of the *Morse, Barron* and *Denton* cases: "It was accordingly adjudged in *Barron* v. *Burnside*, 121 U. S. 186, 200, that an Iowa statute requiring every foreign corporation named in it, as a condition of obtaining a license or permit to transact business in that State, to stipulate that it would not remove into the Federal courts suits that were removable from the state courts under the laws of the United States, was void because it made the right to do business under a license or permit dependent upon the surrender by the corporation of a privilege secured to it by the Constitution. . . . So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." In *Chattanooga, R. & C. R. Co.* v. *Evans*, 66 Fed. Rep. 809, 814, heard before Judges Taft, Lurton and Severens, the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton and referring to the *Morse* and *Barron* cases, recognized the right of the State to prescribe terms upon which a corporation of another State or country may carry on business within its borders, but taking care at the same time to say: "That there are limitations upon this power is equally well settled, for it cannot impose as a condition that such non-resident corporation shall not resort to the courts of the United States."

In *Bigelow* v. *Nickerson*, 70 Fed. Rep. 113, Judge Jenkins, speaking for the Circuit Court of Appeals, Seventh Circuit, after reviewing the cases in this court, said:

"We consider the question foreclosed, and no longer open to discussion. No condition imposed upon a right granted by a State, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States can be upheld."

In *Reimers* v. *Seatco Manufacturing Co.*, 70 Fed. Rep. 573, Judge Taft, speaking for the Circuit Court of Appeals, Sixth Circuit, said:

"The right of a State to impose conditions upon foreign corporations doing business therein is not unlimited. In *Insurance Co.* v. *French*, 18 How. 404, Mr. Justice Curtis, speaking for the Supreme Court said:

" 'A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. *Bank* v. *Earle*, 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.'

"In *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, it was held that the law which permitted a non-resident corporation to do business within its territory on condition that it should forfeit such permit if it removed a suit brought against it into the court of the United States held within the State, was unconstitutional and void, and could give no validity and effect to any agreement or action of the corporation in obedience to its provisions, because it thereby was compelled to surrender a right and privilege secured to it by the Constitution and laws of the United States; citing *Insurance Co.* v. *Morse*, 20 Wall. 445, and *Barron* v. *Burnside*, 121 U. S. 186."

Notwithstanding these cases, it is now adjudged that so far as the Constitution of the United States is concerned, it is competent for any State to withdraw or cancel a license given to a corporation of another State to do business within its limits whenever and solely because that corporation, being sued in a state court, has the case removed to the Federal court for trial or hearing. If each State should enact a statute, such as the

one before us, the right secured to a corporation when sued in the courts of a State other than the one creating it, to invoke the jurisdiction of the Federal court, would be abrogated throughout the whole United States, although such right is secured by the Constitution and by valid acts of Congress. We cannot assent to this view. It amounts to a practical nullification in respect to such corporations of the supreme law of the land and places important constitutional rights at the mercy of the several States.

In the State from which this case comes, after a full review of the decisions of this court, the same conclusion was reached in *Commonwealth* v. *East Tenn. Coal Co.*, 97 Kentucky, 238.

The same view of the effect of *Barron* v. *Burnside* has been accepted by the text-writers. 2 Cook on Corporations, 3d ed. 1675; Moon, Removal of Causes (1901), §§ 30 and 31, and notes in which the author expresses the view that the *Doyle* case has become obsolete and is practically overruled by *Barron* v. *Burnside* and subsequent cases in this court, § 30, note 3; Curtis' Jurisdiction of the United States Courts, 2d ed. by Merwin, 187.

The principles announced in *Doyle* v. *Ins. Co.* and *Barron* v. *Burnside* are directly opposed the one to the other, and cannot both prevail. The former case was decided upon the principle that as the State has the full right to exclude a foreign corporation it may do so for any reason or for no reason. The latter case qualified this doctrine with the limitation that the exclusion may not be solely because the corporation was exercising or would not yield the right to avail itself of a privilege created and protected by the Federal Constitution.

After such repeated affirmance and general acceptance, we do not think the doctrine announced in *Barron* v. *Burnside* ought to be qualified or detracted from, and certainly it seems to us that the court should not return to the rejected doctrine of the *Doyle* case.

If a State may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from

the State upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude, includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation,—You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in the *Doyle* case, destroyed and overthrown as we think in *Barron* v. *Burnside*, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and State, from that day to this, ought not now to be rehabilitated and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and artificial, that they have been secured by the provisions of the Federal Constitution.

In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corpora-

tion may be excluded solely because it exercises a right secured by the Federal Constitution. For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and, as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. Furthermore, it is stated in the prevailing opinion that while the State may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the State, because of the exercise of a Federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional.

We think the distinction is without a substantial difference and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the State because it will not consent to surrender the right given it under the Federal Constitution. While we concede the right of a State to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

In the cases decided in this court subsequently to *Barron* v. *Burnside*, while the general proposition is affirmed that a State may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the State may exclude or expel such corporations because

they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitution. The Federal authority gives no right to deny to the citizens of a State access to the local courts of a State. For wise purposes the Federal Constitution has provided courts for citizens of different States, believed to be free from local influence and prejudice, and laws have been passed by Congress to make the privilege of resort to them effectual. In our view no state enactment can lawfully abridge this right or destroy it, directly or indirectly, by affixing heavy penalties to its assertion by those lawfully entitled to its enjoyment. We think *Barron* v. *Burnside* was intended to overrule the contrary declaration which is found only in the *Doyle* case, which is inconsistent with or opposed to every other declaration directly upon the subject in the opinions of this court.

We are of opinion that the statute in question, so far as it authorizes the cancellation of a license given by a State to a corporation to do business within its limits, whenever such corporation, in the exercise of a constitutional right, has a suit brought against it in a state court removed to the Federal court for trial, is unconstitutional and void.

For the reasons stated we are constrained to dissent.

GILA BEND RESERVOIR AND IRRIGATION COMPANY *v.* GILA WATER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 226. Argued April 12, 16, 1906.—Decided May 14, 1906.

The absence of a formal order by the court need not necessarily prevail over its essential action.

Where appellant's only assignment of error on an appeal from the Supreme Court of a Territory is that the court had not acquired jurisdiction of the property in that suit because it was in its custody in another suit in which a receiver had been appointed, and the receivership had not been extended or the actions consolidated, but the record clearly shows that the District Court considered the cases as consolidated and empowered the receiver appointed in the first suit to sell the property and apply the proceeds as directed in the second suit, and that such decree was affirmed by the Supreme Court of the Territory and by this court, the assignments are without foundation and the decree will be affirmed.

THE facts are stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. Joseph K. McCammon* was on the brief, for appellant.

Mr. C. F. Ainsworth for appellee, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellant and appellee are Arizona corporations. The former brought this suit in the District Court of Maricopa County to quiet title to certain land and water rights against the appellee and the Peoria Canal Company, Valley Canal and Land Company, also Arizona corporations, and against the Arizona Construction Company, an Illinois corporation, and against certain persons, one of whom was a resident of the Ter-

ritory, and the others non-residents. The complaint contained the usual allegations. All the defendants but the Gila Water Company, appellee herein, disclaimed title. The appellee answered denying appellant's title and, in a cross complaint, set up title in itself. To the cross complaint appellant answered that appellee claimed title "under and by virtue of a certain judgment and decree of this court (District Court of Maricopa County) rendered and entered November 20, 1894, and certain pretended receiver's deed or deeds made, executed and delivered under and by authority of said judgment and decree and proceedings thereunder, or a certain deed or deeds of some person or persons deriving title under, through and by virtue of said receiver's deed or deeds." And it was alleged that said judgment and the proceedings thereunder were void in that (1) the action in which the judgment was rendered was a proceeding *in rem* and that the court never acquired jurisdiction over the property or any part thereof; (2) that the judgment was rendered July 21, 1894, and appellant duly appealed from said judgment to the Supreme Court of the Territory, and the District Court thereby lost jurisdiction of the action, and yet on the twelfth of November, 1894, the District Court entered a pretended amendment to the judgment and decree, which was pretended to be in lieu of the original decree of July 21, and that the only right and title appellee has to the property is under this "pretended, amended and void judgment and decree."

It was further alleged that the receiver was duly appointed in another action and that he took possession of the property, and that during the time appellee claims to have obtained title to any of said property the same and the whole thereof was in the custody of the court and in the possession of the receiver, and that prior to the commencement of the suit at bar the court and receiver ceased to have any custody or possession of the property.

The trial court found that the appellee was the owner in fee simple of the property and adjudged that the claim of the ap-

pellant and all of the defendants in the question to be "invalid and groundless." The decree was affirmed by the Supreme Court.

The findings of fact of the Supreme Court are very general. They are only that the appellant had not, at the commencement of the action, any cause of action in respect to the property, and has not now any right, title or interest therein; that the appellee was the owner in fee simple and in possession thereof.

The special rulings of the trial court, which were assigned as errors and affirmed by the Supreme Court, appear in the opinion of the latter court and in the bill of exceptions. These rulings were made upon the introduction in evidence by the appellee to sustain its title of certain judgments rendered by the District Court of Maricopa County. The facts as to these judgments are stated by the Supreme Court as follows:

"It appears that in the District Court of Maricopa County, in the year 1893, the appellant brought suit against the Peoria Canal Company and the Arizona Construction Company and applied for a receiver therein to take possession of the property in controversy in this action. Thereafter the court appointed one James McMillan as such receiver who took possession of the property, and by leave of the court issued a large amount of receiver's certificates to meet the expenses of necessary improvements upon the property. This suit was docketed as number 1728. Pending this action, one W. H. Linn, and others, brought suit in the District Court of Maricopa County, against the appellant and other defendants, alleging in their complaint, among other facts, the pendency of action number 1728, the appointment of the receiver and the issuing of the receiver's certificates, and praying, among other things, that the assets of the Gila Bend Reservoir and Irrigation Company be marshalled and that the receiver take possession of and be directed to sell the property of the said company and from the proceeds of said sale pay the debts adjudged due against it.

"All the parties to this suit, including the Gila Bend Reservoir and Irrigation Company, appeared and answered. A trial was had and judgment was rendered, in which the receiver was directed to sell the property. The record further discloses that a sale was made under this judgment by the receiver, which was affirmed by the court, and a deed executed by the said receiver, to the purchaser, who was one of the grantors of the appellee. This judgment was appealed from to this court, where it was affirmed, and subsequently an appeal was taken by the appellant to the Supreme Court of the United States, where the judgment of this court was affirmed. The latter suit in the court below was docketed as number 1996. The objection which the appellant urged in the court below to the judgment in cause numbered 1996 was that it appears upon the face of the record that the judgment, ordering a sale of the premises by the receiver, was without jurisdiction and void for the reason that no order was made by the court extending the receivership in suit number 1728 to cause number 1996. In passing upon this objection the trial court pointed out that all the parties in the cause number 1728 were parties in cause number 1996, that, when the latter suit was brought, the property was in the hands of the court, through its receiver, and that after the bringing of cause number 1996 the record disclosed that the court and all the parties, including the Gila Bend Reservoir and Irrigation Company, treated the property in possession of the receiver, appointed in cause number 1728, as though it had been placed in his possession as a receiver appointed in cause number 1996, and, further, that orders were made by the court concerning said receivership which were entitled in both suits jointly, and held that, although no order was made consolidating the two suits and no order was in terms made extending the receivership to the second suit number 1996, the receivership was in fact extended to the second suit, and that the court, by its action, ratified the acts of the receiver in the second suit and thereby, in effect, extended his power and authority as such receiver to said second suit.

"The view thus taken is amply justified by an inspection of the record in the two suits, and upon this ground alone the action of the trial court, in admitting the judgment, was correct."

We concur in this conclusion. The objection made by the appellant to it is, as we have indicated, that suit No. 1996 was a proceeding *in rem* and that the court did not acquire jurisdiction of the property for the reason that it was in the custody of the court in suit No. 1728, and that the court in the latter case did not extend the receivership to the No. 1996 nor consolidate the suits, and, therefore, had no power to order the sale of the property by the receiver in No. 1728.

This is tantamount to saying that the absence of formal orders by the court must prevail over its essential action. It is clear from the record that the District Court considered the cases pending before it at the same time, considered No. 1996 as the complement of No. 1728, regarded the cases in fact as consolidated, and empowered the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996. The provision of the decree entered July 21, 1894 (and of the amended decree of November 20, 1894), is as follows:

"It is further ordered, adjudged and decreed by the court that James McMillan, the receiver heretofore appointed by this court, and now in possession of said premises under the orders of this court, proceed to advertise and sell said property and distribute the proceeds as directed in the decree."

This decree was affirmed by the Supreme Court of the Territory and afterwards by this court. The assignments of error, therefore, are without foundation.

Decree affirmed.

HULBERT v. CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 248. Submitted April 25, 1906.—Decided May 14, 1906.

The mere claim in objections to confirmation of a rule in a proceeding in the County Court to confirm an assessment for paving a street that the act under which the assessment was made was unconstitutional as depriving the objector of his process of law, never afterwards brought to the attention of the trial court or of the Supreme Court of the State, is not a sufficient compliance with § 709, Rev. Stat., in setting up a right under the Constitution of the United States to give this court jurisdiction to review the judgment on writ of error.

According to the practice of Illinois an error not assigned is not open to review in the Supreme Court of the State, and if assigned but not noticed or relied on in the brief or argument of counsel it will be regarded as waived or abandoned, and this court will recognize that rule of practice.

It is too late to raise the Federal question by a statement in the writ of error and petition for citation that constitutional rights and privileges were involved and decided by the highest court of the State against plaintiff in error, even if the Chief Justice of that court allowed the writ.

THE facts are stated in the opinion.

Mr. George W. Wilbur for plaintiff in error:

The act entitled, "An Act Concerning Local Improvements," passed June 14, 1897, and amendments thereto, is contrary to section 2, article 2, and section 9, article 9, of the constitution of Illinois.

The board of local improvements is not a municipal corporation, and it has no authority to make special assessments. *Harward* v. *St. Clair & M. L. & D. Co.*, 51 Illinois, 130; *Cornell* v. *People*, 107 Illinois, 372; *Updike* v. *Wright*, 91 Illinois, 49; *Gage* v. *Graham*, 57 Illinois, 144; *Dunham* v. *People*, 96 Illinois, 331; *Wetherell* v. *Devine*, 116 Illinois, 631; *Snell* v. *Chicago*, 133 Illinois, 413; *The People* v. *Knopf*, 171 Illinois, 191.

Sections 42 and 84 of said act are unconstitutional and void

because they interfere with right of contract by fixing the rate of interest on assessments and improvement bonds at five per cent. *Ritchie* v. *People*, 155 Illinois, 98; *McChesney* v. *People*, 200 Illinois, 146; *Adams* v. *Brennan*, 177 Illinois, 194; *Frorer* v. *People*, 141 Illinois, 171; *Millett* v. *People*, 117 Illinois, 294; *Bailey* v. *People*, 190 Illinois, 28.

Mr. James Hamilton Lewis, *Mr. Charles H. Mitchell* and *Mr. Frank Johnston, Jr.*, for defendant in error:

The question of the constitutionality of the Local Improvement Act of Illinois of June 14, 1897, cannot be reviewed by this court for the reason that this question was not decided nor even noticed in the opinion of the Supreme Court of Illinois, and the record does not show that it was called to the attention of that court. In order to give this court the power to reëxamine the judgment of the state court, the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way, and the right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed. *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648; *Sayward* v. *Denny*, 158 U. S. 180; *Levy* v. *Sup. Ct. of San Francisco*, 167 U. S. 175, 177; *C. & N. W. Ry. Co.* v. *Chicago*, 164 U. S. 454, 457; *Ansbro* v. *United States*, 159 U. S. 695, 698; *Hoyt* v. *Shelden*, 1 Black, 518, 521; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626. Although the state court may have decided a Federal question, it must appear that the particular Federal question sought to be raised here was also decided. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248; *Chapin* v. *Fye*, 179 U. S. 127.

The fact that the opinion of the state court makes no reference to the particular question sought to be presented in this court, may be considered in determining whether the question was called to the attention of the state court. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 653, 655; *Kipley* v. *Illinois*, 170 U. S. 182, 186; *C. & N. W. Ry. Co.* v. *Chicago*, 164 U. S.

454, 457; *Mich. Sugar Co.* v. *Michigan*, 185 U. S. 112, 113; *N. Y. Cent. R. R. Co.* v. *New York*, 186 U. S. 269, 273.

This court will recognize and be governed by the rule of practice in a state court prescribing the requirements to be observed in order to save a question for review in that court. *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148.

According to the well settled rule of practice in the Supreme Court of Illinois, every error must be specifically pointed out in the assignments of error, and an error not assigned is not open to review. *Berry* v. *City of Chicago*, 192 Illinois, 154; *Skakel* v. *People*, 188 Illinois, 291; *Gibler* v. *City of Mattoon*, 167 Illinois, 18. Errors assigned, but not noticed or relied on in the brief and argument of counsel, will be regarded as waived or abandoned. *Lewis* v. *King*, 180 Illinois, 259, 266; *Dorn* v. *Ross*, 177 Illinois, 225, 228; *Keyes* v. *Kimmell*, 186 Illinois, 109, 114; *Harris* v. *Shebek*, 151 Illinois, 287, 294.

Even though it should be held that the unconstitutionality of the act was sufficiently set up or claimed in the Supreme Court of Illinois to authorize this court to review it, the proposition contended for by plaintiff in error does not involve a Federal, but only a local question. The United States Supreme Court has no power to review a state statute on the ground solely that it is repugnant to the state constitution. *Kipley* v. *Illinois*, 170 U. S. 182, 186; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131, 134.

A special assessment is levied under the taxing power of a State, and is a species of taxation. *French* v. *Barber Asphalt Pav. Co.*, 181 U. S. 324, 343, 344; *C. & A. R. R. Co.* v. *City of Joliet*, 153 Illinois, 649; *County of Adams* v. *City of Quincy*, 130 Illinois, 566. It is not the province of this court ordinarily to interfere with the policy of the revenue laws of the State or with statutes providing for making local improvements by special assessment. *French* v. *Barber Asphalt Pav. Co.*, 181 U. S. 324; *Witherspoon* v. *Duncan*, 4 Wall. 210, 217; *Williams* v. *Supervisors of Albany*, 122 U. S. 154, 164; *Shaefer* v. *Werling*, 188 U. S. 516, 517.

The statute fixing the rate of interest on special assessment installments and bonds at five per cent is not unconstitutional, as precluding the right of property owners to contract, through the city, for a less rate. *Gage et al.* v. *City of Chicago*, 216 Illinois, 107.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to the judgment of the Supreme Court of the State of Illinois affirming a judgment of the County Court of Cook County, confirming an assessment to defray the cost of paving a street in the city of Chicago.

The proceeding was commenced by a petition filed by the city in the County Court of Cook County in accordance with the law of the State. The petition recited an ordinance of the city providing for the improvement of the street, and prayed "that steps be taken to levy a special assessment for said improvements in accordance with the provisions of said ordinance, and in the manner prescribed by law."

An order was made in accordance with the prayer. An assessment and report thereon were duly made with an assessment roll attached, which exhibited the property of plaintiff in error as assessed and the amount for which it was assessed.

In pursuance of notice given to all parties to file objections to the confirming of the assessment roll, plaintiff in error filed objections thereto. Among his objections were the following:

"Said act concerning local improvements, passed June 14, 1897, and all amendments thereto, are not only contrary to the constitution of Illinois, but they are also contrary to the Constitution of the United States and to the Fourteenth Amendment thereof.

"Said act concerning local improvements, said ordinance, which is the basis of the present proceedings, and all documents and orders relating thereto, are contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, because such act, ordinance, document and orders seek to deprive objector of property without due process of law.

"Said ordinance and proceedings are in other respects illegal, unconstitutional and void.

"The proceedings herein and said act are contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, because the petitioner herein, under and by virtue of said act and of said proceedings, seeks to deprive these objectors of their property without due process of law. Said proceedings and said act are also contrary to the Constitution of the United States, and to the Fourteenth Amendment thereof, for the reasons set forth in the several foregoing objections."

The case came on for hearing before the court, the right of a jury on the question of benefits having been expressly waived.

Petitioner (defendant in error) introduced the petition, assessment roll and notice. They were received in evidence, though objected to as not complying with or meeting the requirements of the statute.

Plaintiff in error to sustain the issues "on the question of the legal objections" offered in evidence the various resolutions and proceedings before the board of local improvements. They are set out in the record, but it is not necessary to quote them. No other evidence was offered. The court overruled the objections.

On the question of benefits the same evidence was offered by the respective parties. Plaintiff in error objected to the documents offered by the city on the ground that the ordinance was illegal and void, because the first resolution of the board of local improvements in regard to assessments did not contain an itemized estimate of the cost of the improvements made by the engineer, in the manner and form required by the statute.

The objection was overruled and the assessment confirmed with some modification not necessary to notice. The judgment was affirmed by the Supreme Court of the State.

The bill of exceptions shows that plaintiff in error did not bring to the attention of the trial court that the act of the State under which the assessment was made, or any of the proceed-

ings, were contrary to the Fourteenth Amendment to the Constitution of the United States, nor did he assign as error on appeal to the Supreme Court that the rulings of the trial court or its judgments infringed that Amendment.

All the questions submitted to the Supreme Court and all the questions passed on by it depended upon the construction of the statute or the compliance of the proceedings with the statute, except that it was contended that the sections of the act which provided for the division of the assessment into installments and the issue of bonds to anticipate the payment of the installments to bear five per cent interest was unconstitutional, in that the legislature had no power to fix the rate of interest, and that by so doing a lower rate of interest was prevented, and plaintiff in error thereby deprived of his property without due process of law. The court decided against both contentions, holding that "the legislature had the right to fix the rate of interest which said installments and bonds when issued should bear," and sections 42 and 86 of the local improvement act "are not in conflict with the constitution." That is, the constitution of the State.

We do not think that the plaintiff in error complied with section 709 of the Revised Statutes in setting up a right under the Constitution of the United States. The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the Supreme Court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States.

It is urged that in the writ of error and petition for citation it is stated that certain rights and privileges were claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and, it is further urged, that the chief justice of the court allowed the writ of error. This is not sufficient. *Marvin* v. *Trout*, 199 U. S. 212, 223.

Nor was a right under the Constitution of the United States necessarily involved in the determination of the cause. And the Supreme Court was justified by its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court an error not assigned is not open to review. *Berry* v. *City of Chicago*, 192 Illinois, 154, 155. Errors assigned but not noticed or relied on in the brief or argument of counsel will be regarded as waived or abandoned. *Keyes* v. *Kimmel*, 186 Illinois, 109, 114. And such rule of practice will be recognized by this court. *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, 153. It follows that this court has not jurisdiction of this writ of error. *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Chapin* v. *Fye*, 179 U. S. 127.

Writ dismissed.

PEARSON *v.* WILLIAMS, UNITED STATES COMMISSIONER OF IMMIGRATION.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 237. Argued April 19, 20, 1906.—Decided May 14, 1906.

The Secretary of Commerce and Labor, has a right under § 21 of the act of March 3, 1903, 32 Stat. 1218, to order the deportation of an alien as having come to this country under contract to perform labor, after a second hearing before a board of special inquiry, although there had previously been a special inquiry, pursuant to § 25 of the act at the time of his landing before the same persons, and upon the same questions, and he had been allowed to land.

The board of inquiry under § 25 of the act of 1903 is not a court, but an instrument of the executive power, and its decisions do not constitute *res judicata* in a technical sense.

THE facts are stated in the opinion.

Mr. Eugene Treadwell for petitioners.

Mr. Charles H. Robb, Assistant Attorney General, for respondent.

Mr. Justice Holmes delivered the opinion of the court.

This case comes here by certiorari. 198 U. S. 585. It is a writ of *habeas corpus*, addressed to the Secretary of Commerce and Labor and to the Commissioner of Immigration of the Port of New York, on which the Circuit Court made an order discharging the petitioners, but the Circuit Court of Appeals reversed the order by a divided court. 136 Fed. Rep. 734. The return to the writ discloses that the petitioners are British aliens, that they arrived in New York on February 1, 1904, were detained for examination by a board of special inquiry, were examined and were allowed to land. The return further shows that afterwards, in March, they were arrested by order of the said Secretary and after another hearing before a board of special inquiry were ordered to be returned to England, as being in this country in violation of the acts of Congress touching the matter. The only question is whether the Secretary had the right to direct the second hearing and to make the order of deportation under § 21 of the act of March 3, 1903, c. 1012, when there had been an inquiry at the time of the petitioners' landing and a decision in their favor under § 25, 32 Stat. 1218, 1220. It is proper to add, as giving more dramatic force to the contention of the petitioners, that the proceedings upon both inquiries are incorporated into the return by reference and that they appear to have been before the same persons, upon the same question, namely, whether the petitioners came to this country under contract to perform labor contrary to the statutes of the United States. Act of February 26, 1885, c. 164, 23 Stat. 332; February 23, 1887, c. 220, 24 Stat. 414; March 3, 1891, c. 551, 26 Stat. 1084; March 3, 1903, c. 1012, 32 Stat. 1213. See also acts of Octo-

ber 19, 1888, c. 1210, 25 Stat. 566; March 3, 1893, c. 206, 27 Stat. 569; August 18, 1894, c. 301, 28 Stat. 372, 390.

It is provided by § 24 of the above mentioned act of 1903 that "every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry." The following section, § 25, directs the appointment of such boards as shall be necessary for the prompt determination of cases of aliens detained, to consist of three members to be selected from the immigrant officials in the service. "Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported." They are to keep records, "and the decision of any two members of a board shall prevail and be final," subject to appeal by the alien or a dissenting member "through the Commissioner of Immigration at the port of arrival and the Commissioner General of Immigration, to the Secretary of the Treasury," (now the Secretary of Commerce and Labor, act of February 14, 1903, c. 552, §§ 4, 7, 10, 32 Stat. 826, 828, 829), whose decision shall then be final." In this case the first decision of the board was unanimous, and the petitioners contend that it was final by the very words of the act.

On the other hand it is provided by § 21 "That in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came," with details as to the method. It is insisted by the Government that this power is not qualified or cut down by § 25. Of course if the Government is right on the construction of the act, there is no question of the validity of the provision. By that construction the finality given to the decision of the board is only a finality consistent with and subject to § 21, as, conversely, by that contended for on the other side, the power of the Secretary is subject to § 25.

On the former view the United States admits aliens conditionally, and preserves that condition notwithstanding a preliminary decision in their favor by a board which it provides. The authority of Congress to impose such conditions hardly was disputed and is not open to doubt. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 543; *Ekiu* v. *United States*, 142 U. S. 651; *Japanese Immigrant Case*, 189 U. S. 86, 97, 99. The only question is what it has done.

Some meaning must be found for § 21, no less than for § 25. For the petitioners it is said that § 21 is satisfied by confining the power of the Secretary to cases where a board of special inquiry has not acted. But this would limit his action to a very narrow scope, since the act provides for such a board in every case where the alien does not appear to the inspector "to be clearly and beyond a doubt entitled to land." Section 24, quoted above. Again it would defeat in great measure the policy of the original act of October 19, 1888, c. 1210, § 1, 25 Stat. 566 (see also act of March 3, 1891, c. 551, § 11, 26 Stat. 1086), which obviously was to give a chance for fuller investigation than is possible at the moment of landing, when any inquiry necessarily must be of a very summary sort. See *Japanese Immigrant Case*, 189 U. S. 86, 99. Yet this policy is emphasized and reinforced by changing the period of probation from one year to three, while in other respects § 21 follows almost literally the words of the earlier act. The petitioners' construction also would empty the requirement in § 20 that "any alien who shall come into the United States in violation of law" shall be deported, of the greater part of its natural meaning, since it would limit it to such aliens only as appeared to the inspector to be entitled beyond a doubt to land and for that reason escaped a board of special inquiry before they came in.

Turning now to § 25, that section seems to us to disclose additional reasons on the Government's side. The board is an instrument of the executive power, not a court. It is made up, as we have mentioned, of the immigrant officials in the

service, subordinates of the Commissioner of Immigration, whose duties are declared to be administrative by § 23. Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense. *Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 305; *Japanese Immigrant Case*, 189 U. S. 86, 98; *United States* v. *Ju Toy*, 198 U. S. 253, 263. The decisions necessarily are made, as we have said, in a summary way, in order to reach the "prompt determination" declared by § 25 to be an object. The board has no power to compel witnesses to attend, but, as was said by the Circuit Court of Appeals, must decide upon such evidence as is at hand or is readily accessible. These are considerations against the likelihood that Congress meant such decisions to be binding upon the Secretary of Commerce and Labor, the superior officer of the members of the board. On the other hand, there is a plain and sufficient meaning for the words making their decision final—and that is that it shall be final where it is most likely to be questioned, in the courts.

It is true that the decision hardly will be questioned in the courts except when it is against the right to land. In the earlier acts the decision of an inspector was made final, in terms, only "when adverse to such right." Act of March 3, 1891, c. 551, § 8, 26 Stat. 1085. Since then, it is said, Congress has gone on increasing the importance of the decision, first, by providing a board in cases of doubt, with a limited appeal, act of March 3, 1893, c. 206, § 5, 27 Stat. 569, 570, and then by enlarging the right of appeal and extending the finality of the ultimate decision to every case, by the present § 25. But this appears to us to strain and even pervert the conclusions to be drawn from the change. There can be no doubt, we think, that the provision of the act of 1891 referred to the courts. The adverse decision of an inspector would be followed by deportation unless that should be stopped by *habeas corpus*. To

prevent a retrial in that event the provision was passed. It is not likely that the purpose was changed when the words "when adverse to such right" were dropped. More probably they were omitted simply as superfluous. If the question ever could arise in the courts, except when the alien was ordered to be deported, there was no reason why the decision to admit should not be given an effect equal to that of a decision to exclude. If the question could arise only in the former case there was no need of the omitted clause. But the matter which was before the mind of Congress presumably was that which had been before it on the former occasion, which had been the subject of judicial discussion, *Lem Moon Sing* v. *United States*, 158 U. S. 538; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 304, 305, and which was not quite disposed of until the last term of this court. *United States* v. *Ju Toy*, 198 U. S. 253.

There was a suggestion at the argument that the decision of the Secretary was not warranted by the evidence. But if, for the purposes of decision, we assume that question to be open, we do not think that it needs discussion. We are of opinion that the decision of the Circuit Court of Appeals was right.

Judgment affirmed.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissent.

HALSELL *v.* RENFROW.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 254. Submitted April 20, 1906.—Decided May 14, 1906.

Where the court of first instance in a Territory sees the witnesses the full court deals with its findings as it would with the verdict of a jury, and does not go beyond questions of admissibility of evidence, and whether there was any evidence to sustain the conclusion reached, and this court goes no further unless in an unusual case.

A judgment for defendant in an action for specific performance based on a finding of fact, among others, that defendant has conveyed the property to an innocent purchaser for value cannot be reversed, as specific performance is impossible where the party to the contract has conveyed the property to one who is free from equities.

Under the Oklahoma statute in regard to conveyance of real estate the contract to be valid must be in writing and subscribed by the parties thereto, and this is not met by a payment of a would-be purchaser to one claiming to be the agent of the owner but not authorized as such under the Oklahoma statute, nor in this case can such payment or a deposit of the deed in bank to be taken up under certain conditions be regarded as part performance on the part of the owner.

THE facts are stated in the opinion.

Mr. Jean H. Everest and *Mr. Henry H. Howard* for appellants:

A contract binding under the statute of frauds may be gathered from letters, telegrams and writings. *Beckwith* v. *Talbot*, 95 U. S. 289; *Ryan* v. *United States*, 136 U. S. 68; *Bibb* v. *Allen*, 149 U. S. 481.

The contract is presumptive evidence of a consideration, and the burden of showing a want of consideration is upon the party seeking to avoid it. Ok. Statutes of 1893, § 815.

There is no such thing as a specialty or distinction between that and a simple contract under our law, and no statute of frauds requiring the consideration to be expressed in any case

where the contract is required to be in writing; in view of which the true consideration may be shown by parol where the contract is sought to be avoided under the statute of frauds as well as in any other case. *Kickland* v. *Menasha Woodenware Co.*, 31 N. W. Rep. 471; *Williams* v. *Robinson*, 40 Am. Rep. 352; *Gass* v. *Hawkins*, Thompson, Tenn. Cas. 238; *Whitby* v. *Whitby*, 36 Tennessee, 473; *Thornburg* v. *Maston*, 88 N. Car. 293.

The statute requiring the authority of the agent to be in writing refers to the agent of the vendor, and not of the vendee. And the agent of the purchaser may make a good contract within the statute of frauds without disclosing his principal, and the true relation may be shown by parol. *Tewksbury* v. *Howard*, 37 N. E. Rep. 355; *Roehl* v. *Haumasser*, 15 N. E. Rep. 345; 2 Parsons on Con., 7th ed., p. 680.

The plaintiffs took possession of the land under the contract and subsequently committed acts which would amount to trespass unless their possession was rightful. Under such circumstances the court should have allowed parol evidence to show the real circumstances. The defendant knew of and did not object to these acts. *Allen* v. *Moore*, 70 Pac. Rep. 682; Lawson on Contracts, § 475; *Overstreet* v. *Rice*, 96 Am. Dec. 279; *Ryan* v. *Nevins*, 90 Am. Dec. 696.

The defendant Edwards, was not an innocent purchaser, and not being such he should have been required to convey to the plaintiffs. *Union Pacific R. R. Co.* v. *McAlpine*, 129 U. S. 305; *Day* v. *Cohn*, 4 Pac. Rep. 511; *Willis* v. *Wozencraft*, 22 California, 617; *Calanchima* v. *Braustetter*, 24 Pac. Rep. 149.

Mr. John W. Shartel, *Mr. James R. Keaton* and *Mr. Frank Wells* for appellees:

The findings of a judge in an equity case, or the verdict of a jury, are conclusive in Oklahoma if there is testimony to support them. *Ellison* v. *Beannabia*, 4 Oklahoma, 352. The civil procedure of Oklahoma, both original and appellate, is governed by civil code, which code was literally borrowed from

the State of Kansas in 1893 and was received with the settled construction in that State to the same effect. *Eckert* v. *Rule*, 51 Kansas, 703; *Medill* v. *Snyder*, 61 Kansas, 15; *Railway Co.* v. *Hildebrand*, 52 Kansas, 284.

This rule being firmly established in Oklahoma and being the only rule that is reasonable under the Code of Civil Practice adopted there, it follows that this court in reviewing the decisions of that court acts only in the place of that court and can no more weigh the testimony than it could, and that this court should follow the rule of the court appealed from. *Sanford* v. *Sanford*, 139 U. S. 642.

Specific performance is a matter of discretion and the ruling of the trial court and the Supreme Court of the Territory should not be interfered with, unless there has been an abuse of discretion. 26 Am. & Eng. Ency. of Law, 2d ed., 62; *McCabe* v. *Matthews*, 155 U. S. 550.

There was no written contract between the parties as required by the statute of frauds. It is based on nine different writings and they are disconnected and contain no references to each other and cannot be connected by verbal evidence. Reed on Statute of Frauds, §§ 344, 352; *Tice* v. *Freeman*, 15 N. W. Rep. 674; *Devine* v. *Warner*, 56 Atl. Rep. 563.

Receipts of payments on a parol contract for the sale of lands are not sufficient to take it out of the statute of frauds. *Williams* v. *Morris*, 95 U. S. 444; *Fox* v. *Easter* (Okla.), 62 Pac. Rep. 283.

The telegrams do not name the purchasers and this cannot be supplied by parol proof. *Grafton* v. *Cummings*, 99 U. S. 100; *Breckenridge* v. *Crocker*, 21 Pac. Rep. 179; *Lewis* v. *Wood*, 26 N. E. Rep. 862.

The telegrams are also insufficient as a contract for the reason that they do not describe in any way the land. *Ferguson* v. *Blackwell* (Okla.), 58 Pac. Rep. 647; *Preston* v. *Preston*, 95 U. S. 200.

The deed executed by Renfrow to Halsell cannot be considered as a memorandum under the statute of frauds for the

reason that it was never delivered and was not executed in accordance with the contract appellants are attempting to enforce. *Day* v. *Lacasse*, 27 Atl. Rep. 124; *Steel* v. *Fife*, 48 Iowa, 99; *Parker* v. *Parker*, 67 Massachusetts, 409; *Comer* v. *Baldwin*, 16 Minnesota, 172; *Johnson* v. *Brooks*, 31 Mississippi, 17; *Weir* v. *Batdorf*, 24 Nebraska, 83; *Cagger* v. *Lansing*, 43 N. Y. 550, reversing judgment, 57 Barb. 421; *Allebach* v. *Godshalk*, 116 Pa. St. 329; *Morrow* v. *Moore*, 57 Atl. Rep. 81.

The obligation, if any, created by the writings was not binding upon the appellants and, therefore, the contract was invalid for want of mutuality. *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339. Unless the contract binds all the parties, it will be enforced against none of them. 22 Am. & Eng. Ency. of Law, 1019; *American Cotton Oil Co.* v. *Kirk*, 68 Fed. Rep. 791; *M., K. & T. Railway Co.* v. *Bagley*, 56 Pac. Rep. 759.

The rule as to innocent purchaser is not limited to the prudent and wary one, but includes the *bona fide* one without notice. 2 Sugden on Vendors, p. 551.

By the fraudulent alteration of the check the whole contract becomes unenforceable even if the documents were otherwise sufficient to constitute a written contract.

The fact that the alleged contract is embraced in numerous documents brings it under the rule that the material alteration of one of them forfeits all rights under all of them. No attempt was made to explain this alteration, and the fact of a material alteration in the contract is presumed to be fraudulent until the contrary is made to appear by the party making the alteration. *Dietz* v. *Harder*, 72 Indiana, 203; *Eckert* v. *Pickle*, 59 Iowa, 545; *Davis* v. *Eppler*, 38 Kansas, 639; *Phœnix Ins. Co.* v. *Kerny*, 100 Kentucky, 97; *Owen* v. *Hall*, 70 Maryland, 96. The fact that appellants admit their fraudulent conduct in making this alteration does not advance their case, because an instrument once altered cannot be restored. *Robinson* v. *Reed*, 46 Iowa, 219; *Shepherd* v. *Whetstone*, 51 Iowa, 457; *Botton* v. *Edwards*, 2 Dana (Ky.), 106; *Citizens' Natl. Bank* v. *Richmond*, 121 Massachusetts, 110; *Warpole* v. *Ellison*, 4 Hus-

ton (Del.), 322; *Lock* v. *Walker*, 2 Arkansas, 4; *Fulner* v. *Seitz*, 68 Pa. St. 237.

It must be assumed for the purpose of this case that the alteration was fraudulently made. *Burwell* v. *Orr*, 84 Illinois, 464; *Inglish* v. *Breneman*, 9 Arkansas, 902; *Eckert* v. *Louis*, 84 Indiana, 895; *Pyle* v. *Oustatt*, 92 Illinois, 209; *Wilson* v. *Harris*, 55 Iowa, 507; *Warder et al.* v. *Willyard*, 49 N. W. Rep. 300. See also *Croswell* v. *Lebree*, 81 Maine, 44; *Citizens' Natl. Bk.* v. *Williams*, 174 Pa. St. 66; *Shepherd* v. *Whetstone*, 51 Iowa, 457; *Hays* v. *Wagoner*, 89 Illinois, 390; 2 Cyc. 182, 224; *Crawford* v. *Hazeltree*, 117 Indiana, 63; *Walton Plow Co.* v. *Campbell*, 37 Nebraska, 883; *Vogel* v. *Repper*, 34 Illinois, 100.

By refusing the deed the appellants refused the only performance possible and cannot now claim specific performance. *Scannell* v. *Am. Soda Fountain Co.*, 68 S. W. Rep. 890; *Oliver Mining Co.* v. *Clark*, 68 N. W. Rep. 23; *Mills* v. *Van Vorhis*, 23 Barb. 125.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for the specific performance of an alleged agreement to convey land, brought by the plaintiffs in error against the defendants in error. The case was tried before a judge of the Supreme Court, and all the issues were found for the defendants. It then was taken before the full court upon a transcript of the evidence and proceedings, and the judgment for the defendants was affirmed. 14 Oklahoma, 674. Thereupon it was brought here by appeal.

It is assumed by the parties that the statement of facts prefixed to the opinion in the record is not the finding required by the act of April 7, 1874, c. 80, § 2, 18 Stat., Part 3, 27, and we assume for purposes of decision that under the act of May 2, 1890, c. 182, § 9, 26 Stat. 81, 86, no such finding of facts was necessary. See *Oklahoma City* v. *McMaster*, 196 U. S. 529; *De la Rama* v. *De la Rama*, 201 U. S. 303. But when, as here, the court of first instance saw the witnesses, the full court of

the Territory would deal with its finding as it would with the verdict of a jury, and would not go beyond questions of the admissibility of evidence and whether there was any evidence to sustain the conclusion reached. *Ellison* v. *Beannabia*, 4 Oklahoma, 347, 352. This court naturally would go no further unless in an unusual case. See *Sanford* v. *Sanford*, 139 U. S. 642.

In view of these preliminaries, if any statement is necessary here when the judgment sets forth that the court "finds the issues in said cause in favor of the defendants," a single matter would be enough. It appears from the petition that after the defendant Renfrow, who was the owner of the land, had broken off his dealings with the plaintiffs, he conveyed the premises to the defendant Edwards. In Edwards' answer it is alleged that he purchased for value and without notice. The answer of Renfrow though less specific is to like effect. This was one of the issues in the cause which were found for the defendants, as upon the evidence it well might be. Therefore it is not necessary to go further in order to show that the judgment cannot be reversed. For, of course, specific performance is impossible where the party to the contract has sold the property to one who is free from all equities. However, as the full court put its affirmation of the judgment upon other grounds we will not stop at this point.

The full court sustained the single judge on the ground that under the Oklahoma statute in force at the time no contract relating to real estate, other than for a lease for not over one year, "shall be valid until reduced to writing and subscribed by the parties thereto;" Laws of 1897, c. 8, § 4, and that the statute had not been satisfied, or the case taken out of it by part performance. This statute, if taken literally and naturally, goes further than its English prototype. It is not satisfied by a memorandum made with a different intent, but requires an instrument drawn for the purpose of embodying the contract, and, in the case of an agreement to buy and sell, the subscription of both the buyer and seller, not merely that of "the party to be charged therewith." *McCormick* v. *Bonfils*,

9 Oklahoma, 605, 618. There was no such instrument. We rather infer that the court below inclined toward the foregoing construction, but its discussion suggests that possibly a memorandum to be gathered from connected documents might be enough, and, therefore, again, we do not stop here.

The case for the plaintiffs is this: Shields, an agent without authority in writing, as required by the Oklahoma statute, made an agreement to sell the land for ten thousand dollars, and received a check for five hundred dollars. Material additions were made to this check afterwards by the plaintiffs, so that it is a question at least whether it was admissible in evidence. Wilson's Stat. Okl. 1903, § 831. See *Bacon* v. *Hooker*, 177 Massachusetts, 335, 337. The agent telegraphed to Renfrow that he had sold "the forty acres ten thousand cash five hundred forfeit," and Renfrow telegraphed back confirming the sale. Later it turned out that a parcel of fifty by one hundred feet had been conveyed to a third person. The parties met and it was agreed orally that two hundred dollars should be taken from the price for this. It was found further that one Springstine had or claimed possession of a part of the land under a lease. Renfrow was willing to convey and to take proceedings to turn Springstine out, but the plaintiffs refused to take a conveyance or to pay unless they were put into possession in thirty days. While matters stood thus Renfrow signed a deed of the land, excepting the conveyed parcel, expressed to be in consideration of ten thousand dollars, sent it to a bank and wrote to the plaintiff Halsell that he had done so, and had instructed the bank to deliver the deed upon his depositing $9,500 to Renfrow's credit and $500 to the credit of Shields within two days. This is the nearest approach to a memorandum that was made. Halsell replied to Renfrow that he had made a tender of $9,300, and that this with the $200 agreed to be allowed for the strip conveyed and the $500 held by Shields would make the $10,000. He further stated that he had requested delivery of possession which had been refused, and that Renfrow could not expect the money without

giving possession. Renfrow replied, stating that he had been willing to give such possession as he could, suggesting that he would have arranged in another way as to the $200, and that he regretted the termination of the matter. That was the end of the dealings, and directly afterwards the sale to Edwards took place.

As the plaintiffs were unwilling to accept the deed unless a fuller and more undisputed possession were given than could be given at the time, Renfrow was justified in selling to another who would take the risk or rely upon his covenants. In fact Edwards paid $500 to get possession, in addition to Renfrow's price of $10,000. Moreover, the plaintiffs' unwillingness shows that apart from the differences as to consideration there was no agreement with regard to an essential term of the conveyance when the deed was sent to the bank. There may have been a previous oral agreement, such as is suggested by the letter and deed, but before any memorandum was made and while Renfrow still was free the plaintiffs were informed that Renfrow would undertake to do only what he could, and what we have stated. So far, therefore, as the writings convey the notion of an absolute undertaking to convey a present clear possession, they do not express the modified bargain to which Renfrow was willing to assent. The delivery of the deed was authorized only upon payment of the price, and acceptance of it would have been an assent to Renfrow's terms. But there was no such assent. The plaintiffs say now that the differences were only trifles, not going to the essence of the contract, but they were enough at the time to make them unwilling to accept the deed.

In view of the findings of the trial judge it is difficult to see what is open as to part performance. As there was no agreement at the last stage, there can have been no part performance then. The few steps, if any, that were taken, while everything rested in parol, before the modification as to the amount of land and the price, and the arising of the difficulty as to possession, were disputed and obliterated by Springstine under his adverse

claim as a lessee. We think that this matter does not deserve discussion at greater length.

It is said that the defendant Renfrow is estopped by the payment of five hundred dollars to Shields by force of the act of 1897, c. 8, § 7, to the effect that any person "having knowingly received and accepted the benefits, or any part thereof, or any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud." But here again we are met by the findings and the facts. The check given to Shields was not a payment to Renfrow. Shields had not even oral authority to convey or to receive the purchase money. The terms of Renfrow's letter to Halsell about the deed show that he had not accepted the delivery of the check as a payment then, and since then it would seem that neither party to the litigation has been willing to accept the money.

It appears to us unnecessary to amplify further the reasons for affirming the judgment below.

Judgment affirmed.

MERCHANTS' NATIONAL BANK OF CINCINNATI *v.* WEHRMANN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 256. Argued April 26, 1906.—Decided May 14, 1906.

Where a national bank sued for debts of a partnership, shares of which it had taken as security and afterwards acquired in payment of the debt, sets up at every stage of the suit its intention of relying on the bankruptcy law of the United States, it cannot be required in the first instance to anticipate the specific and qualified form in which the immunity finally was denied; and if in addition thereto there is a certificate of the state court to the effect that it was material to consider the question of the

bank's power under the banking law to become liable for the debt and that the decision was against the bank, this court has power on writ of error to review the judgment.

While a national bank may take by way of security property in which it is not authorized to invest, and may become the owner thereof by foreclosure in satisfaction of the debt; but, without deciding whether it could take shares in a partnership formed for purely speculative purposes as security, it cannot, even in satisfaction of a debt so secured, become the absolute owner of such shares. It would be *ultra vires* and as it cannot take the shares it is not, and cannot be held, liable for any of the debts of the firm.

A national bank which has taken such shares in satisfaction of a debt is not estopped either from denying that it was a partner or that it is liable for the debts of the firm.

THE facts are stated in the opinion.

Mr. W. C. Herron for plaintiff in error:

This court has jurisdiction under a similar ruling in *California Bank* v. *Kennedy*, 167 U. S. 362. The ruling of the state court necessarily rested upon a construction of the national bank act.

The merits of this case are also covered by *California Bank* v. *Kennedy*. See also *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24; *First Nat. Bank* v. *Converse*, 200 U. S. 425.

Mr. C. Bentley Matthews, with whom *Mr. J. H. Ralston*, *Mr. Joseph B. Kelley* and *Mr. William J. Shroder* were on the brief, for defendants in error:

There was no Federal question involved or raised at any stage of the action.

It is not a Federal question unless some privilege or immunity or right secured by a Federal law is denied. The mere ordinary making of contracts and conducting the business of the bank and the obligations that ensue either from contract or from tort are not Federal questions. Nobody denies that a corporation, whether under the revised acts of the United States, or acts of the state legislature cannot perform acts *ultra vires*, but the section 5136 expressly permits the making of contracts, and the exercise of all powers apper-

taining to such companies that are usual and incidental to the carrying on of the business for which they are chartered and the application of the rules of common law and equity to its acts follows as a matter of course. The application of these rules does not raise a Federal question. *Inez Mining Co.* v. *Kinney*, 46 Fed. Rep. 832; *Allen* v. *Arguimbau*, 198 U. S. 149; *Leonard* v. *U. S. & P. R. R. Co.*, 198 U. S. 416; *Pierce* v. *Somerset Ry.*, 171 U. S. 641, 648; *Eustis* v. *Bolles*, 150 U. S. 361; *Seneca Nation* v. *Christy*, 162 U. S. 283; *Gillins* v. *Stinchfield*, 159 U. S. 658; *Speed* v. *McCarthy*, 181 U. S. 269; *Pa. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.

A bank in common with other corporations is not bound, in a legal sense, by contracts beyond the scope of its charter powers—in other words, *ultra vires*. But when a contract is legal, the results that follow are those that usually follow such contracts in other cases, and the validity of the contract and its obligation depend upon the ordinary principles of the statutory or common law of the State, and do not raise a Federal question. In this case, the papers executed by the parties made out a partnership. *Clagget* v. *Kilbourne*, 1 Black, 346; *Yeoman* v. *Leslie*, 46 Ohio St. 190; *Hulitt* v. *Fairbanks*, 40 Ohio St. 233; *McFadden* v. *Leeka*, 48 Ohio St. 513; *Chester* v. *Dickinson*, 54 N. Y. 1; *Batty* v. *Adams Co.*, 16 Nebraska, 44; *Robins* v. *Butler*, 24 Illinois, 387; *Heirs of Ludlow* v. *Cooper's Devisees*, 4 Ohio St. 1.

A partnership may exist with transferable shares. *Wadsworth* v. *Dunn*, 164 Illinois, 360; *Wells* v. *Wilson*, 3 Ohio, 425; *Rianhard* v. *Hovey*, 13 Ohio, 300; *Jones* v. *Clark*, 42 California, 180; Lindley on Partnership, 363, § 5.

The indebtedness of the partnership follows the interest transferred like a transfer of a share of the stock as is said in *Brown* v. *Hitchcock*, 36 Ohio St. 667; Lindley on Companies, 6th ed. 665; *Mayhew's Case*, 5 De G. McN. & G. 848; *Wells* v. *Wilson*, 3 Ohio, 425.

A bank in working out its security may do, in that behalf,

whatever other persons may do under like circumstances. *First Nat. Bank* v. *Nat. Exchange Bank,* 92 U. S. 122. It is not necessary for us in this case to resort to the decision of *National Bank* v. *Case,* 99 U. S. 629, nor to go that far.

If the bank had acquired the ownership in the syndicate property otherwise than by taking it in payment of or as security for a previously contracted valid indebtedness, the transaction would have been *ultra vires* and void and could not be confirmed or ratified. *Earle* v. *Carson,* 188 U. S. 52. But if the bank, in order to secure and in payment of a valid debt due it, acquired ownership of property, it is not an *ultra vires* act, and it cannot escape liability for its own acts. And an action can be maintained in the state courts to recover indebtedness incurred in preserving and enhancing the value of the security under the act of August 13, 1888. *Roebling* v. *First National Bank of Richmond,* 30 Fed. Rep. 744; *Cockrill* v. *Abeles,* 86 Fed. Rep. 505; *Cooper* v. *Hill,* 94 Fed. Rep. 94; *Libby* v. *Union Nat. Bank,* 99 Illinois, 622; *Upton* v. *South Reading National Bank,* 120 Massachusetts, 153; *Reynolds* v. *Crawfordsville First National Bank,* 112 U. S. 405; *First National Bank* v. *Exchange Bank,* 92 U. S. 122.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill for the dissolution of a partnership, a receiver and an account. The partnership was formed to purchase, improve, divide into lots and sell a leasehold. There were forty shares in the firm, represented by transferable certificates. The plaintiff in error took nine of these shares as security for a debt, and afterwards became the owner of them in satisfaction of the debt, subject to the question whether the transaction was within the powers of a national bank. It was found at the trial that the partners must contribute to pay the debts of the firm, and some of them being insolvent the Bank was charged with the full share of a solvent partner. The Supreme Court of the State held this to be wrong, but decided that the Bank became a part owner of the property and that,

as it joined in the management of the same, it was liable for nine-fortieths of the expenses, which constituted the debts of the firm. 69 Ohio St. 160. A decree was entered to that effect, and the Bank brought the case here.

It is objected at the outset that this court has no jurisdiction because the specific question was not raised sufficiently upon the record. But at the trial the Bank objected that under the statutes of the United States it could not be held liable as a partner, following the frame of the bill and meeting the ruling of the court. Then, when the Supreme Court, after discussion of the statutes, imposed the modified liability and sent the case back, it objected that under the same statutes it could not be held liable for any proportion of the debts of the firm, and took this question on exceptions again to the Supreme Court. It showed at every stage its intention to rely upon the United States banking laws for immunity, and it would be an excessive requirement to hold the Bank bound in the first instance to anticipate the specific and qualified form in which the immunity finally was denied. In addition to the foregoing facts, all of which appear on the record, the Supreme Court made a certificate part of its record and judgment, to the effect that it became and was material to consider whether the Bank had power under Rev. Stat. §§ 5136, 5137, to become liable for the nine-fortieths as above stated and that the decision was against the claim of the plaintiff in error. *Marvin* v. *Trout*, 199 U. S. 212, 223; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179. Of course such a claim of immunity under the laws of the United States, if sufficiently set up, can be brought to this court. *California Bank* v. *Kennedy*, 167 U. S. 362. See *Meyer* v. *Richmond*, 172 U. S. 82.

The question of substantive law presented is not without difficulty. It is not disposed of by the general proposition that a national bank may take by way of security property in which it is not authorized to invest, and may become owner of it by foreclosure or in satisfaction of a debt. It is not disposed of even by the decisions that it may acquire stock in a corporation

in this way, *First National Bank of Charlotte* v. *National Exchange Bank*, 92 U. S. 122, and so subject itself to the liability of a stockholder for the corporate debts. *National Bank* v. *Case*, 99 U. S. 628; *California Bank* v. *Kennedy*, 167 U. S. 362, 366, 367; *First National Bank of Ottawa* v. *Converse*, 200 U. S. 425, 438, a proposition not shaken by *Scott* v. *Deweese*, 181 U. S. 202, 218. For it does not follow that because the interest in a partnership is represented by a paper certificate in form more or less resembling a certificate of stock in a corporation and transferable like it, a national bank can take the partnership certificate to the same extent that it could take the stock.

As the Supreme Court of Ohio assumes such partnerships and certificates to be valid we assume them to be. *Wells* v. *Wilson*, 3 Ohio, 425; *Walburn* v. *Ingilby*, 1 Myl. & K. 61, 76; *Re The Mexican & South American Co.*, 27 Beav. 474, 481; *S. C.*, 4 De G. & J. 320; *Philips* v. *Blatchford*, 137 Massachusetts, 510. We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something it is a proper security, and if it is worth nothing no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

But to take a share by transfer on the books means to be-

come a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. *National Bank* v. *Case*, 99 U. S. 628, 631; *Pullman* v. *Upton*, 96 U. S. 328. This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made of a share in a partnership it means that the transferee at once becomes a member of the firm and goes into its business with an unlimited personal liability, in short, does precisely what a national bank has no authority to do. This the Supreme Court of Ohio rightly held beyond the powers of the Bank. U. S. Rev. Stat. §§ 5136, 5137. It is true that it has been held that a pledgee may escape liability if it appears on the certificate and books that he is only a pledgee. *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606; *Robinson* v. *Southern National Bank*, 180 U. S. 295; *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242, 249. No doubt the security might be realized without the pledgee ever becoming a member of the firm. It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation, with the common double liability, in satisfaction of a debt. *First National Bank of Ottawa*, v. *Converse*, 200 U. S. 425. *A fortiori*, it cannot take shares in a partnership to the same end.

We are of opinion that with the liability as partner all liability falls. The transfer of the shares to the Bank was not a direct transfer of a legal interest in the leasehold, which was in the hands of trustees. It was simply a transfer of a right to have the property accounted for and to receive a share of any balance left after paying debts, and the acquisition of this right was incident solely to membership in the firm. If the membership failed the incidental rights failed with it, and with the

rights the liabilities also disappeared. Becoming a member of the firm was the condition of both consequences. As the Bank was not estopped by its dealings to deny that it was a partner, it was not estopped to deny all liability for partnership debts. See *California Bank* v. *Kennedy*, 167 U. S. 362, 367. It seems to us unnecessary to add more in order to show that the claim against the plaintiff in error must be dismissed.

Judgment reversed.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE MCKENNA dissent.

UNITED STATES *v.* DIECKERHOFF.

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

No. 228. Argued April 17, 1906.—Decided May 14, 1906.

A bond given by an importer to a collector of customs and purporting to be executed under cover of § 2899, Rev. Stat., conditioned in double the value of packages delivered to the importer by the collector and to be forfeited if such packages are opened without consent of the collector and in presence of an inspector, or if not returned to collector on his demand therefor, is a valid bond, for, although not conditioned in express words of the statute, it does not run counter thereto and it is within the authority of the collector to accept it.

Under such a bond the obligation is fixed and the Government is not required to prove any actual loss or damage but is entitled to recover the full amount specified in the bond—double the value of the package ordered to be returned—as a definite sum, to be paid by the importer for nonfulfillment of his statutory duty; and this obligation is not affected by anything contained in § 961, Rev. Stat., limiting recoveries on forfeitures to amount due in equity.

Where Congress has provided a specific penalty for failing to comply with a statutory provision and obligation, it is not within the province of courts of equity to mitigate the harshness of the penalty or forfeiture or to grant relief running directly counter to the statutory requirements.

THE facts are stated in the opinion.

Mr. J. C. McReynolds, Assistant Attorney General, for the United States:

The purpose of Congress, clearly expressed in section 2899, Revised Statutes, is that all imports shall be held pending examination, except when the collector, upon the owner's request, may decide that sample packages can be relied on to reveal the nature of all. To expedite deliveries and favor importers the statute permits them—the collector assenting—to withdraw their merchandise, except the samples, provided bond be given to return the same within ten days if called for. The manifest purpose is to subject all the imports to inspection whenever the Government officers conclude that course is proper.

The redelivery bond taken upon request of the importer is purely voluntary. Much more is involved than mere pecuniary loss to the Government. The articles may be contraband; they may be necessary evidence to punish perjury; they always furnish the best means of ascertaining values, false descriptions, etc.

Section 2899, Revised Statutes, permits demand for a separate, complete bond for each importation; but this would entail much inconvenience upon large importers, and the Secretary of the Treasury, by regulation dating back to 1857, Customs Regulations, article 391, allows a general bond upon which the value of any consignment may be indorsed. In the present case all parties voluntarily assented to the arrangement and the matter stands as if a single bond of like tenor for twice the value of the merchandise had been executed.

The recovery is not limited to the money loss sustained by the Government. *Clark* v. *Barnard,* 108 U. S. 436; *Smythe* v. *United States,* 188 U. S. 156; *Nilson* v. *Jonesboro,* 57 Arkansas, 168, 177; *State* v. *Hall,* 70 Mississippi, 678, 682; *United States* v. *Montell,* Taney's Cir. Ct. Dec. 47; *United States* v. *Hatch,* 1 Paine, 336; *United States* v. *Pingree,* 1 Sprague, 339; Andrews' Revenue Laws, 102.

The Government pursued the proper course by asking judg-

ment for twice the value of the package called for. But if the bond as executed had strictly followed the language of section 2899, under the authority of *Clark* v. *Barnard* the Government would have been entitled to demand a judgment for twice the estimated value of the goods in the invoice which contained the unreturned package. Secs. 2901, 2939, Rev. Stat. Courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions when there cannot be any just compensation. Story, Eq. Jur. §§ 1324, 1326; Pomeroy, Eq. Jur. § 381.

The clause authorizing discharge of the bond upon payment of double the estimated value of any unreturned package is not specifically provided for by section 2899, Revised Statutes; but it is not prohibited and, being less onerous than what might have been demanded, one who voluntarily assented thereto may not complain on that account. *Moses* v. *United States*, 166 U. S. 571, 586. The Secretary of the Treasury or his agent, the collector, has authority to take common-law bonds and to stipulate for liquidated damages therein. *United States* v. *Tingey*, 5 Pet. 115; *United States* v. *Bradley*, 10 Pet. 343; *United States* v. *Hodson*, 10 Wall. 395; *Jessup* v. *United States*, 106 U. S. 147; *Constable* v. *National Steamship Co.*, 154 U. S. 79; *The S. Oteri*, 67 Fed. Rep. 146; *Stephenson* v. *Monmouth Min. & Mfg. Co.*, 84 Fed. Rep. 115; *Grady* v. *United States*, 98 Fed. Rep. 240.

If the clause permitting payment of twice the value of an unreturned article is invalid the defect is cured by those provisions in the bond which follow the language of the statute. The conditions being severable, the authorized one is good. *United States* v. *Mora*, 97 U. S. 413.

Mr. W. Wickham Smith, with whom *Mr. John K. Maxwell* was on the brief, for respondents:

No damage having been sustained by the Government there can be no recovery under § 961, Rev. Stat. *United States* v. *Duys*, 112 Fed. Rep. 875.

A sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting party. *Taylor* v. *Sandiford*, 7 Wheat. 11; *Van Buren* v. *Digges*, 11 How. 461. See also *Watts* v. *Connors*, 115 U. S. 353; *Bignall* v. *Gould*, 119 U. S. 495; *Chicago House Wrecking Co.* v. *United States*, 106 Fed. Rep. 385; *Manufacturing Co.* v. *Camp*, 65 Fed. Rep. 794.

Under the customs administrative act a very similar bond was considered in *United States* v. *Cutajar*, 59 Fed. Rep. 1000; *S. C.*, 67 Fed. Rep. 530, where it was held that, the statute not having fixed the bond, the Secretary of the Treasury was not authorized to impose the limit of bond but only the amount proved to be due under it.

Mr. Justice Day delivered the opinion of the court.

An action was brought in the Circuit Court to recover upon a certain redelivery bond purporting to be executed under cover of section 2899, Rev. Stat. The respondents, prnicipals on the bond, were partners, as Dieckerhoff, Raffloer & Co. Achelis and Boker executed the bond as sureties. On January 13, 1897, Dieckerhoff, Raffloer & Co. imported by the steamship Bovic certain merchandise which was entered in the New York custom house and consisted of seven packages. These were described in two invoices and are numbered 417 to 421, 983, 984. Package No. 418 was designated by the collector to be sent to the public stores for examination and appraisal; the others were turned over to the importer under section 2899, Rev. Stat. The estimated value of the entire importation, $1,522, was indorsed on the bond. Within ten days after the examination and appraisal of package No. 418 the collector ordered respondents to return package No. 420. This package

was not returned. Thereupon suit was instituted upon the bond. A demurrer to the complaint was overruled, and an answer was filed denying breach of the bond and also that the United States had sustained any actual damages. At the trial a customs clerk testified as to the value of package No. 420, estimated from the invoice, that it was $184.56; that the indorsement on the bond was: "Vessel, Bovic; where from, Liverpool; amount, $1,522." It was conceded that the collector had called for the return of the package, that the same was not returned and respondents offered no evidence. Counsel for the United States conceded that there was no proof in the case that the United States had suffered actual damage, and that they could make no such proof. Over the respondents' request for a verdict in their favor the Circuit Court directed a verdict in favor of the Government for $369.12, being twice the estimated value of the unreturned package. The Circuit Court of Appeals reversed this judgment.

The sections of the Revised Statutes pertinent to be considered are:

"SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs, until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited."

"SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be, shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended."

"SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined."

The bond was in the sum of fifty thousand dollars, and conditioned as follows:

"The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and

after the date of these presents and delivered from the custody of the officers of the customs in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined, have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

"And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall indorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof."

Upon the facts stated the question is, How much, if anything, can the Government recover upon this bond? That there is difficulty in the solution of the question is found in the different suggestions put forward; that the actual damages sustained by the Government may be recovered, which is the contention of the respondents, and was the view of a majority of the Circuit Court of Appeals; second, the actual value of the unreturned package, which was the view sustained by one judge of the Circuit Court of Appeals; third, twice the value of the package not returned, which was the view of the Circuit Court; fourth, double the value of the consign-

ment, which seems to be the present contention of the Government.

It may be admitted that the bond does not follow in strict terms the provisions of section 2899, which seems to require, or at least to authorize, a bond in double the estimated value of the merchandise imported, with a condition that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. The statute further provides that if in the meantime any package should be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond; in either case it shall be forfeited. The bond given, while it was for a period of six months, in the sum of $50,000, provided that the collector of customs should indorse on the bond the estimated value of each importation and the date thereof, and that the penalty of the bond should be double the value of each importation as so made and indorsed, which in this case would make the penalty $3,044. This bond contains the condition that if the obligors, in lieu of the return of the package, pay to the proper collecting officer double the value of the package or packages not so returned then the obligation is to be void.

While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter to the statute and is neither *malum prohibitum* nor *malum in se*, it is a valid bond, although not in terms directly required by the statute. *Moses* v. *United States*, 166 U. S. 571, 586. Indeed, the learned counsel for respondents concedes that such a bond can be taken, and in his brief says: "Respondents make no point as to the conformity of the bond to the statute, or the right of the United States or the collector to enforce it in its form as made. For the purposes of this argument we

concede that it was a voluntary bond, enforceable according to its terms, and that there has been a breach."

But we think this something more than a mere voluntary bond. The statute authorizes, it is true, a more stringent undertaking, for literally it authorizes a bond in double the value of the merchandise, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. And further provides that if, in the meantime, any package shall be opened, except in the presence of the collector in the manner provided, or if the package is not delivered to the order of the collector, according to the condition of the bond, it shall in either case be forfeited. With this ample authority to take a more enlarged undertaking we think it was within the power of the collector to take the bond in suit, which, taken together, provides for the return of any required package in an unopened condition or the payment of double its value as a condition of being discharged from the full penalty of the bond. There is nothing in this bond which runs counter to the statute, and it is within the authority conferred to take a bond which should be forfeited if the package was not returned in the manner required. Certainly the makers of the bond cannot complain that they have been permitted, by its terms, to discharge the obligation to return a package by paying double its value, when a bond in double the value of the merchandise to be forfeited for the non-return of a package unopened might have been required.

The real question in the case, then, is what, if anything, can be recovered under the circumstances shown, on the obligation incurred in this bond. It is the contention of the respondents that the United States can recover only for actual damages which it has shown that it sustained, and that it was not the purpose of the statute or the obligation of the bond given to enlarge the liability beyond such damages as the Government shall be able to allege and prove. But we think the purpose of the statute and the purpose of the requirement in the bond

provided for therein, and the one given in this case, was to secure the performance of the duty imposed of returning the package or packages, where an importer availed himself of the privilege of withdrawing merchandise from the custody of the governmental officials before it has been examined and appraised. It is the right of the Government to examine merchandise imported from foreign countries and ascertain its value for the purpose of fixing the amount of duties collectible thereon. It has the right to hold this merchandise until this purpose can be effected. Obviously, in a country where the business of importing goods has become so vast, as is now the case in the United States, it would be impracticable to store all goods and hold them until examination. The law has, therefore, provided for the detention usually of one package in ten of an importation, and given the privilege to the importer of removing the rest of the goods, but to be held intact subject to the right of the Government, if an examination of the packages ordered for inspection shall suggest such course, to require that other packages be returned intact for examination, and if this statutory duty is not performed, we think it was the intention of the law to provide specific damages to be recovered upon the non-performance of the duty imposed, and to secure a prompt and faithful discharge of which the statute provides for the giving of a bond.

In carrying out this purpose we hold the law permitted the taking of such a bond as was given in this case, providing that if the party did not return the package required he should pay double the amount of the value thereof. We think such undertaking, for this manner of discharging this duty, or paying the value stipulated, was intended to and does relieve the Government from the necessity of showing any actual damage or loss. It is suggested that the Government may prove the damages sustained possibly by the testimony of informers or of those who packed the merchandise before shipment, and in other ways. But in our opinion it was the purpose of this statute, and the bond executed in the case, to dispense with

the necessity of resort to this method of showing damages and to fix double the value of the package ordered to be returned, as a definite sum to be paid for the nonfulfillment of the statutory duty. In such cases the recovery is for the stipulated sum, and is not limited to the damages actually proven. *Clark* v. *Barnard,* 108 U. S. 436, 457.

It is strongly urged that this in many cases may work serious hardship, and that in all the years in which this statute or its equivalent has been in force no action is shown to have been brought upon this theory. But the contract is definite in its terms, and it was the privilege of the importer to leave the goods in the custody of the Government or take them out upon giving the obligation which is the subject matter of this suit. It may be that in some cases such a rule would permit the Government to recover a large percentage of the value of the goods imported, and it is suggested the package not returned may represent the larger part of the value of the entire invoice, but we do not think these considerations should overcome the purposes of the statute and the terms of the obligation incurred in the giving of this bond.

The purpose of the statute was to enforce the collection of the revenues, and to require that goods shall be as represented, and if removed from governmental control before the facts about them are ascertained, to require them to be returned unopened, except as provided by statute, or a specific penalty be paid for failure so to do.

It is further contended that section 961, Rev. Stat., protects against enforcement of a penalty of this kind. This section provides: "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

But if we are correct in holding that it was the intention of Congress to provide a specific penalty for failing to return the merchandise as required, it is not within the province of courts of equity to mitigate the harshness of penalties or forfeitures in such cases, for such relief would run directly counter to the statutory requirements. Story, Eq. Jur. § 1326. We think the Circuit Court was right in rendering judgment for double the value of the unreturned package.

The judgment of the Circuit Court of Appeals will be reversed and the judgment of the Circuit Court affirmed and the case remanded to the Circuit Court.

MR. JUSTICE BREWER took no part in the decision of this case.

DEVINE *v.* LOS ANGELES.

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

No. 207. Argued March 13, 1906.—Decided May 14, 1906.

Where diversity of citizenship does not exist a suit can only be maintained in the Circuit Court of the United States on the ground that it arises under the Constitution or laws of the United States, and it does not so arise unless it really and substantially involves a controversy as to the effect or construction of the Constitution or some law or treaty of the United States on the determination whereof the result depends. This must appear from plaintiff's statement of his own claim and cannot be aided by allegations as to defenses which may be interposed.

In this case *held* that as a bill to quiet title the jurisdiction of the Circuit Court could not be sustained by reason of allegations that defendant's adverse claims to the surface and subterranean waters of the Los Angeles river were based on an erroneous construction of the treaty of Guadalupe Hidalgo, the act of March 3, 1851, and certain state acts and city ordinances.

Nor can such jurisdiction be maintained of the suit as one to remove cloud on title, as a bill in equity will not lie to dispel mere verbal assertions of ownership or to adjudge state statutes and charters unconstitutional and void. If the statutes and charters are unconstitutional they are void and cannot constitute a cloud on title.

Where complainant claims title to land in California under Mexican grants confirmed by the Board of Land Commissioners as the State of California

is not in the line of such titles a statute of that State conferring water rights on a city does not deprive complainants of their property or impair the obligation of any contract as the State can only confer whatever rights in such waters had vested in it.

COMPLAINANTS below, appellants here, are 244 in number and own in severalty various tracts of land aggregating several thousand acres, located in the county of Los Angeles, California, in Ranchos San Rafael, Los Felis, and Providencia. The Rancho San Rafael was granted by the King of Spain and the other two ranchos by the Republic of Mexico to the predecessors of complainants. The titles were confirmed, pursuant to the treaty of Guadalupe Hidalgo, to the successors of the original grantees by the Board of Land Commissioners created by and acting under an act of Congress approved March 3, 1851, entitled an act to ascertain and settle private land claims in the State of California. Patents were thereupon issued by the United States to the confirmees and it was alleged that these grants conveyed the title to the waters within them.

It was further alleged that the city of Los Angeles claimed to be the successor in right and title to all the grants made by the Spanish and Mexican governments to the Pueblo de Los Angeles, and the city filed a claim before the Land Commissioners in virtue of the general laws of Spain to sixteen square leagues of land, alleging that the said lands had been granted to the pueblo, which board confirmed the title of the city to four square leagues of land but rejected its claim to the remaining twelve square leagues, and that a patent was issued to the city by the United States for the land so confirmed, which patent did not refer to the river or its tributary waters, and did not purport to convey any of the waters of said river. That the city claimed the paramount right to the waters of the Los Angeles river and the river itself in virtue of the grants, laws, usages and customs of the Republic of Mexico and of the Kingdom of Spain, made and in vogue prior to the cession of the territory embraced within the State of California to the United States under the treaty of Guadalupe Hidalgo, and by virtue

of certain acts of the legislature of the State of California referred to in the bill, and especially by virtue of an act of the legislature of California passed April 4, 1850, incorporating the city of Los Angeles and declaring that it "shall succeed to all the rights, claims, and powers of the Pueblo de Los Angeles in regard to property, and shall be subject to all the liabilities incurred, and obligations created, by the Ayuntamiento of said Pueblo."

It was further alleged that the city never procured the confirmation of any rights in the waters of the Los Angeles river other than those that passed under the grant of land conferred by the patent, and that the act of the legislature, passed April 4, 1850, and certain other acts of the legislature and proceedings, acts and charters of the city set forth in the bill, are a cloud upon complainants' title to their lands. That the Los Angeles river runs through the three ranchos and thence through the city; that complainants' lands are riparian to the stream; that underlying complainants' lands are percolating waters which do not constitute a part of the river, but which by reason of the patents referred to, and mesne conveyances, belong to the several complainants as owners of said lands. The bill then went on to aver that the city claims that it is the owner of the river and its tributaries and their waters, passing through the ranchos named, and of the percolating waters in complainants' lands; that it claims the right to appropriate said waters for the use of the city and its inhabitants, and that complainants have no right to take any of the surface waters of the river or the percolating waters except in subordination to the city's paramount right to take and use the same, and that the city threatens and intends to institute suit in the state courts of California to enjoin complainants from using any of the waters possessed by them from wells on their lands.

That the city rests its right and claim to the river and its waters upon a certain construction of the treaty of Guadalupe Hidalgo and of the act of Congress of March 3, 1851, and upon certain acts of the California legislature and certain charters

of the city of Los Angeles adopted and approved in pursuance of an erroneous construction of the treaty and the act of Congress; the acts and charters being enumerated.

It was further alleged that under said acts and said charters the city has asserted and assumed the right to take physical control of the Los Angeles river and its tributaries, and has exercised the right of obstructing ditches and other conduits maintained by owners of land in the valley of the river above the city and of preventing the use of the waters of the river for irrigation of the lands of complainants, and that said laws and charters and the exercise of said rights have resulted in the destruction of the values of the lands. And it was charged that the acts of the legislature and the charters of the city of Los Angeles were in violation of the Fourteenth Amendment to the Constitution of the United States, in that they deprived or attempted to deprive complainants of their property without due process of law and to grant the same to the city of Los Angeles; that the acts and charters impaired the obligation of the contracts expressed in the patents of the United States to complainants' lands; and that the assertion and exercise by the city of the right to control the river and its waters were in violation of section 1979, Title XXIV, of the Revised Statutes of the United States.

And the bill further averred that the construction of the act of Congress of March 3, 1851, upon which the defendant city rested its right and claim to said river and to said waters, is erroneous, and that, according to the proper construction thereof, the city was required to present to the Board of Land Commissioners its claim to the waters of the river for confirmation.

It was also alleged that the claims and threats of the city to institute actions against complainants and the control which it has exercised over the river and the waters thereof, and the several acts of the legislature of California and the charter of the city purporting to confer title to the river and its waters upon the city as the successor to the Mexican pueblo, cast a

cloud upon the titles of complainants to their lands, and had, in large measure, destroyed the market values thereof.

It was prayed:

1. That a decree be granted complainants removing the cloud cast by the city of Los Angeles upon their titles to the lands described in the bill, and that the acts of the legislature of the State of California and the charters of the city be declared invalid in respect to conferring upon the city any rights in the waters of the Los Angeles river acquired from the pueblo of Los Angeles, other than such rights as were ascertained and confirmed under the act of March 3, 1851.

2. That a decree be granted to complainants and each of them quieting their several titles to their lands and to the waters therein, and to the riparian right of each of them to use the waters of said river, as against the paramount title claimed by said city to have been derived from Spain or Mexico, or claimed to have been derived from or to be supported by said acts of the legislature of the State of California, or by the charter of said city; and also that it be decreed that complainants and the city have each and severally such title only derived from Spain and Mexico as was confirmed and patented to them or their predecessors by the act of Congress of March 3, 1851.

3. That a decree be granted to complainants forever enjoining the city of Los Angeles from setting up or asserting such paramount right and title to said waters; and further enjoining said city from asserting and exercising dominion or control over said river and said waters under or by virtue of said acts of the legislature or said charter of said city of Los Angeles.

It was alleged in the answer that by the terms of each of the grants to the three ranchos named in the bill, and by the laws of the Government making the same, all of the waters within any of the lands embraced in said ranchos, which formed a part of or found their way into the surface or subterranean stream of the Los Angeles river, were excepted and reserved in favor of the pueblo of Los Angeles, and that none of said

waters were confirmed or granted by the United States to complainants' predecessors.

It was admitted that the city claimed to be, and it was alleged that the city was, in fact, the successor to all the rights and grants made by the Spanish and Mexican Governments to the pueblo of Los Angeles.

The answer further alleged that the patent issued by the United States to the city of Los Angeles purported to grant to the mayor and council of the city of Los Angeles all appurtenances belonging to the land therein granted, which included all the waters of the river and the right to the use of the same.

It was admitted that the city claimed the paramount right to the waters of the Los Angeles river, by virtue of grants, laws, usages and customs of the Republic of Mexico and the Kingdom of Spain and the act of the legislature approved April 4, 1850, mentioned in the bill, but it was denied that these were the only sources of title through which the city claimed; and alleged that it also claimed said paramount right by virtue of long-continued use and possession of said river and the waters thereof for the period of more than one hundred and twenty years, and by various grants and conveyances from private individuals, and by virtue of various judgments and decrees of courts of competent jurisdiction and of the patents to the mayor and common council of the city of Los Angeles, mentioned in the bill, and also by virtue of its ownership of various tracts of land, which are riparian to said river, amounting in area to more than four thousand acres, embracing the land through which the river flows in passing through the lands included in said patent.

The answer disclaimed that the city acquired, under the act of the legislature passed April 4, 1850, any right to the Los Angeles river, or the water thereof, or any other water or right which was, at the time of the passage of said act, vested in the predecessors of complainants, or any private individual or corporation.

The answer denied that the acts of the legislature, or the

proceedings or acts or charter of the city, referred to in the bill, constituted any cloud upon complainants' titles, but, on the contrary, alleged that none of complainants had, at the time of the commencement of the suit, or have now, any right or interest in or to the waters of the Los Angeles river, save in subordination to the paramount right of the city to take and use all of the waters of said river to the extent of the necessities of the city or its inhabitants.

The answer alleged that all of the waters underlying complainants' lands form and constitute a part of the Los Angeles river, and would, if not intercepted, reach the surface stream of the river at a point above the northern boundary of the city, and denied that any of said waters belonged to the several complainants, or that they, or any of them, have ever had any ownership of said waters, save in subordination to the paramount right of the city to take and use said waters, so far as it and its inhabitants might need the same.

It was denied that in the petition of the mayor and common council of the city of Los Angeles to the Board of Land Commissioners for confirmation of the pueblo lands, no claim was made to the waters of the Los Angeles river, and alleged that the Board of Land Commissioners, in its finding and judgment confirming the claim of the city to the pueblo lands, also confirmed its claim to the rights with respect to the waters of the river which were possessed by the pueblo; and it was admitted that the city of Los Angeles had in the past claimed and still claimed to be the owner of all the waters of said river, and of its tributaries, from its sources of supply to the southern boundary of the city, and also of all of the waters existing in complainants' lands, and of the waters under said lands; and it was alleged that all of the waters in those lands did in fact constitute a stream or watercourse, and were part of the waters of the Los Angeles river. The city admitted that it claimed that complainants had no right to pump the waters in their lands, because such pumping might ultimately have the effect of reducing the supply in the surface and subterranean river,

and it was denied that they were percolating waters, and also denied that the city claimed the right to enter on the lands of any of complainants to take or use said waters, or any part thereof, without having first obtained the right so to do, by grant from or condemnation against said complainants. It was admitted that the city claimed the right to prevent complainants from using the waters in their lands when the city had need of the same, but denied that it claimed the right to prevent complainants from using said waters by entering upon their lands or by using physical force, and alleged that the city claimed the right to prevent the use of said waters by complainants only in the manner prescribed by the laws of the State of California, and that the city intended to enforce its rights against complainants by means of the suit brought by it, as alleged in the bill, in the state court against certain of the complainants, for the purpose of enjoining them from using the waters pumped by them from their lands, and by means of other legal process, and not by any unlawful acts or physical force.

It was admitted that the city rested its claim to the Los Angeles river and the waters thereof, including the waters in the lands of complainants, in part upon the treaty of Guadalupe Hidalgo, according to the manifest meaning thereof, viz., that the rights of pueblos were intended to be protected by said treaty, as well as the rights of individuals; and it was admitted that the city rested its claim in part upon the act of Congress of March 3, 1851, according to the manifest meaning thereof, viz., that the claims of pueblos and of municipal corporations succeeding them to lands granted by the Spanish and Mexican Governments were entitled to confirmation, and that the confirmation thereof had the effect of confirming all water rights which were appurtenant to said lands, and that said act did not require claims for property other than lands to be presented for confirmation.

It was denied that the city rested its claim to the Los Angeles river and its waters, including the waters in the lands of

complainants, upon the laws of the State of California and the ordinances and charters of the city of Los Angeles, except to the extent that the same had the effect of vesting and continuing in the city and its predecessors such rights with respect to the waters of the Los Angeles river as were possessed by the pueblo at the time the pueblo was dissolved and the city was incorporated by the act of April 4, 1850, and such rights with respect to the waters of the river as might have been vested in the State of California upon its admission to the Union.

It was expressly disclaimed that there was granted by said acts of the legislature, or by the city charter, to the mayor and common council of the city of Los Angeles any right to develop waters percolating under the bed of the Los Angeles river or elsewhere, which at the time of the passage of said acts, or at the time of the adoption of said charter, was vested in the complainants, or any of them, or in their predecessors, or in any private individual or corporation.

It was alleged that the legislative acts and the ordinances and charters mentioned in the bill were adopted with the intention of asserting that the city of Los Angeles was the owner of all the rights possessed by the pueblo of Los Angeles to the waters of the Los Angeles river, and not with the intention of depriving complainants, or any of them, or any of their predecessors, or any other private individual or private corporation, of any right in respect to the waters of said river; and denied that by any of said acts of the legislature mentioned in the bill, or by the charter of the city or the amendments thereof, there was intended to be granted to the city any right with respect to the water, flowing in said river or beneath the surface of the bed thereof, which was then vested in complainants, or any of them, or any of their predecessors, or any private individual or private corporation, or that by any of said acts it was intended to divest any private person or corporation of any vested private rights in said waters, or that any of said acts had ever been construed by any court in the State of California

to so divest any such private vested rights, but on the contrary it was alleged that it had been determined by the Supreme Court of California that said acts did not have such effect.

The answer denied that the city had ever interfered with the appellants in the use of the waters of the river or its tributaries, or the waters of said valley, except when such waters were located on or in the lands of the city or on or in lands on which the city had acquired the right of entry to divert and use said waters, except when the city has interfered with such use by judgments of court obtained by due process of law, and denied that the city has ever assumed or asserted the right to take physical control of any waters on or in complainants' lands. It was disclaimed that the acts or charters referred to in the bill granted to the city the right to take physical control of property belonging to complainants.

The answer denied that the acts of the legislature and the ordinances and charters of the city of Los Angeles, mentioned in the bill, or any of them, were in violation of the Fourteenth Amendment, or impaired the obligation of contracts, or were in violation of section 1979, Title XXIV, of the Revised Statutes of the United States.

The answer alleged that according to the proper construction of the act of March 3, 1851, the confirmation and patent therein provided for only had the effect of confirming to the confirmee and patentee the lands therein described, but subject to all the easements and servitudes imposed thereon by the laws of Spain and Mexico in favor of third parties, including the rights to the waters of unnavigable streams which were attached to other lands, or belonged to pueblos or private individuals other than the grantees. And where such water rights were appurtenant to lands granted by the Spanish and Mexican Governments and confirmed and patented under said act of Congress, such water rights passed by such patents, and a claim for such water rights was not required by such act to be confirmed or patented.

It was admitted that the city claimed that complainants had no right to the waters of the Los Angeles river, including the waters in other lands, as against the city and its inhabitants, when the city shall determine that it needs said waters, and that the city claims that the use by the complainants of such waters is at the sufferance of the city, and may be prohibited by the city at any time, and that the city is threatening to institute suits against complainants for the purpose of enforcing such claims, but it is denied that any and all said claims or any dominion or control which the city has exercised over the river and the waters thereof has cast any cloud upon the several titles of complainants to their lands or affected the market value or salability of such lands.

It was alleged in the answer that in the year 1781 a pueblo was founded on the site of the present city of Los Angeles by the Government of the Kingdom of Spain, and that, according to the laws and regulations of that country, said pueblo became entitled to the sole and exclusive right in perpetuity to the absolute ownership of all the waters of the Los Angeles river, whether flowing upon or beneath the surface of the ground; that said river then rose and now rises several miles above the site of the pueblo and ran and still runs down through said site to the lands now embraced within the city of Los Angeles; that during the whole of the occupation and control of said pueblo by the Spanish and Mexican Governments the municipal authorities at all times exercised control of and claimed the exclusive right to use all the waters of said river, and that right was during all of said time recognized and acknowledged by the owners of all of the lands bordering on said river, including the predecessors of complainants; that ever since the occupation and control of said pueblo by the United States and by the State of California the municipal authorities of the city have exercised the same rights over and to the waters of the river as were previously exercised and claimed by the authorities of the pueblo, and that such control and rights were exercised and claimed for the purpose of irrigation

and for the domestic and other uses of said pueblo and said city and the inhabitants thereof.

It was further alleged that within one year after the foundation of the pueblo the municipal authorities thereof constructed a system of irrigation works and conveyed the waters of the river to and upon lands in the pueblo, and that thereafter from time to time other lands of the pueblo were brought under irrigation, so that all of said waters were diverted from said river and used for such irrigation during a period of many years prior to the conquest of California by the United States, and that, from and after such conquest, the same use was made of the waters of the river for the irrigation of lands within the pueblo and for domestic use of its inhabitants up to the time of the passage of the act of April 4, 1850, incorporating the city of Los Angeles; that from and after that time the municipal authorities of said city continued to construct additional works for the more economical diversion and distribution of such waters for use in irrigating lands within said city and for domestic use of the inhabitants thereof; that within the past eighteen years nearly all of said irrigable lands have been divided into building lots and covered with houses, so that all of the waters previously used for the irrigation of said lands, excepting the portion thereof which has been diverted by complainants within the last five years, have been used by the city and its inhabitants for purposes other than for irrigation, and all of the waters of said river during the dry season of each year, extending from the first day of May to the first day of November, and a great portion of said waters during the rest of the year, have been needed for said uses. That the population of said city is not less than 180,000 people, and is increasing at the rate of more than 10,000 per year, and that the city has no other source of water supply except said river.

It was alleged that, with certain exceptions referred to therein, the pueblo of Los Angeles, from the time of its foundation in the year 1781, up to the incorporation of the pueblo as a

city by the act of 1850, and the said city from that time until now has continuously, exclusively and adversely to the whole world used all of the waters of the Los Angeles river under a claim of ownership of said waters, the exceptions referred to being claims made by certain persons at various times of rights to the use of the waters of the river and of affluents thereof, which have been litigated and decided by the state courts in favor of the city, and it was further alleged that within the past twelve years certain owners of lands in which flowed underground waters of the river have set up a claim that said waters were not a part of the river and that they were entitled to take and appropriate said underground waters for their own use, and that, in pursuance of such claims, great numbers of said parties, including some of complainants, had constructed wells and engaged in pumping large quantities of said water, thereby diminishing the surface flow of the river, and that it was for the purpose of preventing such diminution that the city was bringing and contemplated bringing the actions against complainants referred to in the bill; that within the past five years such abstraction of these underground waters did not interfere with the supply of water required by the city, but within the past three years the amount of diversion by means of said wells has increased so much and the needs of the city and its inhabitants have also so greatly increased that the waters of the river which reached the surface stream thereof and the underground diversion works of the city have not been sufficient to supply it and its inhabitants with the water needed by them.

It was also alleged that the city in its corporate name or in the name of the board of water commissioners is the owner of numerous tracts of land which are riparian to the river, and which are particularly described in the answer. And further, that in the year 1879 two actions were commenced by predecessors of some of complainants against the city of Los Angeles, claiming the right to divert and use waters of the river, and both of said actions were finally determined by the Supreme

Court of the State of California against the plaintiffs and in favor of the city, and it was alleged that complainants, who are successors in interests of the plaintiffs in the suits last mentioned, are by said judgments estopped to deny that the city is the owner of a paramount right to use so much of the waters of the Los Angeles river as it and its inhabitants may need.

Thereafter the city of Los Angeles, by its counsel, moved the court to dismiss this cause on the ground that it appeared that the court had no jurisdiction thereof, which motion was sustained and the bill dismissed, whereupon the cause was brought here on certificate.

Mr. Cyrus F. McNutt, with whom *Mr. Warren E. Lloyd* and *Mr. J. E. Harmon* were on the brief, for appellants:

The bill presents several Federal questions. It is not an action under § 738 of the Code of Civil Procedure of California to quiet title generally, but a bill in equity to remove clouds from complainants' titles. However that section is construed by the California courts, as providing an exclusive remedy for quieting titles to land, the legislature and the courts of the State cannot affect the equity practice and jurisdiction in the Federal courts.

The original jurisdiction in equity, conferred by the Constitution, imposes the duty to adjudicate according to the rules of the English Chancery Court, as administered from the time of the emigration of our ancestors, down to the period when the Constitution was formed. *Pennsylvania* v. *Wheeling &c. Bridge Co.*, 18 How. 492. The equity jurisdiction of the Federal courts is the same as the English High Court of Chancery, and is not subject to limitation or restraint of state legislation. *Payne* v. *Hook*, 7 Wall. 430.

Equity practice and jurisdiction of Federal courts is uniform throughout the United States, and cannot be varied by state laws. *Russell* v. *Southard*, 12 How. 147.

The act of 1872, requiring pleading and procedure in civil causes in the Circuit and District Courts to conform, as near

as may be, to the practice in state courts, has no application to equity or admiralty causes. *Blease* v. *Garlington*, 92 U. S. 8; *Bucher* v. *Cheshire R. R.*, 125 U. S. 582.

Though state legislatures may abolish, in state courts, the distinction between actions at law and actions in equity, by enacting that there shall be but one form of action, which shall be called "civil action," yet the distinction between the two sorts of proceedings cannot be thereby obliterated in the Federal courts. *Thompson* v. *R. R. Companies*, 6 Wall. 134.

The allegations of the bill raise Federal questions by setting out the claim of title by complainants and the clouds cast on such title by the defendants, claiming under a treaty and various laws of the United States and its predecessor in title and sovereignty as well as various acts of the legislature of California which are in violation of the Constitution.

The admissions and averments in the answer are in answer to the charge in the bill, that the city's claim to the river and its waters and the waters in complainants' lands, is rested in part upon a construction of the treaty of Guadalupe Hidalgo, which construction, and that alleged to be placed upon the act of Congress of March 3, 1851, are set forth with particularity.

Whether such admissions in defendant's answer to the averments of the bill in this respect, will be considered as strengthening such averments of the bill, must depend upon whether this court will look beyond the bill in determining whether a Federal question is presented there; and if so, whether there be any matter in the answer defeating such jurisdiction. In either event, the treaty of Guadalupe Hidalgo is fairly drawn into this cause, and whether the averments of the bill alone, or such averments and the admissions of the answer, be considered, the construction of that instrument must be had in order to a proper determination of the controversy here.

The amended bill is framed according to the rules of equity pleading established by this court under § 917 of the Revised Statutes, and in all respects follows well settled practice in

equity. Under Equity Rule 21, the complainant has a right to state defendant's claims and in certain suits they form the very gist of the action. Having been properly pleaded, it is for the court to determine whether or not they form a logical and necessary portion of complainants' case. If they do, there is no doubt that the court may regard them in determining its jurisdiction. When the claim of the defendant is no longer a supposed pretense or excuse, but a specific cloud on title, evidenced by written instruments and records and specific acts, the plaintiff is unable to state his cause of action at all without alleging it. Such allegations are no longer the charging part of the bill but its very substance. If not alleged, evidence will not be received regarding them. Foster's Federal Practice, § 67; *Crockett* v. *Lee,* 7 Wheat. 522.

The acts of the legislature of the State of California complained of are *prima facie* valid and a cloud on title, and complainants have a right in equity to have the same removed and the claims of defendant thereunder quieted. 7 Cyc. 255, Article "Cloud on Title." Courts of equity always show the highest solicitude regarding land titles and will afford a remedy appropriate to the circumstances of each case. *Sharon* v. *Tucker,* 144 U. S. 533.

Complainants claim protection under the Fourteenth Amendment of the Constitution of the United States, in that the legislative acts and municipal acts and ordinances pleaded, deprive, or attempt to deprive, them of their property without due process of law.

If the complainants have the title in their lands which they allege, an act of the legislature of California granting to defendant the exclusive right to all the waters in the river Los Angeles is an attempt to deprive complainants of property protected by the Constitution. As a matter of fact, it has unsettled all land titles in the valley through which the Los Angeles river runs. Defendant claims every benefit of these legislative acts. It denies that complainants ever owned any of the waters in their lands. Coupled with this, it attempts the

disclaimer as to "vested" rights. Having denied the vested rights, the disclaimer becomes but another way by which defendant asserts title.

The proposition is untenable that the city of Los Angeles, even through its common council, could disclaim, deny or in any way affect the validity of a legislative enactment. No power outside of a judicial tribunal is clothed with any such authority. It would be a dangerous doctrine to establish in this country, to hold that the exercise of powers by the legislature of a State, or the effect of its enactments, can be so revised and annulled by a party to a suit.

No authority is anywhere shown as coming from the city council, authorizing or empowering its counsel, appearing in this case, to make any such disclaimer as is attempted to be made in the answer.

The acts, ordinances and charters in favor of defendant, alleged in the bill, impair the obligation of the contracts made through and by the several patents of the United States to the predecessors in title of complainants.

The complainants are subjected to the deprivation of property rights, privileges and immunities secured to them by the Constitution and laws of the United States, under color of the statutes of the State of California, referred to in the bill, and in violation of section 1979, Title XXIV of the Revised Statutes.

Mr. W. B. Matthews and *Mr. J. R. Scott*, with whom *Mr. Henry T. Lee* was on the brief, for appellee:

As the requisite diversity of citizenship does not exist, the court has no jurisdiction of this suit unless it is one arising under the Constitution, laws or treaties of the United States.

A case arises under the Constitution, a law or a treaty of the United States, only when its correct decision depends upon the construction of the Constitution or of such law or treaty. *Cohens* v. *Virginia*, 6 Wheat. 379; *Osborne* v. *Bank of the United States*, 9 Wheat. 822; *Tennessee* v. *Davis*, 100 U. S. 264;

Bankers' Casualty Co. v. *Minn., St. P. &c. Ry.*, 192 U. S. 371, 381; *New Orleans* v. *Benjamin*, 153 U. S. 411.

The jurisdiction of the court must be made to appear from complainants' statement of their own claims, and not from their statement of the nature of the defendant's claim.

While the appellants, in the prayer of the bill, ask for a decree quieting their title to the lands described in the bill, it is evident that they did not intend by their pleading to state a cause of action to quiet title under the old chancery practice. See *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632.

It is apparent that this bill was intended to be framed under section 738, Code of Civil Procedure of California. This statute is similar to statutes in many other States, upon the same subject, and it has the effect of enlarging the ancient jurisdiction of courts of equity in respect to suits to quiet title. *Wehrman* v. *Conklin*, 155 U. S. 314, 325. These enlarged equitable rights are administered in Federal courts, so far as they do not conflict with any provision of the Constitution or with the statutes of the United States. *Broderick's Will*, 21 Wall. 503; *Holland* v. *Challen*, 110 U. S. 15, 26; *United States* v. *Wilson*, 118 U. S. 86; *Frost* v. *Spitley*, 110 U. S. 557.

Section 738 of the Code of Civil Procedure of California, was copied from the old Practice Act of that State, Laws Cal. 1851, pp. 92, 93, in reference to which the Supreme Court of California, in the case of *Head* v. *Fordyce*, 17 California, 151, said:

"The act was intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title, already held, or to grow out of the adverse pretension."

The allegations of the bill, that the adverse claims of the city to the waters of the Los Angeles river, and the waters in the lands of the complainants, are based upon an erroneous construction of the treaty of Guadalupe Hidalgo, etc., are un-

necessary to a statement of appellants' case in a suit to quiet title to such property under the enlarged equitable jurisdiction of the Circuit Court. These allegations are plainly intended to raise a Federal question where none would otherwise appear, and they are, therefore, improper. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632; *Arkansas* v. *Kansas & Texas Coal Co*, 183 U. S. 185; *Florida Central &c. Railroad* v. *Bell*, 176 U. S. 321.

The bill discloses an entire misconception, on the part of the appellants, of the nature and purpose of a suit to remove a cloud, in two particulars: first, such a suit is aimed at an instrument or record and not at mere threats, claims, or pretensions; and, second, it is not available for the purpose of having a statute canceled, or adjudged to be void. *Castro* v. *Barry*, 79 California, 443, 446; *Pixley* v. *Huggins*, 15 California, 127; *Parker* v. *Shannon*, 121 Illinois, 452; *Burr* v. *Hunt*, 18 California, 303; *Hannewinkle* v. *Georgetown*, 15 Wall. 547.

It is manifest that, by the force of the terms used, a statute, which is alleged to be unconstitutional, cannot, at the same time, be alleged to constitute a cloud upon a title. If it is unconstitutional, it is a nullity. An unconstitutional law is void and is no law. *Siebold's Case*, 100 U. S. 376. This is a general rule of equity in suits to remove a cloud on a title and it is embodied in sections 3412 and 3413, of the Civil Code of California, which provide substantially that where an instrument is void on its face or upon the face of another instrument which is necessary to the use of the former in evidence, it is not to be deemed capable of creating a cloud. *Williams* v. *Corcoran*, 46 California, 553. So in this case the statutes and charters which are declared in the bill to be obnoxious to the Constitution of the United States, if they are subject to that objection, are void on their face, and therefore do not constitute a cloud on the title of appellant.

The question of the repugnancy of the acts of the legislature

and the charters of the city to the Federal Constitution is primarily for the state courts.

The question of the repugnancy of these acts or charters to the impairment clause or the deprivation clause of the Constitution, does not actually or necessarily arise under the allegations of the bill. The judicial power extends to all cases in law or equity, arising under the Constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. *New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Defiance Water Company* v. *Defiance*, 191 U. S. 184.

Section 1979, Title XXIV, Revised Statutes of the United States, has no application to suits of this nature. *Holt* v. *Indiana Manufacturing Company*, 176 U. S. 68.

The fact that the United States, in issuing patents to the predecessors of the appellants, under the act of March 3, 1851, did not pretend that it was the owner of such lands, is shown by the provisions contained in the act, that patents issued thereunder shall be "conclusive between the United States and said claimants only, and shall not affect the interests of third persons." The act is not drawn in question and made the subject of dispute merely because adverse claims are made to rights claimed thereunder. *Cook County* v. *Calumet & C. Canal & D. Co.*, 138 U. S. 653; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; *DeLamar's Nevada Gold Min. Co.* v. *Nesbitt*, 175 U. S. 523.

The disclaimers contained in the answer effectually remove any possible ground of Federal jurisdiction. *Crystal Springs Land & Water Co.* v. *Los Angeles*, 177 U. S. 169; *Boston &c. Mining Co.* v. *Montana Ore Co.*, *supra*.

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

There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground

that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed.

Complainants prayed for a decree quieting their title to the lands described in the bill, but the averments did not bring the case within the classes of bills of peace or to quiet title, recognized by the usual chancery practice as succinctly stated in *Boston &c. Mining Company* v. *Montana Ore Company*, 188 U. S. 632. It was apparently framed under section 738 of the California Code of Civil Procedure, providing that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." This statute enlarged the ancient jurisdiction of courts of equity in respect of suits to quiet title, but, the equitable rights themselves remaining, the enlargement thereof may be administered by the Circuit Courts of the United States as well as by the courts of the State. *Broderick's Will*, 21 Wall. 503; *Holland* v. *Challen*, 110 U. S. 15; *Gormley* v. *Clark*, 134 U. S. 338, 348.

It seems, and it has often been held by the Supreme Court of California, that in an action under this section it is not necessary that the complaint should allege the nature of the estate or interest claimed by the defendant. *Head* v. *Fordyce*, 17 California, 149, 151; *Castro* v. *Barry*, 79 California, 443; *Mining Company* v. *Mining Company*, 83 California, 589.

We are dealing with the question of the jurisdiction of the Circuit Court, and the general rule as to that is thus stated by Mr. Justice Peckham, speaking for the court, in *Boston Mining Company* v. *Montana Ore Company*, 188 U. S. 632:

"It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving the defendant to set up in his answer what his defense is.

* * * * * * * *

"The cases hold that to give the Circuit Court jurisdiction the Federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up or which they rely upon. *Third Street Railway Company* v. *Lewis*, 173 U. S. 457."

Tested by this rule, we are of opinion that, as a bill to quiet title, the jurisdiction of the Circuit Court cannot be sustained by reason of the allegations that defendant's adverse claims are based on an erroneous construction of the treaty of Guadalupe Hidalgo, the act of March 3, 1851, and the acts of the legislature of California, and ordinances and charters of the city of Los Angeles, enumerated, as clearly shown hereafter.

But complainants, appellants here, deny that the present case was brought under section 738, and say that the bill was one to remove clouds from complainants' titles, that is to say, clouds created by claims and threats, and by the several acts of California, including defendant's charters, which complainants ask to be declared invalid.

We do not understand, however, that a bill will lie to dispel mere verbal assertions of ownership as clouds on title, or, in-

voking equity interposition on the ground of the removal of clouds, that decrees may be sought adjudging statutes unconstitutional and void. If it were true that the statutes and charters referred to in the bill were unconstitutional as alleged, they were void on their face, and could not constitute a cloud on complainants' titles.

The test as to when a cloud is or is not cast, as stated by Mr. Justice Field, then Chief Justice of California, in *Pixley* v. *Huggins*, 15 California, 127, and reasserted in *Hannewinkle* v. *Georgetown*, 15 Wall. 547, is undoubtedly applicable, and demonstrates that the assertion of unconstitutionality cannot be resorted to to maintain Federal jurisdiction as constituting a cloud. The averment of unconstitutionality in such circumstances is a mere pretext to obtain that jurisdiction.

According to the bill, complainants' titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the Board of Land Commissioners. The State of California was not in the line of such titles, so that the acts of the legislature and the charters of the city complained of manifestly did not have the effect of depriving complainants of their property or of impairing the obligation of any contract, but simply conferred on the city such rights in respect of the waters of the river as may have been vested in the State.

Hooker v. *Los Angeles*, 188 U. S. 314, was a suit brought by the city to condemn a tract of land riparian to the Los Angeles river, and embraced in one of the ranchos described in the present bill. It originated in the Superior Court of the County of Los Angeles under the title of *City of Los Angeles* v. *Pomeroy*, was carried to the Supreme Court of the State, and there affirmed. 124 California, 597, 637, 638. It involved the question of the respective rights of the city and of the defendants to the water of the Los Angeles river. The state Supreme Court said:

"No act of the legislature . . . can diminish or change

the rights of the defendants in these lands derived from their predecessors, the Mexican and Spanish grantees. . . .

"The defendants hold their lands as successors to several Spanish and Mexican grantees, under patents from the United States based upon the original grants. They claim that, even conceding the rights of the pueblo and the city's succession to those rights (a concession which they make only for the purposes of the argument on this point), they are still, by virtue of their ownership of the lands in question, entitled to the exercise of full riparian rights, except so far, and so far only, as those rights are impaired by the paramount rights of the pueblo as they existed before the change of flag and without any legislative addition thereto.

"This claim, we think, is clearly just. The legislature of California could grant nothing to the city of Los Angeles which belonged to others, and the rights of the city, as successor to the pueblo, in the lands of riparian proprietors holding under Mexican and Spanish grants, cannot exceed the rights of the pueblo itself."

The case was brought here on writ of error, and we said:

"And so as to certain statutes of the State of California, which declared that the city of Los Angeles is vested with the paramount right to the surface and subterranean water of the Los Angeles river. Those statutes were admitted in evidence merely to show that the city was the successor of the ancient pueblo. The court held that the right of the city of Los Angeles to take from the Los Angeles river all of the waters of the river to the extent of its reasonable domestic and municipal needs was based on the Spanish and Mexican law, and not on the charters of the city of Los Angeles. The validity of the statutes, on account of repugnancy to the Federal Constitution, was not drawn in question in the trial court nor in the Supreme Court of the State, and both courts held that they neither granted to the city nor took away from plaintiffs in error any rights or property."

This being so, the averments of deprivation or impairment afforded no proper basis for jurisdiction, and as to section 1979 of the Revised Statutes, that was inapplicable. *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68.

In truth, the questions as to the nature and extent of complainants' titles or rights, as put forward in the bill, are not Federal questions, but questions of state or general law.

In *Hooker* v. *Los Angeles*, *supra*, it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States, and so reviewable here. But this court held otherwise, and we said:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco* v. *Scott*, 111 U. S. 768; *Powder Works* v. *Davis*, 151 U. S. 389. And the question of the existence of percolating water was merely a question of fact.

"The patents were in the nature of a quitclaim, and under the act of March 3, 1851, were 'conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.' The validity of that act was not drawn in question in the state court, and as the right or title asserted by plaintiffs in error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error to the waters of the river was not against any title or right claimed under the Constitution or any treaty, or statute of, or commission held, or authority exercised, under the Constitution. If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not in-

volve the construction of the treaty, but the validity of the title of Mexican and Spanish grants prior to the treaty."

Crystal Springs Land & Water Company v. *Los Angeles*, 177 U. S. 169, was a bill brought in the Circuit Court for the Southern District of California, and that court ruled, 82 Fed. Rep. 114, that where both parties claimed under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy was only as to what were the rights thus granted and confirmed, the suit was not one arising under a treaty so as to confer jurisdiction on a Federal court, and that where the only ground of Federal jurisdiction was the allegation that defendant's claim of title was based in part on certain acts of the legislature of the State, which attempted to transfer to it, as alleged, the title held by complainants' grantors at the time of their passage, the court would not retain jurisdiction when an answer was filed by defendant denying the allegations, and disclaiming any title or claim of title not held by it before the passage of the acts. The bill was dismissed, and we affirmed the judgment.

We there cited, among other cases, *Phillips* v. *Mound City Association*, 124 U. S. 605, and *Robinson* v. *Anderson*, 121 U. S. 522. In the one case it was adjudged, as stated in the syllabus, that "an adjudication by the highest court of a State that certain proceedings before a Mexican tribunal prior to the treaty of Guadalupe Hidalgo were insufficient to effect a partition of a tract of land before that time granted by the Mexican Government to three persons who were partners, which grant was confirmed by commissioners appointed under the provisions of the act of March 3, 1851, 9 Stat. 631, 'to ascertain and settle the private land claims in the State of California,' presents no Federal question which is subject to review here."

In the other, that under the act of 1875, even if the complaint, standing by itself, made out a case of jurisdiction, it was taken away as soon as, when the answer came in, it appeared that defendants either disclaimed all interest in the

land in question, or claimed title under and not adverse to that of plaintiff. See also *Boston &c. Mining Company* v. *Montana Ore Company*, 188 U. S. 632, 643. There are the same disclaimers here as in the *Crystal Springs* case, but from what we have heretofore said it will be seen that we are of opinion, in any aspect, that the bill was properly dismissed, and that the decree to that effect must be

Affirmed.

ORTEGA *v.* LARA.

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

No. 230. Argued April 17, 18, 1906.—Decided May 21, 1906.

Where jurisdiction of a writ of error to review a judgment of the District Court of the United States for Porto Rico depends on amount, the judgment itself is the test and it is insufficient if for $5,000 and costs although it carries interest.

Whenever political and legislative power over territory are transferred from another nation to the United States, the laws of the country transferred, unless inconsistent with provisions of the Constitution and laws of the United States applicable thereto, continue in force until abrogated or changed by or under the authority of the United States—and this general rule of law was applied to Porto Rico by the Foraker Act of April 12, 1900, and that act also provided how such laws should be altered or repealed by the legislature of Porto Rico.

Article 44 of the Code of Porto Rico limiting recovery in cases of breach of promise to the expenses of injured party incurred by reason of the promised marriage was a law of Porto Rico and not of the United States and was subject to repeal by the legislature of Porto Rico, and, having been so repealed prior to the breach alleged in this case, a writ of error from this court cannot be maintained on the ground that the ruling of the District Court that the recovery was not limited to such expenses was a denial of a right claimed under a law of the United States.

The District Court of the United States for Porto Rico has jurisdiction when the parties on both sides are subjects of the King of Spain.

THE facts are stated in the opinion.

Mr. George H. Lamar, with whom *Mr. N. B. K. Pettingill* was on the brief, for plaintiff in error:

While the amount involved is not sufficient to give the court jurisdiction, there is a *bona fide* question based on the Federal law involved. Sec. 44 of the Civil Code was adopted by the Foraker Act and became in effect an act of Congress. *United States* v. *Simms,* 1 Cr. 252; *Kendall* v. *United States,* 12 Peters, 524; *McCracken* v. *Hayward,* 2 How. 608; *Glboe Refining Co.* v. *Landa Cotton Oil Co.,* 190 U. S. 540. Sec. 44 of the Civil Code was applicable to the rights of the parties under the contract sued on. The subsequent legislation could not affect the defendant's defenses. *Coghlan* v. *South Carolina,* 142 U. S. 101; *McCullough* v. *Virginia,* 172 U. S. 102; *Bronson* v. *Kinzie,* 1 How. 311; *Pritchard* v. *Norton,* 106 U. S. 124; *United States* v. *Price,* 9 How. 83; *New Orleans &c. Co.* v. *Louisiana,* 157 U. S. 219.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* and *Mr. T. D. Mott, Jr.,* were on the brief, for defendant in error:

This court is without jurisdiction to review the judgment. The matter in dispute, exclusive of costs, does not exceed $5,000. During the trial neither the Constitution of the United States nor a treaty thereof nor an act of Congress was brought in question and the right claimed thereunder denied.

Apart from so-called Federal questions in an action for money, the amount of the judgment against the defendant is the measure of the jurisdiction of this court, and it cannot be maintained unless the judgment exceeds $5,000. *Mayor* v. *Evans,* 97 U. S. 1. Neither interest nor costs can enter into the computation. *West. Un. Tel. Co.* v. *Rogers,* 93 U. S. 565.

Section 44 was repealed by the adoption of the new Code of Porto Rico before the breach of the alleged contract. The parties to a contract have no vested right in the existing general laws of the State which can preclude their amendment or repeal. While it is true that there may be laws which, when accepted by an individual, constitute in themselves binding

contracts which probably could not be altered by subsequent legislation, it is settled in the United States that the laws governing the institution of marriage and the dissolution of the condition are not of this class. *Maynard* v. *Hill*, 125 U. S. 190.

Changes in the laws of evidence, of perjuries and registrations, and those which concern remedies, frauds and limitations of actions, while they may affect the validity, construction or discharge of contracts, are not regarded as necessarily affecting their obligation. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 200; Cooley's Constitutional Limitations, 7th ed., 406 *et seq.*

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

Angela Lara brought her action against Antonio Ortega in the District Court of the United States for the District of Porto Rico to recover damages alleged to have been suffered by her by reason of his breach of promise of marriage. The date of the promise was laid as June 1, 1900, and of the breach in 1904. Both parties were subjects of Spain and residents of Porto Rico.

Defendant demurred to the complaint, and the demurrer having been overruled, pleaded the general issue. The cause was tried by a jury and resulted in a verdict for plaintiff in the sum of $5,000, interest and costs, on which judgment was entered. Defendant moved in arrest and for judgment *non obstante veredicto*, which motions were overruled, and this writ of error was thereupon allowed.

At the conclusion of the evidence defendant requested the court to instruct the jury to find in his favor, on the grounds, among others, that the court had no jurisdiction of a suit where both plaintiff and defendant were subjects of the King of Spain, and because the cause of action arose in June, 1900, "at which time there was no provision in the laws in force in Porto Rico for a suit of the character set out in plaintiff's declaration, the only basis for the said suit being the provisions of article 44 of the Civil Code then in force." Similar reasons were assigned in support of the motions in arrest and *non obstante*.

1. The judgment was for $5,000 and costs. It carried interest, but it is the amount of the judgment that furnishes the test of our jurisdiction, and it is conceded that that is insufficient in this instance. But plaintiff in error contends that the refusal of the court below to limit the right of recovery by the terms of article 44 of the former Civil Code of Porto Rico amounted to the denial of a right claimed under a statute of the United States, and that jurisdiction may be maintained on that ground. Act March 3, 1885, 23 Stat. 443, c. 355, §§ 1 and 2; act April 12, 1900, 31 Stat. 77, c. 191, § 35.

The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations March 3, 1899; and the ratifications were exchanged and the treaty proclaimed April 11, 1899. Then followed the act of April 12, 1900, 31 Stat. 77, c. 191. At that date article 44 of the Civil Code of Porto Rico, relating to breaches of promise of marriage, was in force, and provided that under certain conditions "the person who refuses to marry, without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage."

By the general rule of public law, recognized by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States so far as applicable would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.

Nevertheless, and apparently largely out of abundant caution, the eighth section of the act of April 12, 1900, provided: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military or-

ders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States; . . ."

In 1902 the legislature of Porto Rico enacted a new Civil Code, which went into effect July 1 of that year, and this repealed article 44 of the prior Civil Code, and carried forward several articles bearing upon the same subject.

It will be remembered that the alleged promise was in 1900 and the alleged breach in 1904. And now the argument is, that by reason of § 8 of the act of April 12, 1900, commonly called the "Foraker Act," article 44 became a law of the United States by adoption, and that, therefore, the ruling of the court below that recovery was not limited to expenses was equivalent to the denial of a right claimed under a law of the United States.

We do not agree with this view. Article 44 was a law of Porto Rico on April 12, 1900, and the operation of the Foraker Act was to define how it might be amended or repealed.

It was repealed by the Porto Rican legislature before the alleged breach of promise. If the District Court erred in declining on any ground to apply it as a limitation, the error cannot be corrected on this appeal, because the appeal does not lie.

The alleged Federal question had no existence in substance. The laws of Porto Rico remained the laws of Porto Rico except as indicated in section 8 of the Foraker Act, which section did not make all the laws of Porto Rico acts of Congress.

We cannot perceive that "the Constitution of the United States, or a treaty thereof, or an act of Congress" was brought in question or a right claimed thereunder denied, within section 35 of the Foraker Act, or that "the validity of a treaty or statute of or an authority exercised under the United States" was drawn in question within § 2 of the act of March 3, 1885.

2. By section 3 of the act of March 2, 1901, 31 Stat. 953, c. 812, it was provided "that the jurisdiction of the District

Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States."

The jurisdiction of the District Court, when the parties on both sides were the subjects of the King of Spain, has several times been sustained by this court, and we do not feel required in this case to make any other ruling.

Writ of error dismissed.

BURTON *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 539. Argued April 3, 4, 1906.—Decided May 21, 1906.

Congress has power to make it an offense against the United States for a Senator or Representative, after his election and during his continuance in office, to agree to receive, or to receive, compensation for services before a Department of the Government, in relation to matters in which the United States is directly or indirectly interested, and § 1782, Rev. Stat., is not repugnant to the Constitution as interfering, nor does it by its necessary operation, interfere with the legitimate authority of the House of Congress over their respective members.

Including in the sentence of a Senator convicted of an offense under § 1782, Rev. Stat., that he is rendered forever thereafter incapable of holding any office of trust or emolument of office under the Government of the United States is simply a recital of the effect of the conviction, and the conviction does not operate *ipso facto* to vacate his seat or compel the Senate to expel him or to regard him as expelled.

While the Senate, as a branch of the Legislative Department, owes its existence to the Constitution and passes laws that concern the entire country, its members are chosen by state legislatures and cannot properly be said to hold their places under the Government of the United States.

The United States is interested, either directly or indirectly within the meaning of § 1782, Rev. Stat., in protecting its mails and postal facilities from improper and illegal use and in enforcing statutes regulating such use.

Where the indictment clearly discloses all the elements essential to the commission of the offense charged, and the averments are sufficient in

the event of acquittal, to plead the judgment in lieu of a second prosecution for the same offense, the defendant is informed of the nature and cause of the accusation against him within the meaning of the Constitution and according to the rules of pleading;—and in this case the evidence was sufficient to justify the case being sent to the jury and the court below did not err in refusing to direct an acquittal, nor was there any error in the court's charge to the jury.

Under § 1782, Rev. Stat., an agreement to receive compensation, whether received or not for the prohibited services, is made one offense, and the receiving of compensation, whether in pursuance of a previous agreement or not, is made a separate and distinct offense.

The intention of the legislature must govern in the interpretation of a statute. It is the legislature and not the court which is to define a crime and ordain its punishment.

A plea of *autrefois acquit* must be upon a prosecution for the same identical offense, and where defendant on a former trial was acquitted of having received compensation forbidden by § 1782, Rev. Stat., from an individual described as an officer of a certain corporation, and at the same time was found guilty of having received such compensation from the company, he cannot plead the former acquittal as a bar to a further prosecution of the charge that he had received such compensation from the company.

The Federal court at the place where the agreement was made for compensation to perform services forbidden by § 1782, Rev. Stat., has jurisdiction to try the offense, and even if the agreement was negotiated or tentatively accepted at another place, the place of its final acceptance and ratification is where the agreement was made although defendant may not have been at that place at that time.

THE facts are stated in the opinion.

Mr. John F. Dillon, Mr. Bailey P. Waggener and *Mr. F. W. Lehmann*, with whom *Mr. Harry Hubbard, Mr. W. H. Rossington, Mr. W. Knox Haynes* and *Mr. W. P. Hackney* were on the briefs, for plaintiff in error:

The United States was not a party to nor interested in the proceedings set forth in the indictment. *Inhabitants* v. *Smith*, 11 Metc. (Mass.) 390; *McGrath* v. *The People*, 100 Illinois, 464; *Evans* v. *Eaton*, 7 Wheat. 356; *State* v. *Sutton*, 74 Vermont, 12; *Foreman* v. *Marianna*, 43 Arkansas, 324; *Taylor* v. *Commissioners*, 88 Illinois, 526; *Railroad Company* v. *Kellog*, 54 Nebraska, 138; *Sauls* v. *Freeman*, 24 Florida, 209; *Bowman's* 76; *Case*, 67 Missouri, 146; *United States* v. *Wiltberger*, 5 Wheat.

United States v. *Sheldon*, 2 Wheat. 119; *United States* v. *Morris*, 14 Pet. 464; *United States* v. *Clayton*, 2 Dill. 218.

The indictment states no facts showing the pendency of any proceeding in the Postal Department. *United States* v. *Hess*, 124 U. S. 483; *Post* v. *United States*, 161 U. S. 583; *Virginia* v. *Paul*, 148 U. S. 107; *American School &c.* v. *McAnulty*, 102 Fed. Rep. 565; *Dauphin* v. *Key*, 11 D. C. App. 203; *Enterprise Savings Assn.* v. *Zumstein*, 64 Fed. Rep. 837; aff'd *S. C.*, 67 Fed. Rep. 1000; *Bates & Guild* v. *Payne*, 194 U. S. 106; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *United States* v. *Ju Toy*, 198 U. S. 253; *United States* v. *Eaton*, 144 U. S. 677; *Caha* v. *United States*, 152 U. S. 211.

There was a former indictment and trial for and acquittal of the offense. Placing the defendant on trial again for the offense alleged was in violation of the Sixth Amendment. *Baldwin* v. *Bank*, 1 Wall. 234; *Mechanics' Bank* v. *Bank*, 5 Wheat. 236; *Ford* v. *Williams*, 21 How. 289; *Navigation Co.* v. *Merchants' Bank*, 6 How. 381; *Commercial Bank* v. *French*, 21 Pick. 486; *Dugan* v. *United States*, 3 Wheat. 172. Cases in 2 Daniel on Negotiable Instr., 1st ed., §§ 1187–1189. *State* v. *Cooper*, 13 N. J. Law, 361; *Hurst* v. *State*, 86 Alabama, 604; Cooley, Const. Lim., 7th ed., 470; *People* v. *McGowan*, 17 Wend. 386; *Monroe* v. *State*, 111 Alabama, 15; *United States* v. *Lee*, 4 Cranch C. C. 446; *Ball* v. *United States*, 163 U. S. 662; *United States* v. *Nickerson*, 17 How. 204; *Mitchell* v. *State*, 42 Ohio St. 384; *Campbell* v. *State*, 9 Yerger, 333; *State* v. *Martin*, 30 Wisconsin, 216; *Stuart* v. *Comm.*, 28 Gratt. 950; *Gunther* v. *People*, 24 N. Y. 100; *Morris* v. *State*, 8 S. & M. 762; *State* v. *Kattleman*, 35 Missouri, 105; *State* v. *Kibble*, 2 Tyler, 471; *Dealy* v. *United States*, 152 U. S. 539.

There was no evidence to go to the jury that Burton made any agreement to receive compensation for services to prevent the issuance of a fraud order. Whatever agreement was made to receive compensation from the Rialto Grain and Securities Company for services, such agreement was not made in the State of Missouri, and the defendant was deprived of his con-

stitutional right to be tried in the State and District where the agreement was made, contrary to § 2, art. III, of the Constitution and of the Sixth Amendment thereof. *Tayloe* v. *Merchants' Ins. Co.*, 9 How. 390; *Patrick* v. *Bowman*, 149 U. S. 411; 12 Ency. Law and Prac. 239, 240; *Burr's Case*, Marshall's Const. Dec. 82, 165; *Palliser* v. *United States*, 136 U. S. 256; *Horner* v. *United States*, 143 U. S. 212; *Sands* v. *State*, 26 Tex. App. 580; *United States* v. *Fowkes*, 53 Fed. Rep. 13; *United States* v. *Dietrich*, 126 Fed. Rep. 664; *Eliason* v. *Henshaw*, 4 Wheat. 225; *National Bank* v. *Hall*, 101 U. S. 43; *Railway Co.* v. *Rolling Mills*, 119 U. S. 151; Chitty on Contracts, 11 Am. ed., p. 15, note *f*; *Christian Co.* v. *Bienville Co.*, 106 Alabama, 124; *Tennessee Co.* v. *Pierce*, 81 Fed. Rep. 814; *Seitz* v. *Brewers' &c. Co.*, 141 U. S. 510.

The agreement of the defendant with the Rialto Company was for service by the month, and no service in the Department having been rendered during the period covered by the payment made March 26, there was no offense in the receipt of that payment. *Davis* v. *Preston*, 6 Alabama, 83; *Matthews* v. *Jenkins*, 80 Virginia, 463; *La Coursier* v. *Russell*, 82 Wisconsin, 265; *Benedict* v. *United States*, 176 U. S. 357; *In re Hans Nielsen*, 131 U. S. 188.

The defendant was not subject to trial and punishment as for separate offenses in agreeing to receive and receiving compensation for the services charged in the indictment to have been rendered by him. 2 Bishop's New Criminal Procedure, § 55; 1 Bishop's New Criminal Procedure, § 436; *State* v. *Jones*, 106 Missouri, 802.

The juror William V. Jones was disqualified because he had formed and still retained an opinion as to the guilt or innocence of the defendant, an opinion which was the result of reading the reports of the former trial, which reports he believed to be true, and the challenge to him should have been sustained. *Lewis* v. *United States*, 146 U. S. 370; *Williams* v. *United States*, 93 Fed. Rep. 396.

The letters of Houts, Evans, Allen, Warner and Fravel,

and the accompanying circulars and booklets, all of which were read in full, to the jury, were incompetent and irrelevant as against the defendant, as he had no knowledge of them whatever, and their contents were not necessary to show the fact that some matter was pending in the Department against the Rialto Grain and Securities Company. *Tappan* v. *Beardsley*, 10 Wall. 427.

The endorsements on the jacket subsequent to March 26, 1903, the report of Inspectors Price and Piatt of August 20, 1903, and the letter of Assistant Attorney General Robb of September 9, 1903, were competent and material evidence for defendant to disprove the charges of the indictment that he had agreed to induce and had in fact induced the Postmaster General to issue no fraud order against the company and to stop investigation of it, and also to show that the investigation being made by the Department was with reference to the indictment and prosecution of the officers of the Rialto Company.

The evidence of Francis C. Hubner should have been stricken out, as it established nothing and permitted the jury to conjecture that there had been an interview between the defendant and the Assistant Attorney General for the Post Office Department relative to the affairs of the Rialto Company.

The instruction of the court as to what would constitute service by the defendant in the Department is not responsive to the charge of the indictment, and authorizes a conviction on account of matters not alleged in the indictment, and said charge is erroneous in other respects. The court also erred in refusing to give instructions asked by defendant. *Flachskamm* v. *United States*, 127 Fed. Rep. 674.

The court at St. Louis had no jurisdiction to try counts three and seven, nor is such jurisdiction conferred by § 731, Rev. Stat. The District of Columbia is not a "judicial circuit" or "judicial district" within the meaning of § 731.

The act of 1864, Rev. Stat. § 1782, under which the indictment was found, is unconstitutional. It is in conflict with the fundamental idea on which our whole Federal Govern-

ment is founded, viz: that the Federal Government is a government of limited powers, with duties defined and restrictions imposed, and no authority is lodged anywhere to change those duties or restrictions, except the power reserved by the people.

The framers of our Government, in order to prevent the concentration of power into the hands of one man or one body of men, created three departments,—not necessarily to work in harmony together, but each to act wholly independent of the other. It was the intention, as shown by the debates in the constitutional convention and the Constitution itself, to establish an impassable gulf separating these three great departments of the Federal Government. One department shall not encroach upon or in any way coerce the other. To that end there should be no blending of governmental functions, except where it was absolutely necessary, and then the Constitution clearly and zealously guarded the independence of each department, thus emphasizing the basic principle that the great powers of government were so eternally separated each from the other that there could be no conflict between them. The legislature should make, the judiciary interpret, and the executive should administer, the laws.

The President, the members of Congress, and the judges of the Supreme Court are the only officers of the Federal Constitution. All other officers of those several departments are creatures of the legislature, or what this court has styled congressional officers, as distinguished from constitutional officers. The office of the legislative official may be enlarged, modified or abolished by Congress. This is not true of a constitutional office. It is permanent, fixed, and above and beyond the control of Congress. It is also above and beyond the power of the Executive or Judicial Departments. It gets its life from and can only be changed by the Constitution.

Every citizen, be he official or in private station, is alike amenable to the law, but the constitutional official, acting as an official, cannot be called to an account, or punished for any official act, except in the mode as defined and prescribed

in the Constitution creating him. The recognition of this principle is absolutely necessary to protect him in his independence as an official, and to protect the great constitutional bodies in their independence.

The Constitution defines how the President, a member of this court, and a member of Congress can be punished for any official misconduct, and by such constitutional provisions limits the manner of punishment; and Congress has no power to add to or take from the express provisions so made for that purpose. The denial of this proposition would place it in the power of Congress to destroy the independence of each Department, and nullify the Constitution, and that is just the effect of the law under which this prosecution is brought.

A member of Congress may be punished in such manner as each House may determine as to its "own members," and the right to expel extends to all cases where the offense is such as, in the judgment of "each House," is inconsistent with the trust and duty of "its own members."

It would be an anomaly in a constitutional government, with three coördinate branches of such government, as created by the Federal Constitution, if the legislative branch, under whatever pretext, could enact a law making any act of the President, or any act of a Justice of the Supreme Court, a misdemeanor, and delegate the jurisdiction and power to an inferior judicial tribunal to try the President, or a Justice of this court, for a violation of such law, and subject him to fine, imprisonment and removal from office as the result of a verdict of a jury. The mere statement of the proposition would seem to be sufficient to condemn it as absurd, and the shield of the Constitution is no greater protection for the President, —for the Justice of the Supreme Court,—than for the Senator,—each and all of whom are created by the Constitution.

The Government of the United States is one of *enumerated* powers,—The national constitution being the instrument which specifies them,—and in which authority should be found

for the exercise of any power which the National Government assumes to possess. Cooley, Const. Lim., 7th ed., 11; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 343; *Ableman* v. *Booth*, 21 How. 519.

By the Constitution, there has been delegated express power to each House to punish its own members, in such manner as, in its wisdom, is just and proper, and, by "the concurrence of two-thirds, may expel a member." When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. Cooley, Const. Lim., 7th ed., 99; *Lowe* v. *Commonwealth*, 3 Met. (Ky.) 241; *Falloon* v. *Clark*, 61 Kansas, 127; *Brown* v. *Grover*, 6 Bush. (Ky.) 3; *Thomas* v. *Owens*, 4 Maryland, 190; *Commonwealth*, v. *Williams*, 79 Kentucky, 42; *Sheehan* v. *Scott*, 145 California, 684. See also *Morris* v. *Powell*, 125 Indiana, 287; *McAfferty* v. *Guyer*, 58 Pa. St. 109.

The act of 1864 superadds disqualifications to those expressly contained in the Constitution, and prescribes a mode of procedure and a punishment not expressly authorized by the Constitution, or conferred by necessary implication. Indeed, the express power conferred is an implied prohibition against the exercise by Congress of that most extraordinary legislation,—the basis of this prosecution.

No legislation is appropriate which should conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions. *Ex parte Virginia*, 100 U. S. 361.

When Senator Burton was chosen Senator of the United States, he was chosen for six years. He had all of the qualifications prescribed by the Federal Constitution. He was only required to consult the organic laws as to his duties and obligations as a Senator. He had the constitutional right to hold the office for six years, subject only to the delegated, enumerated and express power of the Senate to expel him, and subject to

the disqualifications provided in section 6, article II, of the Constitution.

The act of 1864 applies only to the conduct or action of the Senator, as contradistinguished from the conduct or action of the citizen. It is a limitation and restriction upon the conduct and action of the Senator during his term of office, nowhere in the Constitution, expressly or by necessary implication, conferred upon Congress to create. The Senate, by and through the power delegated to it by the Constitution, might properly expel for doing of the things charged in the indictment, as a violation of senatorial dignity, but Congress had no power, by enactment, to make such acts and conduct of the Senator a crime, and delegate to the Judiciary the power to take from the Senator the rights and privileges guaranteed by the Constitution. The judgment of conviction not only imprisons him, but disqualifies him from holding the office for which he was chosen by the State of Kansas, for "six years." *United States* v. *Harris*, 106 U. S. 636; 1 Story on Const. § 833; 1 Kent's Com. 235; *People* v. *Hall*, 80 N. Y. 121.

The act of 1864, and section 5, article I, of the Constitution, are wholly incompatible, and in irreconcilable conflict. It cannot be that the framers of the Constitution intended, by express grant, to confer upon each House the power to be the sole judge of the qualification of its own members, and, by implication, to confer the power upon both House and Senate, by concurrent action, by statute, to disable and disqualify each House from exercising the powers thus expressly conferred.

In all of the debates in the constitutional convention, such a contingency was not considered. Evidently, by the express grant conferred by the Constitution, the intention was to lodge the power in each House, to the exclusion of the other.

The identical question was decided by Mr. Justice Brewer, when on the supreme bench of Kansas, in the case of *State* v. *Gilmore*, 20 Kansas, 554, in which was under consideration

a section of the constitution of the State of Kansas, exactly similar to the first clause of section 5, article I, Constitution of the United States. See also *State* v. *Tomlinson*, 20 Kansas, 703; *Robertson* v. *State*, 109 Indiana, 92; *State* v. *Baxter*, 28 Arkansas, 129.

It is well settled that section 5, article I, providing that "Each House shall be the judge of the elections, returns and qualifications of its own members," confers upon "each House" powers of a judicial nature,—in the exercise of which its decision is conclusive, and not subject to review by the courts. *People* v. *Mahoney*, 13 Michigan, 482; *Dalton* v. *State*, 43 Ohio St. 680. Wherever the Constitution has prescribed the qualifications of electors, they cannot be changed or added to by the Legislature, or otherwise than by an amendment of the Constitution. Cooley, Const. Law, 5th ed., 753; *Allison* v. *Blake*, 57 N. J. L. 8, 11; *Kimball* v. *Hendee*, 57 N. J. L. 207.

The act of 1864 uses the words "under the Government of the United States." The Senate is a part of the Government of the United States. Section 1, article I, of the Constitution; section 3, article I.

The office of Senator is one of "profit," under the Government of the United States. Section 6, article I, Constitution.

A State cannot superadd qualifications of a Senator to those prescribed by the Constitution of the United States. *In re Trumbull*, Taft Elec. Cases, 148.

If the Senator is a state officer, and the act of 1864 is constitutional, then Congress would have the power to make the same applicable to the Governor of each sovereign State and this cannot be done. *Kentucky* v. *Dennison*, 24 How. 107.

If, therefore, a Senator is not an officer of the United States in the sense of the Constitution, clearly he may not be coerced, or punished for his refusal to obey the requirements of an act of Congress relative to the discharge of his duties as United States Senator. *United States* v. *Germain*, 99 U. S. 510;

United States v. *Mouat*, 124 U. S. 307; *United States* v. *Smith*, 124 U. S. 532; *In re Greene*, 134 U. S. 377; *McPherson* v. *Blacker*, 146 U. S. 35, 36.

The power of "each House" to judge of the qualifications of its own members, and to establish rules for its proceedings,—to punish members, and, "with the concurrence of two-thirds," expel a member, is not strictly speaking a legislative, but a judicial function, and, unless the act of 1864 can be said to be "necessary and proper for carrying into execution" these functions, it is manifestly unconstitutional. Mr. Madison, The Federalist, vol. 1, p. 273, No. 48; *Marbury* v. *Madison*, 1 Cranch, 391; 1 Tucker on Constitution, 368.

The nature of the implied power exercised as a means must be legitimate; in other words, no power will be implied as a means to an end which is not legitimate; that is, not within the powers granted by the Constitution. The ancillary legislation must be a necessary and proper means to accomplish an end which is clearly constitutional. See *Anderson* v. *Duan*, 6 Wheat. 233.

The express power conferred excludes the idea of any implied power not necessary and proper for carrying into execution the express power.

There is still another view of the act of 1864 which would seem to be an unanswerable reason to sustain the contention that it is unconstitutional. It did not require the concurrence of two-thirds of either or both Houses to pass it. It might become a law with the consent of a bare majority of each House. While the act does not in terms provide for forfeiture of office, or expulsion, it requires a judgment, upon conviction, that the person convicted shall be "rendered forever thereafter incapable of holding any office of honor, profit or trust under the government of the United States." The effect of the judgment, if the act is valid, is to expel the Senator from the Senate. *Lowe* v. *Commonwealth*, 3 Metc. (Ky.) 241; 1 Tucker on Constitution, 429.

By the act of 1864 Congress accomplishes a result which

the Senate may only do "with the concurrence of two-thirds;" and by an act which is not consistent with the letter and spirit of the Constitution. See also Von Holst, Constitutional Law, 102.

The act of 1864 defines a political offense. It is not an attempt to control the conduct of the citizen, but that of the Senator. See Story on Constitution, § 797.

Mr. Charles H. Robb, Assistant Attorney General, for the United States:

The plea in bar was not well taken. Count three of the former indictment charged receipt from Mahaney, whereas counts three and seven of the present indictment charged receipt from the corporation. But the effect of granting a new trial at the defendant's instance was to nullify entirely the proceedings at the former trial, including the verdict of acquittal on the third count. *Trono* v. *United States,* 199 U. S. 521.

No error was committed in limiting the number of peremptory challenges to three ; under § 819, Rev. Stat. Congress, having power to do so, denominated the offenses defined by § 1782, R. S., misdemeanors. *Bannon* v. *United States,* 156 U. S. 454; *Reagan* v. *United States,* 157 U. S. 301; *Considine* v. *United States,* 112 Fed. Rep. 342; *S. C.,* 184 U. S. 699; *Jewett* v. *United States,* 100 Fed. Rep. 832; *Tyler* v. *United States,* 106 Fed. Rep. 137, 138; *United States* v. *Coffersmith,* 4 Fed. Rep. 198; *United States* v. *Daubner,* 17 Fed. Rep.794.

It not appearing that defendant exhausted his three challenges, he cannot therefore complain. *Insurance Company* v. *Hillman,* 188 U. S. 208, 211; *State* v. *Fournier,* 68 Vermont, 262, 266; *Allen* v. *Waddill,* 26 S. W. Rep. 273; *United States* v. *Marchand,* 12 Wheat. 480; *Hayes* v. *Missouri,* 120 U. S. 68, 71.

There was sufficient evidence to go to the jury, the present record containing additional evidence to that presented on the former trial. The court is not concerned with its conclusiveness.

The unlawful agreement was made at St. Louis, where Bur-

ton's offer was accepted. *Taylor* v. *Ins. Co.*, 9 How. 390; *Patrick* v. *Bowman*, 149 U. S. 424; *Garretson* v. *North Atchison Bank*, 47 Fed. Rep. 867; *Phenix Ins. Co.* v. *Schultz*, 80 Fed. Rep. 343; Hammond on Contracts, § 42, n. 22.

No error was committed in the admission or exclusion of evidence.

The charge of the court set the entire case, as presented by the evidence, fairly and substantially before the jury. This was sufficient. *Railway Co.* v. *Whitton*, 13 Wall. 270, 290; *Tweed's Case*, 16 Wall. 516.

The agreement to receive, and the receipt of compensation constituted two offenses. *Clure* v. *United States*, 159 U. S. 590, 595; *United States* v. *Rendskopf*, 6 Biss. 259; Fed. Cas. 16, 165.

Section 1782, Rev. Stat., does not interfere with the constitutional rights of the Senate or of the individual Senator. It prescribes no new qualifications for a Senator, nor does it interfere with the constitutional control of the Senate over him. It merely makes it unlawful for a Senator to do that which he has no moral nor constitutional right to do.

Senators have no constitutional right to appear for hire and against the interests of the Government before any Executive Department or bureau in any matter in which the United States is interested. In fact, that is plainly inconsistent with their Senatorial duties and obligations. With the performance of their constitutional duties as Senators no act of Congress could properly interfere. But when they forsake those duties and engage in matters plainly in conflict with their official obligations they must be amenable to law like other servants of the Government.

The Constitution itself recognizes this amenability of Senators and Representatives. They are privileged from arrest during their attendance at the session of their respective Houses in all cases "except treason, felony, and breach of the peace." Art. I, sec. 6. These words, Mr. Justice Story said, are the same as those in which the privilege of members of the

English Parliament was expressed, and, as all crimes are offenses against the peace, the phrase "breach of the peace" should be construed in accordance with the parliamentary rule to extend to all indictable offenses. 1 Story on Const. § 865.

The provision of section 5 article II which authorizes each House to compel the attendance of absent members must be construed in the light of the above provision, which recognizes that members may be arrested for crime and the Senate thereby deprived of their attendance.

Plaintiff in error concedes that a Senator is not above the law—the criminal statutory law—but says that "Congress has no constitutional power, by legislation, to place any limitations or restrictions upon his official conduct as a Senator."

Section 1782 places no restriction upon the "official conduct" of a Senator. Section 1782 applies to individuals. It is aimed at all persons holding positions of trust or confidence in the service of the United States. The fact that it specifically refers to a Senator cannot invalidate it. A general law against bribery or other crime would, counsel admit, include a Senator. Would the enumeration of Senators among those included in such a law invalidate it?

The provision of section 1782 that every person offending against the statute "shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States," is not open to constitutional objection. It does not interfere with the authority of the Senate over its members, because the position of Senator cannot be construed to be an office under the Government of the United States within the meaning of that section. Story on Const. § 793.

The decisions of this court hold that those only are officers of the United States in a constitutional sense and in the sense in which those words are employed in the statutes, who hold their places by virtue of an appointment by the President or a court of law or the head of a Department. *United States* v.

Germaine, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 307; *United States* v. *Smith*, 124 U. S. 532.

There is no distinction between "officers of the United States" and the language of the statute "office under the Government of the United States."

If Congress had intended that the effect of conviction of violating section 1782 should be to unseat a Senator or Representative, it would have said so. Certainly the court will not twist the words used from their usual sense so as to render the statute unconstitutional. Properly read, the statute leaves the status of a convicted Senator as a member of the Senate to the determination of that body. They may or may not expel him, as they see fit. In this respect section 1782 is no different from any other statute. It was surplusage for the court to include this declaration of the statute in its sentence. The disqualification referred to attaches by virtue of the law itself upon conviction.

If the sentence is defective in any respect, opportunity should be given to correct it. *In re Bonner*, 151 U. S. 242.

Mr. Justice Harlan delivered the opinion of the court.

This criminal prosecution is founded upon the following sections of the Revised Statutes:

"Sec. 3929. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such

registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. . . ." By the act of March 2, 1895, c. 191, this section was "extended and made applicable to all letters or other matter sent by mail." 26 Stat. 465; 28 Stat. 963, 964.

"SEC. 4041. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders. . . ." 26 Stat. 465, 466, c. 908.

"SEC. 1782. No Senator, Representative or Delegate, after his election and during his continuance in office, and no head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a mis-

demeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States." 13 Stat. 123, c. 119.

The plaintiff in error was indicted in the Circuit Court of the United States for the Eastern District of Missouri for a violation of section 1782, the offense being alleged to have been committed at St. Louis. The accused was found guilty, and on writ of error the judgment was reversed by this court and a new trial ordered, upon the ground, among others, that according to the facts disclosed in that case the offense charged was not committed in the State of Missouri where the accused was tried. *Burton* v. *United States*, 196 U. S. 283.

Subsequently, the defendant was tried under a new indictment (the present one) charging him with certain violations of section 1782. The indictment contained eight counts. Stating the case now only in a general way, the first, second, fourth, sixth and eighth counts charged, in substance, that the defendant, a Senator of the United States, had *agreed* to receive compensation, namely, the sum of $2,500, for services to be rendered by him for the Rialto Grain and Securities Company, a corporation (to be hereafter called the Rialto Company), in relation to a proceeding, matter and thing, in which the United States was interested, before the Post Office Department, those counts differing only as to the nature of the interest, which the United States had in such proceeding, matter and thing; some of the counts alleging that the United States was directly, others that it was indirectly, interested in such proceeding, matter and thing. The third, fifth and seventh counts charged that the defendant did *receive* compensation to the amount of $500 for the services alleged to have been so rendered by him, those three counts differing only as to the nature of the interest, whether direct or indirect, which the United States had in the alleged proceeding, matter and thing before the Post Office Department.

The defendant demurred to each count. The Government, at that stage of the prosecution, dismissed the indictment as to the fourth and fifth counts and the court overruled the demurrer as to all the other counts. The accused filed a plea in bar to the third and seventh counts. To that plea the Government filed an answer, to which we will advert hereafter. A demurrer to that answer was overruled and, defendant declining to plead further, the plea in bar was denied. He was then arraigned, tried and found guilty on the first, second, third, sixth, seventh and eighth counts. No judgment or sentence was pronounced on the first, second and eighth counts, because they covered the transaction and offense mentioned in the sixth count. And as the third count covered the transaction and offense embraced by the seventh count, no judgment or sentence was pronounced on it.

On the sixth count the defendant was sentenced to be imprisoned for six months in the county jail and to pay a fine of $2,000; on the seventh, to be imprisoned for six months in the county jail and fined $500. It was declared or recited in the judgment on each of those counts that the accused, by his conviction, "is rendered forever hereafter incapable of holding any office of honor, trust or profit under the Government of the United States."

It will be well to bring out fully the allegations of the two counts upon which the sentences were based. They will show the nature of the proceeding, matter or thing before the Post Office Department, in respect of which the defendant was indicted.

The sixth count alleged that on the eighteenth day of November, 1902, the defendant was a Senator of the United States from the State of Kansas, having been theretofore elected for a term of six years expiring on the fourth day of March, 1907, and the Rialto Company was a corporation engaged in the business of buying, selling and dealing in grain and securities, having its principal offices at the city of St. Louis, Missouri; that before and on the above day there was pending before

the Post Office Department of the United States and before the then Postmaster General of the said United States a certain proceeding in which the United States was then indirectly interested, for determining the question whether that corporation was engaged in conducting a scheme for obtaining money through the mails of the said United States, by means of false and fraudulent pretenses, representations, and promises, made by the said corporation, and whether the said Postmaster General should instruct the postmaster at the post office at St. Louis, the same then being a post office at which registered letters were then arriving, directed to the said corporation, to return all such letters to the postmasters at the several post offices at which they were or should thereafter be originally mailed, with the word "fraudulent" plainly written or stamped upon the outside thereof, to be by such postmasters returned to the writers thereof under the regulations of the said Post Office Department, and in the same manner to dispose of all other letters and matter sent by mail to the said post office directed to the said corporation, "all of which the said Postmaster General might then have lawfully done, upon evidence satisfactory to him that the said corporation was engaged in conducting such a scheme to defraud as that in this count mentioned; and, further, that before and on the day in this count first aforesaid the facts pertaining to the questions in this count mentioned were under investigation by the said Post Office Department and the said Postmaster General and on that day were still undetermined by the said Postmaster General. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Ralph Burton, Senator, as in this count of this indictment aforesaid, on the said eighteenth day of November, in the year of our Lord nineteen hundred and two, after his said election as such Senator, and during his continuance in office as such Senator, at St. Louis, aforesaid, in the Division and District aforesaid, then well knowing the proceedings in this count mentioned, in which the United States was then indirectly interested, to be,

as it then still was, pending as last aforesaid, before the said Post Office Department and the said Postmaster General and undetermined by the said Postmaster General, and then well knowing the character of that proceeding, and that the said United States was then indirectly interested in the same proceeding as last aforesaid, and then well knowing all the premises in this count set forth, unlawfully did *agree* with the said Rialto Grain and Securities Company, corporation as aforesaid, by and through its officers, agents and attorneys, to receive directly from that corporation through its officers, agents and attorneys, certain other compensation, to wit, the sum of twenty-five hundred dollars lawful money of the said United States, for certain services to be rendered by him, the said Joseph Ralph Burton, to the said corporation, in relation to the last-mentioned proceeding in which the said United States was then indirectly interested as aforesaid, before the said Post Office Department and before the said Postmaster General, while the same proceeding was and should still be pending before the said Post Office Department and the said Postmaster General and still undetermined by the said Postmaster General, and after his the said Joseph Ralph Burton's said election as such Senator, and during his continuance in office as such Senator—that is to say, services consisting of his the said Joseph Ralph Burton's appearing before the said Post Office Department and before the said Postmaster General, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department, and other officers of said Post Office Department, as an agent of and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion, inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to

put a stop to any further investigation of the questions in this count mentioned by the said Post Office Department and by the said Postmaster General, and to refrain from determining the same adversely to the interests of the said corporation, and from instructing the said postmaster at the said post office at St. Louis aforesaid to return the registered letters, and other letters and matter sent by mail aforesaid to the postmasters at the post offices at which they were or should thereafter be originally mailed as aforesaid, with the word 'Fraudulent' plainly written or stamped upon the outside thereof, as aforesaid, to be by such postmasters returned to the writers thereof as aforesaid, and also from forbidding the payment to the said corporation, by the said postmaster at the post office at St. Louis aforesaid, or postal money orders drawn to its order, or in its favor. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Joseph Ralph Burton, at the time and place, and in manner and form in this count of this indictment aforesaid, unlawfully did offend against section seventeen hundred and eighty-two of the Revised Statutes of the said United States, against the peace and dignity of the said United States."

The seventh count alleged "that on the said twenty-sixth day of March, in the year of our Lord nineteen hundred and three, the said Joseph Ralph Burton, then still being a Senator of the said United States for the said State of Kansas, as in the sixth count of this indictment set forth, and having, after his election as such Senator and during his continuance in office, to wit, on divers days between the said eighteenth day of November, in the year of our Lord nineteen hundred and two, and the said twenty-sixth day of March, in the year of our Lord nineteen hundred and three, rendered the services in the said sixth count described, to the corporation in that count mentioned, before the Postmaster General of the said United States and before the said Post Office Department, and the same having been, as he the said Joseph Ralph Burton, when so rendering the same, well knew, services in relation to the

proceeding described in the said sixth count, in which the said United States was indirectly interested, pending, as he the said Joseph Ralph Burton also well knew, before the said Post Office Department and Postmaster General, unlawfully did, after his said election and during his continuance in office, at St. Louis aforesaid, in the said Eastern Division of the said Eastern District of Missouri, receive directly from the said corporation through its officers, agents and attorneys, certain compensation for the same services, that is to say, five hundred dollars; he the said Joseph Ralph Burton, when so receiving such compensation for the said services, well knowing the same to have been services in relation to a proceeding pending before a Department and before an officer of the Government of the said United States, and well knowing the said proceeding to have been a proceeding in which the said United States was indirectly interested, and one pending before the said Post Office Department and Postmaster General, and undetermined by the said Postmaster General, as in the said sixth count is more fully set forth: against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

Motions for new trial and in arrest of judgment having been denied, the case was brought here upon writ of error.

1. The first question to be considered is whether section 1782 is repugnant to the Constitution of the United States. This question has been the subject of extended discussion by counsel. But we cannot doubt the authority of Congress by legislation to make it an offense against the United States for a Senator, after his election and during his continuance in office, to agree to receive or to receive compensation for services to be rendered or rendered to any person, before a Department of the Government, in relation to a proceeding, matter or thing in which the United States is a party or directly or indirectly interested.

The principle that underlies section 1782 is not wholly new in our legislative history. For instance, by the act of March 3,

1863, 12 Stat. 765, c. 92, Rev. Stat. § 1058, it was declared that members of Congress shall not practice in the Court of Claims. Later, Congress by statute declared that no member of or Delegate to Congress shall directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States; and every person violating this section was to be deemed guilty of a misdemeanor, and fined three thousand dollars. Rev. Stat. § 3739.

Counsel for the accused insists that section 1782 is in conflict with the fundamental idea of the Federal system, namely, that the Government is one "of limited powers, with duties and restrictions imposed, and no authority is lodged anywhere to change those duties or restrictions, except the power reserved by the people." The proposition here stated is certainly not to be disputed; for it is settled doctrine, as declared by Chief Justice Marshall, and often repeated by this court, that "the Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 343. We do not, however, perceive that there has been in the statute before us any departure from that salutary doctrine.

It is said that the statute interferes, or, by its necessary operation, will interfere, with the legitimate authority of the Senate over its members, in that a judgment of conviction under it may exclude a Senator from the Senate before his constitutional term expires; whereas, under the Constitution, a Senator is elected to serve a specified number of years, and the Senate is made by that instrument the sole judge of the qualifications of its members, and, with the concurrence of two-thirds, may expel a Senator from that body. In our judgment

there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named. While the framers of the Constitution intended that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it. In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several Departments, Congress, having a choice of means, may prescribe such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States," it is meant that Congress—keeping within the limits of its powers and observing the restrictions imposed by the Constitution—may, in its discretion, enact any statute appropriate to accomplish the objects for which the National Government was established. A statute like the one before us has direct relation to those objects, and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. The proper discharge of those duties does not require a Senator to appear before an executive Department in order to enforce his particular views, or the views of others, in respect of matters committed to that Department for determination. He may often do so without impropriety, and, so far as existing law is concerned, may do so whenever he chooses, provided he neither agrees to receive nor receives compensation for such services. Congress, when passing this statute, knew, as indeed

everybody may know, that executive officers are apt, and not unnaturally, to attach great, sometimes, perhaps, undue, weight to the wishes of Senators and Representatives. Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the Government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress, and with whose constitutional functions there can be no interference. If that which is enacted in the form of a statute is within the general sphere of legitimate legislative, as distinguished from executive and judicial, action, and not forbidden by the Constitution, it is the supreme law of the land—supreme over all in public stations as well as over all the people. "No man in this country," this court has said, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 U. S. 196, 220. Nothing in the relations existing between a Senator, Representative or Delegate in Congress and the public matters with which, under the Constitution, they are respectively connected from time to time, can exempt them from the rule of conduct prescribed by section 1782. The enforcement of that rule will not impair or disturb those relations or cripple the power of Senators, Representatives or Delegates to meet all rightful

or appropriate demands made upon them as public servants.

Allusion has been made to that part of the judgment declaring that the accused, by his conviction, "is rendered forever hereafter incapable of holding any office of honor, trust or profit under the Government of the United States." That judgment, it is argued, is inconsistent with the constitutional right of a Senator to hold his place for the full term for which he was elected, and operates of its own force to exclude a convicted Senator from the Senate, although that body alone has the power to expel its members. We answer that the above words, in the concluding part of the judgment of conviction, do nothing more than declare or recite what, in the opinion of the trial court, is the legal effect attending or following a conviction under the statute. They might well have been omitted from the judgment. By its own force, without the aid of such words in the judgment, the statute makes one convicted under it incapable forever thereafter of holding any office of honor, trust or profit under the Government of the United States. But the final judgment of conviction did not operate, *ipso facto*, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment. The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers. This must be so for the further reason that the declaration in section 1782, that any one convicted under its provisions shall be incapable of holding any office of honor, trust or profit "under the Government of the United States" refers only to officers created by or existing under the direct authority of the National Government as organized under the Constitution, and not to offices the appointments to which are made by the States, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a branch of the Legislative Department,

owes its existence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by state legislatures, and cannot properly be said to hold their places "under the Government of the United States."

We are of opinion that section 1782 does not by its necessary operation impinge upon the authority or powers of the Senate of the United States, nor interfere with the legitimate functions, privileges or rights of Senators.

2. It is next contended that the indictment does not present the case of a proceeding, matter or thing in which, within the meaning of the statute, the United States was a party or interested, nor adequately state the facts constituting the offense. These objections are, we think, without merit. Our reading of the statute and the indictment leads to the opposite conclusion.

The statute makes it an offense for a Senator, after his election, and during his continuance in office, to receive or agree to receive compensation, in any form, from any person, in relation to a proceeding, matter or thing before a Department, in which the United States is a party, or directly or indirectly interested. The scope of the statute is, in our judgment, most manifest, and the nature of the offense denounced cannot well be made clearer than it has been made by the words used to express the legislative intent. The business in respect of which the accused is charged to have both agreed to receive, and to have received, compensation, was plainly a proceeding or matter in which the United States was interested. That such proceeding or matter involved the pecuniary interests of the defendant's client is not denied. That it also involved the use of the property as well as postal facilities furnished by the United States for carrying and transporting mail matter must also be admitted. What the Post Office Department aimed to do in the execution of the acts of Congress and the regulations established under those acts was to protect the mails of the United States from being used, in violation of law, to promote schemes for obtaining money and property by means of false and fraudulent pretenses, representations and promises. That

statute has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution. *Ex parte Jackson*, 96 U. S. 727, 732; *In re Rapier*, 143 U. S. 110; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508. In the proceeding, matter and thing before the Department, with which the defendant was connected as an attorney for a corporation immediately concerned in the result, the Postmaster General represented the United States, and, in the discharge of his official duties, sought to enforce a law of the United States. The United States was the real party in interest on one side, while the Rialto Company was the real party in interest on the other side. If the Postmaster General did not represent the United States, whom did he represent? The word "interested" has different meanings, as can be readily ascertained by examining books and the adjudged cases. 4 Words and Phrases Judicially Defined, 3692; Stroud's Judicial Dictionary, 399. But its meaning here is to be ascertained by considering the subject matter of the statute in which the word appears. And it is, we think, a mistake to say that the United States was not interested, directly or indirectly, in protecting its property, that is, its mails and postal facilities, against improper and illegal use, and in the enforcement, through the agency of one of its Departments, of a statute regulating such use. It would give too narrow an interpretation to the statute to hold that the United States was not interested, directly or indirectly, in a proceeding in the Department having such objects in view. It is true the business before the Post Office Department in which the Rialto Company was concerned did not assume the form of a suit in which there were parties according to the technical rules of pleading. But it was, nevertheless, in a substantial sense, a proceeding, matter or thing before an executive Department in which both the United States and the Rialto Company were interested.

It is said that, within the meaning of the statute, the United States is not interested in any proceeding or matter pending before an executive Department, unless it has a direct moneyed or pecuniary interest in the result. Under this view, Senators, Representatives and Delegates in Congress, who are members of the bar, may regularly practice their profession *for compensation* before the executive Departments in proceedings, which if not directly involving the pecuniary interests of the United States, yet involve substantial pecuniary interests for their clients as well as the enforcement of the laws of the United States enacted for the protection of the rights of the public. Such a view rests upon an interpretation of the statute which is wholly inadmissible. In our opinion, section 1782 excludes the possibility of such a condition of things, and makes it illegal for Senators, Representatives or Delegates to receive or agree to receive compensation for such services. We may add that the judgment in *Burton* v. *United States*, 196 U. S. 283, proceeded upon the ground that the case then made—and the present case, as to the facts, is much stronger against the defendant—was embraced by the statute.

It is equally true that the accused was informed with reasonable certainty by the indictment of the nature and cause of the accusation against him—the two counts hereinbefore given at large, and upon which sentences were pronounced, being as full as any of the others. The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the

accusation against him. *United States* v. *Simmons*, 96 U. S. 360, 362; *United States* v. *Carll*, 105 U. S. 611; *Blitz* v. *United States*, 153 U. S. 308, 315.

3. It is insisted, however, that the court below erred in not directing the jury to acquit the defendant; in other words, that the evidence in support of the indictment was so meager that the jury could not properly have found him guilty of any offense. We cannot assent to this view. There was beyond question evidence tending to establish on one side the defendant's guilt of the charges preferred against him; on the other side, his innocence of those charges. It will serve no useful purpose to set out all the testimony. It is sufficient to say that the whole evidence has been subjected to the most careful scrutiny, and our conclusion is that the trial court was not authorized to take the case from the jury and direct a verdict of not guilty. That course could not have been pursued consistently with the principles that underlie the system of trial by jury. The case was preëminently one for the determination of a jury. It was for the jury to pass upon the facts; and as there was sufficient evidence to go to the jury, this court will not weigh the facts, and determine the guilt or innocence of the accused by the mere preponderance of evidence, but will limit its decision to questions of law. In its charge to the jury the Circuit Court held the scales of justice in even balance, saying all that was necessary to guard the rights of the accused. Nothing seems to have been omitted that ought to have been said nor anything said that was not entirely appropriate. Upon the general question of guilt or innocence and as to the rules by which the jury should be guided in their consideration of the case, the Circuit Court, in substance, said that the indictment was not evidence in any sense, but only an accusation which it was incumbent upon the Government to sustain by proof establishing guilt beyond a reasonable doubt; that the presumption of law was that he was innocent of the accusation as a whole and as to every material element of it, and that such presumption abided with him from the beginning to the end of

the trial, and required, at the hands of the jury, an acquittal, unless a careful, intelligent, fair consideration of the whole evidence, attended by the presumption of innocence, produced in the mind, beyond a reasonable doubt, the conviction that the defendant was guilty; and that they, the jury, were the sole judges of the credibility of the witnesses and of the weight to be attached to their testimony.

The Circuit Court was equally direct and impartial in what it said in relation to the particular issues of fact raised by the indictment and evidence. After explaining the nature of the proceeding before the Post Office Department, in respect of which, the indictment alleged, the defendant acted as counsel for the Rialto Company, for compensation received and to be received, and after referring, with some fulness, to the specific charges in the several counts, the court called attention to the questions that were common to all the counts. It said to the jury: "Was the defendant a Senator of the United States for the State of Kansas during the times covered by the transactions under investigation? It is admitted that he was, and therefore you will have no difficulty in determining that. Was the Rialto Grain and Securities Company an existing corporation carrying on business of the character described during the times covered by the transactions under investigation? There was proof that it was, and no proof to the contrary, so you will have no difficulty with that. Was a proceeding pending before the Post Office Department from November 18, 1902, to March 26, 1903, to determine whether or not a fraud order should be issued against that company? If the evidence shows that the officers of the Post Office Department, at the instance of private individuals or otherwise, had before that time set on foot an inquiry to determine whether or not satisfactory evidence existed that the Rialto Grain and Securities Company was engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, as charged in the indictment; and if the evidence further shows that that inquiry had

not been concluded, and was, during the period named, in the charge of any of the officers of the Post Office Department then charged with the performance of any duty in respect of such inquiry—then I charge you that there was such a pending proceeding before the Post Office Department, as described in the indictment, and is referred to in the statutes before mentioned; and also that it was a proceeding in which the United States was both directly and indirectly interested."

It then called the attention of the jury to the particular counts charging the defendant with having *agreed* with the Rialto Company to receive a stated compensation for services to be rendered in the proceeding before named. Touching those counts, the court said: "Did he make such an agreement? That he made an agreement of some character to act as counsel for that company for a stated compensation is conceded. The real question is whether that agreement included, among other matters in relation to which he was to serve the company, the proceeding in the Post Office Department before named. Upon that question the evidence is conflicting, and it is your duty to weigh the evidence and determine the truth. If, among other things, it was intended by the defendant and the Rialto Grain and Securities Company in making the agreement that he would, in part consideration for the compensation he was to receive, appear as agent or attorney of such company before the Post Office Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, whether by way of stopping the investigation or ultimately preventing the issuance of a fraud order: then I charge you that the agreement of the defendant was violative of the statute; otherwise it was not. The offense prescribed in the statute consists in the agreement to receive compensation for the rendition of such services. The mere agreement to render the services is not an offense. It is the agreement to receive compensation for the rendering of them

which constitutes the offense. It should be carefully observed that the actual rendition of services is not a necessary element of this offense. The offense is complete and the defendant's guilt is established if the evidence shows that he made an agreement to render such services for compensation."

Coming then to the questions referring exclusively to the counts charging defendant with having *received* from the Rialto Company compensation for services rendered by him to it, the court said to the jury: "Did he render any service for the Rialto Grain and Securities Company before the Post Office Department in the proceeding named? On that question I charge you that if he appeared as agent or attorney of such company before the Post Office Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing or obtaining action on their part favorable to such company in said proceeding, and did then, by any statement or representation respecting the business in which that company was engaged, or the manner in which it was conducting such business, endeavor to obtain any action favorable to such company on the part of the Post Office Department, or any of its officers, in such fraud order proceeding, then he rendered service for said company within the meaning of the statute. And I further charge you that if he appeared as agent or attorney of such company before the Post Office Department, or any of its officers charged with any duty or having any authority over such fraud order proceeding, for the purpose or with the intent of influencing them in respect to their action in said proceeding, and did then arrange with the Department, or any of its officers, that a hearing should be had in respect of such matter, and then also assured the Department, or any of its officers, that it was the purpose of said company to comply strictly with the law, and then also arranged that no action should be taken against said company in said proceeding without his being first notified thereof, that would constitute services within the meaning of the statute. Did he, at St. Louis,

Missouri, on the twenty-sixth day of March, 1903, receive from the Rialto Grain and Securities Company any payment of money as compensation for such services?" Here the court gave instructions, seven in number, asked by the defendant. They were not objected to by the Government and need not be set out.

4. Another point made by the defendant is that he could not legally be indicted for two separate offenses, one for agreeing to receive compensation in violation of the statute, and the other for receiving such compensation. This is an erroneous interpretation of the statute, and does violence to its words. It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation separate, distinct offenses. The statute, in apt words, expresses that thought by saying: "No Senator . . . shall receive *or* agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered," etc. There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. In this case, the subject matter of the sixth count, which charged an agreement to receive $2,500, was more extensive than that charged in the seventh count, which alleged the receipt of $500. But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. "It is the legislature, not

the court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *Hackfeld & Co.* v. *United States*, 197 U. S. 442, 450.

5. The defendant invokes the protection of that clause of the Constitution of the United States which declares that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The question arose in this way.

The first and second counts of the indictment in the former case charged that the defendant, in violation of the statute, and on March 26, 1903, unlawfully, knowingly, wilfully and corruptly took, accepted and received $500 "from the Rialto Grain and Securities Company," for services rendered in its behalf in a matter before the Post Office Department in which the United States was interested. Those two counts differed only as to the interest, whether direct or indirect, of the United States in that matter. The third count in the former indictment charged that on March 26, 1903, the defendant unlawfully, knowingly, wilfully and corruptly took, accepted and received $500 "from one W. D. Mahaney," (described as an officer and employé of the Rialto Company,) as compensation for services rendered by defendant to that company in a matter before the Post Office Department in which the United States was directly interested. The jury in the former case convicted the defendant on the first and second counts and acquitted him on the third count; in other words, they found, in effect, that he received money from the company, but not from Mahaney. Upon writ of error sued out by defendant this court reversed the judgment and sent the case back with directions for a new trial. Whether that reversal, upon defendant's own writ of error, had the effect, within the principle of *Trono* v. *United States*, 199 U. S. 521, to take from him the benefit of his acquittal on the third count in the former case, we need not decide. It may be assumed, for the purposes of this discussion, that it did not.

The defendant pleaded the judgment of acquittal on the third count in the former indictment in bar of this prosecution

as based on the third and seventh counts in the present indictment. In its answer to that plea the Government alleged that while the third and seventh counts of the present indictment are identical in legal effect with counts one and two of the former indictment, "the offense charged against the defendant in said counts three and seven of the indictment herein is not identical in legal effect with said count three of said original indictment." The defendant, as we have seen, demurred to the answer. The demurrer having been overruled, and the defendant declining to plead further, the plea in bar was overruled and denied.

As no issue was taken upon the answer, by replication, the question presented is whether, upon the face of the record, *as matter of law* simply, the offense charged in the third and seventh counts of the present indictment is the same as that charged in the third count of the former indictment. This question must be answered in the negative, unless the charge, in the present indictment, that the money in question was received by the defendant "from the Rialto Grain and Securities Company" is the same, in law, as the charge, in the former indictment, that he received it "from one W. D. Mahaney," mentioned as an officer and employé of the Rialto Grain and Securities Company. We could not so hold, for the reason that the two charges do not necessarily import, in law, the same thing. The only support for the contrary view is found in the words, added after Mahaney's name, describing him to be an officer and employé of the Rialto Company. But those words are to be taken only as descriptive of the person or as identifying the person from whom, it was charged, the defendant, in fact, received the money. It was not alleged in the former indictment that Mahaney paid the money to the defendant in behalf of or by direction of the company. This distinction was manifestly in the mind of the jury in the former case; for, while they found the defendant guilty of having received forbidden compensation from the company, they found him not guilty of having received such compensation from Mahaney.

The defendant may have received such compensation from Mahaney, but it may not have been paid by direction of the company. So, in a legal sense, it may have been received from the company, although paid by the hands of Mahaney. It cannot be held otherwise, as matter of law, upon the face of the two indictments, apart from any evidence. And there was no evidence in support of the plea or in refutation of the answer. The defendant simply demurred to the answer, thereby admitting its averments of fact; and, without a replication, and without any evidence, rested his defense of former jeopardy upon the face of the two indictments. As the effect of the reversal of the judgment in the former case was to set aside the judgment of conviction on the first and second counts of the original indictment, the way was opened for another trial on those counts. But the Government elected not to proceed under that indictment, but to have a new one embodying the same charge as to the $500 that was made in the former case. Its right to adopt that course cannot be questioned. In our judgment, the defendant cannot plead his acquittal upon the charge of having received forbidden compensation *from Mahaney* in bar of a prosecution upon the charge of having received such compensation *from the company*. A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, "was the same *in law* and *in fact*. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*." *Commonwealth* v. *Roby*, 12 Pick. 496, 504. Looking, as we must, only at the face of the original and the present indictments, the two charges must be regarded as separate and distinct. The plea of former jeopardy in this case presents a technical defense, and cannot be allowed for the reason that the offense of which the defendant was heretofore acquitted does not plainly appear, as matter of law, upon the face of the record, to be identical with the one of which he has been convicted in this case.

If, at the trial below, under the present indictment, proof had been made that the $500 was paid by Mahaney, and that he was an officer and employé of the Rialto Company—if the proof had gone no farther—the jury would not have been authorized to find that the money was received *from the company;* whereas, the same proof would have sustained the charge in the third count of the original indictment. This shows that the two charges were not identical, in law, and that the same evidence would not have sustained each. It is well settled that "the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both." 1 Bishop's Crim. Law, § 1051; *Wilson* v. *State*, 24 Connecticut, 57, 63, 64. For these reasons we hold that the court below properly sustained the answer to the plea and, the defendant not pleading further, the plea in bar was properly overruled and denied.

6. An important point remains to be considered. It relates to the jurisdiction of the court below to try the defendant for the crime alleged.

The Constitution requires that the trial of all crimes against the United States shall be held in the State and the District where *such crimes* shall have been committed. Const. Art. 3, § 2, Sixth Amendment. The contention of the accused is that in no view of the evidence can he be said to have committed any offense in the State of Missouri; consequently, the Federal court, holden at St. Louis, was without jurisdiction, under the Constitution, to try him. The contention of the Government is that the alleged offense was committed at St. Louis, and that it was proper to try the defendant in the District embracing that city.

The Circuit Court thus instructed the jury: "If there was an agreement on the part of the defendant to receive compensation for services to be rendered by him in such a fraud order proceeding, was the agreement made within the jurisdiction of this court—in other words, was it made in St. Louis, Missouri? Upon this question I charge you that if such an agreement was

negotiated or tentatively affected at some other place, but with the understanding on the part of the defendant that it should be communicated to the Rialto Grain and Securities Company at St. Louis, Missouri, to be there accepted or ratified by that company before it should become effective, and if thereafter, in pursuance of such understanding the proposed or tentative agreement was communicated to the Rialto Grain and Securities Company at St. Louis, Missouri, and was there accepted and ratified by that company without any change in its terms, then the agreement was made at St. Louis, Missouri, and within the jurisdiction of this court. The fact that the defendant was notified of such acceptance or ratification by telegram or letter sent to him at Washington would not alter this result, if the circumstances under which the negotiations were had and the tentative agreement was made were such that it can be reasonably inferred that he contemplated and assented to notice of the acceptance of his proposition being communicated to him through that medium."

The jury found that the alleged agreement was consummated, that is, completed, at St. Louis. This finding was clearly justified by the evidence. There was proof that on the seventeenth day of November, 1902, the general counsel of the Rialto Company—while he and the accused were in Illinois traveling together from St. Louis to Chicago—explained to the latter the affairs and condition of the company and invited the defendant to become counsel with him for the company; that, as the result of that conference and invitation, the defendant, being in Illinois at the time, proposed or offered to become such counsel on the basis of an employment for not less than five months at a monthly salary of $500; that he was then informed that only the company could conclude an arrangement as to compensation; that he contemplated, at the time, that his offer as to employment and compensation would be submitted for him to the company at St. Louis; that upon the return of the company's counsel to St. Louis on the morning of November 18, 1902, he at once communicated to the

Rialto company, at that city, the above offer or proposal of the defendant; that the company promptly accepted the offer, of which fact the defendant was immediately informed by telegram of November 18, 1902, sent from St. Louis, and addressed to him at Washington, by the representative of the company; that such acceptance was confirmed by a letter written and duly mailed at St. Louis on the same day, in which letter counsel, speaking for the company, said: "I hope you received my message to the effect that this company accepts your terms to act as counsel at a salary of $500 per month, and service to begin immediately, that is, of this date, November 18, 1902;" that under date of November 20, 1902, by letter addressed to the Rialto counsel at St. Louis, the defendant acknowledged receipt by due course of mail of the above letter of November 18, and stated that he had called that morning at the Department, on behalf of the company, and had found that two complaints had been filed there against it, which had been sent out on November 7 for investigation; that the letter last referred to thus concluded: "I have arranged with the Department to be advised in case any complaints are made against your company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department. No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had. In return, if agreeable, you may make remittance for my first month's pay."

The evidence further tended to show that during the five months following the acceptance of his offer at St. Louis, the defendant acted as counsel for the Rialto Company before the Post Office Department when requested or when it was necessary, and received from the company a salary of $500 per month for his services to it—the salary for each of the first four months being paid by the company's check, drawn at

St. Louis upon a St. Louis bank and made payable to the defendant's order, which check was sent from St. Louis to the defendant at Washington. The last month's salary of $500 was paid in cash to defendant at St. Louis, in the company's office, on March 26, 1903, on which date, with his own consent, he was discharged as the company's attorney, his services being no longer required. The evidence also tended to show that during the whole period of the defendant's employment and service as the company's attorney he relied or counted upon the acceptance of his offer on the eighteenth day of November, 1902, as evidencing an agreement then concluded between him and the company in respect of compensation. He received the letter of November 18, by due course of mail, and does not deny having received the telegram previously sent to him, the same day, on the same subject. Nothing was said or done by him during the whole period of his service as the company's counsel that was inconsistent with the agreement established by the evidence. All that he did, said or wrote was consistent with the idea that he regarded the acceptance at St. Louis, of his offer, as completing the agreement between him and the company. From the time of such acceptance he was entitled, so far as the agreement was concerned, to demand, and he in fact received, the stipulated salary.

In view of the evidence and of all the circumstances, was the jury warranted in finding that the alleged agreement was concluded at St. Louis? Manifestly so, we think. Although this is a criminal prosecution, that question must be determined by the principles recognized in the general law of contracts as to the time when an agreement between parties takes effect and becomes binding upon them. It is to be taken as settled law, both in this country and in England, in cases of contracts between parties distant from each other, but communicating in modes recognized in commercial business, that when an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded, when the offer is accepted in reasonable time, either by tele-

gram duly sent in the ordinary way, or by letter duly posted to the proposer, provided either be done before the offer is withdrawn, to the knowledge of or upon notice to the other party. A leading authority on the general subject is *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390, 399, 400. It appeared in that case that a fire insurance company made an offer by mail to insure property upon certain terms. The offer was accepted in a letter promptly mailed to the proper address of the company. The inquiry arose as to the time when the contract of insurance was to be deemed completed. This court held that, according to the settled principles of law governing contracts entered into by correspondence between parties distant from each other, the contract became complete when the letter accepting the offered terms was mailed, the offer not having been then withdrawn. The court said: "We are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted."

In *Patrick* v. *Bowman*, 149 U. S. 411, 424, the court, referring to the *Tayloe* case, again held that when an offer is made and accepted by the posting of a letter of acceptance the contract is complete according to the terms of the offer.

Kent says: "In creating the contract the negotiation may be conducted by letter, as is very common in mercantile transactions; and the contract is complete when the answer containing the acceptance of a distinct proposition is dispatched by mail or otherwise, provided it be done with due diligence, after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. Putting the answer by letter in the mail containing the acceptance, and thus placing it beyond the control of the party, is

valid as a constructive notice of acceptance. An offer by letter, or by a special agent, is an authority revocable in itself, but not to be revoked without notice to the party receiving it, and never after it has been executed by an acceptance. There would be no certainty in making contracts through the medium of the mail, if the rule were otherwise." 2 Kent's Com. 477.

The authorities to the same effect are too numerous to be cited, but we refer particularly to *Vassar* v. *Camp*, 11 N. Y. 441, 445; *Mactier* v. *Frith*, 6 Wend. 103; *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Imperial Land Co. of Marseilles*, 7 L. R. Ch. App. 587; *Household Fire Ins. Co.* v. *Grant*, L. R. 4 Exch. Div. 216, 218; *Perry* v. *Mt. Hope Iron Co.*, 15 R. I. 380, 381; *Wheat* v. *Cross*, 31 Maryland, 99, 103; *Averill* v. *Hedge*, 12 Connecticut, 424; *Chiles* v. *Nelson*, 7 Dana, 281; *Washburn* v. *Fletcher*, 42 Wisconsin, 152; *Minnesota Oil Co.* v. *Collier Lead Co.*, 4 Dill. 431, 434; *Maclay* v. *Harvey*, 32 Am. Rep. 35, 40, note and authorities cited; *Levy* v. *Cohen*, 4 Georgia, 1, 13; *Falls* v. *Gaither*, 9 Port. 605, 612; 2 Redfield on Law of Railways, 338, 339; Pomeroy on Contracts, 95; 1 Parsons on Contracts, 9th ed. 483; 2 Parsons on Contracts, 257, note; Metcalf on Contracts, 17; Thompson on Law of Electricity, §§ 425–478; Scott and Jarnogin, Law of Telegraphs, § 295 *et seq.;* Addison on Contracts, 16, 17. Whether the acceptance by the Rialto Company of the defendant's offer is to be regarded as effectively made by the telegram duly sent to him, or only when the letter addressed to him by the Rialto counsel was duly mailed at St. Louis, or in both ways—in any event, the acceptance promptly and adequately occurred on the eighteenth of November, 1902, at St. Louis, on which day and at which place it is to be deemed that the minds of the parties met—the agreement becoming complete the moment of the acceptance of defendant's offer, without the necessity of formal notice to the company that Burton had received information of its acceptance of his offer.

But this, the defendant insists, is not enough to show that

the alleged offense was committed at St. Louis. Counsel would seem to contend that the physical absence of the accused from St. Louis, when the offer was received by the company and when the agreement was concluded, rendered it impossible that he could have committed the alleged offense *at that city*. In substance, the contention is that an individual could not, in law or within the meaning of the Constitution, commit a crime within a State in which he is not physically present at the time the crime is committed.

The constitutional requirement is that the *crime* shall be tried in the State and District where committed, not necessarily in the State or District where the party committing it happened to be at the time. This distinction was brought out and recognized in *Palliser's* case, 136 U. S. 257, 265. Palliser was indicted in the District Court of the United States for the District of Connecticut for violating certain statutes relating to the disposal of postage stamps and forbidding postmasters not only to dispose of postage stamps in the payment of debts or in the purchase of commodities or to pledge them, but also to sell or dispose of them except for cash. By letter written and mailed at New York and addressed to a postmaster in Connecticut, Palliser made to that officer an offer of contract which could not have been accepted by the latter without violating the above statutes. This court held that the offer in Palliser's letter was a tender of a contract with the intent to induce the postmaster to sell postage stamps for credit in violation of his duty, and that the case, therefore, came within section 5451 of the Revised Statutes, providing that "every person who promises, offers, or gives or causes or procures to be promised, offered or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity or security for the payment of money, or for the delivery or conveyance of anything of value to any officer of the United States, . . . with intent to influence him to commit or aid in committing, or to collude in or allow any fraud, or make opportunity for the commission of any fraud on the United States,

or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished" by fine and imprisonment.

The question arose whether Palliser, who did not go into Connecticut, could be punished in that State for the offense alleged against him. This court, speaking by Mr. Justice Gray, said: "The petitioner relies on those provisions of the Constitution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the State and District wherein the crime shall have been committed. Art. 3, § 2; Amendments, art. 6. But the right thereby secured is not a right to be tried in the District where the accused resides, or even in the District in which he is personally at the time of committing the crime, but in the District 'wherein the crime shall have been committed.' . . . When a crime is committed partly in one District and partly in another it must, in order to prevent an absolute failure of justice, be tried in either District, or in that one which the legislature may designate; and Congress has accordingly provided, that 'when any offense against the United States is begun in one judicial District and completed in any other, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either District, in the same manner as if it had been actually and wholly committed therein.' Rev. Stat. § 731." In that case the court said it was universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction, the offender may be tried where the shot takes effect.

If the sending by the defendant to the Rialto Company from Chicago to St. Louis of the offer above referred to was the beginning of negotiations for an agreement in violation of section 1782, the agreement between the parties was completed at the time of the acceptance of the defendant's offer at St. Louis on November 18, 1902. Then the offense was committed, and it was committed, at St. Louis, notwithstanding the defendant was not personally present in Missouri when his offer was accepted and the agreement was completed.

The principle announced in *Palliser's* case was reaffirmed in *Horner* v. *United States*, 143 U. S. 207, in which it was held that the District Court of the United States in Illinois had jurisdiction to try one charged with having violated the statute relating to the sending of lottery matter in the mails, in that he had unlawfully caused to be delivered to a certain person in that District lottery circulars conveyed by mail in a sealed letter that he had deposited in the mail at New York, addressed to and to be delivered to such person in Illinois. The fact that the accused was in New York when the lottery circulars were mailed, and not personally present in Illinois when the offense was completed by the delivery there of the lottery circulars to the person to whom they were sent, was held to be immaterial and not to defeat the jurisdiction of the Federal court in Illinois to try the accused.

It cannot be maintained, according to the adjudged cases, that the personal absence of the defendant Burton from St. Louis, at the time his offer was accepted, and when the agreement between him and the company was completed and became binding, as between the parties, deprived the Federal court there of jurisdiction. He sent his offer to St. Louis with the intent that it should be there accepted and consummated. Having been completed at that city in conformity with the intention of both parties, an offense was, in the eye of the law, committed there, and when the court below assumed jurisdiction of this case it did not offend the constitutional requirement that a crime against the United States shall be tried in the State and District where it was committed.

Other questions were discussed by counsel, but we have alluded to all involving the substantial rights of the accused that are mentioned in their briefs of points and authorities, and which we deem it necessary to notice.

Mr. Justice McKenna concurs in the judgment based on the count charging the receipt of forbidden compensation, but does not concur in the judgment on the count charging simply an agreement to receive compensation. He is of opinion that

the agreement to receive and the receipt of compensation constitute under the circumstances of this case but one offense.

Judgment affirmed.

MR. JUSTICE BREWER, with whom MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concurred, dissenting.

A conviction of plaintiff in error on an indictment charging substantially the same offenses as are charged in the present case was reversed by this court. 196 U. S. 283. In the opinion then filed it was stated that four Justices of this court (the writer of this being among the number) were of the opinion that the matters charged against the defendant were not made offenses by the statute under which the indictment was found. Nothing was said in that opinion in respect to this matter beyond the simple statement of the conclusions of the several Justices. As one of the four I think the importance of the case justifies me in stating the reasons which led to that conclusion, and which induces belief that the present conviction is wrongful.

The statute (sec. 1782, Rev. Stat.) forbids a Senator or other official of the Government to "receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever." It was charged in the indictment that there was pending in the Post Office Department a proceeding to inquire whether the Rialto Grain and Securities Company was conducting a scheme for obtaining money by false pretenses through the mails of the United States and whether a fraud order, as it is called, should be issued against said company, and that the defendant, as a Senator of the United States, unlawfully agreed to

receive from the said corporation compensation for services rendered by him in relation to such proceeding before that Department. It was not charged that the United States was a party to the proceeding, nor that it would either make or lose any money or property, whatever might be the result, but only that it was directly and indirectly interested. The question is therefore distinctly presented whether a proceeding in one of the Departments of the Government, in which it does not appear that the United States is pecuniarily interested in the result, will neither make nor lose by the issue of the proceeding, whatever it may be, is one in which it is "directly or indirectly interested." Unless the statute by clear intendment includes the transaction, any extension beyond its meaning so as to include the transaction would be, under the elementary rule governing the interpretation of criminal statutes, simply judicial legislation, as it would be by judicial construction making that a crime which Congress has not so made, and thereupon imposing punishment. *United States* v. *Wiltberger*, 5 Wheat. 76; *Sarlls* v. *United States*, 152 U. S. 570; *United States* v. *Harris*, 177 U. S. 305. There is a certain broad sense in which the word "interest" is sometimes used, which describes the relation which the Government has to the acts of all its officials, to all proceedings in courts or in Departments, and indeed to the conduct of all its citizens. It is interested in seeing justice and righteousness obtain everywhere. It is interested in seeing that no wrongful conduct shall prevail. But so is every official and every citizen interested. It is not an interest which separates and distinguishes the Government from the citizens, but it is that interest which all have, whether government or citizens, in the orderly and just management of affairs, in honorable and right living. It is that interest which a father or head of a family has in the good conduct of all the members of his family. But the word "interest" as found in the law books refers to pecuniary profit and loss, and that Congress used the word "interested" in its common legal acceptation is as clear and certain as anything can be.

It is well to inquire in the first place whether the word "interest" or "interested" has a settled legal meaning. A leading case is that of *Inhabitants of Northampton* v. *Smith*, 11 Met. (Mass.) 390, in which was involved the construction of a statute of Massachusetts which provided that when a judge of probate was interested in any case within his jurisdiction the case should be transferred to the most ancient adjoining county. The probate judge transferred the case on the ground that he was one of the inhabitants of the town of Amherst, and that there were in the will which was offered for probate many bequests to charitable purposes for the benefit of persons described as dwelling in the eight towns enumerated, of which Amherst was one. Mr. Chief Justice Shaw, delivering the opinion of the court, said (p. 394):

"If the term 'interest' were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthropy, and general charity, or a similar interest, with all good men, to repress and put down pernicious and mischievous schemes, no man could be found, fit to be intrusted with the administration of justice; for no man can be exempt from such interests."

And again (p. 395):

"2. It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling or sympathy or bias, which would disqualify a juror. *Smith* v. *Bradstreet*, 16 Pick. 264.

"3. It must be certain, and not merely possible or contingent. *Hawes* v. *Humphrey*, 9 Pick. 350; *Wilbraham* v. *County Commissioners*, 11 Pick. 322; *Danvers* v. *County Commissioners*, 2 Met. 185. It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as the member of a town, parish or other corporation,

where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

"It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action."

In *McGrath* v. *People ex rel. Linnemeyer*, 100 Illinois, 464, it was held that:

"The State is not 'interested, as a party or otherwise,' in a proceeding in the nature of a quo warranto to try the title of a person to an office into which it was alleged he had intruded, in any such sense as would give the Supreme Court jurisdiction to hear an appeal in such a proceeding directly from the trial court, under section 88 of the Practice Act. The interest which the State must have in a cause, within the meaning of this section, in order to entitle either party to bring it directly to the Supreme Court from the trial court, is a substantial interest—as, a monetary interest."

In *Evans* v. *Eaton*, 7 Wheat., 356, a patent case, the question was whether a certain witness was competent, the alleged objection being that he was interested, because he might use the alleged invention if the patent was adjudged void, and Mr. Justice Story, speaking for the court, said (p. 425):

"The special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the court to adjudge the patent void; and it is supposed that this constitutes such an interest in Frederick in the event of the cause that he is thereby rendered incompetent. But in this respect Frederick stands in the same situation as every other person in the community. If the patent is declared void, the in-

vention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think it is to the credit and not to the competency of the witness."

In *State* v. *Sutton*, 74 Vermont, 12, the case and the ruling is disclosed by the following quotation from the opinion:

"This is an indictment under section 5072 of the Vermont Statutes, for defaming this court, and a judgment thereof, and the judges of the court as to said judgment. It is objected that Judge Watson, who sat below, was disqualified by reason of interest in the event of the cause or matter, for that he is one of the judges alleged to have been defamed. It is a pecuniary interest that disqualifies, and Judge Watson is no more interested in this case in that respect than he is in every other criminal case that he tries, and that interest is too small for the law's notice. *State* v. *Batchelder*, 6 Vermont, 479. It is said that a judge defamed would be deeply interested to have the respondent convicted, not only that he might be severely punished, but also for the aid it might afford him in the prosecution and maintenance of a civil action for damages. But such an interest does not disqualify."

In *Foreman* v. *Town of Marianna*, 43 Arkansas, 324, it was held that a judge who was a taxpayer in a town was not disqualified from sitting in a case relating to the annexation of certain territory to the town, the court saying (p. 329):

"A general interest in a public proceeding, which a judge feels in common with a mass of citizens, does not disqualify. If it did, we might chance to have to go out of the State at times for a judge. The 'interest' which disqualifies a judge under the constitution is not the kind of interest which one feels in public proceedings or public measures. It must be a pecuniary or property interest, or one affecting his individual rights; and the liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result re-

motely, in the future, from the general operation of laws and government upon the status fixed by the decision."

In *Taylor* v. *Commissioners of Highways &c.*, 88 Illinois, 526, the question was who had the right to appeal from the decision of the commissioners of highways in laying out a new road or vacating an old one, and the court said:

"The word 'interested' must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such, at the suit of persons who may imagine they have an interest, when in fact they have no such interest as was contemplated by the legislature. Every citizen of a county, in one sense, has an interest in the public highways. So, too, it may be said, and properly, that every citizen of the State has an interest in the highways in the different counties of the State. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the State. But we apprehend it was not the intention of the legislature that the word 'interested' should receive such a liberal construction. It was, doubtless, intended to give the right of appeal to those persons who had a direct and pecuniary interest not shared by the public at large, such as owned land adjoining the new road laid out or the old one vacated."

In *Chicago, Burlington & Quincy Railroad Company* v. *Kellogg*, 54 Nebraska, 138, in deciding whether a trial judge was disqualified, this was the ruling:

"'A judge is disqualified from acting as such . . . in any case wherein he is . . . interested.' But the word 'interested,' found in this section of the statute, probably means pecuniarily interested, or, at least, it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial. It is not claimed that Judge Beall will gain or lose anything from the result of

this action. It is not pretended that he has any pecuniary interest in the matter. The argument seems to be that, because he rendered a law judgment, he would naturally be desirous that the same should be sustained, and that, therefore, his inclination would be to defeat this suit. It can never be presumed that a judge will permit his desires or inclinations to control his decision in any manner, and that he tried the case and rendered the judgment which is sought to be vacated by this action does not render him interested and disqualified within the meaning of said section of the statute."

See also *Commonwealth* v. *O'Neal*, 6 Gray, 343; *Sauls* v. *Freeman*, 24 Florida, 209; *Bowman's Case*, 67 Missouri, 146.

In Bouvier's Law Dictionary, vol. 1, p. 651, "interest" is defined:

"The benefit which a person has in the matter about to be decided and which is in issue between the parties. By the term benefit is here undertsood some pecuniary or other advantage, which if obtained would increase the witness's estate, or some loss, which would decrease it."

In Black's Law Dictionary the definition is (p. 636):

"A relation to the matter in controversy, or to the issue of the suit, in the nature of a prospective gain or loss, which actually does, or presumably might, create a bias or prejudice in the mind, inclining the person to favor one side or the other."

If the word "interested" was not used in this section in this ordinary legal sense, the words "in which the United States is a party, or directly or indirectly interested" are surplusage, because in respect to every proceeding before a Department or other tribunal the United States as *parens patriæ* has an interest in what Chief Justice Shaw calls the "loose" sense of the term. Indeed, what significance is there in inserting the words from "contract" to "interested" inclusive unless some distinct limitation was intended? If the language was "in relation to any proceeding before any Department, court-martial," etc., it would express the intent to exclude

Senators from appearance for compensation in any and all matters before the Departments. Inserting the clause above referred to obviously means a limitation, and no other limitation is suggested except that which limits it to matters in which the Government is pecuniarily interested. Neither do the words "or any other matter or thing" enlarge the scope of the prohibition so as to take in matters of a different nature. The rule of construction regarding the effect of such words when following an enumeration of subjects is that they are to be held as meaning any other matter or thing of a like or similar nature to those already named, so that all subjects of that kind may be included, and none escape by reason of not being specially named. They do not open the statute to all kinds of matters or things not of the same nature as those already named. Otherwise there would be no sense in the prior enumeration. *Hermance* v. *Supervisors &c.*, 71 N. Y. 481; *People* v. *New York &c. Ry. Co.*, 84 N. Y. 565; *Thames &c. Insurance Company* v. *Hamilton*, 12 App. Cas. 484.

Doubtless the Government is charged with the supervision of the action of all its officials, but that supervision does not of itself create a pecuniary interest. This court has a supervising control of the lower Federal judicial tribunals. We are interested in seeing that full justice is done in all cases therein. But that duty of supervision and review creates no pecuniary interest, and does not disqualify a single one of us from participating in the consideration of this case.

If it be said that the Government is pecuniarily interested in the postage the amount of which might be affected by the issue of a fraud order, it is enough to say that there is no proof of any such interest. Further, postage is received in payment for services rendered in transportation. If no services are rendered no postage is received. The issue of a fraud order does not put a stop to the carrying of letters. It simply stops the delivery. It may be that when knowledge of the issue of a fraud orders becomes widespread, the number of letters may be

diminished, but as heretofore said, diminishing the amount of mail matter diminishes likewise the cost thereof. The Government is no more interested in an increase or diminution of the amounts received by railroad and other carriers for transporting the mails, or those received by stamp contractors for the manufacture of stamps, than it is in the fees received by marshals, clerks, and other officers for services rendered to individuals. In any event, opposing a fraud order would not, in the language of the chairman of the House Committee on the Judiciary, hereinafter quoted, be a suit against the Government.

Again, the history of the passage of the bill which culminated in this statute emphasizes the views already expressed. The bill was introduced into the Senate December 23, 1863, by Senator Wade. As prepared it forbade the appearance of a Senator or member of the House of Representatives in any court as well as Department, etc. On February 10, 1864, the Committee on the Judiciary reported in favor of striking out the following words (p. 555):

"No member of the Senate or of the House of Representatives of the United States shall, during his continuance in office, hereafter appear or act as counsel, attorney, or agent in any cause or proceeding, civil or criminal, in any court, civil, criminal, military, or naval, or before any commission, in which the United States is a party or directly or indirectly interested, or receive any compensation of any kind, directly or indirectly, for services of any description rendered by himself or another in relation to any such cause or proceeding;" and they were stricken out.

On page 561 is this statement by Senator Trumbull, the chairman of the committee:

"This is not a bill to prevent attorneys from practicing in courts of law, but it is a bill to prevent Representatives and Senators in Congress and officers of the Government who are paid for their services from receiving a compensation for advocating claims in the Departments and before the bureaus

of the Government, and before courts-martial. That is the particular question that is pending."

On p. 2773 in the proceedings of the House it appears:

"Mr. Wilson, from the Committee on the Judiciary, reported back Senate bill No. 28, relating to members of Congress, heads of Departments and other officers of the Government. The bill was read. It prescribes penalties for members of Congress, heads of Departments, or other officers engaging as attorneys or counselors in suits against the Government. The bill was ordered to a third reading; and was accordingly read the third time and passed."

While much weight must not be given to the declarations of individual Senators, those which are embodied in the reports of the chairman of the judiciary committees are certainly entitled to consideration, and they show clearly that the intent of Congress in this enactment was to prevent Senators and other officials of the Government from receiving compensation for assisting in the prosecution of claims against the Government. It would be the height of absurdity to suppose anyone believed that a Senator should be debarred from the right of appearing in any court in cases in which the Government is without a pecuniary interest, and yet that was the scope of the bill as originally presented, if the present construction of the statute is sustained.

Further, while it may be true that executive officers are apt to give undue weight to the wishes of Senators, yet there is nothing in this statute to prevent a Senator from exerting all his influence over them. He may prosecute any claims in behalf of his constituents or others, even though the Government is directly and largely pecuniarily interested. He may appear in any matter or proceeding pending before one of the Departments, and there is nothing in the statute to prohibit it. The only restriction is that he must himself have no pecuniary interest in the matter. The denunciation is against his receiving or agreeing to receive compensation for his services. Is it not reasonable to believe that if pecuniary interest on his

part is the only bar to his action a like pecuniary interest on the part of the Government is that interest on the other side intended by the statute?

It is said the language of the section is "directly or indirectly interested," but that does not change the fact that the Government must be interested, and interested, as I have shown, refers to some pecuniary interest. It is directly interested when as the result of the proceeding it may make or lose some of its property, as where a claim is prosecuted in the Department for a tract of land, or for the allowance of a contract to a higher rather than to a lower bidder. It is indirectly interested when the effect of the ruling may result in pecuniary loss to the Government in some other case to be thereafter presented to the Department. It may be that in a pending case the Government is guaranteed against loss, and yet if a certain ruling is established as the ruling of the Department it may affect future cases in which there is no such indemnity to the Government, and in those cases it would be indirectly interested. But whatever the line of demarkation between "direct" and "indirect" results, the statute is clear that the Government must be "interested."

Other matters of moment have been discussed by counsel, but as this is fundamental and upon it rests the whole prosecution, I have preferred to express my views on this matter alone. It seems clear to my mind that the construction now given writes into the statute an offense which Congress never placed there. It is a criminal case, and, in such a case above all, judicial legislation is to be deprecated.

I am authorized to say that MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in these views.

JAMES *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 215. Argued April 6, 9, 1906.—Decided May 21, 1906.

Without deciding whether the Supreme Court of the District of Columbia is or is not an inferior court of the United States within the meaning of § 1 of Art. III of the Constitution of the United States, it is a court of the United States within the meaning of § 714, Rev. Stat., the provisions whereof apply to judges of that, and of any other, court of the United States holding office by life tenure. In thus deciding the court follows the evidently correct construction given to the statute by the legislative and executive departments of the Government since the original enactment of the statute.

A justice of the Supreme Court of the District of Columbia retiring during the year ending June 30, 1893, is entitled to receive during his retirement five thousand dollars per annum that being the salary of the office as fixed by the appropriation act for the previous year, and the appropriation act for the year ending June 30, 1893, while only appropriating a lump sum for all the justices of the court amounting to four thousand dollars each will not be construed as reducing the salary to that amount in view of the subsequent deficiency appropriation act appropriating an amount sufficient to make the salaries for that year five thousand dollars.

Congress has power wholly irrespective of prior legislation retroactively to fix the salary payable to a justice of the Supreme Court of the District of Columbia and as the effect of the act of 1895 was a determination of Congress that the salary of the justices of that court for the year ending June 30, 1893, was five thousand dollars this court cannot disregard the retroactive effect of the statute.

THE facts are stated in the opinion.

Mr. Morgan H. Beach, with whom *Mr. A. A. Hoehling, Jr.*, was on the brief, for appellant.

Mr. Josiah A. Van Orsdel, Assistant Attorney General, with whom *Mr. Felix Braningan*, Assistant Attorney, was on the brief, for the United States.

MR. JUSTICE WHITE delivered the opinion of the court.

Charles P. James was an Associate Justice of the Supreme Court of the District of Columbia. On December 1, 1892, being over seventy years of age and having served for more than ten years, he resigned his office. He died on August 8, 1899. This suit was brought by the administratrix of the estate of Justice James, on June 30, 1900, to recover $6,688.90, on the ground that the salary of Justice James at the time of his resignation was five thousand dollars per annum, and that after his resignation and up to the time of his death he was paid, under the provisions of Rev. Stat. § 714, only at the rate of four thousand dollars per annum, upon the erroneous theory that that sum was the rate of salary fixed by law at the time of the resignation. From a judgment rejecting the claim, 38 C. Cl. 615, this appeal was prosecuted.

To comprehend the contentions pressed at bar it is necessary briefly to refer to the statutes fixing the salary of the Justices of the Supreme Court of the District of Columbia in force at the time of and after the date of the resignation of Justice James.

By the second section of the act of June 1, 1866, 14 Stat. 54, the annual salary of the Chief Justice of the Supreme Court of the District of Columbia was fixed at four thousand five hundred dollars, and of each Associate Justice at four thousand dollars. This provision continued in force up to and including the fiscal year ending June 30, 1891. The act, 26 Stat. 908, 947, making appropriations for judicial salaries, etc., for the fiscal year commencing July 1, 1891, and ending June 30, 1892, contained the following provision:

"For salaries of the Chief Justice of the Supreme Court of the District of Columbia and the five Associate Judges, at the rate of five thousand dollars per annum each; thirty thousand dollars."

The law containing this provision had the enacting clause usually found in appropriation acts, declaring that the appro-

priations were made in full compensation for the services of the fiscal year to which the acts related, and the last section of the act repealed all acts or parts of acts inconsistent or in conflict with its provisions. Under this act Justice James was paid for the fiscal year referred to a salary at the rate of five thousand dollars per annum.

The appropriation act for the following fiscal year, commencing July 1, 1892, and ending June 30, 1893, contained an appropriation of a lump sum of $24,500 "for salaries of the Chief Justice of the Supreme Court of the District of Columbia and five Associate Judges." The sum thus appropriated was only adequate to pay the salaries of the Associate Justices at the rate of four thousand dollars per annum each, and this act also contained the general enacting and concluding clauses above referred to.

For the five months of the year covered by this last act, up to his resignation, viz., from July 1, 1892, to December 1, 1892, Justice James was paid at the rate of four thousand dollars per annum. Shortly after his resignation, before the expiration of the fiscal year covered by the lump appropriation for the year commencing July 1, 1892, and ending June 30, 1893, Congress, by the act of February 9, 1893, 27 Stat. 434, created the Court of Appeals of the District of Columbia. By the terms of the act its provisions were not to take effect until April 3, 1893. It was provided in the fourteenth section of the act that "Justices of the Supreme Court of the District of Columbia shall hereafter receive an annual salary of five thousand dollars each payable quarterly at the Treasury of the United States." As the lump appropriation made in the act above referred to for the fiscal year ending June 30, 1893, was adequate only to pay the salaries at the rate of four thousand dollars per annum, it followed that the existing appropriation was not adequate to pay the salaries of the Justices of the Supreme Court of the District of Columbia at the rate of five thousand dollars per annum from the date fixed for the going into effect of the Court of Appeals act, that is, from April 3, 1893, to the end of the

fiscal year. To remedy this, in the deficiency appropriation act of March 3, 1893, 27 Stat. 653, there was appropriated a sum which, added to the previous lump appropriation, was adequate to pay to the Justices of the Supreme Court of the District a salary at the rate of five thousand dollars per annum from April 3, 1893, to the end of the fiscal year. For the following fiscal years, it is conceded, regular appropriations were made for the salaries of the Justices of the Supreme Court of the District of Columbia at the rate of five thousand dollars per annum. The deficiency appropriation act of March 2, 1895, contained an appropriation, 28 Stat. 843, 851, "to pay the Chief Justice and five Associate Justices of the Supreme Court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three." In virtue of this appropriation Justice James was paid for the portion of the fiscal year (from July 1, 1892, to June 30, 1893) covered by the lump appropriation, that is, up to the time of his resignation, on December 1, 1892, a sum which, added to the four thousand dollars appropriated in the lump appropriation act for that fiscal year, made his salary at the rate of five thousand dollars per annum.

On behalf of the administratrix the contention is that the appropriation at the rate of five thousand dollars per annum made for the fiscal year from July 1, 1891, to June 30, 1892, operated as an increase of the salary to that amount, and that this increase was not repealed by the subsequent legislation, or, if intended to be repealed, the repealing act was void, because the Supreme Court of the District of Columbia was an inferior court of the United States within the meaning of section 1, article III, of the Constitution, and therefore, as Congress had increased the salary to five thousand dollars, it was without power to reduce it.

The opposing contention is that the only effect of the appropriation for the fiscal year ending June 30, 1892, was to temporarily raise the salary for that year, and that as in the sub-

sequent year only a lump sum adequate to pay at the rate of four thousand dollars per annum was appropriated, the general law of 1866 governed, and that amount became the salary which by law was payable to Justice James at the time of his resignation. And it is insisted that Congress was vested with power to increase and diminish at pleasure the compensation paid to a Justice of the Supreme Court of the District of Columbia, because that court was not one of the courts referred to in section 1 of article III of the Constitution. Indeed, irrespective of the question of what was the rate of salary payable to Justice James at the time of his resignation, the Government contends that the judgment below should be affirmed, because in any event the Supreme Court of the District of Columbia was not a court of the United States within the intendment of Rev. Stat. § 714, and in consequence the judges of that court were not entitled on resignation to the benefits intended to be conferred thereby.

From the view we take of the case it is unnecessary to consider the constitutional questions which are raised by the opposing parties. We say this because if the result of an analysis of the legislation of Congress be to establish that the salary by law payable to Justice James at the time of his resignation was five thousand dollars per annum, it will be superfluous on that branch of the case to intimate any opinion as to whether the Supreme Court of the District of Columbia is a court of the United States within the meaning of section 1 of article III of the Constitution. Likewise, on the second branch of the case, if it be concluded that the Justices of the Supreme Court of the District of Columbia are embraced within the provisions of section 714 of the Revised Statutes, irrespective of whether that court is or is not an inferior court within the meaning of the constitutional provision above referred to, it will be likewise superfluous to consider the question of constitutional power.

It is not disputed that by the express terms of the appropriation act for the fiscal year ending June 30, 1892, the sal-

aries of the Justices of the Supreme Court of the District of Columbia were increased to five thousand dollars per annum, at least for that year. As, however, the appropriation for the next fiscal year—the one in which Justice James resigned—was only of a lump sum adequate to pay four thousand dollars per annum, it is insisted that that amount was the salary payable to Justice James at the date of his resignation. Whether, if the act appropriating the lump sum stood alone, it would sustain the contention based upon it, we are not called upon to decide, since we may not merely consider the lump appropriation, but must also take into view the act of March 2, 1895, 28 Stat. 851, relating to the identical subject, viz., the salary for the fiscal year ending June 30, 1893, payable by law to the Justices of the Supreme Court of the District.

The act of March 2, 1895, appropriated to pay as a deficiency to the Chief Justice and the five Associate Justices of the Supreme Court of the District of Columbia a sum representing the difference between the rate of compensation theretofore received by them and five thousand dollars per annum for the fiscal year 1893, the year in which Justice James resigned. Now that act is susceptible of only one of two constructions, viz., either that it was a legislative declaration to the effect that the increase of salary operated by the specific provision contained in the appropriation act for the fiscal year ending June 30, 1892, was a permanent provision and had not been repealed by the lump appropriation made in the act of the following year, or that it was intended retroactively to fix the salaries of the Justices of the Supreme Court of the District of Columbia for the fiscal year 1893 at the sum of five thousand dollars, a power which Congress undoubtedly possessed. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, 332. Whichever view is adopted the legal proposition inevitably arises that the salary of the Justices of the Supreme Court of the District of Columbia payable by law for the fiscal year of 1893 was the sum of five thousand dollars. Indeed, as a matter of fact under the operation of the deficiency appropriation, the salary

actually paid to Justice James for the portion of the fiscal year up to the time of his resignation was at the rate of five thousand dollars per annum. It is no answer to this deduction to say that as the effects just indicated arose from the act of 1895, therefore they could not have existed in the fiscal year of 1893 when Justice James resigned; for this would be but to deny efficacy to the act of 1895, either as a Congressional interpretation of the prior legislation or as a retroactive statute fixing the salaries for the year 1893.

As Congress had the power, wholly irrespective of the prior legislation, retroactively to fix the salary payable to a Justice of the Supreme Court of the District of Columbia for an antecedent year, and as the effect of the act of 1895 was necessarily a determination by Congress that the salary payable to Justice James for the year during which he resigned was five thousand dollars, we are not at liberty to disregard the retroactive effect of the act of Congress by holding that the salary payable to him by law for the year during which he retired was a less sum than the amount which Congress, in the exercise of its plenary authority in the premises, has declared was the lawful salary.

The salary of Justice James for the period just referred to being then at the rate of five thousand dollars per annum, it is obvious that he was within the terms of Rev. Stat. § 714, if the provisions of that section applied to Justices of the Supreme Court of the District of Columbia. That section is as follows:

"SEC. 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

On behalf of the Government it is, as we have said, contended that Justice James was not entitled to the benefit of this statute, because that statute only embraced judges of such courts of the United States as were within the purview of section 1

of article III of the Constitution, and it is insisted the Supreme Court of the District of Columbia was not so embraced. We think the premise upon which this contention rests is wholly devoid of merit. The words of the statute, "when any judge of any court of the United States resigns his office," are broad enough to embrace all courts created by the United States, without taking into view the particular constitutional authority which was exercised in such creation. It is true that the statute excludes the conception that it was intended to apply to judges of courts created by Congress when the term of office was of a limited duration. Conversely, however, in our opinion, the text of the statute leaves no room for question that its provisions were intended to apply to a judge of any court of the United States holding his office by a life tenure, such as during good behavior. Indeed, as it is conceded at bar, that from the period of the enactment of the statute down to the present time it has, without interruption or deviation, been construed by the legislative and executive departments of the Government as applicable to Justices of the Supreme Court of the District of Columbia, we do not deem it necessary to determine whether the Supreme Court of the District of Columbia is an inferior court within the meaning of section 1 of article III of the Constitution, since even if it be not a court of that character it is nevertheless a court of the United States within the meaning of Rev. Stat. § 714.

The judgment is reversed and the case remanded with directions to enter a judgment for the petitioner.

AYER AND LORD TIE COMPANY *v.* COMMONWEALTH OF KENTUCKY.

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

No. 268. Argued April 27, 1906.—Decided May 21, 1906.

The general rule as to vessels plying between the ports of different States and engaged in the coastwise trade, is that the domicil of the owner is the situs of the vessel for the purposes of taxation wholly irrespective of the place of enrollment, subject to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than that which is the domicil of the owner it may there be taxed because within the jurisdiction of the taxing authorities.

Vessels owned by a corporation domiciled in Illinois, and which although enrolled in a Kentucky port are not engaged in commerce wholly in the State but are engaged in interstate commerce, and which have acquired a permanent situs for taxation, and are taxed, in another State are not subject to taxation by the State of Kentucky, nor is their situs for taxation therein on account of their being enrolled at a port of that State.

THE Commonwealth of Kentucky, by Frank A. Lucas, revenue agent, commenced an action in the County Court of McCracken County to recover from the Ayer and Lord Tie Company alleged omitted state, county and municipal taxes for the years 1899, 1900 and 1901, claimed to be assessable upon two steamboats and certain barges, and for the year 1901 upon one other steamboat, all the property of the company.

In the statement of the plaintiff the right to recover in respect of the steamboats was based solely upon the assertion that on the dates when it was alleged the boats became subject to the taxes in question they were "enrolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the county of McCracken and State of Kentucky; that, as required by the said laws of the United

States governing navigation, the words of 'Paducah, Kentucky' were painted on the stern of said steamboats; that said boats, when not in use, are kept at Paducah, Kentucky, and that the said port of Paducah is, and was on each of said days, the home port of said steamboats."

The right to recover in respect of the barges was based upon the allegation that "each and all of said boats are now and were on each of the above days mentioned used by the defendant for the purpose of towing ties, loaded on barges; that the defendant was, on each of the days aforesaid, the owner, seized of and in possession of certain barges, used in connection with said steamboats, for the purpose of transporting railroad ties."

The tie company answered as follows: That it was an Illinois corporation, chartered in 1893, and empowered "to transact business with steamboats engaged in interstate commerce;" that "ever since its corporation it has been engaged in business as owner of towboats, plying on the Mississippi, Ohio, Tennessee and Cumberland rivers, and their tributaries; that the business in which towboats had been engaged is that of interstate commerce and of transporting railroad ties in its own barges from different points of said rivers to the port of Brookport, in the State of Illinois; that their said towboats, in pursuit of their business, occasionally touch at the point of Paducah, Kentucky, but never to discharge their cargo, but simply for the purpose of buying stores, employing seamen, and for other like purposes; that they and said barges are in the State of Kentucky but temporarily, and most of their business is transportations from ports and places in Alabama, Mississippi, Kentucky, Missouri, Arkansas, Illinois and Tennessee to said port of Brookport, in the State of Illinois; St. Louis, in the State of Missouri; Duvals Bluff, in the State of Arkansas, at which ports said towboats discharge and deliver their respective cargo of ties, and said boats and barges, owned and controlled by Ayer and Lord Tie Company was engaged in the business aforesaid during and prior to years

1899, 1900 and 1901, and since owned by the said defendant company, have never been engaged in any other business but as aforesaid, nor has said company since its incorporation been engaged in any other business than as aforesaid; that their said vessels were and are regularly licensed and enrolled by the United States under and in pursuance to the acts of Congress."

It was further averred that although the tie company had offices in various cities of Illinois situated on the Ohio river, as also offices in the cities of Paducah and Fulton in the State of Kentucky, and Duvals Bluff in the State of Arkansas, it had such offices in Kentucky for convenience, and its principal office was averred to be in the State of Illinois, of which State it was a citizen.

It was denied that the home port of its vessels was in the port of Paducah, Kentucky, and it was averred that such vessels were enrolled in Kentucky for convenience, and that when they were so enrolled the general manager of its transportation department and of the steamboats of the tie company was a resident of the State of Kentucky.

It was further specifically averred that during the year for which the State of Kentucky was seeking to assess the property in question for taxation "all of said property was assessed (listed?) by the defendant in the State of Illinois for taxation, and has been taxed, and defendant has paid taxes under the State of Illinois, to said State and city of Chicago on all of said property, and denies the right of the State of Kentucky to subject same property to taxation."

Claiming the right under the commerce clause of the Constitution of the United States to trade at the ports of the different States without molestation by the State of Kentucky, the company averred that the imposition and the collection of taxes in question would operate an unlawful interference with the right of the company to trade or engage in interstate commerce as it had heretofore been accustomed to do.

A demurrer was filed to the answer on the ground that it

did not state facts sufficient to constitute a defense. The County Court overruled the demurrer, and plaintiff declining to plead further, the court dismissed "the plaintiff's statement and action." The case was then taken by appeal to the Circuit Court of McCracken County. As part of the record from the County Court the defendant filed in the Circuit Court a petition and bond for removal of the cause to a Federal court, upon the ground of diversity of citizenship. On the trial of the case, before action taken on a demurrer which had been refiled to the answer, the court overruled and dismissed the petition for removal, and the defendant excepted. The demurrer to the answer was overruled, and, the plaintiff declining to plead further, a judgment of dismissal was entered. The cause was then appealed to the Court of Appeals of Kentucky. That court held that the demurrer should have been sustained, and the judgment in favor of the company was reversed. 77 S. W. Rep. 686. A petition for rehearing was denied for reasons stated in an opinion. 79 S. W. Rep. 290.

After the mandate of the Court of Appeals was filed in the Circuit Court that court, upon the pleadings and the mandate and opinion of the Court of Appeals, entered a judgment sustaining the demurrer, and, the defendant declining to plead further, the allegations of plaintiff's statement were taken for confessed, and it was adjudged that the property therein described was liable for taxation at the values stated in the judgment, and the defendant was adjudged to pay the taxes due upon such assessable values for the years in controversy, with the statutory penalty. In compliance with the request of the defendant the court separately stated its findings of fact and conclusions of law, which are as follows:

"Separation of Findings of Facts from Conclusions of Law.

"That the defendant was, at the time specified in the pleadings, the sole owner of the following-described property, named in the petition, to wit: Steamers Russel Lord, Pavonia, Inver-

ness and barges; that the same were of the value as follows, as set out in the statement: Russel Lord, $13,000; Pavonia, $10,000; Inverness, $2,500; barges, $10,000; that the defendant had enrolled said steamboats at Paducah, Kentucky, with the name Paducah painted on the stern of said vessels; that the defendant was a corporation legally incorporated under the laws of the State of Illinois.

"As a matter of law the court adjudges that the port of Paducah, Kentucky, was, at the times mentioned in the statement, the home port of said vessels and barges belonging to defendant and named in the statement, and that all of said vessels were liable to assessment and valuation, at the times stated in the statement, in McCracken County, Kentucky, for purposes of state, county and city taxes for the years, respectively, Russel Lord and Pavonia, 1899, 1900 and 1901; Inverness, 1901; barges, 1899, 1900 and 1901. The defendant excepts to each of the above findings of facts, and also to all of the conclusions of law."

A motion to set aside the judgment and for a new trial having been made and overruled, the cause was again appealed to the Court of Appeals of Kentucky. The court affirmed the judgment of the Circuit Court upon the authority of its previous opinion, and the case was then brought to this court.

Mr. Charles E. Kremer, with whom *Mr. James Campbell* was on the brief, for plaintiff in error:

The barges are engaged in interstate commerce but they are not enrolled and licensed, and have not "Paducah" painted on their sterns, and are not at Paducah when not in use or at any other time.

They have no actual situs in Kentucky, because not in the State, and no artificial situs by virtue of an enrollment and license, and therefore are not in Kentucky at all and cannot therefore be assessed there. Whether they have an actual situs elsewhere, or whether their situs is that of the domicil

of their owner, is entirely immaterial in this case. The case of the barges here comes within *Commonwealth* v. *American Dredge Co.*, 122 Pa. St. 386.

These barges were exempt from enrollment or license under § 21, Rev. Stat. The statement does not allege that they ever were in Kentucky. The answer alleges that they were engaged in interstate commerce between ports of different States. Being unenrolled, they can only be taxed at the residence of the owner in Chicago, where their owner had them assessed and paid taxes on them.

The gist of the decision of the Court of Appeals and its conclusion is, that as Paducah is the home port of the steamers in question, therefore that place is their situs for assessment and taxation.

The court does not find that Paducah is the actual situs of these vessels, but holds that Paducah is the home port of them because it is the place where they are enrolled and licensed, and because Paducah is painted on their sterns. This, their artificial situs, the court holds, is sufficient to subject the vessels to assessment and taxation there, regardless of the place of their ownership.

If it should appear that these vessels were illegally enrolled and licensed at Paducah, and illegally had their names painted on the stern, then they had no legal situs at Paducah and it would follow that plaintiff in error could only be assessed at Chicago, or at the place of the actual situs of the vessels, and therefore it was right in paying taxes upon these vessels at Chicago, the place of its domicil.

The steamers were subject to enrollment under the laws of the United States, and section 4141 of the Revised Statutes applies to them.

Under this statute plaintiff in error could only register or enroll its steamers at a port nearest to that in which it resided. The steamers should have been enrolled at Chicago, where it resided, that being a port and at the same time the place of residence of the corporation. These vessels could

only be enrolled in compliance with sections 4313 and 4314.

These steamers should have been enrolled and licensed in Chicago, and if, at the expiration of their licenses, they were found away from Chicago, should have been enrolled and licensed under section 4328. The vessels were illegally and improperly enrolled at Paducah, and having been so illegally and improperly enrolled there, it follows that painting the name "Paducah" on their sterns was also illegal and improper.

The question of ownership and place of enrollment are, under the law, separate and distinct from the matter of the painting of the name on the stern. Before the passage of the act of 1884, the name to be painted on the stern was provided for by section 4334. The act of 1884 broadened the meaning of the word "port" under §§ 4178, 4334 as to painting the name on the stern.

The steamers were not temporarily enrolled at Paducah under § 4323 and were illegally enrolled there by one who had no right to do so.

This case is governed by *Morgan* v. *Parham*, 16 Wall. 471. See also *St. Louis* v. *Wiggins Ferry Company*, 11 Wall. 423; *Mayor* v. *Baldwin*, 57 Alabama, 61; *Yost* v. *Lake Erie Transp. Co.*, 112 Fed. Rep. 746; *The Lotus*, 26 Fed. Rep. 637.

The place of residence of the owners is to be considered the home port, even when the registration is in another State. *The Jenny B. Gilkey*, 19 Fed. Rep. 127; *The Charlotte Vanderbilt*, 19 Fed. Rep. 219; *The Plymouth Rock*, 14 Blatch. 505; *The Mary Chilton*, 4 Fed. Rep. 487; *The E. A. Barnard*, 2 Fed. Rep. 712; *The Golden Gate*, Newb. Ad. 308; *The Martha Washington*, 1 Cliff. 463; *The Thos. Fletcher*, 24 Fed. Rep. 375; *The Chelmsford*, 34 Fed. Rep. 399; *The Marion G. Harriss*, 81 Fed. Rep. 964; *The Richard G. Garrett*, 44 Fed. Rep. 379; *The Havana*, 64 Fed. Rep. 496.

The plaintiff is not estopped from claiming an invalid enrollment against the State of Kentucky because the State is in no way a party to such enrollment. This is a proceeding

entirely between the Government of the United States and the Ayer and Lord Tie Co., which does not inure to the benefit of the State. The latter is a mere outsider, in no way interested in the matter of enrollment, was not benefited by it, and cannot be injured by its being held illegal.

The steamboats had no actual situs. They were engaged in interstate commerce. They were engaged in trading between places in different States upon different waters. The State must show a situs of the property in question. *Walker* v. *Walker*, 9 Wall. 755; *Marine Nat. Bank* v. *Fiske*, 71 N. Y. 353; *Myers* v. *Cronk*, 113 N. Y. 608; *Monson* v. *Tripp*, 81 Maine, 24.

Mr. N. B. Hays, Attorney General of Kentucky, with whom *Mr. Charles H. Morris* and *Mr. J. H. Ralston* were on the briefs, for defendant in error:

If the actual situs and home port of the boats in question is Paducah, Kentucky, under the laws of the United States governing navigation, then these boats and barges are within the jurisdiction of the State of Kentucky, and the county of McCracken; are protected by the State's laws, and subject to state and county taxation; and if the tax is levied only at the home port, and said boats and barges are valued as other property, and without unfavorable discrimination, because of their employment, it is a valid power of the State. The situs of said boats for the purposes of taxation, is Paducah, Kentucky; and being a part of the property of this State, and said county, they are subject to taxation there, and not elsewhere. *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596; *Transportation Co.* v. *Wheeling*, 99 U. S. 273; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Pullman Pal. Car. Co.* v. *Pennsylvania*, 114 U. S. 36; *Moran* v. *New Orleans*, 112 U. S. 75; *Morgan* v. *Parham*, 16 Wall. 471; Judson on Taxation, § 186.

While, for purposes of taxation, the general rule is that *mobilia sequuntur personam*, such is by no means the invariable rule, and in many cases tangible personal property acquires a

situs for taxation foreign to the residence of its owner. This was recently decided by this court in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. See also *Brown* v. *Houston*, 114 U. S. 622; *Union Refrig. Transit Co.* v. *Lynch*, 177 U. S. 149; *Delaware, Lackawanna & Western Ry. Co.* v. *Pennsylvania*, 198 U. S. 341.

Although assessed and taxed in Illinois, the same property is not exempt from taxation in Kentucky. *Coe* v. *Errol*, 116 U. S. 517.

The taxation of the vessels in Kentucky is not an interference with interstate commerce. Their home port being in McCracken County, Kentucky, and the city of Paducah, and being constantly employed and used in the streams of Kentucky, and those adjacent thereto, and when not in use kept at Paducah, they are property within the jurisdiction of said city, county and State, for the purpose of taxation, and the right of the State to tax them should not be denied. *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 36; *American Refrigerator Trans. Co.* v. *Hall*, 171 U. S. 68; *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 302; *Northwestern Lumber Co.* v. *Chehalis County*, 87 Am. St. Rep. 747; *National Dredging Co.* v. *State*, 99 Alabama, 462; *Norfolk and Western R. R. Co.* v. *Board of Pub. Works*, 97 Virginia, 23; *Minburn* v. *Hays*, 56 Am. Dec. 366; *Union Trust Co.* v. *Kentucky*, 199 U. S. 194.

No State can lay any tonnage tax, or lay any tax on interstate commerce itself, but the principle has always been recognized that the instruments by which interstate commerce was carried on were subject to state taxation as property wherever they might be situated, provided only that they were not discriminated against because of their occupation. *Louisville Ferry Co.* v. *Commonwealth*, 22 Ky. L. Rep. 446; *C. C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 439; *Henderson Bridge Co.* v. *Commonwealth*, 17 Ky. L. Rep. 389; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Morgan* v. *Parham*, 16 Wall. 471.

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

As in the argument counsel for plaintiff in error has not discussed the alleged error in overruling the motion to remove, we treat that question as waived and pass to the merits.

Notwithstanding, by the demurrer to the answer, it was conceded that the tie company was the owner of the alleged taxable property, that it was an Illinois corporation and that its main office was in Chicago, that it had paid taxes in Illinois upon such property, that the property was employed in interstate commerce between ports of different States, including the State of Illinois, that its steamboats were enrolled at Paducah, Kentucky, for convenience, Kentucky being the place of residence of one of its managing officers, and that its boats touched at Paducah only temporarily, never receiving or discharging cargo at that port, the Court of Appeals of Kentucky held that the property in question was subject to the taxing power of the State of Kentucky. The existence of power in the State to tax the property in question was rested solely upon the proposition that as the steamboats were enrolled at Paducah, and the name Paducah was painted upon their sterns, it was to be conclusively presumed that the home port of the vessels was at Paducah, and that such home port was the situs of the property for taxation. The barges were brought within the principle announced, because they were treated as mere accessories of the steamboats. While in the opinion the steamboats were regarded as operated under a registry, the fact is they were engaged in the coastwise trade under an enrollment and license. But this is immaterial, since vessels in order to be enrolled must possess the qualifications and fulfill the requirements necessary for registration.

To comprehend the question a chronological statement of the legislation of Congress as to the registration or enrollment of vessels, etc., is necessary.

By section 3 of an act approved December 31, 1792, 1 Stat. 287, 288, it was provided as follows:

"SEC. 3. *And be it further enacted,* That every ship or vessel, hereafter to be registered (except as hereinafter provided), shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong, at the time of her registry, which port shall be deemed to be that, at or nearest to which, the owner, if there be but one, or if more than one, the husband or acting and managing owner of such ship or vessel, usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. And if any ship or vessel of the United States, shall be found, without having her name, and the name of the port, to which she belongs, painted in the manner aforesaid, the owner or owners shall forfeit fifty dollars; one-half to the person giving the information thereof; the other half to the use of the United States."

On June 23, 1874, 18 Stat. 252, the foregoing provision was amended so as to allow the name of the vessel to be painted upon her stern in yellow or gold letters. In the Revised Statutes the requirement in question was separated into two sections (sections 4141, 4178), reading as follows:

"SEC. 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

"SEC. 4178. The name of every registered vessel, and of the port to which she shall belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length. If any vessel of the United States shall be

found without having her name and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of fifty dollars; recoverable one-half to the person giving the information thereof; the other half to the use of the United States."

By section 2 of the act of February 18, 1793, 1 Stat. 305, "for enrolling and licensing ships or vessels to be employed in the coasting trade," etc., the same requirements were made essential for enrollment as for registering, and by section 11 licensed vessels were specifically obliged to have the name and port painted on the stern. As incorporated into the Revised Statutes the latter provision reads as follows:

"SEC. 4334. Every licensed vessel shall have her name and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of twenty dollars."

By section 21 of an act approved June 26, 1884, 23 Stat. 53, 58, it was provided as follows:

"SEC. 21. That the word 'port,' as used in sections forty-one hundred and seventy-eight and forty-three hundred and thirty-four of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside."

Again, by acts approved February 21, 1891, c. 250, sec. 1, 26 Stat. 765, and January 20, 1897, c. 67, sec. 1, 29 Stat. 491, section 4178, Rev. Stat., was amended so that it now reads as follows:

"SEC. 4178. The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be marked upon the stern. These names shall be painted or gilded, or consist of cut or carved or cast roman letters in light color on a dark ground,

or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked the owner or owners shall be liable to a penalty of ten dollars for each name omitted: *Provided, however,* That the names on each bow may be marked within the year eighteen hundred and ninety-seven."

Was the ruling below justified by these statutes? We think not.

The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority.

In *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596, vessels were registered in New York, where the owner resided. The vessels were employed in commerce on the Pacific Ocean between San Francisco and Panama, and the question was whether the vessels were subject to taxation in California. It was decided that they were not, as they had not become incorporated into the property of California so as to have an actual situs in that State, and it was declared that the vessels were properly taxable at the domicil of their owner.

In *St. Louis* v. *Ferry Co.,* 11 Wall. 423, the boats of the company, an Illinois corporation, were enrolled at St. Louis and plied between that city and the city of East St. Louis, in the State of Illinois. The company had an office in St. Louis, where its president and other principal officers lived and where the ordinary business meetings of the directors were held and the corporate seal was kept. A tax was paid upon the boats in Illinois, the residence of the owner. The city of St. Louis

taxed the ferry boats as personal property "within the city." It was, however, held that the boats did not so abide within the city as to become incorporated with and form part of its personal property, citing *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 559. In the course of the opinion the court said (italics mine):

"The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, sec. 2, 1 Stat. at L. 55, and the act of 1792, sec. 3, 1 Stat. at L. 287, require every vessel to be registered in the district to which she belongs, and the fourth section of the former act and the third section of the latter, declares that her home port shall be that at or near which her owner resides. *The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrollment.* 3 Kent. Com. 133, 170; *Hill* v. *The Golden Gate,* Newberry, 308; *The Superior,* Newberry, 181; *Jordan* v. *Young,* 37 Maine, 27, 29."

In *Morgan* v. *Parham,* 16 Wall. 471, a vessel originally registered in New York had been engaged for years in the coastwise trade between Mobile and New Orleans and was enrolled at Mobile. It was decided that the boat could not be taxed in Alabama.

In *Transportation Co.* v. *Wheeling,* 99 U. S. 273, vessels engaged in commerce between ports of different States were held taxable at the domicil of the owner.

Quite recently, in *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299, the foregoing authorities were approvingly cited, and were in effect reaffirmed. In that case the vessels were enrolled in New York, the domicil of the owner, but, although engaged in interstate commerce, the vessels were navigated wholly within the limits of the State of Virigina, it was held that they came within the exception to the general rule which we have previously stated, and were properly taxable in Virginia.

As in the case at bar, the owner of the vessels was domiciled in Illinois and the vessels were not employed exclusively in commerce between points in the State of Kentucky, but were engaged in traffic between that State and the ports of other States, including Illinois, it seems obvious that, as a question of fact they had no permanent situs in the State of Kentucky within the rule announced in the *Old Dominion Steamship* case. The right then of the State of Kentucky to tax the vessels must solely depend upon the fact that they were enrolled at the port of Paducah in that State. But, if enrollment at that place was within the statutes, it is wholly immaterial, since the previous decisions to which we have referred decisively establish that enrollment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicil of the owner or the permanent situs of the property within the taxing jurisdiction. The court below, however, did not apparently decline to apply the previous decisions of this court, but treated them as inapposite, under the assumption that they were rendered before the act of 1884, and that the necessary effect of that statute was to change the general law so as to cause vessels to be subject to taxation within a State where they were enrolled, although that State was neither the residence of the owner nor the place of the actual situs of the property. As the ruling below was made before the decision of this court in the *Old Dominion Steamship Company* case, rendered since the act of 1884, we might well leave the demonstration of the error into which the court fell to result from the decision of that case, since the ruling below is wholly inconsistent with that decision. This clearly follows, since in the *Old Dominion Steamship* case the right of the State of Virginia to tax was based upon the permanent situs of the vessels in Virginia, although they were enrolled in another State. But in view of the general importance of the subject we shall briefly point out the mistaken construction given by the court below to the act of 1884.

After referring to the act of 1884, and quoting the provisions

of the Rev. Stat. sec. 4178, as now existing, the court below said:

"Appellee had a right to cause its boats to be registered at Paducah, although that was not the place nearest to the port where it resided; and it fully complied with the law regulating the subject, by painting the words 'of Paducah, Ky.,' on the stern thereof; and by the amendment of 1884, Paducah became the home port of the vessels so registered and marked."

* * * * * * * *

"The steamboats involved in this litigation are separated from the residence of their owner by a long distance in both geography and time; in fact, they can never visit the port at which their owner resides; they are, so far as their actual situs is concerned, permanently confined to the rivers over which they float; if their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which is for them a home port in fact, as well as in law and name. Property, such as that under consideration, ought, logically, to be taxed at its own home port; there it can be seen and properly valued for assessment by the fiscal officers; whereas, at the residence of its owner (Chicago), the officers, of necessity, must rely on the statements of the latter for both its existence and its value. At its home port it enjoys the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property thus permanently located, both in legal contemplation and in fact, within a jurisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys."

It is at once apparent that this line of reasoning, whilst it

asserts the principle of actual situs and expounds the act of 1884 as making that the exclusive rule to test the power to tax, at once causes the act to destroy the very principle which it was assumed the act upheld. This is the inevitable consequence of the conclusion reached by the court below, that the act of 1884 endowed the owner of a vessel with the power, simply by the painting a name of a place upon his vessel, to make such place the situs for taxation, although it might be neither the actual situs of the property nor the residence of the owner.

The act in question was an elaborate one, containing thirty sections, relating to the American merchant marine, and was entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes." 23 Stat. 53. The only provision contained in that act which had any reference to the subject under consideration and which was relied upon in the court below was section 21, which we have previously quoted, and which we again copy:

"SEC. 21. That the word 'port,' as used in sections forty-one hundred and seventy-eight and forty-three hundred and thirty-four of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside."

Clearly this section does not essentially change the prior general law respecting enrollment, as it simply enlarges the power of an owner in regard to painting on the stern of his vessel the name of the place from which he may desire to hail her. The prior provisions as to enrollment clearly exacted that the owner, as an incident to enrollment, should mark upon his vessel the name of the place of enrollment; in other words, compelled the owner to hail his vessel from the place of enrollment, although he might be domiciled elsewhere. Now,

as the settled rule at the time of the passage of this act was that enrollment, and consequent marking of the stern of the vessel with the name of the place of enrollment, was not the criterion by which to determine the power of taxation, it is impossible to conceive that Congress intended, by merely conferring a privilege to select the name of a place other than the port of enrollment to be marked upon a vessel, to overthrow the settled rules in regard to taxation of such property which existed at the time of the passage of the act of 1884. To give to the statute the construction adopted by the court below would be simply to hold that its purpose was to endow the owner with the faculty of arbitrarily selecting a place for the taxation of his vessel in defiance of the law of domicil and in disregard of the principle of actual situs, since by the statute the owner was given the right to paint either the name of the place where the vessel was built, where enrolled, or where one of the owners resided. And this demonstrates the misconception of the construction given to the act of 1884 by the court below, since the court declared that the whole effect of the act was to endow the owner of vessels with the power to select, by marking on the stern, a place "in the field of operations," which should be the place of taxation. But no such limitation as the field of operations can be implied from the language of the statute, and, therefore, if the construction adopted were upheld the unlimited right of the owner to arbitrarily frustrate the taxing laws of the State where he was rightfully subject to taxation would result.

Undoubtedly, as we have said, the general statutes as to enrollment in force prior to 1884 required that the name of the port to be painted upon the vessel should be the port of enrollment, although such place might not be the domicil of the owner. In practice, however, that rule was not always observed, because the owners of vessels desired to hail them from the place of the residence of the owner. *The Albany,* 4 Dill. 439. And the history of the adoption of the provision now known as section 21 of the act of 1884 referred to leaves

no room for doubt that Congress simply intended to legalize such practice. The provision had its origin in an amendment unanimously reported by the Committee on Commerce of the Senate on May 1, 1884, to a bill then pending in the Senate. The chairman of the committee, in reporting the proposed amendment, said (15 Cong. Rec. p. 3650):

"Mr. FRYE. The next amendment I am authorized to offer is a section in reference to the painting of the name of the ship on the stern. Not very important that must appear to Senators. Many of our shipowners in the State of Maine think more of that than they do of the rest of this bill. The man who owns a ship looks upon her as his wife or his children; he loves his ship; and under the law as it stands to-day he is required to paint on the stern the name, it may be that of his wife or of his daughter and the port to which she belongs. For seventy-five years the port to which she belonged was construed to be the place where she was owned, and if a man built a ship in Surry, and she was owned there, he painted on the stern the 'May Ann, from Surry, Me.' In 1875 a sharp Treasury official discovered that it was a violation of the law. He reported to the Secretary of the Treasury, and the Secretary issued an order that all those ships must bear the name of the port of entry, regardless of where they were built or owned. They are building vessels, home vessels, owned at home, owned in families, in many instances by the blacksmith, the carpenter, the captain, and the mate. Their vessels they wish to name after one of the family and the home, the place where she is owned and built, and yet under the construction of the Treasury Department she may be the 'Julia Ann,' from Machias, her port of entry, but actually built and owned a hundred miles from there. Take Bath and Richmond, on the Kennebec River—Bath, the greatest shipbuilding city in the United States to-day of wooden ships; her rival, Richmond, is fifteen miles above. The men who build their ships in Richmond regard it as about as serious a wrong as can be imposed upon them by law to compel them

to put a ship built there and owned there under the name of Bath, her port of entry, and Bath would fully reciprocate under like circumstances. I take it that no Senator will object to that provision.

"Mr. HALE. Just there let me ask my colleague, was not the reason for the ruling of the Secretary of the Treasury that the technical view was taken of the word 'port,' and it was concluded there could be nothing but the port of entry, thereby taking away this privilege from the men who built the ship?

"Mr. FRYE. I so understand it."

And, without debate, the amendment was adopted, and subsequently, with other amendments, was incorporated as part of the bill which came from the House of Representatives, relating to the same general subject as the bill which was under consideration in the Senate. 15 Cong. Rec. pp. 3869, 3973, 5440.

The suggestion that because the vessels were enrolled at Paducah the owner was estopped from disputing that they had a situs for taxation there, is but to contend that the place of enrollment was *per se* controlling, in disregard of the repeated rulings of this court to the contrary.

The judgment of the Court of Appeals of Kentucky must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MILLARD *v.* ROBERTS.

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

No. 234. Argued April 18, 1906.—Decided May 21, 1906.

Revenue bills, within the meaning of the constitutional provision that they must originate in the House of Representatives and not in the Senate are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue.

An act of Congress appropriating money to be paid to railway companies to carry out a scheme of public improvements in the District of Columbia, and which also requires those companies to eliminate grade crossings and erect a union station, and recognizes and provides for the surrender of existing rights, is an act appropriating money for governmental purposes and not for the private use exclusively of those companies.

The acts of Congress of February 12, 1901, 31 Stat. 767, 774, and of February 28, 1903, 32 Stat. 909, for eliminating grade crossings of railways and erection of a union station in the District of Columbia and providing for part of the cost thereof by appropriations to be levied and assessed on property in the District other than that of the United States are not unconstitutional either because as bills for raising revenue they should have originated in the House of Representatives and not in the Senate, or because they appropriate moneys to be paid to the railway companies for their exclusive use; and assuming but not deciding that he can raise the question by suit, a taxpayer of the District is not oppressed or deprived of his property without due process of law by reason of the taxes imposed under said statutes.

THE facts are stated in the opinion.

Mr. Josiah Millard, pro se, appellant:

Taxes on land or the profits issuing from lands are taxes in the strict sense of the word: they are direct taxes within the meaning of the constitutional provision respecting the apportionment of representatives and direct taxes, and, therefore, also necessarily within the meaning of the provision that all bills for raising revenue shall originate in the House of Representatives. *Pollock* v. *Farmers' Loan and Trust Co.,* 157 U. S. 429;

S. C., 158 U. S. 601; Story on Constitution, § 880 and note; *Bank* v. *Nebeker*, 3 App. D. C. 190, 198–201; *S. C.*, 167 U. S. 196, 203; Cooley on Taxation, 3d ed., 95, 96 and notes; *License Tax Cases*, 5 Wall. 462; *Binns* v. *United States*, 182 U. S. 292; *Downs* v. *Bidwell*, 194 U. S. 489, 496.

The chief characteristic of an act which lays a tax for any purpose whatever, is, that it is intended to raise revenue by taxation; and no other purpose, pretended or real, can deprive it of the nature of a bill for raising revenue. Bills which lay taxes on lands or incomes for any purpose whatever are "bills for raising revenue within the purview of the Constitution." Story Const. § 880 and note; *Income Tax Cases*, 157 U. S. 429; Cong. Record, February 16, 1905 (Payne's citations).

It does not matter that this legislation relates to the District of Columbia, even if it related exclusively to it; for notwithstanding any rule of either House, the power of Congress in this District is restricted and qualified by all the general limitations, express or implied, which are imposed on its authority by the Constitution. *Curry* v. *District of Columbia*, 14 D. C. App. 429, 438–445; *Callan* v. *Wilson*, 127 U. S. 127; *Thompson* v. *Utah*, 170 U. S. 343, 346; *United States* v. *More*, 3 Cranch, 160, note; *Loan Association* v. *Topeka*, 20 Wall. 655; *Loughborough* v. *Blake*, 5 Wheat. 317, 325; *Wilkes County* v. *Coler*, 180 U. S. 506, 513–525; *Cohens* v. *Virginia*, 6 Wheat. 264, 446.

If a tax is imposed upon one of the political subdivisions of a country, as in the present case, the purpose must not only be a public purpose as regards the people of that subdivision, but it must also be local. *People* v. *Town of Salem*, 20 Michigan, 452, 474; *Cohens* v. *Virginia*, 6 Wheat. 264, 446; *Loughborough* v. *Blake*, 5 Wheat. 317, 325.

The people of the District of Columbia cannot be taxed to pay "the debts of the United States," in whole or in part, whether equitable or legal, unless the taxes on them for that purpose be, if indirect, uniform throughout the United States, and be, if direct, apportioned among the States and Territories in proportion to population; and hence the case of *United*

States v. *Realty Co.*, 163 U. S. 440, 444, the *Sugar Bounty* case, is no precedent here, even if these taxes were designed to pay a debt, and not provide *uno flatu* a bounty for a private corporation and a stately edifice for the adornment of the capital of the nation, as such. The cases above cited sustain this contention.

The right of taxation can only be used in aid of a public object, an object which is within the purpose for which governments are established, and cannot, therefore, be exercised in aid of enterprises strictly private, even though, in a remote or collateral way, the local public may be benefited thereby. *Loan Association* v. *Topeka*, 20 Wall. 655, 664; *Cole* v. *LaGrange*, 112 U. S. 1, 6; *Miles Planting Co.* v. *Carlisle*, 5 D. C. App. 138; *Hanson* v. *Vernon*, 27 Iowa, 28; *Whiting* v. *Sheboygan, Fond du Lac R. R. Co.*, 25 Wisconsin, 167; *Sweet* v. *Hulbert*, 51 Barb. (N. Y.) 312; *Lowell* v. *Boston*, 111 Massachusetts, 454; *Central Branch U. P. R. R. Co.* v. *Smith*, 23 Kansas, 533.

It is admitted by the Court of Appeals that all three of the acts in question originated in the Senate; and the same fact also appears affirmatively by reference to the Congressional Record.

A literal compliance with the mandatory provisions of the Constitution, whether affirmative or negative, is a condition precedent to the validity of any law laying taxes on the property of the people, and attempts to evade those provisions constitute violations of them. *Wilkes County* v. *Coler*, 180 U. S. 506, 521, 522; *Baltimore* v. *Gill*, 31 Maryland, 375, 387, 388; *Rodman* v. *Munson*, 13 Barb. (N. Y.) 63; *People* v. *Nicoll*, 3 Selden, 9, 139.

All remedial laws, such as the constitutional provisions respecting taxation and due process of law, must be so construed as to repel the mischief and advance the remedy, by searching out and nullifying evasions as well as violations of them. *Atty. General* v. *Meyricke*, 2 Vesey, Sr. 44; *Atty. General* v. *Day*, 1 Vesey, Sr. 218; *Atty. General* v. *Davies*, 9 Vesey, Jr. 535, 541; *Marbury* v. *Madison*, 1 Cranch, 137, 175, 176; *Ex parte Gar-*

land, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 237; *Baltimore* v. *Gill*, 31 Maryland, 375; *Cooke County* v. *Industrial School for Girls*, 125 Illinois, 540, 564, 565; *Farmer* v. *St. Paul*, 67 N. W. Rep. 990; *Washingtonian Home* v. *Chicago*, 157 Illinois, 414, 428; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 40 *et seq.*; *Loan Association* v. *Topeka*, 20 Wall. 655; *Ward* v. *Joplin*, 186 U. S. 142, 152; *Brownsville* v. *League*, 129 U. S. 493; *Bank of San Francisco* v. *Dodge, Assessor*, 197 U. S. 70.

No conclusive presumption can arise to defeat the operation of the mandatory and remedial provisions of the Constitution respecting taxation and due process of law, which are self-executing. *Wilkes County* v. *Coler*, 180 U. S. 506, 521, 522; *Post* v. *Supervisors*, 105 U. S. 657, 667; *Town of South Ottawa* v. *Perkins*, 94 U. S. 260.

The Solicitor General for the Treasurer of the United States; *Mr. Wayne Mac Veagh*, *Mr. Frederic D. McKenney* and *Mr. John S. Flannery* for Philadelphia, Baltimore & Washington R. R. Co.; *Mr. George E. Hamilton* and *Mr. Michael J. Colbert* for Baltimore & Ohio R. R. Co. and Washington Terminal Co.; *Mr. Edward H. Thomas* for the Commissioners of the District of Columbia, appellees, submitted:

The act of February 28, 1903, and the two acts approved February 12, 1901, do not appropriate public moneys or levy taxes upon the taxpayers of the District of Columbia for private purposes. The project was in response to a general desire of the public, to abolish dangerous grade crossings and to remove the railroad tracks from the mall. The acts were based on an ample consideration, irrespective of the general power of Congress in the premises.

We submit that Congress, in the acts themselves, having declared that the appropriations were made upon a valuable consideration and for a public purpose, the matter is not open to review in the courts. Cooley's Principles of Constitutional Law, 57, 58; Cooley on Taxation, 2d ed., 111.

This court has repeatedly held that, although railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public. *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 571.

The power of States, counties and municipalities to aid in the construction of railroads, upon the ground that railroads are *quasi* public institutions created and existing for the benefit of the public at large, is well established. *Olcott* v. *Supervisors*, 16 Wall. 698; *Curtis* v. *County of Butler*, 24 How. 447, 449; *Rogers* v. *Burlington*, 3 Wall. 665; *St. Joseph* v. *Rogers*, 16 Wall. 663; *Gillman* v. *Sheboygan*, 2 Black, 515; *Larned* v. *Burlington*, 4 Wall. 276; *Railroad Co.* v. *County of Otoe*, 16 Wall. 673; *Township of Pine Grove* v. *Talbott*, 19 Wall. 676; *United States* v. *Railroad Co.*, 17 Wall. 330; *Loan Assn.* v. *Topeka*, 20 Wall. 661; *Otoe Co.* v. *Baldwin*, 111 U. S. 15.

The United States possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia. When Congress, acting as the municipal legislature of said District, in the exercise of the police power, enacts legislation for the benefit of the health and safety of the community and makes an appropriation and levies an assessment to carry said legislation into effect, the propriety of its action is not open to review by the courts. *Wight* v. *Davidson*, 181 U. S. 371, 381; *Wilson* v. *Lambert*, 168 U. S. 611; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556. See also *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88, 98; *Chicago &c. R. R.* v. *Nebraska*, 170 U. S. 57, 74.

But even if the appropriations made by the acts of 1901 and 1903 could be regarded as donations they would still be legal and the acts providing therefor constitutional and valid.

From the beginning of this Government, Congress has made donations for the benefit of public service corporations, in the nature of land grants, subsidies and bounties, and such donations have been invariably sustained. *Allen* v. *Smith*, 173 U. S. 402; *United States* v. *Realty Co.*, 163 U. S. 440.

Said acts of 1901 and 1903 are not revenue or tax measures in the sense contemplated by the Constitution.

The provisions of section 7, article I of the Constitution, which requires that "all bills for raising revenue shall originate in the House of Representatives," cannot apply to any of the acts involved in this case, even if we should admit for the purposes of the argument that said acts did originate in the Senate instead of in the House of Representatives.

By "bills" is meant "money bills." Story's Constitution, § 874. In practice it is applied to bills to levy taxes in the strict sense of the word. 2 Elliott's Debates, 283, 284; Story's Constitution, § 880.

Twin City Bank v. *Nebeker*, 167 U. S. 196, is decisive of the question.

The act of February 28, 1903, from the recitals in its enacting clause and the fact that it has received the approval of the President and has been regularly enrolled among the statutes of the United States, must be presumed to have been passed by Congress in strict accord with the letter and spirit of the Constitution, and resort cannot be had to the journals of the two houses to overthrow this presumption. *Field* v. *Clark*, 143 U. S. 649, 680; *Harwood* v. *Wentworth*, 162 U. S. 547, 562; *Twin City Bank* v. *Nebeker*, *supra*.

Mr. Justice McKenna delivered the opinion of the court.

This is a bill in equity to enjoin Ellis H. Roberts, as Treasurer of the United States, from paying to any person any moneys of the District of Columbia, under certain acts of Congress [1]

[1] An act entitled "An act to provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore and Ohio Railroad Company in the city of Washington, and for other purposes," approved February 12, 1901; an act entitled "An act to provide for eliminating certain grade crossings on the line of the Baltimore and Potomac Railroad Company, in the city of Washington, D. C., and requiring said company to depress and elevate its tracks, and to enable it to relocate

(31 Stat. 767, 774; 32 Stat. 909), and to enjoin the other defendants from carrying into effect said acts of Congress, and that said acts "be declared null and void for want of constitutional authority." Defendants interposed demurrers to the bill, which were sustained by the Supreme Court, and a decree entered dismissing the bill. The Court of Appeals affirmed the decree.

The principal allegations of the bill are that the railroad defendants are private corporations and all interested in the railway and terminal facilities of the District of Columbia; that the District of Columbia owns no stock in any of the companies nor is otherwise interested in any of them save as useful private enterprises, and yet it is required by said acts, "without any lawful consideration therefor," to pay the Baltimore and Potomac Railroad Company the sum of $750,000, and a like sum to the Baltimore and Ohio Railroad Company, "to be levied and assessed upon the taxable property and privileges in the said District other than the property of the United States and the District of Columbia," and for the exclusive use of said corporations respectively, "which is a private use, and not a governmental use;" that the public moneys of the District of Columbia are raised chiefly by taxation on the lands therein, and that the complainant is obliged to pay and does pay direct taxes on land owned by him therein. And the bill also alleges that the acts of Congress are "acts which provide for raising revenue and are repugnant to article I, section 7, clause 1, of the Constitution of the United States, and are, therefore, null and void *ab initio*, and to their entire extent, because they and each and every one of them originated in the Senate and not in the House of Representatives." Certain volumes of the Congressional Record are referred to and made part of the bill.

---

parts of its railroad therein, and for other purposes," approved February 12, 1901; an act entitled "An act to provide for a union railroad station in the District of Columbia and for other purposes," approved February 28, 1903.

In other allegations of the bill are expressed the limitations upon the power of the United States and the District of Columbia as to taxation; that the acts of Congress complained of are repugnant to the Constitution of the United States; that public funds are appropriated for private use, and that exorbitant taxes will be required to meet the legitimate expenses of the District of Columbia, and appellant will thereby be oppressed and deprived of his property without due process of law.

The first contention of appellant is that the acts of Congress are revenue measures, and therefore should have originated in the House of Representatives and not in the Senate, and to sustain the contention appellant submits an elaborate argument. In answer to the contention the case of *Twin City Bank* v. *Nebeker*, 167 U. S. 196, need only be cited. It was observed there that it was a part of wisdom not to attempt to cover by a general statement what bills shall be said to be "bills for raising revenue" within the meaning of those words in the Constitution, but it was said, quoting Mr. Justice Story, "that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes, which may incidentally create revenue." 1 Story on Constitution, § 880. And the act of Congress which was there passed on illustrates the meaning of the language used. The act involved was one providing a national currency, and imposed a tax upon the average amount of the notes of a national banking association in circulation. The provision was assailed for unconstitutionality because it originated in the Senate. The provision was sustained, this court saying:

"The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States and be available in every part of the country. There was no purpose, by the act or by any of its provisions, to raise revenue to be applied

in meeting the expenses or obligations of the Government."

This language is applicable to the acts of Congress in the case at bar. Whatever taxes are imposed are but means to the purposes provided by the act.

The legality of those purposes is attacked in the other contentions of appellant. All of the contentions rest upon the correctness of the allegation that the moneys provided to be paid to the railroad companies are for the exclusive use of the companies, "which is a private use and not a governmental use."

The titles of the acts are the best brief summary of their purposes, and those purposes are obviously of public benefit. We do not think that it is necessary to enter into a discussion of the cases which establish this. The scheme of improvement provided by the acts required a removal of the railroads from their situations, large expenditures of money by the companies, and the surrender of substantial rights. These rights are recognized and their surrender expressed to be part of the consideration of the sums of money paid to the companies. Indeed there is an element of contract not only in the changes made but in the manner and upon the scale which they are required to be made. As remarked by Mr. Justice Morris, speaking for the Court of Appeals:

"The case is practically that of a contract between the United States and the District of Columbia on the one side and the railroad companies on the other, whereby the railroad companies agree to surrender certain rights, rights of property as well as other rights, and to construct a work of great magnitude, greater perhaps than their own needs require, but which Congress deems to be demanded for the best interest of the national capital and by the public at large; and for this surrender of right and this work of magnitude commensurate with the public demand, Congress agrees to pay a certain sum, partly out of the funds of the United States and partly out of the funds of the District of Columbia. It is a simple case of bargain and sale, like any other purchase."

We have assumed that appellant, as a taxpayer of the District of Columbia, can raise the questions we have considered, but we do not wish to be understood as so deciding.

Decree affirmed.

MR. JUSTICE HARLAN concurs in the result only.

SANTA FE PACIFIC RAILROAD COMPANY *v.* HOLMES.

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

No. 235. Argued April 18, 19, 1906.—Decided May 21, 1906.

The duty of the master to furnish safe places for the employés to work in and safe appliances to work with is a continuing one to be exercised wherever circumstances require it.

While the duty of the master—in this case a railroad company—may be, and frequently is, discharged by one exercise it may recur at any moment in keeping trains in safe relation. A train dispatcher is not relieved, nor does he relieve the company, by the promulgation of an order; he must at all times know and guard against possible changes, and, under the circumstances of this case, *held* that a collision causing injuries to an engineer was the result of the dispatcher's negligence in failing to take into account and do what a prudent man would have taken into account and done.

In this case the dispatcher was the representative of the company to promulgate orders for the running of trains and not a fellow servant of the engineer.

ACTION brought in the Circuit Court of the United States for the Ninth Circuit, Southern District of California, by defendant in error, for damages for injuries received by him in a head-on collision of two trains, on one of which he was an engineer. The answer alleged negligence upon the part of defendant in error, by disobeying the orders, rules and regulations of the company, and also alleged that the collision was

caused by the negligence of a fellow servant. The action was tried without a jury, and the Circuit Court found for defendant in error in the amount of $9,000, and entered judgment against the company for that sum. The judgment was affirmed by the Circuit Court of Appeals. 136 Fed. Rep. 66. The company, being a Federal corporation, then sued out this writ of error.

The colliding trains were regular passenger trains, and are denominated in the testimony as train No. 3 and train No. 4, the former being westbound and the latter eastbound. Defendant in error was the engineer on No. 4, or rather one of the engineers, the train being hauled by two engines. He was the engineer of the second engine. Both trains were run on regular schedule or time cards, when on time or slightly delayed, No. 4 having the right of track. On the morning of the collision, November 20, 1901, train No. 3 was unusually delayed, and special orders became necessary for the operation of the trains on the Arizona division. The first order was issued before train No. 4 had left Needles. The order was as follows: "No. 3 eng. 482 has right of track over No. 4 eng. 444 and 452 to Needles, but will run 1 hour 50 minutes late Kingman to Needles." The copy of the order was delivered to train No. 4 before 4.22 A. M., before its departure from Needles, and to No. 3 upon its arrival at Kingman at 4.21 or 4.22 A. M. Train No. 4 ran east to Mellen, a distance of 11.9 miles, where it stopped upon signal. In the meantime the second order (No. 23) was issued by the train dispatcher, train No. 3 having been more delayed in arriving at Kingman than had been expected. This order was delivered to train No. 4 at Mellen. It read as follows: "No. 3 eng. 482 will run two (2) hours late Kingman to Needles." A copy of the order was delivered to No. 3 at Kingman. The effect of these orders and the general rules of the company was that No. 3 was to run according to the time card, except that it was to run two hours late and was to have the right of track over No. 4, the latter to look out for No. 3, and run with refer-

ence to its movement as provided for by the special orders in connection with the time-table. The orders and the time-table would have made Franconia the proper place of passing of the trains, No. 3 being due to arrive there at 5.17, No. 4 at 5.06, or eleven minutes ahead of No. 3. Train No. 3 should have left Kingman at 4.25. It left at 4.31, six minutes late. It passed Yucca, however, at 4.55 (this is disputed, but upon what evidence we shall presently consider), it should not have passed until 4.57; and it passed Franconia six minutes ahead of time. The operator at Yucca (the only night telegraph office between Kingman and Franconia) at 4.58 or 59 reported to the train dispatcher that No. 3 had passed at 4.55.

No. 4 left Mellen, which was the only night office between Needles and Franconia, between 4.45 and 4.47, and ran 6.8 miles to Powell, arriving there at 5 o'clock. A stop was made of three or four minutes for the purpose of adjusting the flow of oil in the leading locomotive, and then proceeded towards Franconia. In the meantime No. 3 had arrived at Franconia six minutes ahead of the schedule time under the special order for leaving that station. On approaching the station the engineer signalled an inquiry for orders and received by semaphore signal from the operator the reply: "No orders from the train dispatcher." He did not stop at Franconia, and while the train was going at a speed of from sixty to seventy miles an hour, about one and one-quarter miles from Franconia it collided with No. 4, which was running from forty to fifty miles an hour. Both trains were wrecked, the engineer of the leading locomotive of No. 4 and several others were killed, and the defendant in error sustained serious injuries. The operator at Franconia had no orders that morning for either No. 3 or No. 4. But for the collision No. 4 would have reached and have been placed on the siding at Franconia, notwithstanding the delay at Powell, two or three minutes before No. 3 was due at Franconia. Plaintiff in error's rule No. 385 only requires the train not having the right of

track to take a siding and be clear of the main track before the leaving time of the opposing train. Other facts are stated in the opinion.

Mr. Gardiner Lathrop, with whom *Mr. T. J. Norton, Mr. E. W. Camp* and *Mr. Robert Dunlap* were on the brief, for plaintiff in error.

Mr. W. H. Stilwell, with whom *Mr. Byron Waters* and *Mr. Win Wylie* were on the brief, for defendant in error.

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

The case here is in narrow compass both as to the facts and the law. It is apparent that none of the operators of train No. 4 was guilty of negligence. The second special order indicated Franconia as the meeting point of the trains and that train No. 4 should reach there before 5.17, the leaving time for train No. 3. This it could have accomplished notwithstanding the delay at Powell. It is equally apparent that train No. 3 was ahead of time and we may consider that its engineer was culpable. The question is yet presented whether the company is not charged with liability. In this question there are involved two elements, one of law and one of fact. It is not denied that the train dispatcher represented the company in the promulgation of the special orders. It is, however, asserted that this representation ceased by the promulgation of the orders and that he was not required to repeat them or promulgate new ones. "There is no ground," it is insisted, "either upon reason or authority for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them." There is an instant answer to the contention. Instead of according with principle and authority it is opposed to both. It contradicts a concession elsewhere made in the argument, that it is the

duty of a railroad company to promulgate adequate rules and regulations for the safety of employés engaged in the dangerous duty of operating trains, and at times telegraph orders for the movements of trains. It is the duty of a master to furnish safe places to work in and safe instruments to work with, and of this there need be no discussion. The duty is a continuing one and must be exercised whenever circumstances demand it. It may indeed often be discharged by one exercise. It may recur at any moment in keeping moving and opposing trains in safe relation. The rules of the company recognize this. They require telegraph operators to report the time of departure and passing of trains. This is absolutely necessary for supervision. The business is hazardous. Trains may be rushing towards each other upon a single track. All may go well. The observance of time alone may be sufficient for safety. But something may occur to one of the trains, with or without fault of anybody, which may endanger the other. May a train dispatcher know it and not guard against it? A negative answer would be revolting.

There can be no doubt of the duty of the train dispatcher in such case. His duty is clear if the circumstances call for action. Did the circumstances in the case at bar call for action? In answering this it will do no good to discuss cases. The principles of law are clear. A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty. Or to put the matter more guardedly, there is no circumstance in this case which exempted from that duty. The special orders were an assurance of the company, through its train dispatcher, to train No. 4, that it could run with safety between Mellen and Franconia if it arrived at the latter station before 5.17. If anything occurred to change that condition which came to the knowledge of the company train No. 4 was entitled to know it, and we are brought to the simple question, did anything occur? It is admitted all around that train No. 3 did not comply with orders and ar-

rived and departed from Franconia ahead of time. It is disputed whether it arrived at or departed from Yucca ahead of time. Both of the lower courts found that it did, and we cannot say that the evidence does not sustain the finding. The telegraph operator at Yucca notified the train dispatcher that the train passed two minutes ahead of time—passed at 4.55; its time was 4.57; and we know that it passed Franconia six minutes ahead of time, a circumstance which tends to show that the operator at Yucca was right. That there was an error in the operator's clock was an afterthought of the train dispatcher. He received and recorded on the "train sheet" the time (4.55) which was given him. He testified (his deposition was taken by defendant in error) that he received the report of the operator at 4.58, and that he made the entry at 4.55, "just before the accident, and placed '7' over the second '5' just after the accident." He was asked no further explanation by either of the parties. The operator (who was also called by defendant in error) testified that shortly after he had reported the passing of train No. 3 he was called up by the train dispatcher, who asked: "What time have you got?" The operator gave the time 4.51 or 2, and the dispatcher replied: "Your clock is two minutes slow," or such a matter. And this testimony has corroboration in the testimony of the operator at Kingman, who heard the conversation. It appears, therefore, that the attention of the train dispatcher was challenged to the fact and felt the importance of the fact that train No. 3 was running contrary to orders. What should he have done considering that two trains were rushing toward each other upon a single track, the safety of both dependent upon the exact observance of time by both? Minutes were important, and how important the testimony exhibits everywhere. The clocks of the telegraph operators are adjusted by standard, and not allowed to vary three seconds. The practice and safety of special orders are recognized as dependent upon the exact observance of time. Their superiority to meeting points for trains is attempted to be

demonstrated by witness by saying that "it is one of the objects of good railroading to cover the greatest distance in the least time, and to keep in motion the largest number of trains on a division." The object was beset with dangers and demanded a proportionate care. It allowed little margin for inevitable delays. There was no place in it for any negligence. A train was in fault if it was behind time. It was the height of culpability to be ahead of time. A close connection at "clearance" points was expected. It was testified that trains of the first class, which No. 3 and No. 4 were, "can clear each other to a second." If the trains are of different classes the inferior must clear by at least five minutes.

Such was the system and what it demanded the train dispatcher must have known. In such a system minutes—and even seconds—are important, and it is the duty of the train dispatcher to regard them. He knew, to use the testimony of the company's chief dispatcher, that it was the duty of train No. 3 "not to run less than two hours late with reference to her schedule, as prescribed in the regular time-table." She was not allowed, was his emphatic declaration, "to make up one second of that two hours as long as that order was in effect." She (to keep up the personification of the witness) was running two minutes ahead of time. This might of itself have caused a collision. The other train was to be considered, and that minutes were important should not have been out of the train dispatcher's mind an instant. He knew that No. 3 had the right of way with no obligation to No. 4 but to observe time. He knew that No. 4 was "to get into the clear and out of No. 3's way," and had no other guide but the time prescribed.

These comments do not lose their force or application by reason of the fact that under the special orders the trains had an allowance of eleven minutes at Franconia. This allowance was made upon the basis of a strict observance of time, the perfect working of machinery and exact accordance of clocks. But such perfection in the nature of things was liable to dis-

turbance, and when disturbance was observed should have been provided against, and immediately provided against. It was no time to take chances or debate probabilities. It is to be remembered that at all stations there were not night telegraph offices. Yucca was the only one between Yucca and Franconia, and between those stations the train was lost to observation and control. The train dispatcher indeed exhibited his concern. All of the fatal significance of train No. 3 running ahead of time came to his mind. His mistake was to account for it by an error in the telegraph operator's clock (giving to him this excuse against the finding of the lower courts), although he knew that the clock must have been adjusted that day under the rules with the standard time. If we were forced to find the fact we should find it against him, but it is enough to say that there was brought to him, considering his position and the responsibilities upon him, a demand for a care which he omitted to observe. If he had been as considerate as he ought to have been he would have stopped No. 3 at Franconia. And for this conclusion we need not the proof afforded by the collison. The collision, however, and the excuses offered for it, make the conclusion irresistible. Plaintiff in error excuses the train dispatcher by a defect in the clock of the telegraph operator at Yucca. The engineer of No. 3 excuses himself by virtually condemning the clocks of the company by which he had tested his watch. He is sure if No. 4 had been running on time he would have met her at Haviland, the station between Yucca and Franconia. A system which permits such confusion and the endangering or human lives is wrong or wrongly administered. We need go no farther in the present case than to say that it was wrongly administered. The train dispatcher failed to take into account and do what a prudent man would have taken into account and have done.

Judgment affirmed.

Mr. Justice Brewer dissents.

COX *v.* TEXAS.
COX *v.* THOMPSON.

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

Nos. 266, 267. Argued April 27, 1906.—Decided May 21, 1906.

The provisions in the liquor tax law of 1895 of Texas in regard to the sale of liquor to minors, and the liability of the licensee on the bond required to be given in regard thereto, are not unconstitutional under the equal protection clause of the Fourteenth Amendment because, by the terms of the statute, they do not apply to wines produced from grapes grown in the State while in the hands of the producers or manufacturers thereof, it not appearing that there are any distinct classes of liquor dealers, one selling their own domestic wines, and another selling all intoxicants except domestic wines. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, distinguished.

Where the constitutionality of a state statute is assailed in the state court solely on the ground of its conflict with one specified provision of the Fourteenth Amendment, and that Amendment standing alone does not touch the case, other provisions of the Constitution cannot be invoked in this court to give those set up a more extensive application.

THE facts are stated in the opinion.

Mr. J. C. McReynolds, with whom were *Mr. F. E. Albright*, *Mr. E. C. Orrick*, *Mr. J. C. Terrell, Jr.* and *Mr. Dewey Langford*, on a separate brief, for plaintiffs in error:

The exemption from its general provisions of wines produced from domestic grapes, while in the hands of producers or manufacturers, renders the law obnoxious to the equal protection clause of the Fourteenth Amendment.

Intoxicating liquors are recognized by the constitution and laws of Texas as legitimate articles of commerce.

So long as state legislation recognizes intoxicants as articles of lawful consumption and commerce, the Federal courts must afford to such use and commerce the same measure

of protection, under the Constitution and laws of the United States, as is given to other articles. *Leisy* v. *Hardin*, 135 U. S. 100; *Scott* v. *Donald*, 165 U. S. 58.

The peculiar quality of alchoholic liquors justifies discrimination which may tend to temperance and sobriety but when that object is not really present the power to so discriminate does not exist. *Mugler* v. *Kansas*, 123 U. S. 623.

The State, without adequate reason therefor, has attempted to give a special privilege and exemption to producers and manufacturers of domestic grape wines, and has thereby denied the equal protection of the laws to all others engaged in like traffic. The distinction is not justified by the reason which must support the harsh restrictions imposed generally on liquor dealers—the necessity of mitigating the evils of intoxication; nor does it aid in enforcing the law in an administrative way or otherwise. Texas grape wines are not innocuous because peddled out by a manufacturer, and are no less deleterious to health and morals than similar wines from other States. To permit their unrestricted sale tends rather to defeat than to aid the purpose which must be relied on to support the general provisions of the law.

A classification is made which amounts to a discrimination and violates the equal protection clause of the Fourteenth Amendment. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The State could not, in a pure revenue measure, require dealers in foreign wines to pay a tax and operate under stringent regulations while exempting therefrom persons engaged in selling domestic wines. Revenue laws may sometimes properly discriminate between producers and dealers, but there must always be therefor some clear and adequate reason. *Gulf, Colorado &c. Ry.* v. *Ellis*, 165 U. S. 150.

Mr. Charles K. Bell, *Mr. R. V. Davidson*, Attorney General of Texas, and *Mr. Claude Pollard*, for defendants in error, submitted:

There is no inherent right in a citizen to sell intoxicating

liquors. It is not a privilege of a citizen of a State, or of a citizen of the United States which the States are forbidden to abridge. It is a right exercisable only subject to the police powers of the State. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Battemeyer* v. *Louisiana*, 18 Wall. 129; *Mugler* v. *Kansas*, 123 U. S. 659; *Foster* v. *Kansas*, 112 U. S. 206; *Norton* v. *Jamison*, 154 U. S. 591; *Crowley* v. *Christensen*, 137 U. S. 86; *Giozza* v. *Tiernan*, 148 U. S. 657; *Kidd* v. *Pearson*, 128 U. S. 1.

The statutes in question are not repugnant to the Fourteenth Amendment.

The constitutional guaranties of the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a State may lawfully be exerted, for these guaranties have never been construed as being incompatible with the principle, equally vital, because so essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the public. *Jones* v. *Brim*, 165 U. S. 180; *Powell* v. *Pennsylvania*, 127 U. S. 678.

The Fourteenth Amendment does not overthrow state laws, rights and remedies to the extent and purposes for which it is often cited. *Anderson* v. *Henry*, 45 W. Va. 319; *License Cases*, 5 How. 577; *American Sugar Ref. Co.* v. *Louisiana*, 177 U. S. 89; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445; *Barbier* v. *Connolly*, 113 U. S. 27.

The plaintiffs in error not being engaged in the sale of wines exclusively, but being also engaged in the sale of other intoxicating liquors than wines, cannot challenge the validity of the Texas statutes. *Tiernan* v. *Rinker*, 102 U. S. 123; *Powell* v. *State*, 69 Alabama, 13; *McCreary* v. *State*, 73 Alabama, 482; *Bogan* v. *State*, 84 Alabama, 450.

Mr. Justice Holmes delivered the opinion of the court.

These are two suits upon a statutory bond executed by the plaintiffs in error as principal and sureties. There were ver-

dicts and judgments against the plaintiffs in error, whereupon motions were made for new trials, setting up that the act under which the bond was given was contrary to the Fourteenth Amendment of the Constitution of the United States as denying to persons within the jurisdiction the equal protection of the law. The motions were overruled, and an appeal was taken to the Court of Civil Appeals. That court affirmed the judgments below, 85 S. W. Rep. 1199; 85 S. W. Rep. 34, a motion for a rehearing was overruled, an application for a writ of error was refused by the Supreme Court of the State, and thereupon the cases were taken to this court.

The bond in suit was given by a liquor seller and was conditioned, among other things, against selling intoxicating liquors to minors, or allowing minors to enter and remain in the obligor's place of business. The breaches found were breaches of the conditions recited. These suits were brought by the defendants in error respectively, the State of Texas, and the parent of the minor. They seem to have been tried together, and the records are so similar that they properly have been treated by counsel as one.

The Statutes of Texas provide for taxes on sellers of spirituous, vinous or malt liquors, or medicated bitters. Rev. Civil Sts. 1895, Arts. 5060*a*, 5060*b*. They require an application for a license, giving details, a payment of the annual tax as a condition of obtaining the same, and the giving of a bond like the one in suit. Arts. 5060*c*–5060*g*. See amendments, St. 1897, c. 158; 1901, c. 136. They also enact, however, that "the provisions of this chapter shall not apply to wines produced from grapes grown in this State, while the same is in the hands of the producers or manufacturers thereof." Art. 5060*i*. This article is thought to invalidate those which precede. The matters of discrimination relied upon are the tax and the requirement of the bond. It may be proper to add that there was a demurrer, setting up generally that the statute was unconstitutional because of this article, but until the motion for a new trial was made there was no sufficient setting up of a

defense under the Constitution of the United States. *Kipley* v. *Illinois*, 170 U. S. 182; *Layton* v. *Missouri*, 187 U. S. 356.

The main argument addressed to us was rested on the notion that the statutes discriminate unconstitutionally between two classes of persons in the State, naturally existing there, as in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, there was a discrimination with regard to trusts in favor of producers and raisers of agricultural products and live stock. This argument seems to us a fallacy. Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings and not likely to be engaged in anything else. Hence, although farmers and stock raisers equally with others were prohibited from forming trusts for other purposes, to permit them to form trusts in their regular business was practically and in fact to discriminate between two classes and others. The case was discussed throughout on the footing of classification. But, so far as we know, there is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things, which presumably all liquor sellers would prefer to be free to do. Therefore whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class.

There is one slight qualification necessary to what we have said. It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. To that extent, but to that extent alone, favor is shown to a class. But this is not the class discrimination put forward and insisted upon. The attack is not mainly on the distinction between producers and other sellers of domestic wine, but upon that between those producers and the sellers of other wine. The latter, as we have said, is not a true class distinction. Whether there is a difference in the scope of a State's general power to legislate and its power to tax or

not (*Kidd* v. *Pearson*, 128 U. S. 1, 26, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562, 563), the former does not need an extended defense so far as the Fourteenth Amendment alone is concerned. See *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445; *St. John* v. *New York*, 201 U. S. 633.

That part of the Fourteenth Amendment which forbids the abridgement of the privileges or immunities of citizens of the United States was not referred to or relied upon in the motion for a new trial or in the assignment of errors before the Court of Civil Appeals. It is mentioned for the first time in the assignment of errors before this court. *Chicago, Indianapolis & Louisville Ry. Co.* v. *McGuire*, 196 U. S. 128, 132. In view of the decisions we hardly suppose that the omission was by mistake. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Crowley* v. *Christensen*, 137 U. S. 86; *Giozza* v. *Tiernan*, 148 U. S. 657; *Cronin* v. *Adams*, 192 U. S. 108. The truth is that the Fourteenth Amendment does not touch the case, standing alone, and, if so, other provisions of the Constitution which were not invoked cannot be brought in now under cover of the reference to the Fourteenth Amendment to give the latter a more extensive application to the case than it would have when taken by itself. If the States were restricted by the Fourteenth Amendment only, and saw fit to encourage domestic production, or thought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them. If the statutes are open to objection as improperly interfering with commerce among the States, *Tiernan* v. *Rinker*, 102 U. S. 123, *Walling* v. *Michigan*, 116 U. S. 446, the right which springs from Art. 1, § 8, of the Constitution cannot be used to enlarge for the purposes of this case the privileges and immunities or the equal protection of the laws secured by the Fourteenth Amendment. *Dewey* v. *Des Moines*, 173 U. S. 193, 198. The converse case of a right set up under Art. 1, § 8, and an attempt to support it by the Fourteenth Amendment, was decided in *Keokuk and Hamilton Bridge Co.* v. *Illinois*,

175 U. S. 626, 633. See further *Harding* v. *Illinois*, 196 U. S. 78, 86.

It is proper to say that Art. 1, § 8, is referred to in the assignments of error before the Court of Civil Appeals and before this court. But it does not appear that the Court of Civil Appeals dealt with the point and probably it refused to do so on the ground that the section was not relied upon before the trial court. We cannot say that it erred, even if it did, unless that ground is excluded. *Jacobi* v. *Alabama*, 187 U. S. 133; *Erie Railroad* v. *Purdy*, 185 U. S. 148. The case was argued before us on the Fourteenth Amendment alone, and although there is some slight reference to interference with commerce in one of the briefs, it is rather in aid of the argument based on *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, than as an independent point. At all events the question is not open here.

We believe that we have said enough to dispose of the cases. Whether, even if the statute is invalid as to wines made in other States, the bond may be valid, in view of the applications having extended to the sale of spirituous liquors, *Tiernan* v. *Rinker*, 102 U. S. 123, or otherwise, it is unnecessary to inquire.

Judgments affirmed.

MR. JUSTICE HARLAN, dissenting. I do not understand that the court modifies the principles announced in *Walling* v. *Michigan*, 116 U. S. 446, or in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. In my judgment, those cases are applicable to and control this case, and require a reversal of the judgment below upon the ground that the statute of Texas is in violation of the Constitution of the United States. I therefore dissent from the opinion and judgment of the court. MR. JUSTICE BREWER and MR. JUSTICE BROWN concur in this dissent.

VICKSBURG *v.* VICKSBURG WATERWORKS COMPANY.

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

No. 133. Submitted December 13, 1905.—Decided May 21, 1906.

Where complainant's bill discloses an intention by the municipality to deprive complainant—a water supply company—of rights under an existing contract by subsequent legislation, and the city cannot show any inherent want of legal validity in the contract, or any such disregard of its obligations by complainant as would absolve the city therefrom, the case is one arising under the Constitution of the United States, the Circuit Court has jurisdiction, and a direct appeal lies to this court.

It is a valuable feature of equity jurisdiction to anticipate and prevent threatened injury, and in this case an injunction was properly issued to restrain a municipality from erecting its own water system during the continuance of an exclusive franchise owned by complainant.

As a general rule, and so held in this case, it is discretionary with, and under the control of, the trial court to permit the withdrawal by an intervenor of its original bill, and to strike out testimony taken concerning the same.

The power given under the state law to a corporation to mortgage its franchises and privileges necessarily includes the power to bring them to sale and make the mortgage effectual, and the purchaser acquires title thereto although the corporate right to exist may not be sold.

The laws of Mississippi, as construed by its highest court, do not prevent a municipality from granting an exclusive water supply franchise for a limited period during which it cannot erect and operate its own water system; and under the constitutional limitation that the legislative power to alter, amend and repeal charters of corporations must be exercised so that no injustice shall be done to stockholders, an act of the legislature authorizing the municipality to erect its own water system would not amount to repealing the exclusive features of an existing legal franchise.

While grants of franchises are to be strictly construed in favor of the public and nothing is to be taken by implication, where the city has, as in this case, by the terms of the contract given the grantee the exclusive right to erect, maintain and operate waterworks for a definite period it cannot, under the impairment clause of the Constitution, erect and operate, under ordinances subsequently enacted, its own water system during the life of the franchise and subject the company to that competition.

Courts have no power to issue a mandatory injunction requiring a mu-

nicipality to construct a sewer, in a particular manner irrespective of the exercise of discretion vested in the municipal authorities to determine the practicability of the sewer, the availability of taxation for the purpose, and like matters.

THE facts are stated in the opinion.

Mr. J. C. Bryson, Mr. L. W. Magruder, Mr. H. C. McCabe and *Mr. M. Dabney* for appellant:

The motion to dismiss must be denied. *Penn Mutual Life Ins. Co.* v. *Austin*, 168 U. S. 685; *Loeb* v. *Columbia Township*, 179 U. S. 472; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 544.

The Bullock contract was personal and not assignable, and the Supply Company had no power to assign the contract to the Waterworks Company and to compel appellants without their consent to look to it for its performance. The burden is on appellee to show such power or consent. *Matthews* v. *Board of Corp. Comm.*, 97 Fed. Rep. 400; *Thomas* v. *W. Jersey R. R.*, 101 U. S. 71; *Gibbs* v. *Gas Co.*, 130 U. S. 396; *St. Louis R. R. Co.* v. *Gill*, 156 U. S. 649; *Norfolk* v. *Pendleton*, 166 U. S. 667; *Adams* v. *Railroad Co.*, 180 U. S. 1; *Brunswick Gas Co.* v. *United Gas Co.*, 85 Maine, 535; *Commonwealth* v. *Smith* (Mass.), 87 Am. Dec. 672; *Chicago Gas Co.* v. *People's Gas Co.*, 2 Am. St. Rep. 124. But if the contract was assignable and passed to the Waterworks Company without the consent or approval of the appellant, it passed subject to the power of the State to regulate rates whenever it chose to do so, and regulating such rates would not impair complainant's contract. *Stone* v. *Trust Company*, 116 U. S. 636; *Providence Bank* v. *Billings*, 14 Pet. 514.

The State could abandon its governmental right and deprive itself of the power to regulate its corporations, but only by apt words about whose meaning there can be no doubt. The legislative grant by the State to the City does not evidence any purpose on the part of the State to deprive itself of the power to fix and regulate rates to be charged by the party or parties to whom the contract should be let. *Collins* v. *Sherman*, 31

Mississippi, 679; *Railroad Co.* v. *Stone*, 116 U. S. 307, 347; *Norfolk* v. *Pendleton*, 156 U. S. 667; *San Diego* v. *National City*, 174 U. S. 739; *Owensboro* v. *Water Co.*, 191 U. S. 358; *Water Co.* v. *Fergus*, 180 U. S. 624; *Stanislaus County* v. *San Joaquin Co.*, 192 U. S. 201; *Rushville* v. *Rushville*, 15 L. R. A. 321 and note, 322; *Water Co.* v. *Knoxville*, 189 U. S. 434.

Appellee can exercise no powers prohibited by the constitution and laws of Mississippi. Its charter was and is subject to alteration, repeal or amendment, and has been amended by the act of 1904. It cannot complain of any of these laws which were in existence when it accepted its charter. Its rights and privileges are fixed by these laws and the decree of the court which held, in effect, that they were not, is erroneous. *Gas Lt. Co.* v. *Hamilton*, 146 U. S. 258; *Norfolk* v. *Pendleton*, 156 U. S. 667; *Griffin* v. *Goldsboro* (N. Car.), 41 L. R. A. 240; *Redland* v. *Redland*, 121 California, 365; *Matthews* v. *Bd. of Corp. Comm.*, 97 Fed. Rep. 400; *Greenwood* v. *Union Frt Co.*, 105 U. S. 13; *Water Co.* v. *Newburyport*, 193 U. S. 562; *Water Co.* v. *Fergus*, 180 U. S. 702; *County of Stanislaus* v. *San Joaquin Co.*, 192 U. S. 202; *Turnpike Rd.* v. *Croxton*, 33 L. R. A. 177; *Y. & M. V. R. R. Co.* v. *Adams*, 180 U. S. 1, 26; *Walla Walla Water Case*, 172 U. S. 1.

Unless plainly expressed the city had no power to make an exclusive grant. No such purpose was intended or expressed. *Freeport W. W. Co.* v. *Freeport*, 180 U. S. 587; *Gas Lt. Co.* v. *Saginaw*, 28 Fed. Rep. 529; *Wright* v. *Nagle*, 101 U. S. 79; *Water Co.* v. *Greenville*, 7 So. Rep. 409; *Collins* v. *Sherman*, 31 Mississippi, 679; *Gaines* v. *Coates*, 51 Mississippi, 335; *Detroit Citizens' St. Ry. Co.* v. *Detroit Ry.*, 171 U. S. 48; *Brenham* v. *Water Works Co.*, 67 Texas, 542; *Knoxville W. W. Co.* v. *Knoxville*, 189 U. S. 434; *Helena W. W. Co.* v. *Helena*, 195 U. S. 383; *Long* v *Duluth*, 49 Minnesota, 290; *Gas Lt. Co.* v. *Hamilton*, 146 U. S. 258; *Water Co.* v. *Skaneateles*, 184 U. S. 354; *Smith* v. *Westerly*, 35 Atl. Rep. 526; *Water Co.* v. *Fergus*, 180 U. S. 624; *Walla Walla Water Case*, 172 U. S. 1.

Whether or not the city made a contract precluding itself

from building and operating its own waterworks must be determined by the language of the grant itself.

The words "exclusive right and privilege" were intended to apply to all third parties, as against whom the exclusive right and privilege was granted to construct and operate a waterworks. It is true the city could not by its contract exclude all third parties, because such a contract would have been a monopoly and would have been void for that reason, but it is possible that the contracting parties did not know the law in that regard. These words were never intended to be applied to the city of Vicksburg. If it had been the purpose of the parties to the contract to exclude the city from building and operating a waterworks of its own, apt words would have been used as was done in the case of *Walla Walla W. W. Co.* v. *Walla Walla*, 172 U. S. 1. In construing this language all doubts must be resolved in favor of the appellant and against the company; and so construed it does not preclude the city from constructing and operating a water works of its own. *S. W. Mo. Lt. Co.* v. *Joplin*, 191 U. S. 150; *Bienville W. W. Co.* v. *Mobile*, 175 U. S. 109; *S. C.*, 186 U. S. 212; *Freeport W. W. Co.* v. *Freeport*, 180 U. S. 587.

The decree of injunction as to the Washington street sewer is clearly erroneous. In the first place, it is not supported by facts, and in the second place, it is a transgression by the court of the authority reposed in a coördinate branch of the Government. It was held by this court at an early date that the judiciary could not in any manner interfere with the legislative or executive departments of the Government to restrain either from action or to compel action by either where any discretion is vested in either of the coördinates. *Mississippi* v. *Johnson*, 4 Wall. 475. See also Cooley, Const. Lim., 5th ed., 254.

Mr. S. S. Hudson, Mr. Murray F. Smith and *Mr. J. Hirsh* for appellee:

No appeal is authorized by law direct to the Supreme Court

from the District or Circuit Courts in this case under act of March 3, 1891. All questions of law involved in this case have already been decided by this court in a former appeal. 185 U. S. 65. The appeal is frivolous and without color of merit and should be dismissed. *Whitney* v. *Cook*, 99 U. S. 607; *Hinckley* v. *Morton*, 103 U. S. 764; *Micas* v. *Williams*, 104 U. S. 556; *Swope* v. *Leffingwell*, 105 U. S. 3; *Chanute City* v. *Trader*, 132 U. S. 210.

The lower court's decree is strictly in accordance with the Supreme Court's mandate in the former appeal, and therefore the case should be dismissed. *A. M. Smelting Co.* v. *Billings*, 150 U. S. 29; *Mackall* v. *Richards*, 116 U. S. 45; *Stewart* v. *Soloman*, 97 U. S. 361; *Humphreys* v. *Baker*, 103 U. S. 736; *United States* v. *N. Y. Indians*, 173 U. S. 464; *Tyler* v. *L. C. Mine*, 97 Fed. Rep. 394; *In re Pike*, 76 Fed. Rep. 400; *Gregory* v. *Pike*, 77 Fed. Rep. 241. The prior decision is conclusive. *Illinois ex rel. Hunt* v. *Illinois C. R. Co.*, 184 U. S. 77, 91.

Upon an appeal from proceedings under a mandate, directed to a lower court, nothing is before the court, but the proceedings subsequent to the mandate. *Himeley* v. *Rose*, 5 Cranch, 314; *Washington Bridge Co.* v. *Stewart*, 3 How. 424; *Tyler* v. *Magwire*, 17 Wall. 283; *The Lady Pike*, 96 U. S. 462; *Roberts* v. *Cooper*, 20 How. 481; *Cook* v. *Burnley*, 11 Wall. 677; *The Nuestra Sennora De Regla*, 108 U. S. 101; *Sizer* v. *Many*, 16 How. 103; *Supervisors* v. *Kennicott*, 94 U. S. 499; *Clark* v. *Keith*, 106 U. S. 465; *Chaffin* v. *Taylor*, 116 U. S. 572; *Thompson* v. *Maxwell Land &c. Co.*, 168 U. S. 456; *Bent* v. *Miranda*, 168 U. S. 471; *Illinois* v. *Illinois Central Railroad Company*, 184 U. S. 77, 91.

The power of the court to grant the injunction as to the sewer cannot be doubted. *Missouri* v. *Illinois*, 180 U. S. 208; *Mugler* v. *Kansas*, 123 U. S. 623; *Chapman* v. *Rochester*, 110 N. Y. 273.

If a municipal corporation by its system of constructing sewers renders an outlet necessary, it must provide one. *Evansville* v. *Decker*, 84 Indiana, 325; *Crawfordsville* v. *Bond*, 96

Indiana, 236; *Van Pelt* v. *Davenport*, 42 Iowa, 308; *Byrnes* v. *Cohoes*, 67 N. Y. 204; *Fort Wayne* v. *Coombs*, 107 Indiana, 75; *Llano* v. *Llano County*, 23 S. W. Rep. 1008; Wood on Nuisances, § 1032.

Mr. Justice Day delivered the opinion of the court.

This case was before this court at the October term, 1901, and is reported in 185 U. S. 65. It was then here upon the question of jurisdiction, and it was held that it presented a controversy arising under the Constitution of the United States, such as gave the Circuit Court jurisdiction. There was no diversity of citizenship, and the bill was filed by the Vicksburg Waterworks Company, a corporation of the State of Mississippi, against the Mayor and Aldermen of the city of Vicksburg, a municipal corporation of the same State. In view of the full statement of the contents of the bill and the amended bill in the case, as reported in 185 U. S., it is unnecessary to repeat it. On the present appeal a motion to dismiss or affirm was made, which was passed, to be heard with the merits. We regard the decision of this court, when the case was here at the former term, as settling the question of jurisdiction, and affirmatively determining that upon the bill and amended bill the complainant alleged a case which involved the application of the Constitution of the United States and appealable to this court, within section 5 of the act of March 3, 1891, as amended. 26 Stat. 827.

The suit was brought by the Waterworks Company, claiming an exclusive right as against the city under a contract with it for the construction and maintenance for a period of thirty years of a system of waterworks, which exclusive contract, it was alleged, would be practically destroyed if subjected to the competition of a system of waterworks to be erected by the city itself, which was in contemplation under authority of an act of the legislature of Mississippi, authorizing the Mayor and Aldermen of the city of Vicksburg to issue bonds to the amount

of $375,000 to purchase or construct a waterworks system and a sewer system, and for certain other purposes. That act, among other things, required the vote of the electors of the city upon the question of issuing bonds and constructing or buying waterworks; an election was held, and it was voted by a majority of the votes cast that the city should issue bonds to the sum of $150,000 to purchase or construct waterworks for the city. A resolution was passed by the municipal authorities instructing the Mayor and Aldermen to notify the Waterworks Company that liability was denied upon the contract for the use of the waterworks hydrants, and that from and after August, 1900, the city would pay a reasonable compensation for the use of said hydrants. A bill was filed in the Equity Court in Warren County, Mississippi, averring that the original contract to which the Waterworks Company claimed to have succeeded was null and void; that the Mayor and Aldermen had exceeded their powers in making the contract for thirty years; that rates charged to consumers were exorbitant and illegal; that the Mayor and Aldermen at a meeting held on November 5, 1900, had resolved that they no longer recognized any liability under said contract; that the Vicksburg Water Supply Company (a former holder of said contract) and the complainant had no rights in said contract, and the city was entitled to have the same cancelled and annulled. And it was held in 185 U. S. that the facts taken together presented something more than a case of mere breach of private contract, and disclosed an intention and attempt by subsequent legislation of the city to deprive the company of its rights under the existing contract, and it was said: "Unless the city can point to some inherent want of legal validity in the contract, or to some disregard by the Waterworks Company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question." And it was further

held that it was a valuable feature of equity jurisdiction to anticipate and prevent threatened injury, and the conclusion was reached that the allegations of the bill made a case for an injunction. The case was thus brought within section 5 of the act of March, 1891, as one in which the appeal is directly to this court. See also upon this point *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685. The motion to dismiss will be overruled.

Upon the case going back to the Circuit Court an answer was filed raising issues as to whether the complainant had accepted and performed the agreement in its contract to supply water to the city, and denying the right of the complainant to have and to own the contract and the authority of the city to make an exclusive contract, and detailing other matters not necessary to further set forth.

Certain questions of fact as to the character of the water supplied by the complainant, the pressure maintained and similar questions were decided by the Circuit Court in favor of the appellees. An examination of the record makes it sufficient for us to say that we find no reason for disturbing the conclusions of the Circuit Court upon these questions.

The decree in the court below was in favor of the Waterworks Company, maintaining its right to the contract for hydrant rentals and enjoining the city, during the period of the contract, from constructing a waterworks system of its own, and requiring the city to construct a sewer for the disposal of house sewage from the city.

The assignments of error necessary to be considered are:

1. As to the alleged error of the court below in permitting a corporation known as the City Waterworks and Light Company, which had intervened in the case, to withdraw from the files its original bill in the nature of a supplemental bill, and striking out certain testimony which had been taken concerning the same.

2. In enforcing the contract with the city in favor of the complainant and restraining the city from erecting waterworks of

its own during the term covered by the contract with the complainant.

3. In requiring the construction of the sewer by the city.

We shall proceed to notice these in the order named.

The City Waterworks and Light Company, on December 2, 1903, filed its petition praying to be admitted as a party complainant in the cause, and set up that it was the owner of the contract sued upon. To this petition the city answered, denying that the City Waterworks and Light Company had purchased, by deed or otherwise, or owned the property, real and personal, of the complainant the Vicksburg Waterworks Company, and denying that the City Waterworks and Light Company had any interest in the subject matter of the suit or should be admitted as a party complainant therein. The City Waterworks and Light Company then filed its original bill in the nature of a supplemental bill, on May 5, 1904, after the city had denied that it had any interest in the suit. On May 13, 1904, it filed a motion asking leave to withdraw its petition and bill from the files, which motion was granted by the court, and the motion of the Vicksburg Waterworks Company to withdraw from the files its written consent to the filing of the bill was also sustained, and the court granted the withdrawal of the petition, bill, exhibits and written consent. Thereupon the city offered a supplemental answer, and asked the court for leave to file the same. This answer made allegations setting forth the transfer of the contract to the City Waterworks and Light Company, and asked for a continuance of the cause, with leave to take testimony to support the averments of this supplemental answer. The court, on the same day, May 13, 1904, overruled the city's motion for leave to file the supplemental answer and for continuance with leave to take testimony in support thereof, and proceeded to hear the case upon the original pleadings and proofs. It also permitted the withdrawal of certain testimony referring to the City Waterworks and Light Company and the transfer of the contract to it. In view of

the action of the court upon the pleadings as to the City Waterworks and Light Company, this testimony had become immaterial.

In the action of the court just recited we can find no ground for a reversal. The City Waterworks and Light Company had come into the case claiming an ownership of the contract, which was denied by the city; certain testimony was filed concerning this claim of the company. We think it was discretionary with the court to permit the withdrawal of these pleadings and the suppression of this testimony, and it was likewise within its discretion to permit or deny a further answer by the city setting up the alleged transfer of ownership. These matters, except in cases of gross abuse of discretion, are within the control of the trial court. *Chapman* v. *Barney*, 129 U. S. 677, 681; *Dean* v. *Mason*, 20 How. 198, 204.

The principal controversy in the case is as to the correctness of the decree of the court below restraining the city from erecting waterworks of its own within the period named in the contract, which decree proceeded upon the theory that the city had excluded itself from erecting or maintaining a system of waterworks of its own during that period. The contract for the construction of the waterworks was originally made on November 18, 1886, by an ordinance of that date, granting to Samuel R. Bullock & Company, their associates, successors and assigns, the right and privilege to construct a waterworks system in the city of Vicksburg, for the period of thirty years from the date of the ordinance. Section 1 of the ordinance provided that, in consideration of the public benefit to be derived therefrom, the exclusive right and privilege was granted for the period of thirty years from the time the ordinance took effect, to Samuel R. Bullock & Company, their associates, successors and assigns, to erect, maintain and operate a system of waterworks in accordance with the terms of the ordinance, and of using the streets, alleys, etc., within the corporate limits of the city, as they then existed or might thereafter be extended, for the purpose of laying pipes and mains and other conduits,

and erecting hydrants and other apparatus for the obtaining of a good water supply for the city of Vicksburg and for its inhabitants, for public and private use. There was a stipulation for certain hydrants for the term of thirty years at an annual rental of $65.00 each, and it was provided that Bullock & Company, their associates, successors and assigns, might procure the organization of a waterworks company and assign their rights and privileges under the ordinance to such corporation. It is disclosed in the record that Bullock & Company procured the organization of a waterworks company, the Vicksburg Water Supply Company, which company executed a mortgage to the Farmers' Loan & Trust Company of New York, which included "All of its real and personal property, goods, chattels, owned now or which may hereafter be acquired by it, including its land, rents, waterworks, buildings, pump houses, stand pipes, reservoirs, machinery, pipes, mains, hydrants, apparatus and equipments, situated in the city of Vicksburg, county of Warren, State of Mississippi, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, issues, income, profits accruing therefrom; also all and singular the corporate franchises, privileges, rights, liabilities which the Water Company now has and can exercise, or shall hereafter acquire and possess, and also all the estate, right, title, interest, property, possessions, claim and demand whatsoever, as well in law as in equity, of the Water Company, of and to the property above described or hereafter to be acquired, and each and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above granted and described premises with the appurtenances unto the trustee and its successors forever." Upon the foreclosure of this mortgage the property was bid off by M. O. Crumpler on the eighth day of August, 1900. He assigned his bid to the Vicksburg Waterworks Company, complainant in this case, and the Vicksburg Water Supply Company on October 18, 1900, by a quitclaim

deed, conveyed all the property, described in the deed of trust to the Farmers' Loan & Trust Company, to the Vicksburg Waterworks Company.

A preliminary question is made that the Vicksburg Waterworks Company did not acquire title to the contract rights by virtue of these proceedings. But we are cited to an act of the legislature of Mississippi, approved March 7, 1882, Laws of 1882, p. 50, which upon its face is broad enough to authorize such corporations to borrow money and secure the payment of the same by mortgage or deed of trust upon their property and franchises, and we think the mortgage in question would include the contract rights of the Vicksburg Water Supply Company, and that they would pass by the sale and subsequent quitclaim deed to the Vicksburg Waterworks Company. Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may not be sold. *Memphis R. R. Co.* v. *Commissioners,* 112 U. S. 609. The power to mortgage the privileges and rights of the corporation must necessarily include the power to bring them to sale to make the mortgage effectual. *New Orleans &c. R. R. Co.* v. *Delamore,* 114 U. S. 501, cited and followed in *Julian* v. *Cent. Trust Co.,* 193 U. S. 93, 106. We think the mortgage in this case covered and the decree passed the contract rights given originally to the Vicksburg Water Supply Company by the ordinance of November 18, 1886.

It is further urged that the Vicksburg Waterworks Company was organized after the taking effect of the constitution of Mississippi of 1890, which provided: "Sec. 178. Corporations shall be formed under general laws only. The legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interests to do so; provided, however, that no injustice shall be done to the stockholders." And it is insisted that the subsequent legislative authority given to the city to issue bonds and

build its own waterworks amounted to a repeal of the exclusive feature of the grant in the ordinance of 1886, if any it contained. We are cited in support of that proposition to the case of the *Hamilton Gas Light & Coke Co.* v. *City of Hamilton*, 146 U. S. 258, considering the provisions of the constitution of Ohio as to altering or revoking corporate privileges. But we think the right of the Vicksburg Waterworks Company was acquired under the foreclosure and sale of the contract rights conferred in the ordinance of 1886 and covered in the mortgage, as we have stated. Furthermore, the Mississippi constitution contains this provision, which is not in the Ohio constitution considered in the *Hamilton* case, namely, "Provided, [in exercising the right of amendment or repeal of a charter] no injustice shall be done to the stockholders." If it be true that the complainant below had a binding contract excluding competition by the city in furnishing a water supply for the period of thirty years, we think it would be a palpable injustice to the stockholders to permit the competition of the city by new works of its own; which, whether operated profitably for the municipality or not, might be destructive of all successful operation in furnishing water to consumers by the private company.

Coming directly then to the question whether this is an exclusive contract, the question resolves itself into two branches. Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect? The legislature of the State of Mississippi on March 8, 1886, in the charter of the city of Vicksburg, among others, gave to the city the following powers: "To provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." The question is now, not whether the city might make a contract giving the exclusive right as against all third persons to erect a system of waterworks, but whether it can, in exercising this legislative power, exclude itself from constructing and operating waterworks for the period of years covered by the contract. It is

said the Supreme Court of Mississippi has denied this power, and we are referred to *Collins* v. *Sherman,* 31 Mississippi, 679; *Gaines* v. *Coates,* 51 Mississippi, 335, and *Greenville Water-Works Co.* v. *City of Greenville,* 7 So. Rep. 409.

We do not think any of these cases decisive of the point. In *Collins* v. *Sherman,* it was held that the charter granting the right to a turnpike and ferry company to maintain a ferry upon a particular river, which contained no grant of an exclusive right, did not prevent the legislature from afterwards incorporating another company authorized to establish a turnpike and ferry upon the same river and upon the same line of travel, although the establishment of the latter company might materially impair the value of the franchise granted to the first company. The cases were cited and the general principles stated that exclusive privileges could not be granted by implication; there was no attempt to make the first franchise exclusive in that case. In *Gaines* v. *Coates,* it was held that the act in question did not confer upon a certain corporation the exclusive privilege of weighing cotton; that there was nothing in the charter indicating any intention to confer an exclusive right, and many cases were cited, including a number from this court, to the effect that exclusive privileges are not to be granted by implication. In *Greenville Water-Works Co.* v. *City of Greenville,* the city of Greenville had made a contract with the Greenville Water-Works Company to build a system of waterworks by a certain time, but the company had failed to comply with the contract, the time was extended and the company again defaulted. The city thereupon cancelled the contract and made a new contract with the Delta Waterworks Company. Then the Greenville Water-Works Company filed a bill to enjoin the city and the other company from carrying out the contract and prayed for a specific performance of its contract with the city. The court held that there was no power given by the charter of the city of Greenville to grant a monopoly for a long series of years for supplying the city and its inhabitants with water. The question whether the city could

exclude itself in such a contract as we have now before us was not met or passed upon. But if the doctrine of Mississippi were otherwise, and with due respect to which the decisions of its highest court are justly entitled, it has been frequently held, in passing upon a question of contract, in circumstances such as exist in this case, involving the constitutional protection afforded by the Constitution of the United States, this court determines the nature and character thereof for itself. *Douglas* v. *Kentucky*, 168 U. S. 488. And we think the question of the power of the city to exclude itself from competition is controlled in this court by the case of *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1. In that case the city charter of Walla Walla provided, section 10, that no exclusive grant should be made nor should prevent the council from granting the right to others, and section 11 provided: "The city of Walla Walla shall have power to erect and maintain waterworks within or without the city limits, or to authorize the erection of the same for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water." The contract was made for twenty-five years. The grant was not made exclusive to the Waterworks Company, but the city agreed not to erect waterworks of its own, and reserved the right to take, condemn and pay for the works of the company at any time after the expiration of the contract. It was held by this court that the city might thus exclude itself from competition during the period of the contract, and of this feature of the contract the following pertinent language was used by Mr. Justice Brown, who delivered the opinion of the court:

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power house and the

laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. . . .

"Cases are not infrequent where, under a general power to cause the streets of a city to be lighted or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party."

In the *Walla Walla* case the same general power to make the contract existed. There was an express provision against making an exclusive contract, and this court held that for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, the city might exclude itself from competition. We think that case is decisive of the present one on this proposition.

We shall proceed to consider whether the language of the contract is such as to prevent the city, during the period named therein, from erecting a waterworks of its own.

The case of *Lehigh Water Company's Appeal*, 102 Pa. St. 515, cited by counsel for appellant, is not in point. The act provided "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock." Of this grant Mr. Justice Paxson, who delivered the opinion of the court, observed:

"While the language from the act of 1874 above quoted would seem to favor the exclusive right claimed by the water company, a careful examination of clause 3 of section 34 shows that the legislature intended that the right should be exclusive only as against other water companies, for immediately in this connection occur the words: 'And no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock.' The provision that another company shall not be incorporated was not intended to prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury."

In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the Water-Works Company during the period of this contract it cannot be held to have done so by mere implication. The rule, as applied to waterworks contracts, was last announced in this court in *Knoxville Water Company* v. *Knoxville*, 200 U. S. 22, decided at this term, citing previous cases.

The contract in the respect under consideration is found in section 1 of the ordinance, and undertakes to give to Bullock & Company, their associates, successors and assigns, the exclusive right and privilege, for the period of thirty years, from the time the ordinance takes effect, of erecting, maintaining and operating a system of waterworks, with certain privileges named, for the furnishing of a supply of good water to the city of Vicksburg and its inhabitants, for public and private use.

Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors and assigns, the exclusive right to erect, maintain and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla* case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of waterworks, which may and probably would practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned.

The term "exclusive" is so plain that little additional light

can be gained by resort to the lexicons. If we turn to the Century Dictionary we find it defined to mean "Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction." We think, therefore, it requires no resort to implication or intendment in order to give a construction to this phase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which says in plain and apt words that it shall have an exclusive right, a sole and undivided privilege. To hold otherwise in our view would do violence to the plain words of the contract, and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. On the authority of the *Walla Walla* case, the city had the power to exclude itself for the term of this contract, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that for the term named the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far at least as the city's right to compete is concerned. Any other construction seems to us to ignore the language employed and to permit one of the parties to the contract to destroy its benefit to the other. We think the court below did not err in reaching this conclusion.

The court decreed as to a sewer, which the record discloses was originally a surface-water sewer, that the city should refrain from permitting future connections therewith for the conveyance of house sewage. The company complaining that this sewer entered into the source of supply above the intake of the waterworks, the court by a mandatory injunction required the city of Vicksburg to extend the sewer and construct an outlet therefor, so as to discharge sewage into the Yazoo or Mississippi river, below the intake of the complainant, provided, if the city was unable to construct such sewer within

twelve months from date application might be made to the court for an extension of time. The error assigned in this behalf is as to the award of the mandatory injunction. We think the court erred in this respect and that it had no authority to issue a mandatory injunction requiring the city to construct a sewer, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and the like matters; and we think that the exercise of this authority is primarily vested in the municipality and not in the courts.

We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract, but error in granting a mandatory injunction as to the sewer, and in that respect the decree will be modified, and, as so modified,

Affirmed.

MR. JUSTICE HARLAN, dissenting. I cannot agree to the opinion and judgment in this case.

In my opinion the city of Vicksburg had no authority, under the constitution and laws of Mississippi, to give an exclusive right to any person or corporation to maintain a system of waterworks for the benefit of that city and its people.

But if I am wrong in this view, it ought not, in my judgment, to be held upon the present record that the city has, by ordinance or otherwise, precluded itself from establishing and maintaining, at its own expense, a system of waterworks for the benefit of its people. The contrary cannot be maintained, unless we hold that a municipal corporation may, by mere implication, bargain away its duty to protect the public health and the public safety as they are involved in supplying the people with sufficient water. Nothing can be more important or vital to any people than that they should be supplied with

pure, wholesome water. And yet it is now held that it was competent for the city of Vicksburg, by mere implication, to so tie its hands that it cannot perform the duty which it owes in that regard to its people.

NAGANAB *v.* HITCHCOCK.

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

No. 247. Argued April 25, 1906.—Decided May 21, 1906.

A suit brought by a Chippewa Indian on behalf of himself and other members of his tribe against the Secretary of the Interior, to enjoin him from executing the act of June 27, 1902, and to compel him to account under the act of January 4, 1889, in regard to sale and disposition of lands, the title to which is still in the Government, is in effect a suit against the United States, and in the absence of any waiver on the part of the Government of immunity from suit, the courts have no jurisdiction of such a suit. *Oregon* v. *Hitchcock*, 202 U. S. 60 followed; *Minnesota* v. *Hitchcock*, 185 U. S. 373 distinguished.

THE facts are stated in the opinion.

Mr. Tracy L. Jeffords for appellant.

Mr. William C. Pollock, Assistant Attorney, with whom *Mr. Frank L. Campbell*, Assistant Attorney General, was on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

In this suit a bill was filed in the Supreme Court of the District of Columbia by Joseph Naganab against Ethan Allen Hitchcock, Secretary of the Interior. Complainant brought the suit as a citizen of the United States and a member of the band and tribe of Chippewa Indians of the State of Minnesota,

suing for himself and other members of the band and tribe. The bill is quite voluminous, but in substance sets out the alleged right of the Indians who had conveyed certain lands under the act of Congress of January 14, 1889, to the United States to have them administered for their benefit. The bill averred that under the act of Congress the Indians of the State of Minnesota had conveyed to the United States upwards of 3,555,771 acres of land, constituting certain reservations named, all of which lands and reservations were held by the United States under conveyances in trust for the benefit of the Indians; that the Secretary of the Interior had caused the lands to be classified as required by the act, and that approximately 1,500,000 acres thereof were classified as pine lands, 1,855,000 acres as agricultural lands—600,000 acres of the lands, classified under the said act as pine lands, were situated in certain reservations, to wit, Chippewas of the Mississippi, Leech Lake, Cass Lake and Lake Winnibigoshish; that upon said last-mentioned area, there was and is growing a large amount of merchantable pine timber, reasonably worth $10,000,000. The value of the lands classified as agricultural lands to be sold under said act for $1.25 per acre is $2,318,750. And it is averred that it is the right of the Chippewa Indians to have certain of the lands sold, the proceeds to draw five per cent interest for fifty years, and the interest money to be used for the benefit of the Indians as provided in the act, and at the expiration of the fifty years the balance of the principal sum remaining to be paid to the Indians.

The complaint is of the act of June 27, 1902, amendatory of the act of January 14, 1889. It is averred that at the time of the passage of the latter act there yet remained 600,000 acres of pine lands, and 200,000 acres of agricultural lands, which ought to be disposed of in pursuance of said trust in favor of the Indians; that the pine lands are worth upwards of $10,000,000, and the agricultural lands $1.25 per acre; that without the consent of the Indians a portion of the pine lands were set off as a forest reservation, the timber on this land being of the

value of $3,000,000; that the rules and regulations prescribed by the Secretary of the Interior for the selling and removal thereof would reduce the value of the pine timber to an amount exceeding $1,000,000; that the Secretary is about to sell and has advertised for sale the pine timber on 300,000 acres of said lands; that said act of June 27, 1902, if carried out, will deprive the complainant and other Chippewa Indians of the State of Minnesota of their property without compensation and without due process of law, in violation of the Constitution of the United States. The bill prays that the defendant, the Secretary of the Interior, may be temporarily enjoined from any further act or acts in execution of the act of Congress of June 27, 1902; that he be required to execute the trust in favor of the Indians, and account to the complainant, as required by the act of January 14, 1889, and for general relief.

The defendant demurred on three grounds, viz.: 1. That there is a defect of parties complainant. 2. That the bill is bad in substance, in that it does not set out any facts sufficient to entitle the complainant or the real party in interest, the Chippewa Indians of Minnesota, to the relief prayed for, or to any relief. 3. That the court has no jurisdiction over the subject matter of the suit. The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. This judgment was affirmed in the Court of Appeals.

It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is no jurisdiction to enter-

tain this case. In respect to this question it is on all fours with *State of Oregon* v. *Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term. 202 U. S. 60. That case was distinguished from *Minnesota* v. *Hitchcock*, 185 U. S. 373, relied on here by the appellant, in the fact that in the *Minnesota* case, the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision so far as the Indians were concerned. Act of March 2, 1901, 31 Stat. 950. In this case, as in the *Oregon* case, the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner its immunity, or consented to be sued concerning the lands in question, and there is no act of Congress in anywise authorizing this action. Upon the authority of the *Oregon* case we hold that there is no jurisdiction to maintain the present suit, and the action of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District dismissing the complainant's bill, is

Affirmed.

BUSH *v.* ELLIOTT.

BUSH *v.* ELLIOTT CAR COMPANY.

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

Nos. 245, 246. Argued April 24, 25, 1906.—Decided May 21, 1906.

Where by reason of the amount involved and the diverse citizenship existing the bankrupt might have sued the defendant in the Circuit Court of the United States, independently of the bankruptcy proceedings, under § 23 of the act of 1898 that right is preserved to the trustee, and the citizenship of the latter is wholly immaterial to the jurisdiction of the court in such a case.

THE facts are stated in the opinion.

Mr. James H. Beal and *Mr. George D. Lancaster*, with whom was *Mr. John P. Tillman* on the brief, for plaintiffs in error.

Mr. Amos E. Goodhue for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were heard together and concern the same question upon practically the same facts. They involve the jurisdiction of the Circuit Court of the United States to entertain a suit to recover upon an alleged cause of action for moneys due the bankrupt at and prior to the adjudication in bankruptcy, where one of the trustees in bankruptcy is a citizen of the same State with the defendant, and the bankrupt a citizen of another State.

The suits were brought by the plaintiffs as trustees in bankruptcy of the Southern Car and Foundry Company, a corporation organized under the laws of New Jersey and a citizen of

that State, against the Elliott Car Company, a corporation and a citizen of the State of Alabama, and against J. M. Elliott, Jr., a citizen of the same State. They were to recover certain sums of money alleged to have been lent by the bankrupt, for goods sold and delivered to the defendants, and upon an account stated and for money paid for them by the bankrupt. In both cases motions to dismiss were filed upon the ground that the Circuit Court of the United States had no jurisdiction because Thomas G. Bush, one of the trustees in bankruptcy, is and was at the time of the beginning of the suit a citizen of the State of Alabama, the same State of which the defendants were citizens, and the defendants had not consented to be sued in the Circuit Court of the United States in which the action was brought. The Circuit Court held that it had no jurisdiction and dismissed the suit.

The correctness of the decision of the court below depends upon the construction of section 23 of the Bankruptcy Act of 1898. This section, entitled "Jurisdiction of the United States and State Courts," prior to the amendment of February 5, 1903, read as follows: "*a.* The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. *b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." By the amendment of February 5, 1903, the following words were added to clause *b*: "except suits for the recovery of property under section sixty, subdivision *b*, and section sixty-seven, subdivision *e*." The excepted suits, for the recovery of property, covered by the

amendment of 1903, pertain to actions to recover property conveyed by the bankrupt in fraud of the act, and do not concern actions of the character of those now under consideration.

Both sides cite and rely upon the case of *Bardes* v. *Hawarden Bank*, 178 U. S. 524, in which case it was held that a District Court of the United States had no jurisdiction of an action brought by the trustee to set aside an alleged fraudulent transfer made by the bankrupt within four months before the proceedings in bankruptcy. That case pertained to an action to set aside a fraudulent conveyance of property which had not come into the control of the bankruptcy court. In later cases it has been held that the decision did not extend to cases wherein the bankrupt court had acquired jurisdiction over the subject matter of the property as that of the bankrupt, as to which the bankrupt courts have been held to have jurisdiction under the power conferred in subdivision seven, section two, of the act. *White* v. *Schloerb*, 178 U. S. 542; *Bryan* v. *Burnheimer*, 181 U. S. 188, in which case the opinion was given by Mr. Justice Gray, who also delivered the opinion in the *Bardes* case, and *Whitney* v. *Wenman*, 198 U. S. 539.

While the *Bardes* case involved only the jurisdiction of the District Court, we think the principles announced in the opinion of Mr. Justice Gray in that case, when applied to the one now under consideration, are decisive in favor of the jurisdiction of the Circuit Court to entertain these suits. The elaborate consideration of the history of section 23 of the present Bankruptcy Act, given in the *Bardes* case, renders it unnecessary to do more than epitomize from the opinion so much thereof as is necessary to an understanding of the question now made as to the jurisdiction of the Circuit Court.

The Bankruptcy Act of 1898, in respect to the matters now under consideration, was a radical departure from the act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankruptcy courts, and to preserve, to a

greater extent than the former act, the jurisdiction of the state courts over actions which were not distinctly matters and proceedings in bankruptcy. Under the act of 1867 the jurisdiction of District and Circuit Courts of the United States was concurrent with the state courts of suits in law or in equity brought by or against the assignee in reference to property of the bankrupt or to claims alleged to be due from or to him. *Lathrop* v. *Drake*, 91 U. S. 516; *Bardes* v. *Hawarden Bank*, 178 U. S. 531, 532. The intention of Congress to prevent actions not strictly proceedings in bankruptcy from coming within the jurisdiction of the United States courts, except in certain cases, was enacted into law in the section of the statute now under consideration. Of clause *a*, Mr. Justice Gray, speaking for the court in the *Bardes* case, said:

"The first clause provides that 'the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees,' restricting jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.' This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

Clause *a* thus construed gives jurisdiction to such a con-

troversy as the present one, for the jurisdiction is not attempted to be enlarged because of a title in the trustee derived under the bankruptcy proceedings, which it was the purpose of this clause to prevent. Loveland on Bankruptcy, 2d ed., 105.

The suit concerns the right to recover a money debt which is property, *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438, and, in the sense of the law, is with an adverse claimant "concerning property acquired or claimed by the trustee," and is a controversy of which the Circuit Court had jurisdiction, as between the bankrupt and the claimant, but for the bankruptcy proceedings.

The act of 1841 (sec. 8) gave the Circuit Court concurrent jurisdiction with the District Court of suits at law and in equity "which may and shall be brought by the assignee against any person or persons claiming an adverse interest, or by such persons against such assignees touching any property or rights of property of the bankrupt, transferable to or vested in such assignee." It was held that the Circuit Court had jurisdiction to recover a debt due the bankrupt at the suit of the assignee, and that the debtor was a party claiming an adverse interest within the sense of the act. *Mitchell* v. *Great Works Milling Company*, 2 Story, 648; *Pritchard* v. *Chandler*, 2 Curtis, 488. While the phraseology of the present act is somewhat different, its provisions come to practically the same thing in this respect.

Of clause *b*, in the *Bardes* case, it was said:

"But the second clause applied both to the District Courts and to the Circuit Courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words 'the courts,' as contrasted with the specific words 'the United States Circuit Courts,' in the first and in the third clauses.

"The second clause positively directs that 'suits by the trustee shall only be brought or prosecuted in the courts where

the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'

"Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, c. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits."

And after pointing out that the Bankruptcy Act of 1898 did not intend to confer the jurisdiction given under the former bankruptcy acts, the opinion continues:

"Congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretence in this case."

Applying the principles thus announced, remembering that we are dealing with an action which might have been brought by the bankrupt, but for the bankruptcy proceedings, in a Circuit Court of the United States, we think it is apparent that this action comes within the provisions of section 23 of the act of 1898. The effect of clause *a*, as pointed out by

Mr. Justice Gray, is to prevent the jurisdiction of the United States Circuit Court from attaching, because of the appointment of a trustee in bankruptcy. In other words, the jurisdiction of the United States courts was not to be extended, as had been done under the former acts, because of the institution of the proceedings in bankruptcy. Under clause *b* the jurisdiction of all courts is affected, and this clause pertains to suits begun by the trustee, and he is not (prior to the amendment of February 5, 1903) permitted to prosecute suits unless by the consent of the defendant, except where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted. That is, while the jurisdic- of the courts was not to be extended because of the bankruptcy proceedings or the citizenship of the trustee, it was preserved to the trustee, in the jurisdiction where the bankrupt might have brought or prosecuted the suit but for the bankruptcy proceedings. While this section preserves the jurisdiction of the United States Circuit Courts over cases coming within clause *a*, in clause *b* the right of suit by the trustee is limited to courts wherein the bankrupt might have brought or prosecuted the action had the bankruptcy proceedings not been instituted.

The case of *Spencer* v. *Duplan Silk Company*, 191 U. S. 526, relied upon by the counsel for defendant in error, does not militate against this construction. In that case the question was as to the right to appeal directly to this court where an action had been begun in the state court by the trustee and was removed, on the ground of diverse citizenship, to the Federal court. It was held that the jurisdiction of the Circuit Court was acquired because of diverse citizenship and not under section 23 of the Bankruptcy Act, and consequently the judgment was final in the Circuit Court of Appeals. The same principle was recognized in *Cochran* v. *Montgomery County*, 199 U. S. 260, decided at this term.

The action in the present case was to recover a sum of money alleged to have been due, prior to the bankruptcy proceedings,

to the Southern Car and Foundry Company, which was a citizen of the State of New Jersey. The amount involved and the diverse citizenship of the parties were such that the car company might have sued the defendant, a citizen of the State of Alabama, in the Circuit Court of the United States independently of the bankruptcy proceedings. We think, by the terms of this section, it was intended to preserve this right to the trustee in bankruptcy, and that the citizenship of the trustee is wholly immaterial to the jurisdiction of such a case.

The Circuit Court erred in reaching the contrary conclusion, and its judgment is

Reversed.

LINCOLN *v.* UNITED STATES.

WARNER, BARNES AND COMPANY, LIMITED, *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK. APPEAL FROM THE COURT OF CLAIMS.

Nos. 149, 466. Argued March 3, 1905; decided April 3, 1905; Petitions for rehearing allowed May 29, 1905; Reargued January 18, 19, 1906.—Decided on reargument May 28, 1906.

Lincoln v. *United States*, 197 U. S. 419, reaffirmed, after rehearing, to the effect that the Executive order of July 12, 1898, directing that upon the occupation of ports and places in the Philippine Islands by the forces of the United States duties should be levied and collected as a military contribution, was a regulation for and during the war with Spain, referred to as definitely as though it had been named, and the right to levy duties thereunder on goods brought from the United States ceased on the exchange of ratifications of the treaty of peace; that after title to the Philippine Islands passed by the exchange of ratifications on April 11, 1899, there was nothing in the Philippine Insurrection of sufficient gravity to give to those islands the character of foreign countries within the meaning of a tariff act; that the ratification of Executive action, and of authorities under the Executive order of July 12, 1898, contained in the act of July 1, 1902, 32 Stat. 691, was confined to actions taken in accord-

ance with its provisions; and that the exaction of duties on goods brought from the United States after April 11, 1899, was not in accordance with those provisions and was not ratified.

A ratification by act of Congress will not be extended to cover what was not, in the judgment of the courts, intended to be covered, because otherwise the ratification would be meaningless or unnecessary. Congress out of abundant caution may ratify, and at times has ratified, that which was subsequently found not to have needed ratification.

THE facts are stated in the opinion.

Mr. Paul Fuller, Mr. Frederic R. Coudert and *Mr. John G. Carlisle,* with whom *Mr. Henry M. Ward* was on the brief, for plaintiffs in error and appellant:[1]

The moneys exacted from the plaintiffs in error and appellants were unlawfully exacted and consequently are still their property. No change of title is operated by illegal seizure. That point is not open to reargument. *Warner, Barnes & Co.* v. *United States,* 197 U. S. 419; *Dorr* v. *United States,* 195 U. S. 138; *Rassmussen* v. *United States,* 197 U. S. 516; *Czarnikow* v. *Bidwell,* 191 U. S. 559; *De Lima* v. *Bidwell,* 182 U. S. 1, 199, 200.

The only question subject to rehearing is the effect of the act of Congress of July 1, 1902, upon the illegal seizure of the moneys of complainants and whether their ownership of the moneys was divested by the operation of said act.

Congress had no power to divest the complainants of their ownership of the moneys or deprive them of their property. Constitution, Fifth Amendment; *United States* v. *Lee,* 106 U. S. 218, 219. Nor could any ratification of an illegal act operate a change of title, nor divest complainants of their vested right to recover the moneys unlawfully exacted. *De Lima* v. *Bidwell,* 182 U. S. 199, 200; *Alter's Appeal,* 67 Pa. St. 433; *Donovan* v. *Pitcher,* 53 Alabama, 634; *Palairet's Appeal,* 67 Pa. St. 341; *Norman* v. *Heist,* 5 W. & S. 171.

[1] There was also a separate brief filed by *Mr. Hilary A. Herbert* and *Mr. Benj. Micou* in behalf of certain claimants having interests similar to those of appellants.

Apart from the right of the complainants to protect their ownership of the moneys as against the United States and to bring suit for recovery,—complainants had a right of recovery against the officer or agent who made the illegal exaction. Such was the recovery in *De Lima* v. *Bidwell, supra.* This right of recovery or right of action against the official who makes the exaction or commits the trespass is recognized in a long line of cases. *Little* v. *Barreme,* 2 Cranch, 170; *Meigs* v. *McClung's Lessee,* 9 Cranch, 11; *Osborn* v. *Bank of U. S.,* 9 Wheat. 738; *Grisar* v. *McDowell,* 6 Wall. 363; *Bates* v. *Clark,* 95 U. S. 204; *United States* v. *Lee,* 106 U. S. 196; *Virginia Coupon Cases,* 114 U. S. 270; *In re Ayers,* 123 U. S. 443; *McGahey* v. *Virginia,* 135 U. S. 662; *Belknap* v. *Schild,* 161 U. S. 10.

Such a right of action constitutes property in the same sense as tangible things and is equally entitled to protection against arbitrary interference or legislative impairment; even to the extent that the denial of a remedy or imposition of new conditions or restrictions upon its exercise is such an interference. Cooley, Const. Lim., 6th ed., 443; Sutherland, Stat. Const. §§ 164, 206; *Steamship Co.* v. *Joliffe,* 2 Wall. 450, 457, 458; *Angle* v. *Chicago, St. P. &c. Ry.,* 151 U. S. 1, 19; *Bronson* v. *Kinzie,* 1 How. 311, 317; *Barnitz* v. *Beverly,* 163 U. S. 118, and cases there collated; *Auffmordt* v. *Rasin,* 102 U. S. 622; *Hubbard* v. *Brainard,* 35 Connecticut, 563.

The limitation upon the right to pass retrospective or retroactive legislation is that it must not interfere with vested rights. *Fleckner* v. *Bank of U. S.,* 8 Wheat. 338, 363; *Society* v. *Wheeler,* 22 Fed. Cas. 767 (per Story, J.), approved in *Sturgis* v. *Carter,* 114 U. S. 519.

All of the cases in the books validating assessments or municipal bond issues have reference solely to the methods of action employed and relate to statutes curative only of defects in the procedure by which an undoubted power has been exercised. Such is the case of *Mattingly* v. *District of Columbia,* 97 U. S. 687, and the many kindred cases. No cases can

be found in this court where the fundamental absence of power to do an act sought to be supplied by subsequent legislation has been upheld.

The distinction is well pointed out in *Lennon* v. *The Mayor*, 53 N. Y. 367, and in *Cromwell* v. *MacLean*, 123 N. Y. 474 (per Peckham, J.).

The constitutional guarantees against protection are as applicable to personal property as to realty. Relief against interference with such property can be had against the United States as well as against individuals. *Osborn* v. *Bank of U. S.*, 91 U. S. 474; *United States* v. *Klein*, 13 Wall. 128; *United States* v. *State Bank*, 96 U. S. 30.

Congress cannot ratify an invalid act unless at the time of ratification it could itself lawfully do the act which it assumes to ratify. Unless Congress could in July, 1902, have legally imposed customs duties upon importations theretofore made into the Philippines, it could not, under guise of ratification, accomplish an identical result. *Grenada Co. Supervisors* v. *Brogden*, 112 U. S. 271; *Norton* v. *Shelby County*, 118 U. S. 457; *Kimball* v. *Rosedale*, 42 Wisconsin, 413.

The power of Congress is limited in the levying of duties to a tax upon the importation of merchandise; if merchandise has been imported in accordance with existing law, free from duty, and is mingled with the property of the country, Congress has no authority to levy duties upon it. Complainants' merchandise was imported free of duty in accordance with the law at the time of its importation and Congress cannot by a retroactive law sanction the imposition of the duty upon goods not subject to it at the time of their importation.

The act of July 1, 1902, does not disclose any intention to legalize the collection of duties which this court had decided to have been unlawfully exacted. Duties are never imposed upon vague or doubtful interpretations; the requirement of a tax law is that any intention to impose a burden upon the citizen must be expressed in clear and unambiguous language. *Hartranft* v. *Wiegmann*, 121 U. S. 609; *Am. N. & T. Co.* v.

Worthington, 141 U. S. 468. There is no such intention expressed in clear language; if such was the purpose of Congress it could have been expressed in language of the utmost simplicity. Under the decisions quoted such an intention cannot be inferred.

Such an inference would assume that the Government is unwilling to fulfill its obligations, pay its debts and do justice to the citizen. This is a supposition that cannot be indulged in. *Gibbons* v. *United States*, 8 Wall. 274. It is as much the duty of the Government as of individuals to fulfil its obligations and no assumption can be indulged in that the United States intended to deprive the citizen of his property without compensation. *United States* v. *Klein*, 13 Wall. 144; *Meigs* v. *McClung's Lessee*, 9 Cranch, 11; *United States* v. *State Bank*, 96 U. S. 30.

A contrary intent is shown in cotemporary acts of Congress authorizing the refunding to citizens of duties unadvisedly collected. Act of April 29, 1902, 32 Stat. 176; act of March 3, 1903, 32 Stat. 1224; act of March 3, 1905, 33 Stat. 1013. It may rightfully be presumed that the legislature never intends to interfere with the action of the courts. *Angle* v. *Chicago & St. P. Ry.*, 151 U. S. 20. To infer such an intention would assume that Congress intended to ignore the prohibitions of the Fifth Amendment and such a presumption will never be assumed. *Supervisors* v. *Brogden*, 112 U. S. 269, and cases collated in *Hawaii* v. *Mankichi*, 190 U. S. 214.

The act of July 1, 1902, § 5, extends to the Philippines the constitutional guarantees for the protection of property which is inconsistent with the intention attributed to the act of depriving citizens of property without a hearing. The act only purports to ratify the action of the President as set forth in the order of July 12, 1898, and the action of the authorities "taken in accordance with the provisions of said order." It has already been held that the order was only intended to enforce the payment of duties on goods from foreign countries and that it ceased to apply to the Philippines, when the Philip-

pines ceased to be foreign. *Dooley* v. *United States,* 182 U. S. 235; *Lincoln* v. *United States,* 197 U. S. 428.

The act did not ratify nor assume to ratify acts done beyond the sanction of the order or under misinterpretations of the order. The authorities misinterpreted the order in applying it to the Philippines, after the Philippines had ceased to be foreign as held in the *Fourteen Diamond Rings,* 183 U. S. 176.

What the act of July 1, 1902, probably intended to ratify and did ratify was the action of the President in applying the order and in enforcing certain additional or amendatory orders after the ratification of the treaty of peace, such as applying a tariff between the Philippines and foreign countries, different from the congressional tariff applicable to the United States, contrary to the rulings of this court in *Cross* v. *Harrison,* 16 How. 164. *Dooley* v. *United States,* 182 U. S. 222; *De Lima* v. *Bidwell,* 182 U. S. 184. And the further assumption of authority by the President in adding articles to the dutiable list (Tariff Circular No. 53, War Department, 17 Apr., 1899), in constituting the Philippines and the Island of Guam into a collection district, creating ports of entry and directing the appointment of collectors, auditors, etc. Tariff Circular No. 65, War Department, 5th May, 1899; Circular No. 20, Division of Custom and Insular Affairs, 8 May, 1899.

The exercise of these powers in time of peace were of questionable validity and a proper subject for congressional ratification.

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

The failure of Congress at the outset to enact as to the Philippine tariff specifically as soon as the treaty of December 8, 1898, was ratified, must be taken, we think, to mean that Congress also supposed that the war power of the President was ample and extended to the new armed conflict. The legislature not disapproving, its silence signified assent and acquiescence. Apart from formal recorded proceedings, com-

mittee action, the taking of testimony, etc., it must be conclusively presumed that Congress was fully informed at all stages and knew exactly what was taking place and being done both in the military campaigns and in civil administration. The formal and concrete action of Congress during the insurrectionary period up to the enactment of the Spooner amendment was logically confined to providing men and munitions. This was necessary for Congress to do, and this is all that was necessary for it to do consistently with the idea of its tacit assumption of the extent of the executive power and its tacit agreement in the propriety of the excutive acts. Plainly no unfavorable inference can be drawn from this essential "legislation of the purse," as containing in the affirmative grant a sort of negative pregnant; this is not a prohibition on the President or any dissent whatever from the civil and military programme of his administration.

Then came the Spooner amendment in March, 1901, and whatever else may be pertinent to say about it, this much is certain—that it followed by substantial reproduction of language the precedent of the Louisiana case (act of October 31, 1803; 2 Stat. 245); that there could not well be a broader grant of power giving the President all possible authority to cover every phase of the Philippine emergencies and necessities, and that the general intention of Congress at that point to approve comprehensively what the President had previously done, and to authorize him comprehensively to act thus in future, appears too plainly for any discussion.

The act of March 8, 1902, was the adoption by Congress itself, as its own tariff law for the Philippines, of the existing provisional tariff, without any change, and specifying that it applied to merchandise entering the Philippines from the United States. This statute altogether disposed for the future of the question of the validity of the taxation, and of course falls completely within the ruling of the insular cases respecting the constitutionality of the analogous law for Porto Rico —the Foraker Act. No reasonable mind could doubt that the

fair and natural inference from this act is that Congress had followed the proceedings in the tariff field respecting the Philippines and approved what had been done, although so far without specific ratification as to the past. In other words, this act throws light on the real intendment of Congress in the ratifying act of the following July.

It is certainly difficult to a plain apprehension approaching the confirming act of July 1, 1902, and reading the language in the light of the previous facts which we have briefly set forth, to conceive that Congress did not mean to foreclose this subject when it approved, ratified, and confirmed the action of the President as set forth in his order of July 12, 1898, together with the subsequent amendments of said order, and approved the action of the authorities of the government of the Philippine Islands taken in accordance with the provisions of said order and subsequent amendments.

With deference, it seems like ignoring the plain meaning and searching for hidden significance and distinctions which were not at all in the mind of Congress and do not really exist, to say that the statute was meant to ratify the President's action only so far as taken by virtue of his undoubted authority as Commander in Chief, and approved only those proceedings and doings of his subordinate officers which were in unquestioned accordance with the provisions of the order; that is, as applicable only before April 11, 1899; because all those actions of the Executive (prior to April 11, 1899) were unquestionably valid without ratification by Congress under established principles of public law.

Long before the act was passed this court said when it decided in *Dooley* v. *United States*, 182 U. S. 222, that the executive action imposing duties upon goods imported into Porto Rico up to the date of ratification of the treaty of peace was entirely valid.

The language used has this full force and significance and it is impossible to restrain and confine it to the time, and the executive action, before April 11, 1899, unless the

words of the statute are wrested from their obvious and natural import.

Congress could have authorized the imposition of duties in advance, and therefore could ratify afterwards. There was no illegal delegation of legislative power or approval tantamount to attempted illegal delegation by relation back. The President's tariff order was a military decree, operating with the compulsion of a command upon all subordinate officers. It is misleading to treat it as legislation. But in either aspect, as military mandate or law, it was valid in origin. *Dooley* v. *United States*, 182 U. S. 222, 230.

When its constitutional authority expired on April 11, 1899, the Executive was acting, not legislating, believing the action authorized; it was proceeding *de facto*. There was no legislation or revival of legislation. The subsequent amendments to the order were administrative directions to military officers and were believed to rest on the war power. When Congress approved, it did not seek to revitalize a legislative power or validate *nunc pro tunc* an unconstitutional exercise of such power. It simply confirmed the acts done and adopted the effects of the previous originating legislative cause, which was efficacious *de facto*, although its legal validity had expired. It was efficacious *de facto* because the acts were done in point of fact.

Clearly, Congress could have authorized in advance. On April 11, 1899, it could have passed the Philippine tariff act which it passed March 8, 1902. *Downes* v. *Bidwell*, 182 U. S. 244. On April 11, 1899, it could have authorized the President to proceed as he did, to continue the operation of the tariff order which he had already imposed and under which, in fact, he steadily collected duties. That is to say, on April 11, 1899, Congress could have adopted the Spooner amendment of March 2, 1901, which the court fully recognizes as a constitutional delegation of power to the President and his subordinate executive agencies, resting on the authority of Congress to "make all needful rules and regulations respecting

the territory . . . belonging to the United States." *Dorr* v. *United States*, 195 U. S. 138, 143, 153.

This case does not involve the consequence that Congress must be able to lay a retrospective tax, that is, impose duties now on a transaction of, say, five years ago. But if such a tax were equal and uniform, what is to prevent? Congress perhaps is not likely so to tax; it might be unwise or even unjust, but it would be constitutionally valid. There is no precise authority, but this is manifestly the tendency and effect of *Stockdale* v. *Insurance Companies*, 20 Wall. 323.

As to the notion of vested rights. This case does not fall within that exception, either, as preventing subsequent ratification by Congress.

On the general doctrines about ratification we cite the following authorities additional to those cited on the original hearing. *State* v. *Squires*, 26 Iowa, 340; *Grogan* v. *San Francisco*, 18 California, 590; *McCauley* v. *Brooks*, 16 California, 1, 27; *McCracken* v. *San Francisco*, 16 California, 591; *Brady* v. *Mayor &c.*, 16 How. Pr. 432; *Zottman* v. *San Francisco*, 20 California, 97; *Peterson* v. *Mayor &c.*, 17 N. Y. 449; *Schneck* v. *City of Jeffersonville*, 152 Indiana, 204; *Marks* v. *Purdue University*, 37 Indiana, 155.

The vested right must be one which is constitutionally protected, that is, the right to be compensated when private property is taken for public use, and the right to have due process of law. It is idle to claim that legislation may not affect vested rights of property, and no man has a vested right not to be taxed. There was due process of law here, because when these duties were levied, the law of the Philippines, like our own law, fully provided for protest and hearing. That is, there was entire compliance with the rules of due process as to tax levies. It is only when there is no notice to the taxpayer or some other vital defect, as in the authorities cited by our adversaries, that the tax is illegal. There is no more reason for saying that private property is taken here for public use without compensation, than in any other case

of taxation. All these suggestions beg the question. The very inquiry before the court is whether these duties are the claimants' property.

The power of a legislature to confirm embraces not only cases where mere irregularities or informalities in procedure are cured, but where there was a total want of authority in the executive officer and the tax levies were therefore utterly void. It makes no difference if rights are divested. To legalize a tax in this way does not unconstitutionally interfere with vested rights. There is no right of action vested beyond control by the curative act, and the bringing of suit makes no difference. *Iowa R. R. Land Co.* v. *Soper*, 39 Iowa, 112, and cases cited; *Grim* v. *School District*, 57 Pa. St. 433. The power to tax, and especially the Federal power to tax, is unlimited, and the constitutionality of retrospective laws has been sustained many times. The real question is whether the retrospective intention is clear. In *De Lima* v. *Bidwell*, 182 U. S. 1, 199, the retroactive effect of the statute rested on inference, and the court naturally construed it as not intended to operate retroactively. This law is, however, expressly and manifestly retroactive, leaving no room for construction. The claimants appear to repudiate the idea that the filing of suit makes any difference, by which they seem to mean that their mere right of action is protected, and probably have in mind the numerous suits filed after July 1, 1902. If the intention of Congress is sustained by the court and only the retroactive power denied, manifestly those suits fall. But we go beyond the claimants' concession. We say that a right of action is not a vested right of property, and that the bringing of suit even before the passage of the act does not vest a right. The state authorities cited for the contrary view in *De Lima* v. *Bidwell*, 182 U. S. 200, on analysis show that the bringing of suit was not the real ground of decision. For instance, in *Palairet's Appeal*, 67 Pa. St. 479, it was simply held that an act of assembly providing for the extinguishment of irredeemable ground rents was unconstitutional, because it took

private property for private use without consent of the owner. There is no such case here. There is no taking even for public use, because, on fundamental and firmly established principles, burdens on property imposed under the power of taxation do not constitute a taking of private property for public use without compensation.

Further, in *De Lima* v. *Bidwell* there was due protest. There was no protest at all in these cases, written or verbal, formal or informal. That alone is a sufficient ground for denying this claim. Protest is a necessary preliminary to establish any claim. The authorities without exception sustain the contention that where there is no protest the payment is voluntary and cannot be recovered. *Elliott* v. *Swartwout,* 10 Pet. 137; *Bend* v. *Hoyt,* 13 Pet. 263; *Converse* v. *Burgess,* 18 How. 413; *Philadelphia* v. *Collector,* 5 Wall. 720; *Nicholl* v. *United States,* 7 Wall. 122; *Wright* v. *Blakeslee,* 101 U. S. 174; *Barney* v. *Rickard,* 157 U. S. 352; *Chesebrough* v. *United States,* 192 U. S. 253. And see especially *Hamilton* v. *Dillin,* 21 Wall. 73, 92; and *Cross* v. *Harrison,* 16 How. 201, as to the supposed "compulsion" resting on importers. No valid reason can be given why absence of protest cannot now be set up as a defense.

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

These are suits to recover duties exacted from plaintiffs in error and appellants upon merchandise shipped by them from New York to Manila, and landed at the latter port between April 11, 1899, the date when the ratifications of the treaty with Spain were exchanged, and the treaty proclaimed, and October 25, 1901. The duties were levied under an order of the President, dated July 12, 1898. The cases were argued in this court March 3, 1905, and the judgments reversed April 3, 1905. 197 U. S. 419, 429.

We ruled that the order of July 12, 1898, was a regulation

for and during the then existing war with Spain, referred to as definitely as if it had been named, and that the right to levy duties thereunder on goods brought from the United States ceased on the exchange of ratifications. *Dooley* v. *United States*, 182 U. S. 222.

And that after title passed, April 11, 1899, there was nothing in the Philippine insurrection of sufficient gravity to give to the islands the character of foreign countries within the meaning of a tariff act. *Fourteen Diamond Rings*, 183 U. S. 176. As to the subsidiary point that whether the exaction of the duties was lawful or not, it had been ratified by the act of July 1, 1902, 32 Stat. 691, 692, c. 1369, § 2, we were of opinion that the ratification of "the actions of the authorities . . . taken in accordance with the provisions of said order and subsequent amendments" was confined to actions which were taken in accordance with the provisions of the order and amendments, which these exactions were not. May 29, 1905, we allowed petitions for rehearing to be filed addressed solely to the matter of ratification, and subsequently (November 13) a rehearing was granted "as to the question whether Congress ratified the collection of the sums sought to be recovered in these suits."

The cases were reargued January 18 and 19 on that question.

That the moneys exacted from plaintiffs in error and appellants were illegally exacted is not open to question under our order, unless the act of July 1, 1902, operated to the contrary. The second section of that act reads as follows: "That the action of the President of the United States heretofore taken by virtue of the authority vested in him as Commander in Chief of the Army and Navy, as set forth in his order of July twelfth, eighteen hundred and ninety-eight, whereby a tariff of duties and taxes as set forth by said order was to be levied and collected at all ports and places in the Philippine Islands upon passing into the occupation and possession of the forces of the United States, together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philip-

pine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved."

The order of July 12, 1898, by President McKinley, as Commander in Chief, directed that upon occupation of any ports or places in the Philippine Islands by the forces of the United States an accompanying tariff of duties and taxes should be levied and collected as a military contribution, and that regulations for its administration should take effect and be in force in the ports and places occupied. Manila was captured August 13, and the next day the custom house was opened and taxes were collected according to the prior Spanish tariff up to November 10, 1898, until which date the order of July 12 had been suspended.

On the rehearing an order of the Military Governor of the Philippines of October 26, 1898, which embodied the full text of the customs tariff and regulations, was brought forward, and was in all essential respects a repetition of the order of July 12.

The Porto Rican cases were decided May 27, 1901, and in June the Secretary of War cabled the commission at Manila that: "The most obvious distinction between the status of Porto Rico and the Philippines, after the cession, indicated in the opinions of the court, is in the fact that Porto Rico was at the time of cession in full peaceable possession, while a state of war has continued in the Philippines. As the question of the President's power to impose duties in the Philippine Islands under the existing conditions of military occupation has not been decided by the court, the President has determined to continue to impose duties as heretofore."

Undoubtedly the order of July 12, 1898, contemplated vessels from America as well as others, yet that order, having been made in time of war, for a military contribution, when the Philippines did not belong to us, must be taken to have contemplated them, as it contemplated those from other countries, as vessels foreign to the country, and to have imposed the tax upon them *qua* foreign. The military tax was, so to speak, a seizure of Spanish revenues. That was what the order meant

when it was passed, and a change of circumstances did not change its meaning. Neither was the meaning changed by any amendment. The ground on which it was kept in force by the Secretary of War, June 8, 1901, was that the Philippines were still in a state of war. If that view had been correct the order would have applied and would have had lawful effect, but it turned out not to be correct.

The ratification may be assumed to apply to the order as actually made, and not to have been limited to such an order or so much of this order as the President had a right to make. But it does not construe the order, and as it confines the ratification to actions in accordance with the order and amendments, the question what actions were in accordance with them is for us. The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order. If the order properly construed did not purport to apply to vessels unless they were either enemy or foreign, then when a vessel ceased to be foreign the order did not apply, and a tax upon such a vessel not being in accordance with the order is not ratified by the act. This construction is favored by the consideration that the suits had been begun when the act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted, *Hamilton* v. *Dillin*, 21 Wall. 73, still it is not to be presumed to do so on language which, literally taken, has a narrower sense.

Moreover, the act of July, 1902, was passed with full knowledge and after careful consideration of the decisions of this court, and Congress was aware that grave doubt, at least, had been thrown upon its power to ratify a tax under circumstances like the present. *De Lima* v. *Bidwell*, 182 U. S. 1, 199, 200. This affords a special reason for believing that if it had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape.

It should also be remembered that there was a powerful opposition in Congress and that the phraseology of the act prob-

ably represents all that it was deemed safe to ask. Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words. In a literal sense they ratify only actions in accordance with the order construed as it would have been construed by this court had it come before us upon the day when it was made.

It is not a sufficient answer to say that the ratification was meaningless unless it embraced duties collected on imports from the United States after April 11, 1899, because the exactions before were legal. The instances are many where Congress out of abundant caution has ratified what did not need, or was afterwards found not to have needed, ratification. *Cross* v. *Harrison*, 16 How. 164; *Prize Cases*, 2 Black, 635.

It would be inadmissible to lay down as a general rule that a particular ratification covered what was not, in the judgment of the courts, included or intended to be, simply because it might be thought to have been otherwise unnecessary.

In these cases, however, the ratification act was not otherwise meaningless. Duties were collected under the order of July 12, 1898, as a military contribution while the war with Spain was in progress. The treaty was signed December 10, 1898, and the President on December 21 issued an order proclaiming the sovereignty of the United States in the islands and directing duties and taxes to be collected in future as public revenues for the support of the government. When the treaty was ratified the applicable laws of the United States became operative, but the President, nevertheless, continued in force the tariff created by the order of July 12, 1898, and by an order of April 21, 1899, established a collection district with Manila as the chief port of entry, and under these orders collections of duties were made. This involves the question whether after April 11, 1899, the President could have enforced any tariff other than such as existed under acts of Congress or might be sanctioned by Congress. And that question was put at rest by this ratification.

Much more might be said, but we think it would needlessly prolong this opinion.

Notwithstanding the able argument of the Attorney General, we adhere to the conclusion previously announced.

Judgments reversed.

MR. JUSTICE WHITE, with whom concurs MR. JUSTICE MCKENNA, dissenting.

Although I dissented in *De Lima* v. *Bidwell*, 182 U. S. 1, *Dooley* v. *United States*, 182 U. S. 222, and *Fourteen Diamond Rings*, 183 U. S. 176, nevertheless I agreed to the judgment of reversal as previously rendered in this case. 197 U. S. 429. I was constrained so to do because to me it seemed that the determination of the substantial issues in the case were foreclosed by the prior cases above mentioned, which were binding on me under the rule of *stare decisis*. It is true that in this case, as previously argued and decided, there was present the question of an alleged ratification by Congress of the imposition and collection of the taxes in controversy; but, on the former argument, my attention was not directed to public reports and documents throwing light upon the scope of the ratifying act, as was done on the present argument. Construing the act of Congress which is relied upon to establish the ratification, by the light of the public documents referred to, my mind sees no possible escape from the conclusion that that act was intended to and did ratify the collection of the charges complained of. Having no doubt of the power of Congress to ratify, to my mind it clearly results that I erred in giving my assent to the previous judgment of reversal, and I therefore dissent from the opinion and conclusion of the court now announced.

I am authorized to say that MR. JUSTICE MCKENNA concurs in this dissent.

O'CONOR *v.* TEXAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 236. Argued April 19, 1906.—Decided May 28, 1906.

As subsection 1 of section 639, Rev. Stat., was repealed by the act of March 3, 1875, 18 Stat. 470, and, as the purpose of the act of March 3, 1887, 24 Stat. 556, as corrected by the act of August 13, 1888, 25 Stat. 433, was to limit the jurisdiction of the Circuit Courts, a petition for removal of an action brought by a State in its own courts against an alien was properly denied.

In an action to recover real estate, part of a grant from a former sovereign, defenses based on adverse possession, estoppel, construction of state statutes, and the effect of judgments of the state court in other actions, neither the validity nor the construction of any treaty of the United States or the validity of the grant being challenged, do not present Federal questions which give this court jurisdiction to review the judgment on writ of error.

THE facts are stated in the opinion.

Mr. H. G. Dickinson for plaintiff in error:

This court has jurisdiction to review the judgment in this case on writ of error because the plaintiff in error claimed the land in controversy under a grant from the government of Spain to Joaquin Galan, made in 1767, or about that time and prior to the year 1804, the grant covering such land and being made at such time as to be within the protection guaranteed by the treaty of Guadalupe Hidalgo; and plaintiff in error connected his title with said grant by a regular chain of title, and none of the state courts which had this case under consideration found that plaintiff in error did not connect his title with said grant.

There was drawn in question a title claimed by plaintiff in error under a treaty of the United States and also under two statutes of the United States, one for annexing Texas to

the United States, approved March 1, 1845, and the other for the admission of the State of Texas into the Union, approved December 29, 1845.

If this case is one in which there was drawn in question a title claimed under a treaty or the statutes of the United States, then the judgment of the Supreme Court of Texas is reviewable by this court. *Owings* v. *Norwood's Lessee*, 5 Cranch, 347; *Smith* v. *Maryland*, 6 Cranch, 286; *Martin* v. *Hunter*, 1 Wheat. 359; *Henderson* v. *Tennessee*, 10 How. 311.

An action at law brought in her own court by one of the States of the United States as plaintiff, against a non-resident alien, as defendant, is removable to the Circuit Court of the United States. Constitution of the United States, art. III, § 2; Judiciary Act of 1789; Judiciary Act of 1875; Judiciary Act of 1887, 1888; Revised Statutes of the United States, § 639; *Texas* v. *Lewis*, 14 Fed. Rep. 65; *S. C.*, 12 Fed. Rep. 1.

The act of the legislature under which this suit was brought shows that this is a suit arising under the laws of the United States and the treaty of Guadalupe Hidalgo; and being such a suit the petition of plaintiff in error for removal to the Circuit Court of the United States should have been granted. *Chadman* v. *Goodnow*, 123 U. S. 540; *Lytle* v. *Arkansas*, 22 How. 193; *Marlin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264; *Hickie* v. *Starke*, 1 Pet. 94; *Covington & L. Co.* v. *Landford*, 164 U. S. 578; *Louisville & N. R. Co.* v. *Louisville*, 166 U. S. 709; *F. G. Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648.

The jurisdiction of a state court in so far as it is fixed by the constitution of the State is not subject to the regulation or control of the legislature. *Ex parte Towles*, 48 Texas, 414; *Ex parte Whitelaw*, 59 Texas, 273.

The judgment of the District Court of Webb County of March 13, 1872, in the cause entitled *Ruggles* v. *State of Texas*, is a valid judgment or at least an irregular and voidable judgment and the State of Texas is bound by it and cannot im-

peach it in this collateral proceeding. Gammel's Laws of Texas, vol. 4, p. 1471 and vol. 5, p. 568; *Kenedy* v. *Jarvis* 1 S. W. Rep. 191; *Buchanan* v. *Bilger*, 64 Texas, 589; *Johnson* v. *Loop*, 2 Texas, 331; *Stephens* v. *Stephens*, 62 Texas, 337; *Murchison* v. *White*, 54 Texas, 78; 1 Freeman on Judgments, §§ 96, 97, 100, 101; Black on Interpretation of Laws, 99, 100, 104, 212.

By the act of the legislature approved April 4, 1881, the State recognized the validity of the judgment in *Ruggles* v. *Texas*, and the act ratified and confirmed the judgment and operates as a grant from the State of the land in controversy to plaintiff in error or to those under whom he claims and further operates to estop the State from now claiming the land. *Turner* v. *Rogers*, 38 Texas, 582; *Sanders* v. *Hart*, 57 Texas, 8; *May* v. *Ramsay*, 46 Texas, 371; *Alexander* v. *State*, 56 Georgia, 486; *Enfield* v. *Permit*, 5 N. H. 285; *Heirs of Andre* v. *Billou*, 3 Pick. 224.

The judgment in *Ruggles* v. *Texas* was introduced in evidence and relied upon by both parties to this suit; the court in that case having jurisdiction of the parties and the subject matter, the recital of the judgment of any fact essential to the rendition of the judgment or without the proof of which it could not have been rendered, is conclusive evidence against the parties to the judgment of the existence of such fact. *Tex. Mex. Ry. Co.* v. *Jarvis*, 80 Texas, 457; *Watson* v. *Hopkins*, 27 Texas, 637; *Swearingen* v. *Glenn*, 34 Texas, 243; *Foster* v. *Wells*, 4 Texas, 101; *Lee* v. *Kingsbury*, 13 Texas, 68; *Tadlock* v. *Eccles*, 20 Texas, 783; *Hatch* v. *Garza*, 22 Texas, 176; *Cook* v. *Burnley*, 45 Texas, 97; *Burford* v. *Rosenfield*, 37 Texas, 42; *Fristoe* v. *Blum*, 92 Texas, 76; *State of Texas* v. *Ortiz*, Tex. Sup. of Feb. 12, 1906.

The adverse and uninterrupted possession of plaintiff in error and those under whom he claims for such a great period of time, of the land in dispute, under claim of right and title, derived from the Spanish government and recognized by the Mexican government and Republic of Texas, raises a presump-

tion of a grant; and the title of plaintiff in error is, consequently, such a title as is and ought to be protected by the courts of the United States under the terms of the treaty of Guadalupe Hidalgo. *Smith* v. *State of Maryland,* 6 Cranch, 286; *United States* v. *Chavez,* 159 U. S. 452; *Tex. Mex. Ry. Co.* v. *Locke,* 74 Texas, 370; *Haynes* v. *State of Texas,* 11 Tex. Ct. Rep. 885; *State* v. *Russell,* 11 Tex. Ct. Rep. 435; *Strother* v. *Lucas,* 12 Pet. 435; *Ortiz* v. *State of Texas,* 12 Tex. Ct. Rep. 476; *The State* v. *Ortiz,* 14 Tex. Ct. Rep. 883; *Baldwin* v. *Goldfrank,* 88 Texas, 257; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304.

Mr. Charles K. Bell, Mr. Robert V. Davidson, Attorney General of the State of Texas, and *Mr. William E. Hawkins,* for defendant in error, submitted:

In a suit in a District Court of the State of Texas for land lying within that State, wherein the State is plaintiff and the defendant is an alien and a subject of the United Kingdom of Great Britain and Ireland and a resident of the State of Tamaulipas, Mexico, the defendant is not entitled to have the case removed to the United States Circuit Court. *Postal Telegraph Cable Co.* v. *Alabama,* 155 U. S. 482; *Texas* v. *O'Conor,* 96 Texas, 492; *Garland & Ralston,* Fed. Prac. § 156.

Although the defendant, by plea, claimed to be the owner of the land in controversy, which was embraced in a "grant emanating, or claimed to have emanated from the Spanish government, and having its origin at such a time as to be, and being within the protection guaranteed by the treaty of Guadalupe Hidalgo," his case involves no Federal question, the state courts having found the fact to be that defendant did not connect his title with such grant, the validity of the treaty of Guadalupe Hidalgo was not "drawn in question."

The question as to the effect to be given to the judgment in *Ruggles* v. *Texas,* and as to which of the recitals, and as to how far such recitals in said judgment are binding upon the State of Texas upon the issue of "outstanding title," are local or general questions, and the judgment of the Supreme Court

of Texas thereon will not be reviewed by this court, no Federal question being involved. *Thayer* v. *Spratt*, 189 U. S. 346, and cases cited; *Clipper Min. Co.* v. *Eli Min. & Land Co.*, 194 U. S. 220, and cases cited; *Semple* v. *Hagar*, 4 Wall. 431; *Mining Co.* v. *Boggs*, 3 Wall. 309; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.*, 187 U. S. 569; *Jacks* v. *Helena*, 115 U. S. 288; *East Tennessee, V. & G. R. Co.* v. *Frazier*, 139 U. S. 288; *White* v. *Leovy*, 174 U. S. 91; *Minder* v. *Georgia*, 183 U. S. 559; *McKinney* v. *Carroll*, 12 Pet. 66; *Maxwell* v. *Newbold*, 18 How. 51; *Crowell* v. *Randell*, 10 Pet. 368.

Whether the District Court of Travis County, or the District Court of the county in which the land in controversy is situated, alone, had authority to try and determine the question of title to said land, is a local or state question upon which the decision of the courts of the State of Texas are final, and not subject to review in this court, no Federal question being involved. *Bacon* v. *Texas*, 163 U. S. 219; *Avery* v. *Popper*, 179 U. S. 315; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.*, 187 U. S. 569; *White* v. *Leovy*, 174 U. S. 91.

The state courts having found and held that the judgment of March 13, 1872, in the case of *Ruggles* v. *State of Texas*, under which defendant claims the land in controversy, was void, said judgment cannot be held to have vested in him, or in the plaintiff Ruggles under whom he claims, any right to said land, and hence the judgment of the Supreme Court of Texas in favor of the State of Texas did not divest defendant of any vested right or title, nor deprive him of his property without due process of law, nor take his private property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States. The judgment of the state court upon the question having been a question of local or general law, involving no Federal question, will not be reviewed by this court. *White* v. *Leovy*, 174 U. S. 91; *California* v. *Holladay*, 159 U. S. 415; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.*, 187

U. S. 569; *Lynde* v. *Lynde*, 181 U. S. 183; *Gulf & Ship Island R. Co.* v. *Hewes*, 183 U. S. 67; *Bacon* v. *Texas*, 163 U. S. 219; *Quinby* v. *Boyd*, 128 U. S. 489; *Merced Min. Co.* v. *Boggs*, 3 Wall. 310; *Eastern B. & L. Assn.* v. *Ebaugh*, 185 U. S. 114; Taylor on Jurisdiction and Procedure of the U. S. Supreme Court, § 249, and cases cited.

The question as to the effect to be given to the judgment of January 8, 1862, in the case of *Ruggles* v. *State of Texas*, and as to which of the recitals, and as to how far such recitals in said judgment are binding upon the State of Texas upon the issue of "outstanding title," are local or state questions, and the judgment of the Supreme Court of Texas thereon will not be reviewed by this court, no Federal question being involved. *San Francisco* v. *Itsell*, 133 U. S. 65, and authorities cited *supra*.

Whether a grant should be presumed is, primarily, a question of fact for a jury, or, in the absence of a jury, for the trial court. The trial court having found against the defendant upon that issue and its judgment having been affirmed by the Supreme Court of Texas the question is not open for review by this court. Under the facts and circumstances of the case no grant should be presumed in favor of defendant. *Crespin* v. *United States*, 168 U. S. 218; *Chavez* v. *United States*, 175 U. S. 563; *Hays* v. *United States*, 175 U. S. 148; *Paschal* v. *Daingerfield*, 37 Texas, 305; 2 White's Recopilacion, 562.

Mr. Justice Brewer delivered the opinion of the court.

On July 5, 1901, the State of Texas, under the authority of an act of its legislature, filed its petition in the District Court of Travis County against Thomas O'Conor, to recover possession of a tract of over nineteen thousand acres, situated in Webb County.

The defendant appeared and filed a petition for removal to the Circuit Court of the United States, on the ground that he was an alien domiciled in the Republic of Mexico. The re-

moval was claimed under subsection 1 of section 639, Revised Statutes, but, as said by Mr. Chief Justice Waite, delivering the opinion of the court, in *Baltimore & Ohio Railroad Company* v. *Bates*, 119 U. S. 464, 467: "Subsections 1 and 2 of section 639 were repealed by the act of 1875; *Hyde* v. *Ruble*, 104 U. S. 407; *King* v. *Cornell*, 106 U. S. 395, 398; *Holland* v. *Chambers*, 110 U. S. 59; *Ayres* v. *Watson*, 113 U. S. 594."

Further, in *Fisk* v. *Henarie*, 142 U. S. 459, 466, it was held that the purpose of the act of March 3, 1887, 24 Stat. 552, as corrected by the act of August 13, 1888, 25 Stat. 433, was to restrict the jurisdiction of the Circuit Courts, and it was said (p. 468):

"The repealing clause in the act of 1887 does not specifically refer to these prior acts, but declares that 'all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby repealed.' The provisions relating to the subject matter under consideration are, however, so comprehensive, as well as so variant from those of the former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail."

See also *Smith* v. *Lyon*, 133 U. S. 315; *Shaw* v. *Quincy Mining Company*, 145 U. S. 444; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673; *Tennessee* v. *Union &c. Bank*, 152 U. S. 454; *Hanrick* v. *Hanrick*, 153 U. S. 192; *Mexican National Railroad* v. *Davidson*, 157 U. S. 201; *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556; *Wabash Western Railway* v. *Brow*, 164 U. S. 271.

It is clear from these authorities that the petition for removal, which, as will appear, presented the only definite Federal question, was rightfully denied.

Thereupon the defendant filed an answer containing several defenses; a claim of title under and by virtue of a grant made in the year 1767, by the government of Spain to Joaquin Galan; a decree of the District Court of Webb County on March 13, 1872, in a suit for confirmation of title, wherein Daniel Ruggles, claiming to be the owner of the grant to

Galan, was plaintiff and the State of Texas defendant, prosecuted under and by virtue of an act of the legislature of Texas, approved February 11, 1860; a confirmation of this decree by an act of the legislature of Texas of April 4, 1881; title by adverse possession under claim of right and title for a period of more than ninety-six years; title by estoppel, in that the State of Texas was estopped by long acquiescence from questioning the decree of the District Court of Webb County of March 13, 1872; title under and by virtue of a decree of the District Court of Webb County, Texas, rendered on January 8, 1862; and a claim of outstanding title in the settlers of the town of Palafox, or their heirs or assigns, as shown by the recitals in the last-mentioned decree.

The case was tried by the court without a jury, which rendered a judgment in favor of the State. From this judgment the defendant prosecuted an appeal to the state Court of Civil Appeals, which reversed the judgment of the trial court and ordered a judgment for the defendant. This judgment was taken to the Supreme Court of the State, which reversed the judgment of the Court of Civil Appeals, and, sustaining the decision of the trial court, entered a judgment in favor of the State.

It is obvious that most of the questions raised by the defenses are of a purely local nature, involving no Federal right. Some explanation may, however, be proper in reference to the decrees of the Webb County District Court. The record is somewhat obscure, but we take the facts to be as stated in the opinions of the Court of Civil Appeals and the Supreme Court. Under the law of 1860 Daniel Ruggles instituted two suits in the District Court of Webb County for confirmation of title to separate tracts of land, one designated as the Palafox and the other as the Balconcitas tract. One suit came to trial on January 8, 1862, and resulted in a decree in favor of Ruggles and a confirmation of his title to a large tract of land. In 1869 a motion was filed by him seeking a construction and modification of this decree of January 8, 1862, but it was

overruled. In 1871 the other suit was dismissed for want of jurisdiction. The same year he made a motion to redocket the two cases, which was granted, and at the same time he filed a petition in which he sought to have the decree of 1862 set aside and a confirmation of title of both the tracts, but on March 9, 1872, these motions were refused. On March 12, 1872, he filed in the same court another petition seeking to set aside the decree of January 8, 1862. This motion was sustained. On March 13, 1872, Ruggles filed an amended petition, in which he sought confirmation of title to both tracts, and upon this a decree was the same day entered in favor of Ruggles. The land which was covered by the decree of 1862 was patented to Ruggles and the State has not since questioned the validity of the decree or Ruggles' title. The land in controversy here is located entirely in that portion of the grant which the court in its decree of 1862, declined to confirm in favor of Ruggles, but is included in that which purports to have been confirmed by the decree of March 13, 1872. The suits originally brought by Ruggles were authorized by special statute, to wit, the act of the legislature passed February 11, 1860. That act expired by its own limitations in 1865, and, as the Supreme Court of the State held, the District Court had thereafter no power to set aside the decree of January 8, 1862, or to enter the decree of March 13, 1872. The construction of the state statute and the power which it gave to the District Court of Webb County, and the length of time for the exercise of that power, are matters arising under state law, and the decision of the Supreme Court of the State is conclusive upon us and presents no question arising under the Federal Constitution. So the alleged confirmation of the decree of March 13, 1872, by an act of the legislature of 1881, is also a question arising in the construction of a state statute. The Supreme Court held that it applied only to those decrees which were rendered while the Webb County District Court had authority under the special statute, and did not apply to those which that court assumed to render thereafter.

So far as any defense is based upon the grant made by the government of Spain in the year 1767, it involves no question of a Federal nature. Neither the validity nor construction of any treaty of the United States, nor the validity of the grant, were challenged. Indeed, it may be observed that during the progress of the case in the several state courts no appeal was made to the Federal Constitution, or to any acts of Congress save the one providing for the removal of cases from state to Federal courts.

It is apparent that the only Federal question which was presented, to wit, the right of removal, was correctly decided, and, therefore, the judgment of the District Court is

Affirmed.

McDONALD, RECEIVER, *v.* DEWEY.
DEWEY *v.* McDONALD, RECEIVER.

APPEAL AND CROSS APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 220, 530. Argued April 11, 12, 1906.—Decided May 28, 1906.

An officer of a national bank owning stock therein knowing that it was insolvent, although it did not actually fail for two years after the first transfer, transferred stock at various times to one who merely acted as his agent and who absolutely transferred a part thereof to various people of doubtful financial responsibility, all transfers being forthwith made on the books of the bank; after the failure an assessment was levied by the comptroller and the receiver sued the original owner for the assessment on all of the shares originally owned by him. *Held*, that:

The gist of the shareholders' liability is the fraud implied in selling with notice of insolvency and with intent to evade the double liability imposed by § 5139, Rev. Stat.

The fact that the sale is made to an insolvent buyer is additional evidence of fraudulent intent but not sufficient to constitute fraud unless as in this case with notice of the bank's insolvency.

While a shareholder selling with notice of the bank's insolvency may defend against a claim of double liability by showing that the vendee is solvent, and the creditors therefore are not affected by the sale, the

burden of proof is on him to show such solvency, and that burden is not sustained when, as in this case, it does not satisfactorily appear that a decree for the amount of the assessment could have been collected by ordinary process of law.

A shareholder who has transferred his stock to a mere agent is liable for the full amount of the assessment on the stock so transferred standing in the agent's name at the time of the failure; but when he has absolutely transferred stock prior to the failure with knowledge of the bank's insolvency to persons financially unable to respond to the assessment and those transfers have been made on the books of the bank, he is liable only for such amount of the assessment as may be necessary to satisfy creditors at the time of the transfer.

THE first of these cases was an appeal from a decree of the Circuit Court of Appeals, rendered in a case wherein John W. McDonald, receiver of the First National Bank of Orleans, Nebraska, was complainant, and Charles P. Dewey and others were defendants, reversing a decree of the Circuit Court for the Northern District of Illinois, and remanding the case to that court with directions to enter a decree against Dewey for his full assessment on 25 shares of stock of the First National Bank, and for interest thereon. The second case is a cross appeal by Chauncey Dewey and his co-executor from the same decree.

Charles P. Dewey having died pending the litigation, the suits were revived in the name of Chauncey Dewey and Charles T. Killen, executors of his will.

The original was a bill in equity to enforce an assessment of $86 a share on 105 shares of stock of the First National Bank of Orleans, Neb., which failed on May 20, 1897. These shares, having been originally owned by Charles P. Dewey, were sold by him in December, 1894, and in January, 1895. Eighty shares were duly transferred on the books of the bank within a few weeks after the sale. The remaining twenty-five shares had been previously transferred by Dewey to his agent, Frederick L. Jewett, who was admitted to be irresponsible, and stood on the books of the bank in the name of Jewett, when the bank went into the hands of a receiver, on May 20, 1897, although they had been sold by Dewey. The bill alleged that Hedlund, the original receiver (since superseded by McDonald,

the present receiver), was appointed and took possession on June 5, 1897, a fortnight after the failure of the bank; that on September 14, 1897, the Comptroller levied an assessment of $86 a share upon the capital stock; that on May 8, 1894, Charles P. Dewey was the owner of 105 shares of stock, and was registered as such; that the bank was then, and continuously remained, insolvent; that this insolvency was known to Dewey, who on that day, May 8, assigned 95 of these shares to the defendant Jewett, who was wholly irresponsible; that the transfer was colorable only, and made for the sole purpose of evading Dewey's liability as a stockholder; that Jewett thereafter, at various times, transferred 80 of the 95 shares to the several other defendants, and that on January 3, 1895, Dewey transferred his remaining 10 shares to Jewett, so that the bank failed said 105 shares were registered on the books of the bank in the names of the several transferees; that the several transfers were made at a time when the bank was insolvent, and known by Dewey to be so, for the purpose of evading liability for assessments, and to irresponsible persons.

The answer of Dewey contained a general denial of all material allegations, and set up that the transfers were outright and for the par value of the stock; that he had sold all his stock, and with the exception of the 25 shares, all transfers had been made on the books of the bank prior to its suspension.

The Circuit Court found that the sales of stock were all made through Jewett, who acted merely as the agent of Dewey and had no interest in the stock, but held it for Dewey in his name; that the bank failed about two years and five months after the sale by Dewey; that the bank was insolvent in December, 1894, and January, 1895, at the time Dewey sold the hundred and five shares, and that Dewey, who was vice president of the bank from 1892 to 1895, knew, or ought to have known, that fact; that three certificates, aggregating twenty-five shares, were not transferred on the books of the bank and still stood in the name of Jewett when the bank suspended; that the claims of the creditors of the bank, who were such when Dewey sold his

stock and remained such at the time of the failure, aggregated $11,839.15, of which, however, only $2,787.97 remained unsatisfied, and that of this the ratable share of Dewey was $585.48, for which sum a decree was rendered.

On appeal by the receiver to the Circuit Court of Appeals the decree of the Circuit Court was reversed and a new decree directed to be entered for the full amount of the assessment on the twenty-five shares standing in the name of Jewett at the time of the failure; that as to the eighty shares there could be no recovery, although the bank was insolvent at the time of the sale of the stock, and was known to be insolvent, and the transfer was made for the purpose of evading liability; but that there could be no recovery without proof of the additional fact that the several transferees were likewise insolvent; that as to the twenty-five shares Dewey remained liable, as he had not surrendered the certificate to the bank or given the officers such data as to enable them to make such transfer on its books. The case was remanded to the Circuit Court, with directions to render a decree against Dewey for his full assessment on twenty-five shares. From this decree both parties appealed to this court.

Mr. Frank M. Hall, with whom *Mr. Roscoe Pound* and *Mr. E. E. Prussing* were on the brief, for the receiver:

Upon proof of the insolvency of the bank at the time of the assignment, knowledge thereof by Dewey at that time, and that the purpose and intent of the transfer was to escape his liability upon the stock in an insolvent bank, a decree should be rendered for the full assessment on 105 shares. *Stuart* v. *Hayden,* 169 U. S. 1; *Earle* v. *Carson,* 188 U. S. 42; *National Bank* v. *Case,* 99 U. S. 632; *Bowden* v. *Johnson,* 107 U. S. 251.

Under a proper construction of the National Banking Act, Dewey's estate should be held for the full assessment on 105 shares, upon the facts found. The purpose of the statutory provision as to sale of the stock is to permit sale of stock in a solvent bank, not to permit evasion of liability upon stock in

a bank known to be insolvent, and the statute should be construed accordingly.

The word "transfer" in section 5139 means transfer in good faith; that good faith, in this connection, means that good faith which inheres in the ordinary sale of stocks and securities in the usual course of business, and that a transfer made in view of known insolvency, with a purpose of avoiding liability, is the sort of transfer excluded.

The liability of a stockholder in a national bank is contractual in its nature. *Richmond* v. *Irons*, 121 U. S. 27; *Concord Nat. Bank* v. *Hawkins*, 174 U. S. 365; *Whitman* v. *Oxford Nat. Bank*, 176 U. S. 559, 565; *Stuart* v. *Hayden*, 169 U. S. 1.

This court has held expressly that insolvency of a national bank changes at once the relation between stockholders and creditors. *McDonald* v. *Williams*, 174 U. S. 397.

The American rule as to the effect of transfers of stock in an insolvent corporation upon statutory stockholder's liability, is that such transfers will only divest the liability where made both in good faith and to solvent transferees, and that if made for the purpose and with the intent of avoiding liability upon the stock of a corporation known to be insolvent, the assignor remains liable. See *National Bank* v. *Case* and *Bowden* v. *Johnson*, *supra*.

The general rule is, undoubtedly, that a stockholder may freely transfer his shares to any person capable of acquiring them and thus substitute the latter as a member of the corporation in his stead. This rule, however, which permits a transfer of a liability, without the concurrence of those for whose benefit the liability exists, is anomalous, and rests upon special reasons, which are the measure of its extent. *National Carriage Co.* v. *Story Commercial Co.*, 111 California, 537.

The ordinary run of transfers made to avoid liability are, for obvious reasons, made to insolvent or irresponsible transferees. Hence many text-writers and many courts have coupled the two propositions—intent to avoid liability and insolvency of the transferees. But it does not follow from this

not unnatural juxtaposition of these propositions that both of these elements are essential in order to hold the transferrer, and must co-exist with insolvency of the corporation before he can be held liable. On the contrary, a detailed examination of the long list of cases in which this question has been before the courts of this country, will show these significant facts:

In substantially every case in which courts have held that a transfer of stock would divest the liability, they have qualified this statement by the proviso that the transfer must be in good faith. *Moss* v. *Oakley*, 2 Hill (N. Y.), 265; *Tucker* v. *Gilman*, 121 N. Y. 189; *Rochester & Kettle Falls Land Co.* v. *Raymond*, 158 N. Y. 576; *Middletown Bank* v. *Magill*, 33 Connecticut, 28, 70; *Aultman's Appeal*, 98 Pa. St. 505, 517; *Harpold* v. *Strobart*, 46 Ohio St. 397, 406; *Cole* v. *Adams*, 19 Tex. Civ. App. 507; *Stewart* v. *Walla Walla Co.*, 1 Washington, 521. In those cases in which intent to evade liability and insolvency on the part of the transferees co-existed, the courts have uniformly insisted upon the former as the material and important element. *Scofield* v. *Twining*, 127 Fed. Rep. 486; *Ward* v. *Joslin*, 100 Fed. Rep. 676; *Foster* v. *Lincoln*, 79 Fed. Rep. 170; *Cox* v. *Montague*, 78 Fed. Rep. 845; *Miller* v. *Great Republic Ins. Co.*, 50 Missouri, 55; *Burt* v. *Real Estate Exchange*, 175 Pa. St. 619. It has been held in many cases, by courts of high authority, that there need not be both intent to escape liability and insolvency of the transferees, but that one of these, coupled with known insolvency of the corporation, is enough. These cases are of two types, those which hold the original stockholder liable upon proof of known insolvency of the corporation and insolvency of the transferees, alone, without regard to proof of the intent with which the transfer was made, and those which hold him liable by reason of the known insolvency of the corporation and intent to escape liability, alone, without regard to the financial condition of the transferees. Cases of the first type are: *National Carriage Co.* v. *Story & Isham Co.*, 111 California, 537; *Welch* v. *Sargent*, 127 California, 72.

Of course, a transfer to an insolvent with knowledge of in-

solvency of the corporation is in and of itself a fraud. Cases like *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479, where pledgees, seeking to protect their claims, put the stock in the name of irresponsible trustees, are quite different. Such a transaction is no fraud, since the pledgee is merely interested to the extent of security.

Cases of the second type, holding that a transfer with knowledge of insolvency of the corporation, made for the purpose and with the intent to escape the impending stockholder's liability, will not divest such liability, without regard to the financial status of the transferees, are: *Marcy* v. *Clark*, 17 Massachusetts, 330; *McLaren* v. *Franciscus*, 43 Missouri, 452; *Provident Savings Inst.* v. *Skating & Bathing Rink*, 52 Missouri, 557; *Stewart* v. *Printing & Publishing Co.*, 1 Washington, 521; *Sykes* v. *Holloway*, 81 Fed. Rep. 432.

The transfers being fraudulent and invalid when made, the assignor remained liable down to the failure, and should be held for the full amount of the assessment.

Mr. William B. McIlvaine, with whom *Mr. John P. Wilson* and *Mr. Nathan G. Moore* were on the brief, for Dewey et al.

The only question presented by the record in this case is whether a sale of stock in a national bank, in operation as a going concern, and made with actual or imputed knowledge of the bank's insolvency, is under all circumstances voidable by the receiver.

There was no finding by the Circuit Court that the sale by Dewey was made in bad faith to avoid liability as a stockholder. This was a contested proposition, and if appellant was not satisfied with the court's ruling thereon, he should have brought the matter to the attention of the Court of Appeals in assignments of error. The Circuit Court expressly found that there was no evidence tending to show any fraud upon the creditors. This was equivalent to a finding that there was no bad faith or fraudulent intent.

The receiver was evidently satisfied that the concurrence of

the two facts, namely: the insolvency of the bank and the seller's knowledge thereof, was sufficient to charge Dewey with liability, regardless of whether his sale was made in good or in bad faith.

A sale of stock in a going bank, with actual or imputed knowledge of the insolvency of the bank, can only be avoided if it results in injury to creditors. *Earle* v. *Carson,* 188 U. S. 42; *Brunswick Terminal Co.* v. *National Bank of Baltimore,* 192 U. S. 386; *Richmond* v. *Irons,* 121 U. S. 27; *Bowden* v. *Johnson,* 107 U. S. 251; *Anderson* v. *Philadelphia Warehouse Co.,* 111 U. S. 479; *Robinson* v. *Southern Nat'l Bank,* 180 U. S. 295; *Sykes* v. *Holloway,* 81 Fed. Rep. 434; *Clarke* v. *White,* 12 Pet. 178; *Ming* v. *Woolfolk,* 116 U. S. 599.

The record fails to establish that Dewey knew or ought to have known of the alleged insolvency of the bank or that the bank was solvent at the time of his transfers of stock. If Dewey did not know of the alleged insolvency of the bank, then his sale of the 80 shares out and out, in good faith, clearly relieved him from any further liability thereon. *Earle* v. *Carson, supra.*

We are entitled to be heard in this court in support of the judgment of the lower court without assignments or cross error. *The Stephen Morgan,* 94 U. S. 599; and that the judgment was right upon any ground disclosed by the record. *Ridings* v. *Johnson,* 128 U. S. 212–218; 3 Ency. of Pleading & Practice, 372.

Insolvency is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business. An act of insolvency takes place when this condition is demonstrated and the person has actually failed to meet some of his obligations. *Dodge* v. *Martin,* 17 Fed. Rep. 660; *Buchanan* v. *Smith,* 16 Wall. 277.

Although the liabilities of a corporation may greatly exceed its assets, it is not insolvent in such sense that its assets become a trust fund for *pro rata* distribution among its creditors, so long as it continues to be a going concern, and conducts its

business in the ordinary way. *Comfort* v. *McTeer*, 7 Lea, 652, 660; *Publishing Co.* v. *Wheel Co.*, 95 Tennessee, 634.

Insolvency expresses the inability of a party to pay his debts as they become due in the ordinary course of business. *Toof* v. *Martin*, 13 Wall. 47.

Mere inadequacy of assets of a bank to pay its debts is not insolvency; the true definition of insolvency is failure and consequent suspension of business. *Earle* v. *Carson*, 188 U. S. 42.

Dewey was liable in any event only for his pro rata share of the debts of the bank existing at the time when he transferred his stock and which remained unpaid at the time of the failure.

We contend that after a stockholder has sold his stock out and out, and has had it transferred upon the books of the bank, so as to give notice to the world that he is no longer connected with the bank, he should be relieved from liability for debts incurred by the bank thereafter. The statute is susceptible of this construction. *Lantry* v. *Wallace*, 182 U. S. 536; *Waite* v. *Dawley*, 94 U. S. 527; Cook on Stock and Stockholders, § 261.

If a creditor of a bank uses ordinary diligence, he can always ascertain who the shareholders are before he extends credit to the bank. If he does not use such ordinary diligence, and extends credit upon an indefinite idea that there are shareholders who can be made to respond for his claim, can he subsequently look to shareholders who had previously sold their stock out and out by a *bona fide* transfer and had the sale registered on the bank's books?

The exact question involved here has been decided by the Supreme Court of Ohio, and upon a statute substantially similar to section 5151 of the National Banking Act. See Rev. Stat. Ohio, § 3258; *Peter* v. *Union Mfg. Co.*, 56 Ohio St. 181.

In another line of cases this court has held that only creditors who may be presumed to have extended credit to a corporation on the faith of an increase of stock or other stock liability, are entitled to base claims thereon. See *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343; *Bank of Ft. Madison* v. *Alden*, 129 U. S.

372; *Handley* v. *Stutz*, 139 U. S. 417. See also *Stufflebeam* v. *De Lashmutt*, 83 Fed. Rep. 449.

Stockholders will be assessed ratably only for debts existing while they held the stock. *Young* v. *Wemple*, 36 Fed. Rep. 354.

Pledgees of stock may take stock in the name of an irresponsible party without in any way indicating that the stock is held as collateral and for the express purpose of avoiding liability. *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479; *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242.

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

Three sections of the National Bank Act, which are printed in the margin,[1] are pertinent in connection with the leading questions involved in this case.

---

[1] Sec. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

(The shares of this Nebraska bank were transferable only on the books of the bank, in person or by attorney, on surrender of the certificate that represented the shares proposed to be transferred.)

Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for an-

That the transfer of stock in corporations, even when in failing circumstances, should not be unduly impeded, is essential not only to the prosperity of such corporations and the value of their stock, but to the interest of stockholders who may desire for legitimate reasons to change their investments or to raise money for debts incurred outside the business of such corporation. *Bank* v. *Lanier*, 11 Wall. 369, 377. At the same time the frequency with which such transfers are made for the purpose of evading the double liability imposed by the National Banking Act, has given rise to a large amount of litigation turning upon their legality. In this connection certain propositions have been laid down by so many courts and in so many cases that they may be regarded as fundamental principles of law applicable to all cases of this character.

(1) That a party, who by way of pledge or collateral security for a loan of money, accepts stock of a national bank and puts his name on the registry as owner, incurs an immediate liability as a stockholder, and cannot relieve himself therefrom by making a colorable transfer of his stock to another person for his own benefit, as was done by the sale to Jewett in this case. *National Bank* v. *Case*, 99 U. S. 628; *Marcy* v. *Clark*, 17 Massachusetts, 329; *Nathan* v. *Whitlock*, 9 Paige, 152; Cook on Stockholders, § 263.

(2) The same result follows if the stockholder, knowing, or having good reason to know, the insolvency of the bank, colludes with an irresponsible person with design to substitute the latter in his place, and thus escape individual liability, and transfers his stock to such person. It is immaterial in such case that he may be able to show a full or partial consideration for the transfer as between himself and the transferee. *Bowden* v. *Johnson*, 107 U. S. 251.

Upon the other hand, in *Whitney* v. *Butler*, 118 U. S. 655, certain stockholders employed an auctioneer to sell their shares

---

other, 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; . . .

at public auction. They were bidden in by a purchaser who paid the auctioneer for them and received from him the certificate of stock with a power of attorney to transfer the same in blank. The auctioneer paid the money to the original owner of stock, but no formal transfer was made on the books of the bank. Shortly afterwards the bank became insolvent and went into the hands of a receiver, who made an assessment upon the original stockholders. We held that the responsibility of the stockholders ceased upon the surrender of the certificate to the bank, and the delivery to its president of a power of attorney to transfer the stock on the books of the bank. The controlling considerations were the good faith of the stockholders in making the sale, believing the bank to be solvent, and the fact that they had done all that they could reasonably be expected to do to make a valid sale of the stock and a transfer of the certificate on the stock register.

Under the English law a shareholder may transfer his shares to an irresponsible party for a nominal consideration, though the sole purpose of the transfer be to escape liability, provided the transfer be out and out, and not merely colorable or collusive, with a secret trust attached. Under such circumstances the person making the transfer is released from liability, both as to corporate creditors and the other shareholders. Cook on Stockholders, § 266; 2 Morawetz on Private Corporations, § 859.

The law is quite different in this country. At the same time the original stockholder cannot be held liable, unless the bank were practically insolvent at the time the transfer was made, and its condition was known or ought to have been known to the stockholder making the transfer. If the bank were in fact solvent and able to pay its debts as they matured when the transfer was made, the creditors having ample security in the solvency of the bank, have no special interest in knowing who the stockholders are, since their only recourse to them would be in the remote contingency of the insolvency of the bank. The transferrer can only be held liable if the bank be insolvent, and such insolvency be known, or ought to have been known,

to him from his relations to the bank, since the transfer is *prima facie* valid, and shifts to the transferee the burden of the responsibility, which can be laid upon the original stockholder only in case of bad faith, or evidence of a purpose to evade liability.

This bad faith may be shown by the fact that the bank was known to him to be insolvent; but notwithstanding this the transfer would be valid if made to a person of known financial responsibility, since the creditors could not suffer by the substitution of one solvent stockholder in place of another. The Court of Appeals, however, went further and held that the transfer would be valid unless made to an irresponsible person unable to respond to an assessment, whose financial condition was known, or ought to have been known, to him.

There is no such limitation intimated in the case of *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606, which involved a question as to the liability of a pledgee, but in which certain rules were stated, p. 619, as to the liability of shareholders, one of which was "that if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder and liable as therein prescribed." The case, however, is not directly in point.

The most pertinent in this connection is that of *Stuart* v. *Hayden*, 169 U. S. 1. In that case, Stuart, being an owner of one hundred shares of stock in a national bank, a director of the bank, and a member of its finance committee, purchased certain real property of Gruetter and Joers, and as a consideration assumed a mortgage debt, turned over his stock in the bank as of the value of $18,000, delivered to them the certificate of the shares and paid the balance of the agreed price in cash.

These certificates of stock were returned to the bank and new certificates issued to Gruetter and Joers, to whom Stuart rep-

resented that the bank was in a solvent and prosperous condition. The Circuit Court found that such representation was false to the knowledge of Stuart, and made for the purpose of inducing them to purchase the stock, and of evading and escaping his liability as a shareholder for his assessment thereon. Upon this state of facts Stuart was held liable to the receiver as the holder and owner of these shares.

The principal inquiry was whether Stuart transferred his stock to escape the liability imposed by the statute, his contention being that, if the transfer were absolute and to persons who were at the time solvent and able to respond to an assessment upon the shares, the motive with which the transfer was made was of no consequence.

In answer to this it was said by Mr. Justice Harlan (pp. 7, 8):

"There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition.

* * * * * * * *

"One who holds such shares—the bank being at the time insolvent—cannot escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank that it is insolvent or about to fail. A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee."

The court found upon the facts (p. 14) "that Stuart, with knowledge of the insolvency of the bank, or at all events with such knowledge of the facts as reasonably justified the belief that insolvency existed or was impending, sold and transferred his stock with the intent to escape individual liability, . . .

and the bank having been in fact insolvent at the time of the transfer of his stock—which fact is not disputed—he remained, notwithstanding such transfer, and as between the receiver and himself, a shareholder, subject to the individual liability imposed by section 5151." Although it was alleged in the bill by the receiver that Gruetter and Joers were at the time of the transfer pecuniarily irresponsible, there was no finding to that effect, and in treating of the liability of Stuart no stress was laid upon their financial condition, but the case was disposed of as one of bad faith on Stuart's part in transferring the shares at a time when he knew the bank to be insolvent. There is certainly nothing in this case to justify the inference that the receiver was bound in making out his case to establish the fact that the transferee was insolvent, and was known to the stockholder to be so when he transferred his stock.

In *Matteson* v. *Dent*, 176 U. S. 521, the stockholder, while the stock was yet owned by him and stood registered in his name, died intestate, and the stock was distributed to the widow and heirs by decree of the Probate Court. Shortly thereafter the bank became insolvent and the receiver brought suit against the widow and children for an assessment. The defendants were held to be liable upon the ground that the obligation of a subscriber of stock is contractual in its nature, and is not extinguished by death, but, like any other contract obligation, survives and is enforceable against the estate of the stockholder, notwithstanding that the estate of the decedent had been settled and fully administered according to law, and that the insolvency of the bank occurred after the death of the intestate, citing *Richmond* v. *Irons*, 121 U. S. 27. It is true that the case did not involve the question here presented, but in delivering the opinion the prior cases of *National Bank* v. *Case*, 99 U. S. 628, and *Bowden* v. *Johnson*, 107 U. S. 251, were cited in support of the proposition, treated as elementary, that "where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded, and the real owner be held liable." (p. 531).

Much stress is laid, in the opinion of the Court of Appeals, upon the case of *Earle* v. *Carson*, 188 U. S. 42, supposed to lend countenance to the doctrine that the receiver is bound, as part of his case, to establish the fact that the transferee was insolvent and known to the transferrer to be so at the time of the transfer. The defense was that, prior to the suspension of the bank, the defendant had in good faith sold the stock standing in her name for the full market price, which had been paid her; that she had delivered up to the bank her stock certificate, with a power of attorney to make the transfer, and requested that the stock be transferred; that the officer of the bank said the transfer would be made, but it seems that the officer had failed to discharge that duty; that as the defendant had done everything which the law required her to do to secure the transfer, she had ceased to be a stockholder and was not responsible. It was alleged as error that the trial court refused to instruct the jury that the sale of the stock, though lawful in every other respect, could not be so treated if it were found that at the time of the sale the reserve of the bank were, to the knowledge of the defendant, below the limit fixed by law (p. 44). This refusal was held not to be error. "Certainly," said Mr. Justice White in the opinion (p. 46), "it cannot in reason be said that the power would exist to sell stock like any other personal property if before the power could be exercised the seller must examine the affairs of the bank, marshal its assets and liabilities in order to form an accurate judgment as to the precise condition of the bank."

In discussing the question in regard to the validity of the transfer, it was said (p. 49) that "the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the

discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale."

The argument was made (p. 54) that as the "person to whom the stock was sold was insolvent, and hence unable to respond to the double liability, the sale was void, although the fact of such insolvency of the buyer was unknown to the seller." This was held to be unsound, "since it but insists that the validity of the sale of the stock is to be tested, not by the good faith of the seller, but upon the unknown financial condition of the buyer." We find nothing in this case which impugns in any degree the authority of the prior cases, or holds that the validity of the sale is to be gauged by the financial condition of the transferee, or the knowledge of that condition by the transferrer.

1. We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling, with notice of the insolvency of the bank and with intent to evade the double liability imposed upon the stockholder by the National Banking Act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the ruling in *Earle* v. *Carson*, in which we held that a *bona fide* sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. The case of *Earle* v. *Carson*, so far from lending countenance to the argument of the appellees, bears strongly in the opposite direction.

The solvency of the vendee, however, is pertinent in showing that no damage could have resulted to the creditors of the bank by the transfer. Though not a necessary part of the plaintiff's

case, it may be a complete defense, if it be shown that the sale, however fraudulent, was made to a vendee who was as able to respond to the double liability as was the vendor. The proposition that the executors are not responsible because the sales were made to solvent vendees, being defensive in its character, the burden of proof was upon them. In this particular the case is not unlike that of an ordinary action upon a contract, where the plaintiff relies upon the contract and the breach, and sues for such damages as may be reasonably supposed to follow therefrom. But it may be shown in defense that no damages really resulted, as, for instance, in an action for services, that plaintiff might have obtained other employment at the same wages, or, in an action for a failure to deliver goods, that plaintiff might have gone into the market and purchased other goods at the same price at which the defendant had agreed to sell them. In such case defendant assumes the burden of proving that no damage in fact resulted. The argument in this case really is that the receiver was bound to show, not only that Dewey was guilty of fraud, but that damages necessarily resulted and that he knew that fact. The reply is that the fraud was consummated by the sale of the stock of a bank known to be insolvent, with intent to evade liability, and that the fraud is not less though the transferees happened to be solvent, but that their solvency may be proved to rebut the presumption that injury resulted to the creditors from the transfers.

While there is no express finding of the Court of Appeals (though there was in the Circuit Court) that Dewey knew, or should have known, of the insolvency of the bank at the time of the transfer, and that the transfer was made with the intent to evade his double liability as stockholder, the decree of both courts is based upon this assumption; and as stated in the dissenting opinion "that the final suspension of the bank, though it occurred two years and five months after Dewey's transfer of stock, is traceable, in the line of cause and effect, to the insolvency of the bank at the time of the trans-

fer." We do not understand these facts to be seriously disputed.

In this connection it only remains to consider whether the transferees were financially responsible to the amount of the assessment. It is not necessary to show that they were persons of responsibility equal to that of the original stockholder. It is sufficient that they were responsible to the amount called for by the necessities of the case—in other words, in an amount sufficient to indicate that the creditors of the bank were not damnified by the change of ownership.

Although the evidence does not show affirmatively the insolvency of the ultimate transferees, it falls far short of showing that a decree against them for their assessment could be collected. Without going into details of the property of each one of the seven transferees, it is sufficient to say that they were either working on salaries, with no evidence of available property, outside of such salaries, or that their property consisted of incumbered real estate in Chicago of a largely speculative value; and that in some cases, at least, the shares were paid for in real estate conveyed for the purpose of getting rid of the property and avoiding the payment of interest on the incumbrances. There is no satisfactory evidence that a decree against any one of these parties for the amount of his assessment could have been collected by ordinary process of law.

2. But, except so far as the twenty-five shares held by Jewett as the agent of Dewey at the time of the failure, we think the executors should not be held liable to the creditors who became such after the transfer. The National Banking Act requires (Rev. Stat. § 5210) a list of the names and residences of all the shareholders, and the number of shares held by each to be kept in the banking house, subject to the inspection of all the shareholders and creditors of the association; and (sec. 5139), that every person becoming a shareholder by a transfer of shares to himself shall succeeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the ar-

ticles of association by which the rights, remedies or securities of the *existing creditors* of the association shall be impaired.

The object of this legislation is evidently to apprise persons dealing with the bank of the names of the shareholders, upon whom the double liability shall be imposed in case of the insolvency of the bank. In the event of such insolvency it is only existing creditors who can claim to have been damnified by a fraudulent transfer of shares. As to them such transfer is voidable. Subsequent creditors are apprised by the published list of the names of the shareholders, to whom transfers have been made, and of the persons to whom they may have recourse for the double liability. The injustice of holding a stockholder liable for an indefinite time in the future to creditors who may have become such years after he had parted with his stock, and who were apprised of the names of the stockholders by the published list, is too manifest to require an extended comment. We are only applying to this case by analogy the ordinary rule of the common law, that a voluntary deed by a person heavily indebted is fraudulent and void as to prior creditors merely upon the ground that he was so indebted, but as to subsequent creditors is only void upon evidence that the deed was made in contemplation of future indebtedness. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Schreyer* v. *Scott*, 134 U. S. 405; *Ridgeway* v. *Underwood*, 4 Wash. C. C. 129, 137; *Bennett* v. *Bedford Bank*, 11 Massachusetts, 421.

This was the interpretation given to a similar statute by the Supreme Court of Ohio in *Peter* v. *Union Mfg. Co.*, 56 Ohio St. 181, 204 It is true that in Ohio a stockholder cannot escape liability to existing creditors by a transfer of his stock, however *bona fide* such transfer may be. But we do not see how that affects the ruling in the *Peter* case, that he does not continue liable as to future creditors.

The case of *Bowden* v. *Johnson*, 107 U. S. 251, turned upon the question of the fraud in a certain transfer of stock, the conclusion being that such transfer was fraudulent, and that the original owner continued liable to the creditors of the bank.

The question as to whether such liability was limited to existing creditors or extended to future creditors was not touched upon in the opinion of the court, but as the insolvency of the bank seems to have occurred soon after the fraudulent transfer was made, it is improbable that any future creditors existed.

There are, undoubtedly, cases in which we have used the general expression that in the event of a fraudulent transfer of stock the stockholder remains liable to the creditors of the bank, but in none of them were we called upon to discriminate between existing and subsequent creditors, since as a rule the insolvency of the bank followed soon after the transfer, and the distinction was not called to our attention by counsel.

It results that there must be a decree affirming the decree of the Circuit Court of Appeals so far as it holds Dewey liable for his full assessment on the twenty-five shares standing in Jewett's name, and reversing in so far as it exonerated his estate from assessment upon the remaining shares, to such amount as is necessary to satisfy the creditors existing at the time the transfer of the stock was made, and that the cause be remanded to the Circuit Court for the Northern District of Illinois for further proceedings consistent with this opinion.

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

To make clear the reasons for my dissent I briefly recapitulate the facts, the issues and the matters decided.

As a result of the failure in May, 1897, of the First National Bank of Orleans, Nebraska, the Comptroller appointed a receiver and subsequently levied an assessment of $86 a share to make good a deficiency of assets required to enable the payment of the creditors of the bank existing at the date of the failure.

In May, 1894, Dewey was the registered owner of 105 shares of the stock of the bank. In that month and year he assigned 95 of these shares to Jewett and they were transferred on the

stock register in the name of Jewett. Jewett then transferred on the stock register 80 of these shares to six other persons, Jewett thus remaining the registered holder of but 15 out of the 95 shares transferred to him by Dewey. Subsequently Dewey transferred on the stock register the remaining 10 of the original 105 shares to Jewett. At the time, therefore, of the failure of the bank the 105 shares originally owned by Dewey had been put out of his name and stood on the stock register of the bank as follows: 25 shares in the name of Jewett and 80 shares in various proportions in the names of the six persons to whom Jewett had transferred them.

The object of the bill is to hold Dewey liable on the 105 shares for the assessment levied by the Comptroller. Questions of fact and of law are involved. The first are, At the time of the failure of the bank did the 105 shares of stock stand in the name of the agent of Dewey, or if not, did they stand in the name of irresponsible persons to whom Dewey, with the knowledge of the insolvency of the bank and to escape liability, transferred the stock? And the question of law is, If the stock was still Dewey's, or if it was transferred by him, as stated, is he liable for the assessment or for any part thereof?

The court now determines both questions of fact against Dewey. In other words, the court holds that Dewey was the owner of the 25 shares standing in the name of Jewett, because Jewett received the transfer merely as the agent of Dewey and never became the owner of the stock. As to the 80 shares standing in the names of the six persons to whom Jewett transferred them, the court holds that they were transferred by Dewey to his agent Jewett with knowledge of the insolvency and to avoid the statutory liability, and to carry out this purpose were transferred by Jewett as his (Dewey's) agent, into the names of six irresponsible persons. The questions of fact being thus decided against Dewey, the proposition of law is in substance decided in his favor. I say this because it is now held that Dewey is not liable, except as to the 25 shares, for the assessment of $86 a share to pay the debts of the bank

existing at the time of the failure, but only for such proportion of such assessment as may be required to pay such unsatisfied debts of the bank, if any there be, which were in existence at the several dates when the transfers of the 80 shares were made by Jewett as the agent of Dewey.

My dissent is constrained by a deep conviction of the unsoundness of the proposition now upheld exempting Dewey from liability, in respect to the 80 shares, for the call made by the Comptroller to pay the debts of the bank existing at the time of the failure, and the decision that he is only liable for such sum as may be necessary to pay the unsatisfied debts, if any, which existed when the fraudulent transfer of the stock was made.

As it is given to me to see it, this ruling is both novel and dangerous and without the support of any administrative or judicial construction applied to the statute, since it was originally enacted, more than forty years ago. To me it moreover seems that the ruling is repugnant both to the text and spirit of the statute, considered as an original question, and is besides contrary to a line of adjudications of this and other Federal courts. My endeavor shall be briefly to state the reasons by which I am led to this conclusion.

It cannot be denied that from the date of the original enactment of the National Banking Act in 1863 to the present time the Comptroller of the Currency, in making an assessment under the law to pay the debts of a failed national bank, has always made such call upon the assumption that the stockholders who were liable for assessment were so liable ratably for the amount required to pay the debts of the bank existing at the time of the failure. Such also is the case viewed from the standpoint of judicial decisions, for, although in numerous cases in this court and many cases in the lower Federal courts for years and years, questions in every aspect have been considered concerning the liability of a stockholder in a national bank who, it was alleged, had transferred his stock in fraud of the statute, no case can be found where even a suggestion was

made by counsel or by the courts of the existence of the rule of limited liability which the court now upholds. In saying this I do not overlook the fact that the court in its opinion refers to an Ohio case *Peter* v. *Union Mfg. Co.*, 56 Ohio St. 181, as sustaining the doctrine which is now announced. That case, however, did not concern a national bank, but related to an Ohio corporation, and, as I shall hereafter endeavor to demonstrate, rested solely upon the provisions of the constitution and laws of the State of Ohio, which were not only peculiar to that State, but were directly in conflict with the principle of liability expressed in the acts of Congress concerning the responsibility of stockholders in national banks.

Whilst of course the absence during such a long period of time, in administrative execution and judicial exposition, of even a suggestion that the limitation of liability now sustained was warranted by the statute is not conclusive, it certainly is persuasive that if such a limitation can be evolved from the law it must be occult and strained, since it has been latent and undiscovered for forty years. But a consideration of the statute it seems to me will at once make clear the fact that the limitation now sanctioned has never before been intimated, because that limitation must have been considered to be repugnant to the text of the statute.

Both by the National Banking Act as originally adopted in 1863 and as reënacted in 1864, and as now embodied in section 5139 of the Revised Statutes, owners of stock in national banks were empowered to transfer that stock as personal property. The purpose of Congress to render this transfer effectual is evidenced by the omission in the reënactment in 1864 of a provision found in the act of 1863, which might have had the effect of limiting transfers. *Earle* v. *Carson*, 188 U. S. 42, 46. And, following the plain text of the act, it has not been questioned that creditors existing at the time a stockholder made and completed a lawful transfer of his stock had no right to complain or hold the outgoing stockholder for existing debts of the bank, since by the statute the result of such a transfer

was to sever all connection between such stockholder and the bank, wholly without reference to the consent of the then existing creditors, and to substitute the person to whom the valid and completed transfer had been made. Now, whilst it is true that the statute requires a registry of stockholders to be kept and transfers to be noted thereon, in view of the unlimited right of a stockholder to make a lawful transfer without the consent of the creditors existing at the time of the transfer, it cannot be said that the statute gave to the creditors a right to prevent transfers or presupposed that they would contract with the bank upon the faith of a particular state of the registry, when by the statute that registry could be changed by lawful transfers without the power of the creditor to complain. It is true also that the statute declares (Rev. Stat. § 5139) that when a lawful transfer is made the shareholder "shall succeed to all the rights and liabilities of the prior holder of such shares." But this does not imply that existing creditors have a contract right against the transferring stockholder, since the right of such stockholder to make a lawful transfer and substitute another for himself without the consent of the creditors is an affirmance instead of a negation of the absence of the contract relation between the transferring stockholder and then existing creditors. And this is emphasized, since the new stockholder becomes ratably liable not only for debts contracted after the transfer made to him but for all the prior unsatisfied debts. Of course by the statute as originally enacted and as now existing (Rev. Stat. § 5151), those who were stockholders in a national bank at the time of its failure are made equally and ratably liable to the amount of their stock for the debts of the bank then existing. But this provision does not destroy or impair the right to make a lawful transfer before the failure of a bank, since it only attaches the double liability to those who have not made a lawful transfer and who are in contemplation of law stockholders at the time of the failure. Harmonizing these two sections of the statute, they import the purpose to secure the great advantage result-

ing from the untrammelled power to make a lawful transfer of stock as pointed out by this court in *Earle* v. *Carson, supra,* and *First National Bank* v. *Lanier,* 11 Wall. 369, 377, and yet at the same time when failure ensues to give the then existing creditors the benefit of the double liability of the then existing stockholders.

And when the repeated adjudications of this court are considered to me it seems that they expound the text and spirit of the statute as above pointed out, and, therefore, the rule now announced cannot be consistently upheld without overthrowing those decisions and substituting a new statute. In *National Bank* v. *Case,* 99 U. S. 628 (decided in 1878), the principle controlling the question of the liability of a stockholder in a national bank who had made a fraudulent disposition of his stock was considered. On the one hand it was insisted that as the stockholder had a right to transfer his stock without the consent of then existing creditors of the bank, every "out and out" transfer, as it was termed, should be held to be efficacious to relieve from liability at the date of the failure. On the other hand it was contended that if a transfer was made with a knowledge of the insolvency of the bank and to escape the statutory liability, the stockholder remained a stockholder, and was, therefore, subject to the double liability. The latter contention was sustained. The court recognized the fact that in England, when a stockholder had a right to dispose of his stock at pleasure, the rule was that every out and out transfer which was not a mere sham severed the connection of the stockholder with the corporation, thus causing him to be no longer a stockholder and leaving him entirely free from liability. But the American rule was held to be different. Expounding that rule, it was declared that both in the case where a stockholder made a sham sale or transferred his stock to an irresponsible person, with knowledge of the insolvency of the bank, and for the purpose of escaping the statutory liability, the transferrer remained a stockholder for the purpose of the statutory double liability. In other words,

the court declared that in both such cases the transfer, in legal intendment, at the election of creditors would be held to be a mere simulation, leaving the stockholder, despite such transfer, continuously subject to his statutory liability.

Without attempting to review all of the many other cases decided by this court involving controversies on this subject, it may not be doubted that the substantial doctrine of the case just reviewed has been reiterated time and time again and is the settled law of this court. Thus in *Bowden* v. *Johnson*, 107 U. S. 251, Johnson was the holder of stock in a national bank. On February 14, 1874, his stock was transferred on the books of the bank in the name of a Mrs. Valentine. On May 26, 1874, more than three months after such transfer, the bank failed and the Comptroller made an assessment to pay the debts existing at the time of the failure, and the suit had for its object the enforcement of this assessment against Johnson. It was found that the transfer to Mrs. Valentine was not a sham, but that at the time it was made the bank was insolvent, that Johnson knew of the insolvency and transferred his stock to avoid liability and with the knowledge that Mrs. Valentine was irresponsible. Coming to consider the contention, under these facts, that Johnson could not be held for the debts existing at the time of the failure, the court expressly reiterated the ruling in the *Case* case, held that a shareholder who made a fraudulent transfer of the kind under consideration continued liable as a stockholder, and the assessment which had been made by the Comptroller for the debts existing at the time of the failure was adjudged to be valid, although such failure happened months after the fraudulent transfer. In the course of the opinion the court said (p. 261):

"But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect

of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or a partial consideration for the transfer, as between him and the transferee.

"The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that, therefore, the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this court in *National Bank* v. *Case*, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors. Mrs. Valentine might be liable as a shareholder succeeding to the liabilities of Johnson, because she has voluntarily assumed that position; but that is no reason why Johnson should not, at the election of creditors, still be treated as a shareholder, he having, to escape liability, perpetrated a fraud on the statute. This is the view enforced by the decision of the Chief Justice in *Davis* v. *Stevens*, 17 Blatchf. 259."

Again, in *Stuart* v. *Hayden*, 169 U. S. 1, where it was found that a transfer of stock in a national bank had been made with knowledge on the part of the transferrer of the insolvency of the bank, and to escape the double liability, the court, after approvingly citing the previous cases, said (p. 14):

"And the bank having been, in fact, insolvent at the time of the transfer of the stock—which fact is not disputed—he

(the transferrer) remained notwithstanding such transfer, as between the receiver and himself, a shareholder subject to the individual liability imposed by section 5151."

I need not stop to refer to the subsequent adjudications of this court which expressly reiterate the rulings just reviewed, since they are approvingly cited in the opinion of the court, and indeed are made the basis of the ruling. But to my mind it seems clear that the limited liability of Dewey which the court now applies to the eighty shares is repugnant to the previous decisions, and therefore the effect of citing approvingly the cases in question and yet deciding, as the court now does, is but at one and the same time to approve and disapprove the previous decisions.

Let me briefly state why I think this conclusion inevitable. Certain it is that the previous cases expressly and unequivocally decided that a stockholder who in fraud of the liability as stated makes a transfer of his stock remains at the election of the creditors a stockholder to the same extent as if the transfer had not been made or as if it had been a mere sham. Can there be doubt of this in view of the language of the *Case* case announcing the American rule, of the express statement to that effect in the *Bowden* case, and the fact that in that case the liability, under the call of the Comptroller, was enforced for the debts existing months after the completed transfer and not merely for the unsatisfied debts existing at the time of the transfer? Is this not certain also in view of the declaration in *Stuart* v. *Hayden*, that because of the fraudulent transfer the stockholder continued to be liable under the statute? And mark, in the *Hayden* case, as if *ex industria* to exclude the conception that the fraud was only relative as to creditors existing at the time of the fraudulent transfer, the court expressly declared that the liability of the transferring stockholder was to the receiver and according to the terms of the statute. And this, but in different form, reiterated the declaration made in the *Bowden* case, that the fraud was a fraud on the statute, and not, therefore,

simply relative as to particular creditors existing at the time.

Besides to me it seems that the rule of limited liability now announced is self-destructive. What is the liability which the statute imposes? Is it a responsibility only to pay debts of the bank as they existed at the time a fraudulent transfer was made? Not so; for the only liability imposed by the statute on the stockholders is an obligation to respond to an equal and ratable assessment made by the Comptroller to pay the debts existing at the time of the failure. Rev. Stat. §§ 5151, 5234. From this it results that if a person is not a stockholder at the time of the failure he is liable for nothing, and if he is such stockholder he is liable for the statutory sum and no other. This plain result of the statute to my mind demonstrates the error of the conclusion as to limited liability now announced. For, if Dewey was not a stockholder at the time of the failure there is an entire absence of statutory authority to make any assessment whatever upon him, and if he was such stockholder then the statute fixed the measure of liability, and there is no power to substitute by judicial discretion a liability which the statute does not impose, and which on the contrary is excluded by its express terms. In other words, the statute imposes a uniform and ratable liability upon all stockholders who are liable at all and affords no justification for assessing one stockholder at one amount and another stockholder in another sum, upon the theory that the date of the contracting of debts and not the date of the failure is the test of liability.

And that this departure from the long received and judicially sanctioned construction of the statute will tend to destroy the security of the national banking system by rendering the double liability impossible of enforcement results from a few obvious considerations. Thus, under the rule now announced, one who owns or controls a majority of the stock of a national bank, knowing it to be insolvent, can transfer his stock to wholly irresponsible persons in order to avoid the statutory liability,

and, by postponing the date of open failure until the existing debts of the bank have been extinguished by novation, leave the creditors existing at the time of the failure with substantially no stockholder to respond to the double liability. Indeed, this condition of things cannot be more cogently made manifest than by considering the facts in this case as found by the court. What are they? They are that Dewey was an officer of the bank and knew its hopelessly insolvent condition, and that he transferred his stock to avoid the liability, leaving the shares in the name of his agent or causing that agent to put the same in the names of irresponsible people. In effect controlling the affairs of the bank, Dewey delays the open failure until by a change of the situation, although the indebtedness of the bank may not have diminished, yet, by a mere substitution of creditors, the particular debts due at the time of his fraudulent transfers have largely been extinguished. And thus, when the open failure comes, it is now decided that, as to the shares fraudulently transferred by his agent, Dewey owes nothing towards payment of the debts of the bank, except as to debts still existing, which were contracted prior to the fraudulent transfers. In other words, it is held that although the bank was insolvent prior to and at the time of the commission of the fraudulent acts and continued so to the time of the failure, the fraudulent transferrer has accomplished the wrong which the statute was intended to prevent by holding back and preventing the open failure until he had discharged, at the expense of the subsequent creditors of the bank, the indebtedness existing at the time of the fraudulent transfers. Under the rule hitherto prevailing the duty of the administrative officer was plainly marked out in the statute, to realize the assets, and, if necessary to meet a deficiency of assets, to assess ratably the legal stockholders—a simple and effective rule. Now the duty of the administrative officer is wholly changed. He must analyze the situation at the bank, he must determine who were creditors at this time and that, in order to fix the liability of stockholders, and when this process is gone through

with, instead of levying the equal and ratable statutory liability, he must call upon the shareholders for unequal and unratable contributions.

I can see no reason for now changing the construction of the National Banking Act as applied in forty years of administration, as embodied in the text and spirit of the statute and as sanctioned by a long line of decisions of this court, especially when the inevitable consequence of such change will, in my judgment, operate to the detriment of the public interest and the security and stability of national banks which it was the purpose of Congress by the statute to secure.

It remains only to briefly notice the case of *Peter* v. *Union Mfg. Co.*, 56 Ohio St. 181, heretofore referred to and cited by the court in its opinion. To understand that case a prior decision of the Supreme Court of Ohio, *Brown* v. *Hitchcock*, 36 Ohio St. 667, of which the opinion in the *Peter* case was but an evolution, must be taken into view. In *Brown* v. *Hitchcock*, interpreting the Ohio law, the Supreme Court of Ohio held that by the effect of the constitution and laws of that State a stockholder in an Ohio corporation who was subjected to a double liability was impotent to dispose of his stock, however *bona fide* might be the sale or disposition thereof, so as to escape liability to creditors who were such at the time of the transfer. In other words, the court held that the effect of that double liability imposed by the Ohio statutes was to prevent an efficacious transfer of the stock without the consent of the creditors, since such creditors, despite a *bona fide* sale, as long as debts contracted previously remained unsatisfied, had the power, if circumstances required, to proceed against the stockholders who were such at the time the debt was contracted, and this irrespective of whether the corporation was at the time of the transfer solvent or insolvent. Subsequently, in the *Peter* case, the Ohio court was called upon to determine how far a transfer of stock by a stockholder in an Ohio corporation operated to relieve him from future debts of the corporation. As to this question the court, in effect,

applied to the Ohio statutes the English "out and out" rule; in other words, that court, whilst reiterating its ruling as to existing creditors, decided that a stockholder who made an out and out sale, although the corporation was insolvent and the purpose was to escape the double liability, was discharged from any responsibility to future creditors, although remaining liable to existing creditors. The difference between the Ohio statutes, as thus expounded, and the National Banking Act, as expounded by this court, is at once demonstrated by the statement that under the National Banking Act the stockholder, as repeatedly decided by this court, has a right, when acting in good faith, to dispose of his stock and escape liability both as to existing and future creditors, and that the theory of out and out transfers as to future debts, applied by the Ohio court to the statute of that State, was expressly repudiated by this court as to the National Banking Act in the *Case* and subsequent decisions. To treat then the Ohio case as authoritative here is, in effect, but to expunge the National Banking Act from the statutes of the United States and to substitute in its stead the statutes of Ohio, when such statutes have a wholly different significance as interpreted by the highest court of that State.

I therefore dissent.

I am authorized to say that MR. JUSTICE MCKENNA and MR. JUSTICE DAY concur in this dissent.

McNEILL *v.* SOUTHERN RAILWAY COMPANY. SOUTHERN RAILWAY COMPANY *v.* McNEILL.

APPEAL AND CROSS APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

Nos. 370, 594. Argued April 2, 3, 1906.—Decided May 28, 1906.

Although the dispute which was the origin of the controversy involved less than $2,000, where the controversy presented by the bill involves the right of enforcement of statutory penalties against complianant of over $2,000, and also its right to carry on interstate business within the State, which is worth more than $2,000, the Circuit Court has jurisdiction so far as the amount in controversy is concerned.

A suit brought by a railway company against the members of a state railway commission to restrain them from interfering with complainant's property and interstate business under a state statute alleged in the bill to be unconstitutional as imposing burdens on interstate commerce is not a suit against the State within the meaning of the Eleventh Amendment.

The interstate transportation of cars from another State which have not been delivered to the consignee, but remain on the track of the railway company in the condition in which they were originally brought into the State, is not completed and they are still within the protection of the commerce clause of the Constitution.

While a State in the exercise of its police power may confer power on an administrative agency to make reasonable regulations as to the place, time and manner of delivery of merchandise moving in channels of interstate commerce, any regulation which directly burdens interstate commerce is a regulation thereof and repugnant to the Federal Constitution, and so *held* that an order of the North Carolina Corporation Commission requiring a railway company to deliver cars from another State to the consignee on a private siding beyond its own right of way was a burden on interstate commerce and void.

Quære whether such an order applicable solely to state business would be repugnant to the due process clause of the Constitution.

An injunction granted by the final decree should not be broader than the necessities of the case require and if broader than that it will be modified, as in this case, by this court.

THE Southern Railway Company, a corporation organized under the laws of the State of Virginia, operates among others a line of railway passing through Greensboro, North Carolina. At that place the Greensboro Ice and Coal Company, during the times hereafter mentioned, had a coal and wood yard, located some distance from the main track and right of way of the railroad. From this main track, however, there was a private siding or spur track extending across the land of private persons to the establishment of the ice and coal company. In consequence of the views expressed in the opinion it is unnecessary to review the facts as to the construction of this spur track or to detail the course of dealing between the parties concerning it prior to the origin of this controversy. Certain it is that at one time the railroad delivered cars consigned to the ice and coal company from its main track on to the spur track in question. A dispute arose between the railway company and the ice and coal company concerning demurrage on thirteen cars containing coal and wood consigned to the latter company. In consequence of the refusal of the ice and coal company to pay these charges the railway, on October 12, 1903, notified the ice and coal company that after October 17, 1903, it would only deliver cars consigned to the ice and coal company on the public tracks of the railway company at a place known as the team track, set aside for the delivery to the public generally of merchandise of that character. After receiving this notice the ice and coal company ordered four cars of coal from points in the States of Pennsylvania, West Virginia and Tennessee. These cars reached Greensboro between October 18, 1903, and October 22, 1903, were placed upon the team track, and delivery was tendered to the ice and coal company. That company, however, declined to receive or unload the cars elsewhere than on the siding above referred to. An informal complaint on the subject was made by letter on October 20, 1903, to the North Carolina Corporation Commission, composed of the appellants, Franklin McNeill, Samuel L. Rogers and Eugene C. Beddingfield. After conversations had with

officers of the railway company, the commission, on October 31, 1903, made an order requiring the railway company, upon payment of freight charges, to make delivery of the cars beyond its right of way and on the siding referred to. Hearing was had on exceptions filed on behalf of the railway company, and on December 10, 1903, the commission made an order overruling the exceptions. The railway company appealed to the Circuit Court of Guilford County.

In the meantime, on November 2, 1903, after demurrage or car service charges had attached in respect to the four cars of coal, and to prevent unnecessary interference with its other business, the railway company removed the cars in question from the team track and placed them on a distant siding.

By chapter 164 of the Public Laws of North Carolina for 1899, creating the corporation commission, and by the acts amendatory thereof, as contained in chapter 20, revisal of 1905, as amended in 1905, it was provided as follows:

"1086. For violating rules.—If any railroad company doing business in this State by its agents or employés shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officers thereof, if residing in the State, or, if not, to the manager or superintendent or secretary or treasurer if residing in the State, or if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars. (1899, c. 164, s. 15.)

"1087. Refusing to obey orders of commission.—Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in this chapter, forfeit and

pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter, or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense. (1899, c. 164, s. 23.)

* * * * * * * *

"1091. Violation of rules, causing injury; damages; limitation.—If any railroad company doing business in this State shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. (1899, c. 164, s. 16.)"

On January 5, 1904, the bill in this case was filed in the Circuit Court of the United States for the Eastern District of North Carolina to perpetually enjoin the bringing of actions by the ice and coal company and by the commission to recover penalties or damages under the authority of the aforesaid statutory provisions, because of the noncompliance of the railway company with the order of the commission. As grounds for the relief prayed it was averred that the railway company had a common defense based upon the commerce clause of the Constitution of the United States, the provisions of the act of Congress to regulate commerce and the due process clause of the Constitution, and also because the corporation commission was an illegal body, as it was empowered to exercise judicial, executive and legislative functions contrary to the Constitutions of the State and of the United States. After the filing

of answers the cause was referred to a master to report the testimony and findings of fact to the court. The court, concluding that the order of the corporation commission was repugnant to the commerce clause of the Constitution, entered a decree in favor of the railway company and perpetually enjoined the enforcement of the order of the corporation commission and the bringing of actions to recover penalties or damages for a violation of that order. 134 Fed. Rep. 82. The corporation commission and the ice and coal company appealed and the railway company prosecuted a cross appeal upon the ground that the court below erred in not deciding that the corporation commission was an unconstitutional body because of the alleged mixed and peculiar character of the functions conferred upon it by the state statutes.

Mr. R. H. Battle, Mr. E. J. Justice and *Mr. Robert D. Gilmer,* Attorney General for the State of North Carolina, for appellants in No. 370 and appellees in No. 594:

The amount involved was less than $2,000, and the Circuit Court had no jurisdiction. The jurisdictional amount cannot be added to by reason of the probative force of the judgment in other cases. *Elgin* v. *Marshall,* 106 U. S. 578; *Holt* v. *Indiana Mfg. Co.,* 176 U. S. 68; *United States* v. *Wanamaker,* 147 U. S. 149; *Washington &c. Ry. Co.* v. *District of Columbia,* 146 U. S. 227; *New England Mort. Security Co.* v. *Gay,* 145 U. S. 123; *Baltimore* v. *Postal Tel. Co.,* 62 Fed. Rep. 500, 502.

The North Carolina Corporation Commission was made a court of record under article IV, section 12, of the state constitution. Chap. 164, Laws of 1899; amendment of 1903, c. 342, Pub. Laws. Being a court of record, its record imports verity, and having jurisdiction of the parties and the subject matter of the proceedings before it, the Southern Railway Company was bound by its judgment. *Caldwell* v. *Wilson,* 121 N. Car. 423, at p. 453, citing: *Jones* v. *Penland,* 19 N. Car. 358; *Hyatt* v. *Tomlin,* 24 N. Car. 149; *Duffey* v. *Averitt,* 27 N. Car. 455; *Middleton* v. *Duffey,* 73 N. Car. 72; *Wheeler* v. *Cobb,* 75 N.

Car. 21; *Etheridge* v. *Woodley*, 83 N Car. 11; *Penniman* v. *Daniel*, 95 N. Car. 341; *Roberts* v. *Allman*, 106 N. Car. 391; *State* v. *Jones*, 88 N. Car. 683, 685. See 2 Ency. of Pl. & Pr. 639.

The "due process" clause of the Fourteenth Amendment to the Constitution of the United States does not control forms of procedure nor regulate practice therein. Its requirements are complied with if the party complaining has had sufficient notice and opportunity to defend. *Louisville and N. R. R.* v. *Schmidt*, 177 U. S. 230; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Hooker* v. *Los Angeles*, 188 U. S. 314; *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389. This process is regulated by the state law, and the United States courts can only intervene when it is in conflict, with the Constitution and laws of the United States. *Walker* v. *Sauvinet*, 92 U. S. 90; *Leeper* v. *Texas*, 139 U. S. 462, 467.

The question in this case is, whether the order of the commission, made in pursuance of the powers conferred upon it by the state law violates the "commerce clause" of the Federal Constitution.

Neither the act of Congress of February 4, 1887, establishing the Interstate Commerce Commission, nor the amendments thereto, adopted in 1889, 1893, and 1903, have any provision with reference to side-tracks at stations of railway companies. State legislation not intended to impede or interfere with interstate commerce, but rather to aid its safe and prompt delivery to consignees after reaching its place of destination, is not in conflict with the Constitution of the United States. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Wetson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Mayor, &c. of New York* v. *Miln*, 11 Pet. 102; *Mobile* v. *Kimball*, 102 U. S. 691; *Bagg* v. *Wilmington, C. & A. R. Co.*, 109 N. Car. 281; *Leisy* v. *Hardin*, 135 U. S. 100; *Nashville, C. & St. L. R. R.* v. *Alabama*, 128 U. S. 96; *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204.

Under the police power the State can legislate for the public convenience, as well as for the public health, morals and safety.

Lake Shore &c. R. R. Co. v. *Ohio,* 173 U. S. 285; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Wisconsin &c. R. R. Co.* v. *Jacobson,* 179 U. S. 294; *Olsen* v. *Smith,* 195 U. S. 332; *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477; *Railroad Commission Cases,* 116 U. S. 307, 335; *Chicago, M. & N. R. R.* v. *Solon,* 169 U. S. 133.

The act of the general assembly of North Carolina constituting the corporation commission was not void as being in violation of the constitution of the State.

The act under which the North Carolina Corporation Commission was organized, and is exercising its functions for the benefit of the people of the State, is, in its essential particulars, so far as it relates to railway companies, but a rescript of the laws establishing the North Carolina Railroad Commission and making it a court of record (Laws of 1891, chapter 320 and chapter 498); and the acts establishing both the railroad commission and the corporation commission have been expressly declared to be constitutional by the Supreme Court. And like statutes, under which railroad commissions in other States have been organized, have been upheld by this court. *Railroad Commission Cases,* 116 U. S. 307; *Caldwell* v. *Wilson,* 121 N. Car. 425; *Express Co.* v. *Railroad,* 11 N. Car. 463; *Railroad Company* v. *Telegraph Co.,* 113 N. Car. 213; *Leavell* v. *Telegraph Co.,* 116 N. Car. 211; *Pate* v. *Railroad Co.,* 122 N. Car. 877; *Abbott* v. *Beddingfield,* 125 N. Car. 256; *Corporation Commission* v. *Railroad,* 127 N. Car. 283; *Corporation Commission* v. *Railroad,* 139 N. Car. 126.

This court is concluded by the decisions of the Supreme Court of North Carolina upon this point. *Duncan* v. *McCall,* 139 U. S. 449; *Leeper* v. *Texas,* 139 U. S. 462; *O'Neill* v. *Vermont,* 144 U. S. 323; *McNulty* v. *California,* 149 U. S. 645; *Bergemann* v. *Backer,* 157 U. S. 655; *Kohl* v. *Lehlbach,* 160 U. S. 293; *Howard* v. *Fleming,* 191 U. S. 126.

Mr. Claudian B. Northrop and *Mr. Fabius H. Busbee* for Southern Railway Company:

It has been conclusively settled by this court that where the

master and the court both concur this court will not disturb the findings, and in the language of Mr. Justice Brown "so far as there is any testimony consistent with the finding, it must be treated as unassailable." *Davis* v. *Schwartz*, 155 U. S. 636; *Wiscart* v. *D'Auchy*, 3 Dall. 321; *Bond* v. *Brown*, 12 How. 254; *Graham* v. *Bayne*, 18 How. 60; *Norris* v. *Jackson*, 9 Wall. 125; *Ins. Co.* v. *Folsom*, 18 Wall. 237; *The Abbotsford*, 98 U. S. 440; *Crawford* v. *Neal*, 144 U. S. 585; *Turner* v. *Ferris*, 145 U. S. 132; *Evans* v. *State Bank*, 141 U. S. 107; *Kimberly* v. *Arms*, 129 U. S. 512; *Morewood* v. *Enequist*, 23 How. 491; *The Ship Marcellus*, 1 Black, 414; *Dravo* v. *Fabel*, 132 U. S. 487; *Companie de Navigacion* v. *Brauer*, 168 U. S. 104; *The Richmond*, 103 U. S. 540; *The Conqueror*, 166 U. S. 110; *Stuart* v. *Hayden*, 169 U. S. 14; *Baker* v. *Cummings*, 169 U. S. 198.

The necessary diversity of citizenship exists, all of defendants being citizens and residents of a different State from that of which the complainant is a citizen and resident. There are also questions arising under the Constitution of the United States.

The amount or matter in dispute exceeds the sum or value of $2,000, exclusive of interest and costs, and is properly alleged. See *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 570, 574; *Butchers' & Drovers' Stock Yards Co.* v. *Louisville & N. R. Co.*, 67 Fed. Rep. 35.

The question of jurisdiction, not having been raised in the case at bar by any special plea to the jurisdiction, it must be held under the rulings of this court that the facts sufficient to establish the jurisdiction are admitted when properly averred in the bill, as in the case here.

Both the master and the Circuit Judge have held that this suit involves the right of Southern Railway Company to conduct and manage its interstate business at Greensboro, North Carolina, and to dispose of its rolling stock, and to distribute it, and to refuse or permit its cars to be placed on private sidings, according to its reasonable rules and regulations, and that said right is of incalculable value to Southern Railway Com-

pany, and amounts to many thousands of dollars far in excess of the sum or value of $2,000 exclusive of interest and costs. *Butchers' & Drovers' Stock Yards Co.* v. *Louisville & N. R. R. Co., supra; Nashville, C. & St. L. Ry.* v. *McConnell,* 82 Fed. Rep. 65; *Scott* v. *Donald,* 165 U. S. 107; *Louisville* v. *N. R. R.* v. *Smith,* 128 Fed. Rep. 1.

This is not a suit against the State of North Carolina. A bill to restrain the executive officers of a State, under alleged authority of an unconstitutional statute, is not a suit against the State. *Scott* v. *Donald,* 165 U. S. 107 and cases cited; *Belknap* v. *Schild,* 161 U. S. 10, 18.

The equities of this bill are to prevent irreparable injury and a multiplicity of suits to which Southern Railway Company has a common defense, involving questions of law common to all said suits.

Where a failure to obey an order made by a state railroad commission, which was unauthorized and void, would under the state statutes, subject the company, in its daily business, to large numbers of individual actions, and to heavy penalties, a court of equity has jurisdiction of a suit to enjoin enforcement of such order, on the ground that its decree will avoid a multiplicity of suits and afford a more efficacious remedy than can be had at law. *Dinsmore* v. *So. Express Co.,* 92 Fed. Rep. 714, 715; *Smyth* v. *Ames,* 169 U. S. 517; *Va.-Carolina Chem. Co.* v. *Home Ins. Co.,* 113 Fed. Rep. 1; *Louisville & N. R. R.* v. *Smith,* 128 Fed. Rep. 1.

This is not a suit to restrain cases already pending in state courts contrary to section 720, United States Revised Statutes. *Texas & P. R. Co.* v. *Kuteman,* 54 Fed. Rep. 547. The corporation commission is not a "court" in the sense of the statute. *Gumee* v. *Brunswick,* 11 Fed. Cas. No. 5,872; *People* v. *Trustees,* 39 N. Y. Supp. 607; *People* v. *Van Allen,* 55 N. Y. 31; *White County Com'rs* v. *Givin,* 136 Indiana, 562; *Johnston* v. *Hunter,* 50 W. Va. 52; *Upshur* v. *Rich,* 135 U. S. 467; *Fuller* v. *County of Colfax,* 14 Fed. Rep. 177. See *Western Union Tel. Co.* v. *Wyatt,* 98 Fed. Rep. 335.

The Supreme Court of North Carolina has directly held that the corporation commission of North Carolina is not a "judicial court." *State ex rel. Caldwell* v. *Wilson*, 121 N. Car. 425; *State* v. *Wilmington and Weldon R. R. Co.*, 122 N. Car. 877.

The four cars of coal in question were and are articles of interstate commerce and beyond control of North Carolina Corporation Commission. Where the articles are still in the cars and undelivered, they are subjects of interstate commerce, and the transfer of said articles from the car to the depot or station is a part of the interstate transportation. In the case at bar it will be noted that even such transfer had not taken place, and unquestionably the interstate transportation was uncompleted. *Rhodes* v. *Iowa*, 170 U. S. 412; *Wall* v. *N. & W. R. R. Co.*, 52 W. Va. 485; *Connery* v. *Railroad Co.*, 92 Minnesota, 20.

Furthermore, the act to regulate commerce, itself, provides that it shall and does apply to the "transportation of passengers or property" . . . "from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country," etc. Congress having legislated no state regulations can apply. *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98; *Gulf, C. & S. F. R. Co.* v. *Miami S. S. Co.*, 86 Fed. Rep. 407. Switching and terminal charges are exclusively covered by act of Congress. *Fielder* v. *M., K. & T. R. Co.*, 42 S. W. Rep. 362; *Walker* v. *Keenan*, C. C. A. 7th Cir. 73 Fed. Rep. 755; *I. C. C.* v. *D. G. H. M. R. Co.*, 167 U. S. 633; *I. C. C.* v. *C., B. & Q. Ry. Co.*, 186 U. S. 320.

An article of interstate commerce remains wholly free from such state control, as long as it is in the original package. *Leisy* v. *Hardin*, 135 U. S. 100. Unquestionably coal stored in a car in which it originally started on its transit is still in the original package. *Austin* v. *Tennessee*, 179 U. S. 343.

This is not only the law of the United States but the statutes of North Carolina themselves expressly disclaim any applica-

tion to interstate commerce. Act of March 6, 1899, c. 164, § 14. See also *McGwigan* v. *Railroad Co.*, 95 N. Car. 428.

The rules of the North Carolina Corporation Commission as to placing cars loaded with interstate freight, and its orders to place the four cars of interstate freight now in question are void because they interfere with interstate commerce; because they deal with a subject National in its character, requiring uniform treatment throughout the United States, and a subject over which the action of Congress is exclusive, the States being powerless to interfere at all; and because Congress has in fact legislated on this particular subject, and the field is exclusively occupied by existing acts of the Federal Government.

This court has never separated the cases into those which aid interstate commerce and those which interfere with interstate commerce, and it has never held that the States may pass acts in aid of commerce, while they are forbidden to pass acts interfering with commerce. The only classification of cases ever made by this court were the three classes set forth in *Bridge Co.* v. *Kentucky*, 154 U. S. 204, 209, where it divides them as follows:

First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.

The case of *Bridge Co.* v. *Kentucky*, 154 U. S. 204, has been cited and reaffirmed in the following cases. *W. U. Tel. Co.* v. *James*, 162 U. S. 650, 655; *M. P. R. Co.* v. *Nebraska*, 164 U. S. 403, 416; *C. & L. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 586; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 153; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 623; *K. & H. Bridge Co.* v. *Illinois*, 175 U. S. 626, 632; *Hanley* v. *Kansas City S. R. Co.*, 187 U. S. 617, 620; *Champion* v. *Ames*, 188 U. S. 321, 352; *St. Clair County* v. *Interstate S. & C. T. Co.*, 192 U. S. 454, 457.

See also *Wabash &c. R. Co.* v. *Illinois*, 118 U. S. 557, which

has been cited and reaffirmed in many cases, holding that the times and modes of delivery of interstate freight are not the subject of state regulation.

This court has never disturbed its rulings in the *Wabash* case, and while some state statutes indirectly affecting interstate commerce have been sustained it will be found that they in no way conflict with or modify the doctrine laid down. This will more clearly appear by reference to some of the cases decided by this court sustaining certain state statutes.

Animals having contagious diseases may be excluded from a State: *M., K. & T. R. Co.* v. *Haber*, 169 U. S. 613; *Reid* v. *Colorado*, 187 U. S. 137. A law requiring the erection of fences and cattle guards: *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512; *M. & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26; *M. & St. L. R. Co.* v. *Emmons*, 149 U. S. 364. A state law requiring engineers operating passenger and freight trains to have their sight examined: *Smith* v. *Alabama*, 124 U. S. 465; prohibiting the consolidation of parallel or competing lines: *L. & N. R. Co.* v. *Kentucky*, 161 U. S. 677; separating the white and colored races: *L. N. O. & T. P. Ry. Co.* v. *Mississippi*, 133 U. S. 587; *Plessy* v. *Ferguson*, 163 U. S. 537; prohibiting the running of freight trains on Sunday: *Hennington* v. *Georgia*, 163 U. S. 299.

In reference to the *Hennington* case, Justices Brewer, White, Peckham and Shiras appear to have placed themselves on record in a dissenting opinion that they considered the *Hennington* case erroneously decided. *L. S. & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285, 325.

A statute forbidding the use of stoves as means of heating cars has been upheld: *N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 628; requiring trains to stop at county seats: *Gladson* v. *Minnesota*, 166 U. S. 427; requiring a carrier to inform the shipper that a loss has not happened on its line: *Railroad Company* v. *Patterson*, 169 U. S. 311; requiring bills of lading to be signed by both parties has been upheld, as a rule of evidence: *Railroad Co.* v. *Patterson*, 169 U. S. 311.

A law requiring a railroad company to stop three trains each way at cities containing 3,000 inhabitants, has been upheld: *L. S. & M. S. R. Co.* v. *Ohio,* 173 U. S. 285; requiring a physical connection of tracks by two different railroads: *Wisconsin &c. R. Co.* v. *Jacobson,* 179 U. S. 287.

See the following cases where the regulations are held invalid. *I. C. R. R. Co.* v. *Illinois,* 163 U. S. 142, where a statute of Illinois was declared void because it attempted to require an interstate express train from Chicago to New Orleans to go three and one half miles out of its way and deviate from its course so as to stop at Cairo, Ill. Likewise a statute of Illinois requiring all passenger trains to stop at stations. *C. C. C. & St. L. R. Co.* v. *Illinois,* 177 U. S. 514.

In *Central Stock Yards Co.* v. *Louisville & Nashville R. R. Co.,* 192 U. S. 568, an attempt to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way was held an interference with interstate commerce and the constitution of Kentucky was impotent to produce any such result.

The rules of the corporation commission governing loading and unloading interstate freight, are in conflict with the Interstate Commerce Law, and must yield. *Gulf, C. & S. F. R. R.* v. *Hefley,* 158 U. S. 98; *L. & N. R. R. Co.* v. *Eubank,* 184 U. S. 27; *Interstate Com. Com.* v. *D. G. H. & M. Ry. Co.,* 167 U. S. 633; *Interstate Com. Com.* v. *C., B. & Q. R. R. Co.,* 186 U. S. 320; *Central Stock Yards Co.* v. *L. & N. R. R. Co.,* 118 Fed. Rep. 113.

It was also held by the commission that the Commerce Act covers demurrage, storage, terminal charges, and the distribution of cars, in so far as interstate freight is concerned, in the following cases. *Riddle et al.* v. *Pittsburg & L. E. R. R. Co.,* 1 I. C. R. 688; *Riddle* v. *N. Y., L. E. W. R. R. Co.,* 1 I. C. R. 787; *Heck* v. *R. R. Co.,* 1 I. C. R. 775; *Cutting* v. *F. R. & N. Co.,* 1 I. C. R. 294; *Rice et al.* v. *Western N. Y. & Penna. R. R.,* 3 I. C. R. 162; *Independent Refiners' Association* v. *W. N. Y. & P. R. R. Co.,* 4 I. C. R. 162; *Cattle Raisers' Association* v.

Fort Worth & D. C. Ry. Co. et al., 7 I. C. R. 513; *American Warehousemen's Association* v. *Ill. Central R. Co.*, 7 I. C. R. 556, 592; *Pennsylvania Millers' State Association* v. *P. & R. Ry. Co. et al.*, 8 I. C. R. 531, 553, 558; *Palmer's Dock H. & P. Board of Trade* v. *Penn. R. R. Co.*, 9 I. C. R. 61. See also opinion of Circuit Court of Appeals for the Fourth Circuit announced February 6, 1906, in *United States ex rel. Greenbriar Coal & Coke Company* v. *Norfolk & Western Railway Company; Fielder* v. *Missouri, K. & T. Ry. Co.*, 42 S. W. Rep. 362.

Railroads have the right to make reasonable rules and regulations for the conduct of their traffic in their own interests and that of the public. *Harp* v. *Choctaw, O. & G. R. R. Co.*, 125 Fed. Rep. 445; *Robinson* v. *Baltimore & Ohio R. R.*, 129 Fed. Rep. 753; *Stock Yards Co.* v. *Keith*, 139 U. S. 128; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279.

No legislation can supersede the president, general managers, traffic officials and other officers of railway companies charged by the owners with the conduct of the company's business, but the power of the legislature is limited solely to the protection of the health, safety and convenience of the public, and the term "convenience" is not to be construed into the right of the legislature to usurp the management of the company. *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684.

It would be intolerable if a railway company should at any moment be subjected to orders by telegram from railway commissions to take cars out of trains at any points designated by said commissions and place them upon spur or side-tracks. Such action would disarrange the entire schedules of the railway company throughout its system. It would demoralize the service and endanger the safe conduct and movement of the trains, and would supersede the authority of the officers of the company and practically usurp the management of the railway.

A carrier is not obliged to receive or deliver freight at a mere switch track. The switch of the Greensboro Ice and Coal Company was not built under any order of the corporation commission or any state authority, nor was there any contract re-

quiring such delivery. *Charnock* v. *Texas & Pacific Ry.*, 194 U. S. 432.

A railway company is not a common carrier as to private sidings or spur tracks, and the State has no power to force a railroad company to deliver its cars thereon. *Mann* v. *Pere Marquette R. Co.*, 135 Michigan, 210, 219; *S. C.*, 97 N. W. Rep. 721, 724, and cases cited; *Jones* v. *Newport News &c. R. Co.*, 65 Fed. Rep. 136; *Mercantile Trust Co.* v. *Columbus S. & H. R. Co.*, 91 Fed. Rep. 148.

The proceedings before the corporation commission were not due process of law. The statute creates a body combining the three functions of government—legislative, executive and judicial.

The power to make rates is unquestionably a legislative function. *Munn* v. *Illinois*, 94 U. S. 113, 144; *Peik* v. *R. R. Co.*, 94 U. S. 164, 168; *R. R. Co.* v. *Express Co.*, 117 U. S. 1; *R. R. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' L. & T. Co*, 154 U. S. 362; *R. R. Co.* v. *Gill*, 156 U. S. 649; *R. R. Co.* v. *I. C. C.*, 162 U. S. 184; *I. C. C.* v. *R. R. Co.*, 167 U. S. 479; *I. C. C.* v. *R. R. Co.*, 168 U. S. 144.

Assessment of property for taxation is an executive function. *County of Upshur* v. *Rich*, 135 U. S. 467.

It is clear that the legislative intent was not to create a body to exercise alone either the judicial, the executive or the legislative functions conferred upon North Carolina Corporation Commission, but the object of the entire legislation was to create a body that could exercise all of the functions conferred upon it, consequently it is impossible to separate one portion of the act from the other and declare that void, but the entire act must fall. *Trade-mark Cases*, 100 U. S. 82; *United States* v. *Reese*, 92 U. S. 214; *Connolly* v. *Pipe Co.*, 184 U. S. 540, 565.

It necessarily follows that an order of any such unconstitutional body is void for it has been settled beyond question that an unconstitutional law cannot create even a *de facto* officer and that no office at all exists under an unconstitutional statute. *Norton* v. *Shelby County*, 118 U. S. 425.

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

The legal principle which controls the determination of this cause renders it unnecessary to state many of the facts contained in this voluminous record or to consider and pass upon a number of the legal propositions urged in the cause. But three questions are essential to be passed upon. They are, First. Whether the record discloses that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. Second. Whether, as to the individual defendants below, this cause in fact was a suit against the State of North Carolina. Third. Whether the order and decision of the corporation commission of North Carolina and the statutes of that State upon which the same was based were void because in conflict with the commerce clause of the Constitution and the act of Congress to regulate commerce.

1. It was urged in argument on behalf of the commission and the ice and coal company that the extra cost or expense, if any, of placing the four cars of coal on the siding was the matter in controversy. In the court below it would seem to have been claimed that the one hundred and forty-six dollars demurrage was the question at issue. However this may be, as said by the trial court, although the demurrage dispute may have been the origin of the litigation, there is involved in the controversy presented by the bill not only the right to enforce against the railway company the payment of statutory penalties much in excess of two thousand dollars, but also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the corporation commission which so directly burdened such commerce as to amount to a regulation thereof. This latter right is alleged in the bill to be of the necessary jurisdictional value, the averment was supported by testimony, and the master and the court below have found such to be the

fact. There is no merit in the contention that there is a want of jurisdiction to entertain the writ of error.

2. We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not in any proper sense one against the State. *Scott* v. *Donald*, 165 U. S. 107, 112; *Fitts* v. *McGhee*, 172 U. S. 516, 529, 530.

3. The cars of coal not having been delivered to the consignee, but remaining on the tracks of the railway company in the condition in which they had been originally brought into North Carolina from points outside of that State, it follows that the interstate transportation of the property had not been completed when the corporation commission made the order complained of. *Rhodes* v. *Iowa*, 170 U. S. 412.

By section 1066 of the revisal of 1905 the general powers of the North Carolina Corporation Commission were thus defined:

"1066. General powers.—The corporation commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies. (1899, c. 164; 1901, c. 679.)"

By section 1100 it was provided as follows:

"1100. Demurrage; storage; placing and loading of cars.—The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules gov-

erning railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment. (1903, c. 342.)"

Under these circumstances it is undoubted that by a circular, numbered 36 and dated July 9, 1903, the corporation commission promulgated rules fully regulating the right of railway companies to exact and the amount of charges which might be made for storage, demurrage, etc. And the pleadings make it clear that the order of the corporation commission complained of was not made upon the assumption of any supposed contract right which the corporation commission as a judicial tribunal was enforcing as between the ice and coal company and the railway company, but was exclusively rested upon the general administrative authority which the corporation commission deemed it had power to exercise in virtue of the rights delegated to it by the statutes of North Carolina as above stated. Thus, in paragraph 12 of the answer, the corporation commission averred as follows:

"These defendants are advised that the orders made by them, hereinbefore referred to, do not constitute an interference with interstate commerce as alleged in said paragraph 12 (referring to bill of complaint); nor with the right of the complainant to conduct its business according to its reasonable rules and regulations, except so far as the corporation commission has the right and power to control its rules and regulations by virtue of said act creating the corporation commission, and the amendment thereto, contained in chapter 342, Public Laws, 1903, whereby the power is expressly conferred upon the North Carolina Corporation Commission, by subsection 26, 'to make rules governing railroad companies in the placing of cars for loading and unloading, and in fixing time limit for the delivery of freights after the same have been received by the transportation companies for shipment.' And these defendants further say that, having full power to provide for placing cars for unloading, and in conformity with the rules of the said North

Carolina Corporation Commission, the orders complained of in the bill were in strict conformity to the law, and finally adjudged and made after the complainant company had full opportunity to make defense as to its alleged rights in the premises."

Without at all questioning the right of the State of North Carolina in the exercise of its police authority to confer upon an administrative agency the power to make many reasonable regulations concerning the place, manner and time of delivery of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject made by the State or under its authority which directly burdens interstate commerce is a regulation of such commerce and repugnant to the Constitution of the United States. *Houston & Texas Central Ry. Co.* v. *Mayes*, 201 U. S. 321; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

Not being called upon to do so, we do not pass upon all the general regulations formulated by the commission on the subject stated, but are clearly of opinion that the court below rightly held that the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void. Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce. On the other hand, treating the order as but the assertion of the power of the corporation commission to so direct in a particular case, in favor of a given person or corporation, the order not only was in its very nature a direct burden and regulation of interstate commerce, but also asserted a power concerning a subject directly covered by the act of Congress to regulate commerce and the amendments to that act, which forbid and provide remedies to prevent unjust dis-

criminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce.

The direct burden and resulting regulation of interstate commerce operated by an alleged assertion of state authority similar in character to the one here involved was passed upon by the Circuit Court of Appeals for the Sixth Circuit in *Central Stock Yards Co.* v. *Louisville & Nashville R. R. Co.*, 118 Fed. Rep. 113. The court in that case was called upon to determine whether certain laws of Kentucky imposed a direct burden upon interstate commerce and were a regulation of such commerce, upon the assumption that those laws compelled a common carrier engaged in interstate commerce transportation to deliver cars of live stock moving in the channels of interstate commerce at a particular place beyond its own line different from the general place of delivery established by the railway company. In pointing out that if the legislation in question was entitled to the construction claimed for it, it would amount to a state regulation of interstate commerce, it was aptly and tersely said (p. 120):

"It is thoroughly well settled that a State may not regulate interstate commerce, using the terms in the sense of intercourse and the interchange of traffic between the States. In the case at bar we think the relief sought pertains to the transportation and delivery of interstate freight. It is not the means of making a physical connection with other railroads that is aimed at, but it is sought to compel the cars and freight received from one State to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow it could regulate interstate commerce. This it cannot do."

As we conclude that the court below rightly decreed that the order complained of was invalid because amounting to an unlawful interference with interstate commerce, we deem it unnecessary to consider the contentions made on the cross appeal of the railway company. And because we confine our decision to the issue which necessarily arises we do not intimate any

opinion upon the question pressed at bar as to whether an order which was solely applicable to purely state business, directing a carrier to deliver property upon a private track beyond the line of the railway company, would be repugnant to the due process clause of the Constitution.

The final decree which the Circuit Court entered and the writ of perpetual injunction issued thereon were, however, much broader than the necessities of the case required, and should be limited so as to adjudge the invalidity of the order complained of, restrain the institution by the defendant of suits or actions for the recovery of penalties or damages founded upon the disobedience of such order, and forbid future interferences under like circumstances and conditions with the interstate commerce business of the railway company. As so modified, the decree below is

Affirmed.

UNITED STATES v. AMERICAN SUGAR REFINING COMPANY.

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

No. 269. Argued April 27, 1906.—Decided May 28, 1906.

Under the treaty between the United States and Cuba of December 11, 1902, and the act of Congress of December 17, 1903, imports from Cuba were not entitled to reduction of duties imposed by the tariff act of July 24, 1897, until December 27, 1903, the date proclaimed by the President of the United States and the President of Cuba for the commencement of the operation of the treaty.

After the treaty was amended by the Senate and the amendment accepted by Cuba the time of its going into effect was to be fixed by act of Congress and not as originally fixed by the treaty ten days after the exchange of ratifications.

There is a presumption against retrospective legislation and words in a statute will not be construed as having such effect unless they clearly can have no other effect, and the legislative intent cannot otherwise be satisfied; and in this respect the use in the statute of the future tense must be given weight.

THE question in the case is whether certain sugars which were imported between the twelfth of June and the twenty-eighth of September, 1903, were chargeable with full duties under the tariff act of July 24, 1897, or were entitled to twenty per cent reduction of duties prescribed by that act, under the treaty between the United States and Cuba of the date December 11, 1902, and an act of Congress of December 17, 1903. The answer to the question depends upon when the treaty went into effect, whether upon the tenth of April, 1903, or the twenty-seventh of December, 1903. The appellee contends for the former and the appellant for the latter date. Duties were assessed under the act of 1897 without reduction. Protests were filed and an appeal taken to the board of appraisers, who sustained the collector. The decision of the board was reversed by the Circuit Court. The treaty provided, 33 Stat. 2136, 2142, among other things as follows:

"The President of the United States of America, and the President of the Republic of Cuba . . . have in consideration of, and in compensation for, the respective concessions and engagements made by one to the other as hereinafter recited, agreed and do hereby agree upon the following articles for the regulations and government of their reciprocal trade, namely:

Article II.

"During the term of this convention, all articles of merchandise not included in the foregoing Article I, and being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty per centum of the rates of duty thereon as provided by the tariff act of the United States approved July 24, 1897, or

as may be provided by any tariff law of the United States subsequently enacted."

Article XI was as follows:

"The present convention shall be ratified by the appropriate authorities of the respective countries, and the ratifications shall be exchanged at Washington, District of Columbia, United States of America, as soon as may be before the thirty-first day of January, 1903, *and the convention shall go into effect on the tenth day after the exchange of ratifications*, and shall continue in force for the term of five (5) years from date of going into effect, and from year to year thereafter until the expiration of one year from the day when either of the contracting parties shall give notice to the other of its intention to terminate the same."

By supplemental treaty signed January 26, 1903, 33 Stat. 2145, it was provided that "the respective ratifications of the said convention shall be exchanged as soon as possible, and within two months from January 31, 1903."

March 19, 1903, the Senate added the following amendment at the end of Article XI: "This convention shall not take effect until the same shall have been approved by the Congress."

On March 31, 1903, ratifications were exchanged. At this date Congress was not in session, but was convened in special session November 9, 1903, and passed on December 17, 1903, 33 Stat. 3, an act entitled: "An act to carry into effect a convention between the United States and the Republic of Cuba, signed on the eleventh day of December in the year 1902." Section 1 provides as follows:

"That whenever the President of the United States shall receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the articles of the convention between the United States and the Republic of Cuba, signed on the eleventh day of December, in the year nineteen hundred and two, he is hereby authorized to issue his proclamation declaring he has received such evidence, *and thereupon, on the tenth day after exchange of ratifications of such convention* be-

tween the United States and the Republic of Cuba, *and so long as the said convention shall remain in force*, all articles of merchandise being the product of the soil or industry of the Republic of Cuba, which *are now* imported into the United States free of duty, *shall continue* to be so admitted free of duty, and all other articles of merchandise being the product of the soil or industry of the Republic of Cuba imported into the United States *shall be admitted* at a reduction of twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven, or as may be provided by any tariff law of the United States subsequently enacted. The rates of duty herein granted by the United States to the Republic of Cuba are and shall continue *during the term of said convention* preferential in respect to all like imports from other countries: *Provided*, That while said convention is in force no sugar imported from the Republic of Cuba, and being the product of the soil or industry of the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven, and no sugar the product of any other foreign country shall be admitted by treaty or convention into the United States while this convention is in force at a lower rate of duty than that provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven: *And provided further*, That nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that custom duties can be changed otherwise than by an act of Congress, originating in said House."

The same day (December 17, 1903) the President issued his proclamation, 33 Stat. 2136, which, after setting forth the treaty and the act of Congress and reciting the above facts, together with the fact that ratifications of said convention had been exchanged on March 31, 1903, declared:

"And whereas satisfactory evidence has been received by the President of the United States that the Republic of Cuba has made provision to give full effect to the articles of said convention:

"Now, therefore, be it known that I, Theodore Roosevelt, President of the United States of America, in conformity with the said act of Congress, do hereby declare and proclaim the said convention, as amended by the Senate of the United States, to be in effect *on the tenth day from the date of this my proclamation.*"

The Solicitor General for the United States, in this case, and in No. 652, argued simultaneously herewith: [1]

The treaty and act were prospective and coterminous. The original stipulation that the treaty was to take effect ten days after exchange of ratifications was superseded by the Senate amendment, ratified and approved by Cuba, that the treaty should not take effect until approved by Congress. The subsequent action of the contracting parties was in accordance with that intent. The act was passed to carry the treaty into effect; its language is prospective. The words "on the tenth day after exchange of ratifications" are said to be retrospective because the President's proclamation after the passage of the act showed for the first time that ratifications had been theretofore exchanged. But the Executive alone knew this; Congress was not advised at the time the act was passed that ratifications had been exchanged March 31, 1903. At that date Congress was not in session, having adjourned March 4, 1903. A special session of the Senate began March 5 and adjourned March 19, the day the resolution amending the treaty was adopted. The President's proclamation of October 10, 1903, convening a special session to consider the treaty, sets forth that the approval of Congress is necessary before the treaty shall take effect; and in his message to that session he refers to ratification without stating when the treaty was

[1] *Franklin Sugar Refining Company* v. *United States*, *post*, p. 580.

ratified or whether ratifications had been exchanged. Both Houses thought that the stipulation as to the exchange of ratifications was superseded by the Senate amendment, and supposed that final step had been deferred until Congress should act.

That Congress did not intend a retroactive effect is clear from the committee reports and debates. The discussion in Senate and House was as to the scope of the treaty-making power and the propriety of granting the proposed reductions in the Cuban tariff. The fact was mentioned that the bill would make an annual reduction of $8,000,000 in duties on imports from Cuba, which would have meant, in case of retrospective operation, a refund of $6,000,000 for the previous nine months. Yet nothing was said about this, and no provision whatever was made.

The treaty and act took effect simultaneously on the tenth day after proclamation. The approval by Congress was conditional: the President was first to ascertain whether Cuba had made provision to give full effect to the convention, issue his proclamation declaring that he had received such evidence, and "thereupon on the tenth day after exchange of ratifications" the new arrangement was to begin. This was clearly within the authority of Congress to do. *Field* v. *Clark*, 143 U. S. 649. The President, although aware of the fact that ratifications had been exchanged, had to construe the law so as to carry into effect the intention of Congress, which was clearly that not only should the new arrangement not begin to operate until Cuba had made due provision on her part, but that ten days' notice should be given before it should take effect, as originally provided in the treaty. The President therefore did the only possible and logical thing under the circumstances.

Even if the approval of Congress and the action of the President were not strictly in accordance with the terms of the treaty, no one but Cuba could take exception. The interpretation and enforcement of such treaty stipulations are

for the determination of the political departments of the Government, and courts will respect their decision. *Foster* v. *Neilson*, 2 Pet. 253; *The Cherokee Tobacco*, 11 Wall. 616; *Whitney* v. *Robertson*, 124 U. S. 190; *Botiller* v. *Dominguez*, 130 U. S. 238; *Fong Yue Ting* v. *United States*, 149 U. S. 698. Cuba has concurred in the action of this Government, and the arrangement was essentially reciprocal. Both the United States and Cuba have put this treaty into effect on the same day to operate prospectively, and there is nothing to indicate that the two governments are not perfectly satisfied that the true intent of the treaty has been observed. The argument, reiterated by our opponents, that one party to the agreement has undertaken to modify it without consulting the other party, is simply disproved by the facts.

The case of *United States* v. *Burr*, 159 U. S. 78, is controlling. There the tariff act of 1894 specifically required its retrospective operation; yet the court looked to the spirit of the law. The doctrine of *United States* v. *Heth*, 3 Cranch, 398 was affirmed; the court held the question was one of intention, and emphasized the rule that tariff laws should have a prospective operation in order that there might be an interval before the act took effect for business to adjust itself to the change, and thus avoid confusion and mischief to the country. Those considerations apply with even greater force in this case, where the retrospective intention does not appear on the face of the statute, but rests on inference, based on an assumption that Congress knew of the exchange of ratifications,—which convicts it of inconsistency in its direction as to proclamation by the President. If Congress knew that ratifications had been exchanged several months before, why say the treaty should take effect on the tenth day after exchange? Congress was evidently anticipating something yet to occur, and intending to give adequate notice to business men.

The Senate resolution requiring approval of Congress was valid and operative. There is an inconsistency between the theory of appellees' protest and their brief. The protest says

that the clause of the treaty stipulating for approval by Congress is inoperative, and yet anticipates the act and relies on it when passed. Now they concede that the amendment was operative and the Senate had power thus to amend. There is no doubt of this. An act of Congress is not necessary to the validity of a treaty, but may be to its taking effect. *Foster* v. *Neilson*, 2 Pet. 253; *United States* v. *Arredondo*, 6 Pet. 691. It is not necessary to determine whether this treaty is self-executing or not, since it in terms stipulates that it shall not take effect until approved by Congress, and Congress in giving its approval enacted the necessary legislation to carry the treaty into execution.

The sugars not actually removed from the bonded warehouse until after December 27, 1903, but for which withdrawal entry had been made and permit to deliver issued prior to that date, were properly held to have been withdrawn before the treaty took effect (sec. 20, Customs Administrative Act, as amended by act Dec. 15, 1902, 32 Stat. 753). There was a constructive withdrawal of the goods. This court has held that goods are to be deemed to have been warehoused from the time of importation, because from that time they are in the custody and control of the Government. *Hartranft* v. *Oliver*, 125 U. S. 525; *Seeberger* v. *Schweyer*, 153 U. S. 609. It therefore follows that the period of warehousing must be held to end when the withdrawal entry is made and a permit to deliver issued, because the goods then cease to be in the custody and control of the Government. This is the only practical rule to adopt, and it has been followed by the Treasury Department from the first in applying the Cuban treaty. T. D. 24,855; T. D. 29,924.

To hold that because liquidation occurred after the treaty became operative the goods were entitled to the benefit of its terms would be to make the date of liquidation and not the date of withdrawal the determining factor, contrary to sec. 20, Customs Administrative Act. The law does not prescribe the time in which liquidation shall be made, but only that, after

liquidating, the collector may not, in the absence of fraud or protest, reliquidate after a year from the date of entry. Act June 22, 1874, sec. 21, 18 Stat. 186; *Abner Doble Co.* v. *United States,* 119 Fed. Rep. 152; *United States* v. *De Rivera,* 73 Fed. Rep. 679; *Gandolfi* v. *United States,* 74 Fed. Rep. 549. And see *Merritt* v. *Cameron,* 137 U. S. 542, 549–551. The date of liquidation is important only in its bearing upon the time for making protest and reliquidation. There is no provision in the treaty or the act requiring the liquidation or reliquidation of goods previously entered in accordance with its terms. This shows that the treaty and act were not intended to be retroactive in any respect. *United States* v. *Burr, supra,* citing *Barney* v. *Rickard,* 157 U. S. 352. The merchandise was liquidated as entered, there was no change in the classification, the original assessment of duty was right, and the final liquidation was the same. The estimated duties paid at the time of withdrawal are the duties.

Mr. John G. Johnson, with whom *Mr. John E. Parsons* and *Mr. H. B. Closson* were on the brief, for appellee in this case and for appellant in No. 652, argued simultaneously herewith.[1]

There was also a separate brief by *Mr. Edward S. Hatch* and *Mr. J. Stuart Tompkins* in behalf of certain importers having similar interests.

By the convention itself, the term of its duration was fixed, viz., five years from the tenth day of April, 1903, which date was ten days after that of exchange of the ratifications by the respective governments.

This contention rests upon the unequivocally expressed provision that "the convention shall go into effect on the tenth day after the exchange of ratifications, and shall continue in force for a term of five years from the date of going into effect."

The treaty, as made by the respective plenipotentiaries, after execution by them, required the confirmation of the

[1] *Franklin Sugar Refining Company* v. *United States, post,* p. 580.

Presidents of the respective governments, and of the Senates of each county.

Until these confirmations, there could be no exchange of ratifications, and of course it was necessary to provide that it should not go into effect until such exchange.

As originally drafted, the convention must have failed altogether, because of the inability to exchange ratifications on or before the thirty-first day of January, 1903. The supplemental convention which was entered into, was requisite to save such failure; but it still remained necessary the exchange should take place on or before the thirty-first day of March, 1903.

There was an obvious reason why a limit of time for commencement of the reduction was fixed. The principal product which would be imported into the United States from Cuba would be sugar. The negotiations for the treaty were conducted, we may assume, in anticipation of the exportation to, and importation into, the United States, of the crop for 1902. In the ordinary course of trade, this crop would begin to be imported in February, 1903, the importations being at their maximum in April, and ceasing substantially on the first day of July.

An extension of the date to December, 1903, would have lost to Cuba the benefit of a reduction upon a crop which was undoubtedly in the minds of both the contracting parties.

Of course we must deal with the effect of words inserted, at the instance of the Senate of the United States, in accordance with the report of its Committee on Foreign Relations; providing that "This convention shall not take effect until the same shall have been approved by the Congress."

Whatever may be urged as to the interpretation of the convention, with these words inserted, it cannot be urged, with conviction, that the intent was to alter, or to do anything other than to guard against the possibility of its becoming non-enforceable because of its affecting a tariff duly enacted by the Congress of the United States.

One of the provisos, inserted in the act, discloses the jealousy of the House of Representatives of its right, claimed by it to exist, that customs duties could not be changed other than by "an act of Congress originating in said House."

The Senate, it may be assumed, was equally jealous of its right of approval of treaties without any consent of the House of Representatives. We think it may be asserted, confidently, it was not intended by the Senate, that Congress should approve the treaty, but simply that it should give approval to what might be necessary, in the way of legislation, in removing all possibility of question of enforcement in the United States, of its conditions.

The Senate knowing it had been provided the term should commence "on the tenth day after the exchange of ratifications," did not alter said provision; but knowing, also, that a question existed as to the right to make any treaty which altered a revenue law, it directed that though the term should continue as prescribed, the convention itself should not be effective until approved by the Congress.

No doubt as to the actual intention of the Senate can exist, in view of the explanation of Senator Bacon, and of what was said in its committee's report as to the ratification of certain reciprocity treaties to which we have already referred. This report shows that the Senate considered the words, "prohibiting the taking of effect until the same shall have been approved by Congress," as the equivalent of the words, "shall not take effect without the approval of Congress."

It was not intended by the Senate, by the insertion of these words, to affect the exchange of ratifications. It was evident that if this should not take place on or before the thirty-first day of March, 1903, the convention would fall, by its own terms. Knowing that the ratifications must be thus exchanged, it was obvious the term must commence anterior to the time when Congress could act, inasmuch as it had adjourned, the Senate being in session under a special call.

We must read article XI, it is true, with the words we are

considering added, but we must read it as a whole, not simply the added words. The rules of construction require that so far as may be, all parts of an agreement shall be regarded. If it had been intended the added words should repeal those first used, it would have been so said. Presumably the original words were meant to continue to have effect, because they were allowed to remain, without alteration.

An interpretation can be made which will render the whole of the article effective—that for which we contend—holding the term to continue without alteration, but the convention itself not to have been a binding obligation until something had been done by Congress by way of legislation, necessary, or at least deemed desirable.

In other words, when the Senate said: "The treaty should not take effect until the same shall have been approved by the Congress," it meant only that: "This treaty shall not take effect unless it shall be approved by the Congress."

In determining the meaning and effect of the act of December 17, 1903, it is necessary to bear in mind the fact that it is the meaning of the convention, not that of Congress, as embodied in this act, which we must ascertain, the first being the act of the two contracting parties, whilst the latter emanates only from one.

No construction will be given to the act which, in any way, will affect the contract. It was in the power of Congress to refuse to legislate by way of amendment of the tariff act, but it possessed no other power in the matter.

The beginning, and the end, of the act, was the removal of any bar in the way of a question as to the right, in the United States, to make valid a treaty, which provided for the payment of duties upon imports, less than those which had been prescribed by act of Congress.

In the case of the New York importations, as there was a suspension of the liquidation until a date subsequent to December, 1903, the ultimate liquidation was required to be made under a reduction at that time conceded to be in force.

The effect of the importers' protest and appeal from the decision of the collector to the board of general appraisers was to suspend the liquidation of the duties upon merchandise until after its disposition of the appeal; which was not made until April, 1904, months after the Cuban treaty had become the law of the land.

This principle is the necessary result of the language of the Customs Administrative Act and the revisory powers with which it endows the board of general appraisers. Act of June 10, 1890, § 14. See also Attorney General's argument in *United States* v. *Goldenberg*, 168 U. S. 95.

If, while the importers' protest and appeal were pending *sub judice*, either before the board of appraisers or before the Circuit Court, and while the duties therefore still remain unliquidated, so much of the statute as imposed upon these imports more than eighty per cent of the general tariff rates was repealed, as of a date prior to that of the importation, it was the duty both of the board of appraisers and of the Circuit Court to give effect to the repeal and to reverse the collector's decision, even though correct when made. 26 Am. & Eng. Ency. of Law, 2d ed., 748. *United States* v. *Schooner Peggy*, 1 Cranch, 103.

While the importers' protest and appeal were still *sub judice* before the board of appraisers, and before the duties had been liquidated; so much of the statute as imposed more than eighty per cent of the regular duties upon these imports was repealed, and the repeal by its very terms took effect as of a date prior to the date of the importation.

It was not until April 28, 1904, that the board of appraisers acted upon the importers' protest and appeal. In the meantime the Cuban treaty upon its approval by Congress on December 17, 1903, four months before, had become the law of the land. Article II of that treaty provided that "during the term of this convention" all Cuban sugar should be admitted at a reduction of twenty per cent; and as to the term of the convention that it should "go into effect on the tenth day after

the exchange of ratifications, and continue in force for the term of five years from the date of going into effect." The tenth day after the exchange of ratifications was April 10, 1903. The sugars were imported in June, July, August and September, 1903.

In the case of the Philadelphia importations, the liquidation was not made until after December, 1903, and was therefore required to be made in accordance with the tariff act as then in force. What has just been said applies with greater force to these importations where there was no liquidation until after the convention was concededly in effect.

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

The treaty as drafted and presented to the Senate provided for an exchange of ratifications at Washington as soon as might be before the thirty-first day of January, 1903, and should "go into effect on the tenth day after the exchange of ratifications." A supplemental convention became necessary, and an exchange of ratifications was provided to be "as soon as possible and within two months from January 31, 1903." But subsequent to that date, to wit, March 19, 1903, the Senate added the amendment: "This convention shall not take effect until the same shall have been approved by the Congress." Between the treaty, therefore, and the amendment there was an emphatic difference. The date at which the instrument should go into effect was changed. It cannot be said that the treaty provision related to time and the amendment to sanction merely and adopted the time of the treaty. To do this would be to interpret the words of the treaty one way and the same words in the amendment another way. We start, then, with the proposition that not the treaty, but the act of Congress, was to fix the date that the treaty should take effect. What date Congress fixed is the question to be considered. It was certainly competent for Congress (with the consent of Cuba)

to have given the treaty retrospective, immediate or prospective operation. Which did Congress do? And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation "unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied." *United States* v. *Burr*, 159 U. S. 78. On the other hand, it must be admitted that there are words in the act of Congress which, if not of themselves, yet in connection with events, may be said to look to a retrospective operation. It is not, however, an unusual judicial problem to have to seek the meaning of a law expressed in words not doubtful of themselves, but made so by circumstances or the objects to which they come to be applied.

Both the treaty and the act of Congress concern tariff duties, and "the usual course in tariff legislation," we have said, "has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix a future day at which the statutes are to become operative." *United States* v. *Burr*, *supra*. And these remarks have application here. The treaty, it may be admitted, was intended as a beneficial concession to Cuba. But conditions in the United States were also to be considered, and we cannot assume that this would have been overlooked by Congress when legislating. It is true, as urged by appellant, that the act of December 17 deals entirely with importations from Cuba, but it is those which would have the most disturbing effect, and on account of which business in like products would have to be accommodated. These as well as the considerations urged by the appellant must be kept in mind in seeking the meaning of Congress, and we repeat that, under the Senate amendment, it is the meaning of Congress, not the meaning of the convention independent of that of Congress, we are to ascertain. It was open to Cuba to reject the amendment; it was open to Cuba to reject the legislation. If she chose to accept both they became her contracts.

Turning to the act of December 17 we find it expressed in the simple future tense, and this must be given weight. *United States* v. *Goldenberg*, 168 U. S. 95, 102. So far as the text of the act itself is concerned, all of its parts accord; all of its provisions are prospective but one. That pertained to the then present, the date of the act. It provided that all products which were imported free should continue to be admitted free. The provision is "all articles . . . which *are now* imported . . . free of duty *shall continue* to be so admitted. . . ." This accords with and reinforces the prospective provisions, and was apparently used with deliberate and provident intention, making the act provide for the present and future, excluding the past, certainly not expressing it. Passing from the text of the act, an element of confusion appears. Ratifications had been exchanged between the United States and Cuba on March 1, 1903. The text of the act provides "that whenever the President *shall* receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the article of convention . . . he is hereby authorized to issue his proclamation declaring that he has received such evidence, and *thereupon*, on the tenth day after exchange of ratifications of such convention, . . . *and so long as said convention shall remain in force*, all articles of merchandise being the products of the Republic of Cuba, which are now imported . . . free of duty, shall continue to be admitted free of duty, and all other articles . . . shall be admitted at a reduction of 20% of the rates of duty thereon as provided in the tariff act of the United States approved July 24, 1897. . . ." The words of the act, therefore, refer manifestly to an event to occur, which seemingly had already occurred, and upon such event, it is contended, the treaty, by its own terms and by the act of Congress, took effect, to wit, "the exchange of ratifications" of the convention. To this the Government replies that Congress, not being in session at the time, was ignorant that ratifications had been exchanged, and framed its legislation with the view that some further provision by Cuba was neces-

sary. If we may not accept the explanation of Congress's ignorance it is not unreasonable to suppose that Congress considered it was still open to Cuba to accept or reject the treaty, and to make sure of her acceptance before the treaty should go into effect in the United States. This view satisfies completely the text of the act. We cannot suppose that if Congress intended to give retrospective operation to the act it would have used words that expressed the contrary. The day at which the treaty should operate was important, and would necessarily be ever present in mind, and it was easy of expression. Future time and past time are directly opposite, and by no inadvertence or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other.

There is another important fact. The treaty was a reciprocal arrangement and intended to go into effect coincidently in the United States and Cuba. The two nations provided for this. On the day the President approved the act of Congress he issued his proclamation declaring that the treaty should go into effect on the twenty-seventh day of December. On the seventeenth of December the President of Cuba also issued his proclamation, stating that Congress had approved the treaty in accordance with the requirements of Article XI, and declaring that the treaty should take effect in Cuba on the day named in the proclamation of the President of the United States—December 27, 1903. This coincident operation is of the very essence of the convention. It would indeed be anomalous if a treaty which provided for reciprocal concessions should be in operation in one nation eight months before it was in operation in the other. And this is not adequately answered as appellee answers it, by saying that the President of Cuba and the President of the United States were both mistaken as to the date of the operation of the treaty, and their mistake could not affect the rights of importers. Certainly not if a mistake could be conceded. But the action of the Presidents is proof against

the existence of mistakes. It shows the understanding of the executives of the two countries and affords confirmation of the view that Congress contemplated action subsequent to its legislation to put the treaty into effect.

The judgment of the Circuit Court is reversed and the case remanded with directions to affirm the order of the Board of General Appraisers.

FRANKLIN SUGAR REFINING COMPANY *v.* UNITED STATES.

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

No. 652. Argued April 27, 1906.—Decided May 28, 1906.

United States v. *American Sugar Co.*, *ante*, p. 563, followed, to effect that the treaty of December 11, 1902, with Cuba went into effect December 27, 1903.

Under § 20 of the Customs Administrative Act as amended December 15, 1902, 32 Stat. 753, merchandise in bonded warehouse on which duties are paid and permits for delivery issued to the storekeeper is thereupon withdrawn from consumption and subject to rate of duty in force at that time; this is not affected by the fact that the merchandise may remain in the warehouse after such permit is issued and if directly exported the owner will under § 2977 Rev. Stat. be entitled to drawbacks.

Under § 20 of the Customs Administrative Act merchandise in bonded warehouse is subject to the rate of duty in force at the time of withdrawal for consumption and not to the rate in force at time of liquidation.

Cuban sugar in bonded warehouse on which duty was paid and for which withdrawal permits were issued and delivered to the storekeeper prior to December 27, 1903, but which remained in the warehouse after that date were, subject to full duty, and not entitled to the 20% reduction under the act of December 17, 1903, and the treaty with Cuba.

THE facts are stated in the opinion.

Mr. John G. Johnson, with whom *Mr. John E. Parsons* and *Mr. H. B. Closson* were on the brief, for appellant.[1]

There was also a separate brief by *Mr. Edward S. Hatch* and *Mr. J. Stuart Tompkins* in behalf of certain importers having similar interests.

The Solicitor General for the United States.[1]

Mr. Justice McKenna delivered the opinion of the court.

This case was argued and submitted with No. 269.

The appellant imported and entered at the port of Philadelphia on September 29, 1903, certain sugars, the product of the Republic of Cuba. The collector imposed on all the sugars the full rate imposed by the tariff act of July 24, 1897. Permits for the removal of all the sugars for consumption from bonded warehouse were issued to appellant before December 17, 1903, and all removed for consumption before that date except 1,250 bags, which were removed December 28, and 3,279 bags and 67 bags of sweepings on December 29.

It is contended (1) that all of the sugars having been imported after the exchange of ratifications of the treaty between the United States and Cuba, appellant was entitled to the reduction of 20% of the rates of duty imposed by the act of July 24, 1897; (2) that appellant was entitled in any event to such reduction as to the sugar not actually removed from bonded warehouse until after December 27, 1903. The board of appraisers sustained the collector and the Circuit Court affirmed the order of the board.

As to the first contention, this case is exactly like that of *United States* v. *American Sugar Refining Company,* just decided. We decided that under the treaty between the United

[1] For abstracts of arguments see *United States* v. *American Sugar Refining Company, ante,* p. 563, argued simultaneously herewith.

States and Cuba and the act of Congress approved December 17, 1903, there quoted, imports from Cuba were not entitled to the reduction of the duties imposed by the act of July 24, 1897, until December 27, 1903, the date proclaimed by the President of the United States and the President of Cuba for the commencement of the operation of the treaty.

The answer to the second contention depends upon section 20 of the Customs Administrative Act, as amended by the act of December 15, 1902. 32 Stat. 753. Section 20 provides as follows:

"That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal: *And provided further*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

The section needs no interpretation. It is clear that it subjects merchandise to the duties prescribed by law at the time it is withdrawn for consumption. *Mosle* v. *Bidwell*, 130 Fed. Rep. 334. And our inquiry then must be, when were the sugars in controversy withdrawn for consumption? If before December 27, 1903, they were dutiable under the act of July, 1897; if after December 27, they were entitled to 20% reduction of the duties prescribed by that act.

Between September 29 and October 10 withdrawal entries were made of the entire cargo and duties at regular rates paid thereon. The delivery permits were lodged with the storekeeper at the same time. This put the sugars at the absolute disposition of the importers. It may be that the Government had the custody of them, or rather the joint custody with the importer. Section 2960, Rev. Stat. But it was a mere manual custody, not claiming any right over them or right to

detain them. Indeed it may be said that the payment of duties and the delivery of the permit to the storekeeper operated to give up the custody which the Government had jointly with the importer before the payment of duties. It is, however, pointed out by appellant that by section 2977, Rev. Stat., merchandise upon which duty has been paid may remain in the warehouse, "in the custody of the officers of the customs, at the expense and risk of the owners of such merchandise, and if exported directly from such custody to a foreign country within three years, shall be entitled to return duties." Whether this section covers a case where a permit has been issued it is not necessary to decide. It is enough to say that the section is part of the plan for the payment of drawbacks. The merchandise is identified by remaining in the warehouse. Section 2978, Rev. Stat. We think, therefore, that where duties are paid upon merchandise and permits issued for its removal which have been delivered to the storekeeper, it is withdrawn for consumption and is subject to duties as of that time.

A contention is made based on the date of ultimate liquidation of duties, which was not until after December, 1903. In case No. 269 the effect of liquidation was apparently urged to be to entitle the importer to the benefit of the treaty, which it was contended went into operation April 10, 1903, although the act giving the treaty effect was not passed until after the importation of the sugars. In other words, it was said "before the duties had been liquidated; so much of the statute as imposed more than eighty per cent of the regular duties upon these imports was repealed, and the repeal by its very terms took effect as of a date prior to the date of the importation." It was not necessary in No. 269 to notice the contention, as we decided the treaty did not go into effect until December 27, 1903. In the case at bar the date of final liquidation is seemingly given greater force. It is contended that "there was no liquidation until after the convention was concededly in effect," and was therefore "required to be made in accordance

with the tariff act as then in force." In other words, whether the treaty went into effect in April or in December was unimportant, being in effect under the act of Congress when liquidation was made it determined the rate of duty. The proposition, if true, is decisive and makes all others in the case valueless. Appellant submits the proposition without other argument than its statement, and we may, therefore, reply to it briefly. It is plainly in contradiction of section 20 of the Customs Administrative Act as amended. That section subjects merchandise to the rate of duty in force at the time of withdrawal for consumption, not the rate in force at the time of liquidation. See *United States* v. *Burr*, 159 U. S. 78, 83, 84.

Judgment affirmed.

PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *v.* MILLER.

SAME *v.* SAME.

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

SAME *v.* KELSEY.

SAME *v.* SAME.

SAME *v.* SAME.

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

Nos. 81, 82, 586, 587, 588. Argued April 9, 1906.—Decided May 28, 1906.

If the state statute as construed by its highest court is valid under the Federal Constitution this court is bound by that construction.

The State of origin remains the permanent situs of personal property notwithstanding its occasional excursions to foreign parts, and a State may tax its own corporations for all their property in the State during the year even if every item should be taken into another State for a period and then brought back.

The taxation of cars under the New York franchise tax law, belonging to a

New York corporation is not unconstitutional as depriving the owner of its property without due process of law because the cars are at times temporarily absent from the State—it appearing that no cars permanently without the State are taxed.

THE facts are stated in the opinion.

Mr. Albert H. Harris, with whom *Mr. Ira A. Place* and *Mr. Thomas Emery* were on the brief, for plaintiff in error:

The subject matter taxed, as herein complained of, is the use and exercise of the franchise, privilege and business of transportation of persons and commodities. Ownership or possession of the corporate franchise to be or to do, do not subject the owner or possessor to the tax.

Notwithstanding the continued existence of the corporation, and continued existence and possession of the corporate capacity, powers, faculties and franchises with which it was at its creation endowed, if none of its capital is employed within this State during the tax year, section 182 imposes no tax. *People ex rel. Singer Mfg. Co.* v. *Wemple,* 150 N. Y. 46; *People ex rel. Niagara River Hydraulic Co.* v. *Roberts,* 30 App. Div. 180, which the Court of Appeals affirmed on opinion below. 157 N. Y. 676.

Exercise of the franchise is the foundation for imposition of the tax, and the average amount of capital stock employed is the basis of computation of the tax. *People ex rel. U. V. Copper Co.* v. *Roberts,* 156 N. Y. 586; *People ex rel. Commercial Cable Co.* v. *Morgan,* 178 N. Y. 433; *People ex rel. Brooklyn R. T. Co.* v. *Morgan,* 57 App. Div. 335; aff'd 168 N. Y. 672; *People ex rel. Mutual Trust Co.* v. *Miller,* 177 N. Y. 51.

The use and exercise of the franchise, privilege or business of transportation thus taxed is that of carrying on commerce either intrastate, interstate or foreign. The general unrestricted power to contract for the transportation of persons and property, possessed by plaintiff in error, embraced the power not only to make contracts at places foreign to this State, but also to make contracts for such transportation to

and from points and via routes in foreign States and countries. Railroad Law, N. Y. § 78; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Day* v. *O. & L. C. R. R. Co.*, 107 N. Y. 129; *Matter of N. Y. L. & W. Ry. Co.*, 35 Hun, 220; *Matter of Townsend*, 39 N. Y. 171.

It is necessary to the power of taxation upon the use and exercise of a franchise, privilege or business, that such use and exercise thereof be carried on within the territorial domain of the taxing sovereignty; and that the franchise, privilege or business so there used and exercised be such as is within the organic prerogative of that sovereignty to tax the use of.

The State grants the privilege of exercising a public franchise, and, in consideration of that grant, exacts from those who accept and avail themselves thereof, payment, to be computed upon the basis of the amount of capital.

The business transacted and the functions exercised in movements of relator's cars outside of this State are primarily those commanded and compelled by the Federal Government in its power to regulate interstate commerce.

So far as such exercise of franchises affords warrant for state taxation, computed upon the basis of the capital employed therein or otherwise, and as well regarding such exercise of franchises as is involved in the portion of car movements, which is outside of this State, as also such exercise of franchises as have regard to transportation wholly outside of this State, the right and power of state taxation is exclusively that of the respective States wherein the cars are thus employed. *The Delaware Railroad Tax*, 18 Wall. 206, 232; *Erie Railroad Co.* v. *Pennsylvania*, 158 U. S. 431, 436.

Transportation between respective points one thereof within and the other without, or via routes in part within and in part without, a State, is interstate or foreign commerce. *State &c.* v. *Knight*, 192 U. S. 21.

Refusal of observance of the rule of per annum average of capital as the basis of assessment where the capital is employed in interstate commerce constitutes discrimination

prejudicial to such commerce, and is thus violative of the commerce clause and the due faith and credit clause of the Federal Constitution.

That the car mileage basis upon lines of companies within the State, and upon lines without the State, *prima facie* affords a just basis of apportionment of average total of mail, express, passenger, baggage and freight cars continuously employed by other corporations without the State, and that the road mileage operated within and without the State affords a just basis of apportionment of average total equipment continuously employed by, within and without the State, is affirmed by this court in numerous cases. *State Railroad Tax Cases*, 92 U. S. 575; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Charlotte &c. R. R. Co.* v. *Gibbs*, 142 U. S. 386; *Columbus Southern Ry. Co.* v. *Wright*, 151 U. S. 470; *Pittsburgh &c. Ry. Co.* v. *Backus*, 154 U. S. 421; *Cleveland &c. Ry. Co.* v. *Backus*, 154 U. S. 439; *Adams Ex. Co.* v. *Ohio*, 164 U. S. 194; *S. C.*, 166 U. S. 185; *Am. Refrig. Transit Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194.

Taxation of or upon the exercise of the privilege of commerce conducted in another State, or computed upon the capital there so employed, whether such commerce be interstate, foreign or intrastate, transcends the jurisdiction of the taxing State, and thus takes property without due process of law, and denies full faith and credit to the public acts of such other State.

The power of taxation cannot embrace either person, property or business having their *situs* outside the taxing State. Jurisdiction of the person carrying on business or exercising privilege in the State of his domicil and in other States, cannot draw to the domiciliary State the power of taxation of business done or privilege exercised in other States.

It is requisite to due process of law that the tribunal have jurisdiction of the subject matter of such process. The taxing

authorities had jurisdiction of the person of the corporation taxed in *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Del., L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. They did not, however, have jurisdiction of the subject matter of the tax, and, therefore, the imposition of the tax was adjudged unauthorized and void.

Absence of congressional regulation of, or restraint or burden upon, interstate commerce, constitutes no warrant for state regulation, restraint or burden thereof. Upon like principle, absence of state regulation of, or restraint or burden upon, commerce local to such State, constitutes no warrant for another State to exercise extra-territorial jurisdiction, whereby to impose such regulation, restraint or burden.

The mere fact that a State grants and continues corporate life and capacity to a body corporate of its creation, constitutes no warrant for taxation by that State of such corporation's tangible property having its *situs* beyond the territorial jurisdiction of that State, or of the corporation's capital stock invested in that property, *Del., L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341; nor for taxation of franchises owned by such corporation which were granted by authority foreign to, and have their *situs* outside of, the territorial jurisdiction of such State, *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385; nor of franchises owned by such corporation, but which were granted to it by the United States, *California* v. *Pac. R. Co.*, 127 U. S. 1; nor of cars owned in excess of the average number thereof employed in the taxing State, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194.

The State cannot, by conferment of corporate charter powers to transact business (1) outside of its territorial domain, or, (2), of character outside the sphere of its governance, draw to itself the power of taxation upon such exercise of the charter powers conferred by it. *People ex rel. &c.* v. *Wemple*, 138 N. Y. 1; *People ex rel. &c.* v. *Roberts*, 154 N. Y. 1.

The *situs* of exercise of the franchise pertaining to transportation upon and over any railroad, is the *situs* of the railroad, and of the franchise relating thereto. The corporate franchises exercised within the State, by domestic surface steam railroad corporations, are those which the State has granted by charters authorizing the building and operation of railroads within the State.

As it is the peculiar and sole province of the United States to prescribe what burdens the exercise of the business of interstate and foreign commerce shall be subject to, so also, for like reason and upon like principle, it is the peculiar and sole province of each State to prescribe what burdens the exercise of the business of its local commerce shall be subject to.

Car movements, or the exercise of franchise thereby, cannot have an imputed *situs*. *People ex rel. Manhattan R. Co.* v. *Barker*, 152 N. Y. 417.

Taxation of exercise of franchise to do can only be imposed by the sovereignty in whose domain the work is done. *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *McCulloch* v. *Maryland*, 4 Wheat. 316, 429; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Morgan* v. *Parham*, 16 Wall. 471; *Delaware Railroad Tax*, 18 Wall. 206; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Erie Railroad* v. *Pennsylvania*, 153 U. S. 628; *Leloup* v. *Mobile*, 127 U. S. 640; *Postal Tel. Cable Co.* v. *Adams*, 155 U. S. 688.

What is true of the franchise in this regard is true of the lease or license under authority of which relator's cars are employed in the use of the franchise. *Louisville & Jeff. Ferry Co.* v. *Kentucky*, 188 U. S. 385.

Local commerce is subject to local tax by the State wherein it is conducted. *New York ex rel. Penn. R. R. Co.* v. *Knight*, 192 U. S. 21, aff'g 171 N. Y. 354.

The effect of the holding of the state courts, that this statute authorizes taxation to be computed upon the basis of the capital employed in and by the average number of relator's

cars operated outside of this State, is to subject the statute to the rule announced by this court in *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557.

The effect of the statute, as adjudged by the New York courts, is to tax the corporate use and exercise in other States, of the occupation, privilege, and business, of the local commerce of those States. *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Delaware, L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341.

Mr. Julius M. Mayer, Attorney General of the State of New York, with whom *Mr. Horace McGuire* was on the brief, for defendants in error:

There was no evidence before the comptroller showing that any portion of the rolling stock of the relator was exclusively and continuously without the State of New York for the year ending October 31, 1900, or any of the other years under review.

The policy of the courts has been not to disturb the findings of the assessing officers. No system of taxation can be perfect, and the courts have realized the practical difficulties with which assessing officers are so frequently confronted. The reasons which have led to a conclusion or the methods of computation have not been inquired into by appellate courts, unless that method offends some provision of the statute under consideration or of the state or Federal constitutions. *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 610; *People ex rel. Metropolitan Street Ry. Co.* v. *State Board of Tax Commissioners*, 199 U. S. 1.

The statute under consideration does not offend against the commerce clause of the Federal Constitution, nor does it offend against the Fourteenth Amendment of the Federal Constitution. The term "capital stock" as used in the statute, means the property of the corporation as distinguished from its share capital. *People ex rel. Commercial Cable Co.* v. *Morgan*, 178 N. Y. 433.

As the relator did not pay six per cent upon its stock, it therefore became necessary for the comptroller to ascertain the value of the corporate property employed within the State, simply as a basis of determining the per cent of tax to be placed upon its franchise.

People ex rel. Niagara River Hydraulic Company v. *Roberts*, 157 N. Y. 676; *People ex rel. Fort George Realty Company* v. *Miller*, 179 N. Y. 49, and *People ex rel. Singer Mfg. Co.* v. *Wemple*, 150 N. Y. 49, have been clearly distinguished in the last word on this subject, by the Court of Appeals of New York, in *People ex rel. Wall & Hanover Street Realty Company* v. *Miller*, 181 N. Y. 328.

Although that case was decided by a bare majority of the Court of Appeals, it has been consistently followed by a unanimous court, which now regards that case as authority without further dissent in *People ex rel. Nassau Co.* v. *Miller*, 182 N. Y. 521; *People ex rel. North American Co.* v. *Miller*, 182 N. Y. 521; *People ex rel. Fourteenth St. Realty Co.* v. *Kelsey*, 110 App. Div. affirmed by Court of Appeals without opinion; *People ex rel. Hubert Apartment Association* v. *Kelsey*, 110 App. Div., affirmed by Court of Appeals without opinion.

Even if the legislature of New York determined by section 182 of the Tax Law to tax the freight cars of the relator when temporarily outside of the State, its determination to do so and to determine the *situs* of that personal property was the exercise of a legislative function with which the Federal courts will not interfere. *State Railroad Tax Cases*, 92 U. S. 575.

The mere fact that some portion of the property of a domestic corporation is employed in interstate or foreign commerce does not preclude the State from taxing such property within its borders and by proper legislative enactment to determine the *situs* of such property, provided, of course,that the rights and powers of the National Government are not interfered with. *Atlantic and Pacific Telegraph Company* v. *Philadelphia*, 190 U. S. 160; *People ex rel. P. R. R. Co.* v. *Wemple*, 138 N. Y. 1; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18.

There being no evidence before the comptroller upon which it could be found what the value was of the rolling stock of the relator which was claimed to be continuously employed without the State, his finding thereon is correct and was properly approved by the Appellate Division, and also by the Court of Appeals, as a finding of fact upon the evidence presented to the comptroller. *Levis* v. *Monson*, 151 U. S. 545. Such ruling presents no Federal question. This court will not interfere to review findings of fact or the conclusions of assessing officers as to the value of property sought to be assessed. *Kelly* v. *Pittsburgh*, 104 U. S. 78.

In the case of a foreign corporation the basis of taxation is the actual and tangible property which it uses continuously within the borders of the State. *New York ex rel. Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21; *Delaware, L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341. See also *Commonwealth* v. *American Dredging Co.*, 122 Pa. St. 386.

No Federal question is presented in the several cases under review. This court will not interfere with a question of fact, however erroneously it may have been determined by the trial court. In this case the trial court was the comptroller of the State; the State makes no claim to tax any of the property of the plaintiff in error which is shown to have been permanently or continuously without the State during the tax period.

The statute does not purport to take, nor has the determination of the comptroller of the State of New York taken, any of the property of the relator without due process of law.

The plaintiff in error had opportunity to be heard upon the amount of the assessment before the comptroller; the plaintiff in error had the right to a writ of certiorari to review the determination of the comptroller, and pursued that right through the courts of the State of New York.

The plaintiff in error has equal protection under the law for the reason that all corporations within the State of New York similarly situated to the plaintiff in error are required by the same section of the statute to share in the burdens of the State

to the extent of the value of the property employed by it within the State of New York.

Mr. Justice Holmes delivered the opinion of the court.

These cases arise upon writs of certiorari, issued under the state law and addressed to the state comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903 and 1904, respectively. The tax was levied under New York Laws of 1896, c. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations.—Every corporation . . . incorporated . . . under . . . law in this State, shall pay to the state treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this State and upon each dollar of such amount," at a certain rate, if the dividends amount to six per cent or more upon the par value of such capital stock. "If such dividend or dividends amount to less than six per centum on the par value of the capital stock [as was the case with the relator], the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this State bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, etc., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital employed by it within this State."

The relator is a New York corporation owning or hiring lines without as well as within the State, having arrangements with other carriers for through transportation, routing and rating, and sending its cars to points without as well as within the State, and over other lines as well as its own. The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they

return to the relator or the State. In short, by the familiar course of railroad business a considerable proportion of the relator's cars constantly is out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State. This contention the comptroller disallowed.

The writ of certiorari in the earliest case, No. 81, with the return setting forth the proceedings of the comptroller, Knight, and the evidence given before him, was heard by the Appellate Division of the Supreme Court, and a reduction of the amount of the tax was ordered. 75 App. Div. 169. On appeal the Court of Appeals ordered the proceedings to be remitted to the comptroller, to the end that further evidence might be taken upon the question whether any of the relator's rolling stock was used exclusively outside of the State, with directions that if it should be found that such was the fact the amount of the rolling stock so used should be deducted. 173 N. Y. 255. On rehearing of No. 81 and with it No. 82, before the comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the State during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. But in all of them evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned, as has been stated, evidence of the relator's road mileage outside and inside of the State, and also evidence of the car mileage outside and inside of the State, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year. The comptroller refused to make any reduction of the tax, and the case being taken up again, his refusal was affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals on the authority of the former decision. 89 App. Div. 127; 177 N. Y. 584.

The later cases took substantially the same course. The relator saved the questions whether the statute as construed was not contrary to Article 1, § 8, of the Constitution of the United States, as to commerce among the States; Article 1, § 10, against impairing the obligation of contracts; Article 4, § 1, as to giving full faith and credit to the public acts of other States; and the Fourteenth Amendment. It took out writs of error and brought the cases here.

The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the Court of Appeals was wrong. Of course if the statute as construed is valid under the Constitution, we are bound by the construction given to it by the state court. In this case we are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the State during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the State during the whole tax year. The proposition really was conceded, as we have said, and the evidence that was offered had no tendency to prove the contrary. If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the State. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the State all the time.

In view of what we have said it is questionable whether the relator has offered evidence enough to open the constitutional objections urged against the tax. But as it cannot be doubted, in view of the well known course of railroad business, that some considerable proportion of the relator's cars always is absent from the State, it would be unsatisfactory to turn the

case off with a merely technical answer, and we proceed. The most salient points of the relator's argument are as follows: This tax is not a tax on the franchise to be a corporation, but a tax on the use and exercise of the franchise of transportation. The use of this or any other franchise outside the State cannot be taxed by New York. The car mileage within the State and that upon other lines without the State affords a basis of apportionment of the average total of cars continuously employed by other corporations without the State, and the relator's road mileage within and without the State affords a basis of apportionment of its average total equipment continuously employed by it respectively within and without the State. To tax on the total value within and without is beyond the jurisdiction of the State, a taking of property without due process of law, and an unconstitutional interference with commerce among the States.

A part of this argument we have answered already. But we must go further. We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts it must be sustained by us. It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case. See *People* v. *Morgan*, 178 N. Y. 433, 439. If it is a tax on any franchise which the State of New York gave, and the same State could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the state court regards it.

Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is perma-

nently out of the State. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 201, 211; *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania,* 198 U. S. 341; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie Co.* v. *Kentucky,* May 21, 1906, *ante* p. 409. See also *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 208, 209.

It was suggested that this case is but the complement of *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, and that as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the State bore to the whole number of miles over which its cars were run, so here in the domicil of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But in that case it was found that the "cars used in this State have, during all the time for which tax is charged, been running into, through and out of the State." The same cars were continuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the

varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.

MISSOURI *v.* ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO.

No. 4, Original. Submitted May 14, 1906.—Decided May 28, 1906.

This court has power to allow costs in original actions and in any action between States, the successful State may ask for costs or not as it sees fit, and there is no absolute rule that in boundary cases the costs are divided. Costs, therefore, are allowed to the defendant in this suit in which the plaintiff alleged serious pecuniary damage, and framed its bill like the ordinary bill of a private person to restrain a nuisance.

The solicitor's fee of $2.50 for each witness examined before the examiner and admitted in evidence was properly allowed as fees for depositions under § 824, Rev. Stat.

THE question involved in the motion is stated in the opinion.

Mr. Erasmus C. Lindley for defendant, Sanitary District of Chicago.

Mr. Herbert S. Hadley, Attorney General of the State of Missouri, *Mr. Charles W. Bates* and *Mr. Sam B. Jefferies* for complainant.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a motion for the allowance and taxation of costs in the case reported in 200 U. S. 496. The costs asked are as follows:

$5,650 paid to the special commissioner.

$3,776.37 for taking down and transcribing the testimony of defendant's witnesses, etc.

$720 Solicitors' fees, viz., $20 for attendance at final hearing and $2.50 for each deposition taken and admitted in evidence, in accordance with Rev. Stat. § 824.

$10,146.37, total. The plaintiff objected to the allowance and the Clerk referred the matter to this court.

The only question of detail concerns the last item. The main objection is to the allowance of any costs at all. The power of the court to allow costs is not disputed. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 460. The former decree in this case allowed them, and in the stipulation for the appointment of a special commissioner the parties agreed that the costs should be "taxed by the court on the final disposal of the case, to be paid in such manner as the court may at that time determine." But it is said that it is inconsistent with the dignity of a sovereign State to ask for costs; that in boundary cases costs have been divided, and that the suit was not for a pecuniary interest, but only the performance of the duty of a sovereign to its citizens, for which no costs should be imposed.

So far as the dignity of the State is concerned, that is its own affair. The United States has not been above taking costs. *United States* v. *Sanborn*, 135 U. S. 271. As to the supposed rule in boundary cases, it is not absolute. But in many cases of that kind both parties are equally interested to have the boundary settled, and whichever State begins the suit both equally are actors. Thus counter-relief was asked by the defendants in *Nebraska* v. *Iowa*, 143 U. S. 359 and *Missouri* v. *Iowa*, 160 U. S. 688. As to the nature of this suit, the plaintiff alleged serious pecuniary damage to itself by the deposit of great quantities of filth upon the portion of the bed of the Mississippi alleged to belong to it, and, in short, framed its bill like any ordinary bill by a private person to restrain a nuisance. The chief difference was in the size of the nuisance alleged. There is no indication that the defendants desired or needed the determination of this court, as States well might when

their jurisdiction was in doubt. So far as this point is concerned, there is no reason why the plaintiff should not suffer the usual consequence of failure to establish its case.

The only item specially discussed is the charge of $2.50 for each witness examined before the examiner, on the footing of "depositions" mentioned in Rev. Stat. § 824. There seems to have been some difference of opinion in the lower courts as to whether testimony given before an examiner could be treated as a deposition. See *Strauss* v. *Meyer*, 22 Fed. Rep. 467; 1 Foster's Fed. Prac., 3d ed., 727, § 330. In favor of so treating it are *Ferguson* v. *Dent*, 46 Fed. Rep. 88; *Hake* v. *Brown*, 44 Fed. Rep. 734; *Ingham* v. *Pierce*, 37 Fed. Rep. 647; *The Sallie P. Linderman*, 22 Fed. Rep. 557; *Stimpson* v. *Brooks*, 3 Blatchf. 456. See also *St. Matthew's Sav. Bank* v. *Fidelity Casualty Co.*, 105 Fed. Rep. 161–163. The words of the statute are broad enough to embrace the testimony, unless they are taken very strictly, and the trouble to the parties in having to visit different places was similar to that caused by the taking of depositions adverted to by Judge Treat in *Strauss* v. *Meyer*. The case is quite distinct from that of testimony taken in court and reduced to writing by a reporter. We are of opinion that the item may be allowed.

Motion for costs allowed.

McDERMOTT *v.* SEVERE.

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

No. 244. Argued April 20, 23, 1906.—Decided May 28, 1906.

The motorman of a trolley car, which was rapidly approaching a place where a small boy was trying to assist his smaller brother to extricate his foot from the track, made no effort to stop the car when he first saw the boys, supposing, as he testified, that they were playing on the track, as many boys did, until the last moment and that they would, as usual, get off the track in time; when the car was within a few yards of the boys he

saw and realized their situation, and did what he could to stop the car, but did not succeed in doing so and one of the boys was so injured that one of his legs had to be amputated. In the trial court the jury found the defendant company guilty, on a special verdict, of negligence in the improper construction of the crossing and also in the management of the car, and it was consented that the jury find that the motorman did all in his power to stop the car when he saw that the boy's foot was caught. In affirming the judgment entered on the verdict and passing on questions of sufficiency of evidence to submit questions to jury, *Held*, that:

Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence; and if, from the facts admitted or conflicting testimony, such men may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact, to be settled by the jury under proper instructions; and in this case it was properly left to the jury to determine whether the motorman was guilty of negligence in not getting his car under control so that in event of probable injury he could quickly and promptly stop it.

The court properly left it to the jury to determine whether the motorman exercised reasonable care to avoid injury to the boys which the circumstances required, taking into consideration that they were children and that older people are chargeable with the duty of care and caution towards them.

An exception of general character to a charge covering a number of elements of damages will not cover specific objections which in fairness to the court should be called to its attention in order that it may if necessary correct or modify its instructions.

It was not error for the trial court in the case of a boy who has lost a leg to charge that the jury can consider mental suffering past and future found to be the necessary consequence of the loss of his leg. The action being one for injury to the person of an intelligent being if the injury produced mental as well as bodily anguish it is impossible to exclude the former in estimating the extent of the injury.

Where the court instructs that the sum claimed should not be taken as a criterion but that it is a limit beyond which the jury cannot go there is no error.

THE facts are stated in the opinion.

Mr. George P. Hoover and *Mr. Charles A. Douglas* for plaintiff in error.

Mr. A. S. Worthington, Mr. William Meyer Lewin and *Mr. Charles L. Frailey* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This is an action to recover damages because of an injury received by Charles E. Severe, an infant, who was run over at a plank crossing of the railway company, the railroad then being in charge of the defendant, operating the same as receiver.

The plaintiff below recovered judgment in the Supreme Court of the District, which was affirmed in the Court of Appeals.

At the place of the accident there was a plank crossing, the planks laid between and on either side of the rails, at a point where a street was opened to the westward, and on the other side of the track a footpath, but no thoroughfare for vehicles. The crossing was one of the regular stopping places of the cars of the street railway near Riverdale, Maryland. The words "Cars stop here" were on both sides of the telegraph pole at the crossing. At the time of the injury plaintiff was six years and ten months old. His youngest brother Raymond was a little over five years of age, and with them another brother, Edward, about nine years old. The injured boy, at the time he was hurt, had his foot caught in a space between the rail and the edge of the plank on the inside. There was testimony tending to show that this opening was two to two and eleven-sixteenths inches wide. The accident happened between two and three o'clock in the afternoon of August 31, 1902. The testimony discloses that the boys had expected to meet their parents returning from a visit, about two o'clock that afternoon, and went to the crossing for that purpose. Edward the oldest boy, went to his father's house nearby to get a drink of water; while he was gone the youngest boy, Raymond, got his foot caught in the space between the west rail and the plank next the inside of the rail. Plaintiff came to the assistance of his little brother, whose foot he helped to extricate, and was himself caught in the space between the plank and the rail. Raymond ran to the house to notify Edward that

the plaintiff's foot was caught. Together the two boys ran back towards the crossing, and shortly thereafter the plaintiff was struck and so severely injured that it became necessary to amputate his leg below the knee.

In the view we take of this case we do not consider it necessary to state in detail the testimony as to the construction of the crossing and the alleged negligence in leaving the space in which the boy's foot was caught. Under the pleadings and the testimony the jury was directed to return a special verdict upon three propositions: 1. Was the defendant guilty of negligence in the improper construction or maintenance of the crossing? 2. Was the defendant guilty of negligence in the improper management of the car? 3. Did the motorman do all in his power to stop the car as soon as he saw the plaintiff's foot was caught in the space between the rail and plank? The jury answered the first and second questions in the affirmative; being unable to agree on the third, the plaintiff consented that it might also be answered in the affirmative.

In view of these special findings, if the issue concerning either of the first two of them was properly submitted to the jury upon sufficient evidence and found against the company, the judgment of the Court of Appeals must be affirmed.

In delivering the opinion of the Court of Appeals Mr. Chief Justice Shepard says:

"It is conceded, by reason of the special findings of the jury, that the defendant was guilty of negligence, not only in the construction and maintenance of the crossing, but also in the management and control of the car; that error in the instructions upon both points must be shown in order to obtain a reversal of the judgment, because either finding alone is sufficient support therefor."

It is insisted in argument here that the court ought to have taken the case from the jury because of the insufficiency of the evidence to sustain a verdict. In the view we take of the case as made and submitted concerning the conduct of the motorman at the time of the accident and the instructions given to

the jury in that connection, we do not deem it necessary to consider the correctness of the charge submitting the question as to the negligent construction of this crossing. We think the testimony was ample to carry the case to the jury upon the question of the negligent conduct of the motorman at the time of the injury, and that this issue was properly left to the jury under instructions which afford no ground for reversal.

Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact, and to be settled by the jury under proper instructions. *Railroad Company* v. *Powers,* 149 U. S. 43; *Railroad Company* v. *Everett,* 152 U. S. 107.

In addition to the facts to which we have adverted upon the branch of the case which we deem it necessary to consider, the testimony tended to show that there was nothing to prevent the motorman from seeing the crossing for a distance more than sufficient to have avoided the injury by controlling or stopping his car; that the boy Edward waved his hat and "hollered" for the motorman "to stop," when the car was 50 or 60 feet away. A passenger who was on the car testified that his attention being called by the motorman ringing his bell he saw a larger boy than the one on the track, waving his hand. Another passenger testified that when from sixty to one hundred yards from the place he saw three boys apparently standing on the platform or crossing. Plaintiff says that just before he was hurt he saw his brother waving his hat and "hollering" to the motorman, and that he too waved his hand at the motorman. Witnesses testified that the car when stopped came up with a sudden jolt. There was also testimony tending to show that boys were in the habit of playing at this crossing and running back and forth over it.

The motorman testified that he was in charge of the car and

was on the Washington bound track at the time; that he saw the boys when he was about three or four hundred feet away; when he first saw them there were three boys on the track, running and jumping backwards and forwards on the crossing. He sounded his gong when he approached, about one hundred and fifty feet away, and repeatedly thereafter until he reached the boy; when he first saw that the boy was not going to get off the track he was about thirty or thirty-five feet away from him; that he then put on the brakes, reversed the power, and did everything possible to stop the car. He had often seen the plaintiff on the track at that place and on the crossing at Riverdale, Maryland; that he had seen him remaining on the track until the car got close to him, when he would jump off the track, clap his hands and laugh; had seen the plaintiff and other boys do the same thing; the first thing that indicated to him that the boy would not get off the track was when he saw that his foot was caught; that at that time he was from thirty to thirty-five feet from him; that he did not see the boys wave their hands or hats or making any motions to him or did not hear them calling to him. There was testimony tending to show on the part of the plaintiff below that he was not in the habit of playing at this crossing, and that he and his brothers had not been there before in the manner stated by the motorman. The motorman testified further that he saw the boy on the track when he was about three or four hundred feet away.

We are of opinion that in the attitude of the case on this subject it was not error to leave to the jury, under proper instructions, to find whether or not there was negligence in managing the car just before the accident occurred. Upon this part of the case the instructions requested were as follows:

"If the jury shall find from the evidence that the motorman sounded his gong when he was far enough away from the plaintiff and his associates so that they had sufficient time to leave the track before the car reached them, he had the right to assume that they would do so, and he was not required to

commence to stop the car until such time as he discovered that the plaintiff had his foot caught between the rail and the plank; and if they shall further find that as soon as the motorman made such discovery he did all in his power to stop the car before it struck the plaintiff, then they should find for the defendant.

"If the jury find from the evidence that the motorman sounded the gong when he was far enough away from the plaintiff and his associates, so that they had sufficient time to leave the track before the car reached them; and if they shall further find that as soon as the motorman saw that the plaintiff would not or could not leave the track before the car reached him, he did all in his power to stop the car before it struck the plaintiff, and shall further find that the construction was not negligent, then they should find for the defendant; and in determining whether the motorman should have commenced to stop the car before he did they may consider the fact, if they find it to be a fact from the evidence, that plaintiff and others were in the habit of standing on the track and leaving it as the car approached near them, and whether he saw any waving from any one before he commenced to stop the car."

Upon this subject the court said to the jury:

"On the other question, as to whether the motorman did all that he could possibly do under the circumstances to avert this danger you will have to consider all the testimony, not only that of the plaintiff, but of the defendant, and try to reconcile it as far as you can in order to ascertain where the fact lies. Was it prudent in that motorman, under all the circumstances of the case, to calculate that these children would be off from the track and out of danger when he got there? Or was it requisite for him, as a prudent and reasonable man, to have his car under control so that he could stop very suddenly in case they were not out of danger when he got there? Of course, in determining that question, you are to consider what had been the habit of children about playing

at that place. You are not to attribute any contributory negligence to the plaintiff, because this plaintiff is less than seven years of age and the law does not give him discretion. Adults have to look out for children of that kind. But at the same time he may have been in the habit of jumping off and on that track in such a way that the motorman might have been justified in concluding there would be no danger. You are to look at all the surrounding facts and see whether that is true, whether he was justified in that calculation. There was one boy still smaller than the boy who was injured, and according to the motorman's own statement the three boys were running back and forth across the track. It is for you to determine whether or not he should have gotten into close proximity to them without getting his car under such control that he could have stopped very suddenly if necessary to prevent an accident. Of course, after he saw that the boy's foot was caught, he must do everything to stop the car. But I call your attention to the time before he could see that the boy's foot was caught and ask you to consider what it would have been prudent for him to do before that time, considering all the surrounding circumstances, considering the formation of this plank crossing, of this track and of this platform, and considering the fact, as the motorman says it was a fact, that children were frequently there running back and forth. Should he have anticipated that there might have been some kind of danger there, and should he have stopped his car or gotten it under control before he even saw any signal or waving or before he saw that the boy's foot was caught? Of course after he saw that the boy's foot was caught it must be his duty to stop just as soon as he can in order to prevent the accident. I have no doubt he did that. But whether he discharged his whole duty towards these children, whom he admits having seen there before that time, is a question for the jury.

"In considering the question of the liability of the defendant on either of the two foregoing grounds, the jury are instructed that they have a right to take into consideration the

evidence tending to show that the place where the accident occurred was a public crossing and that it was frequented, and that it was known to the motorman in charge of the car to be frequented, by young children, as well as by older persons.

"It is a question for the jury whether the motorman should have commenced to stop the car sooner than he did, and in determining that question they should take into consideration the fact, if they find it to be a fact, that the plaintiff and other boys were in the habit, at the point in question, of standing on the track until the car was very near them and then jumping off.

"In determining the question of how far the car was from the platform when the boys waved their hands they must be governed by the evidence, and not by speculation."

The substance of the requests of the defendant on this part of the case was that the motorman having sounded his gong far enough away to give warning to the boys in time to get off the track before the car reached them, did all his duty required, provided, that as soon as he saw that the boy could not or would not leave the track, he did all in his power to stop the car before the injury. On the other hand, the court left it to the jury to say whether, under the circumstances shown, the motorman was or was not guilty of negligence in failing to get his car under control, so that in the event of probable injury he could quickly and promptly stop it.

We think the court did not err in its charge in this respect and that the motorman had no right to assume that boys of tender age, such as the plaintiff, might not be caught upon the crossing, notwithstanding his signals, which would have been adequate to warn one of mature years of approaching danger. Plaintiff was not a wrongdoer. He had gone upon the track with a view of rescuing his brother, and was himself caught and was unable to extricate his foot from the space between the rail and the plank. It is not contended that he was guilty of any contributory negligence. He was a child of tender years;

the testimony is undisputed that children were in the habit of playing at and near this crossing; that they were at the time of the injury in full view of the motorman at least four hundred feet away, at which distance he admits he saw the boys. It was apparent that one of the boys was right upon the track. The jury may have found from the testimony, and the court could not have disturbed that conclusion, that the motorman acted upon the assumption that the boys would get off the track, and though running at a speed of eight to ten miles per hour, made no effort to get his car under control or to stop it, until he saw the boy's foot was caught, when it was too late to do otherwise than run over him. The car, running with electric power, could have been controlled and taken well in hand so as to be readily stopped at the crossing.

This court in *Union Pacific Railroad Co.* v. *McDonald*, 152 U. S. 262, 277, quoted approvingly from Judge Cooley in a Michigan case: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly." This view is supported by other well considered cases. *Powers* v. *Harlow*, 53 Michigan, 507, 514; *Camden Interstate Railway Co.* v. *Broom*, 139 Fed. Rep. 595; *Forestal* v. *Milwaukee Electric Railway Co.*, 119 Wisconsin, 495; *Strutzel* v. *St. Paul City Railway Co.*, 47 Minnesota, 543; *Gray* v. *St. Paul City Railway Co.*, 87 Minnesota, 280.

This is not a case of a sudden and unexpected coming of children upon a track. The jury may have found that if the motorman had acted prudently in view of the signals and warnings to stop, which the testimony tends to show were given, and the full view he had of the boys at the time of the accident, checked the car and kept it under control, the injury might have been avoided.

We think, upon principle and authority, the court properly left to the jury to find whether the motorman exercised that reasonable care to avoid injury to the boy which the circum-

stances of the occasion required. And to have given an instruction as requested by the plaintiff in error, which limited the duty of the motorman to sounding an alarm in time for the boy to get off the track, and to act upon the presumption that he would do so until he found it was impossible for the plaintiff to remove his foot, would have been an unwarranted charge.

It is further urged that the court erred in instructing the jury upon the question of damages. Upon this point the court said:

"The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury, and for the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put, during the remainder of his life, in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

The court's attention was not called to any particular in which this charge which covers a number of elements of damages was alleged to be wrong, only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections, which in fairness to the court ought to have been called to its attention, in order that if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous.

Baltimore & Potomac Railway Co. v. *Mackey,* 157 U. S. 72, 86.

It is now objected that to permit a recovery for a pecuniary loss as covered in the instructions would allow the infant plaintiff to recover compensation for his time before as well as after he has reached his majority, and that during infancy his father is entitled to recover any wages be might earn. If the defendant wished the charge modified in this respect he should have called the attention of the court directly to this feature. The charge in this respect was general, permitting a recovery for a pecuniary loss directly resulting from the injury. It would be very unfair to the trial court to keep such an objection in abeyance and urge it for the first time in an appellate tribunal.

Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. The court said: "The jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg." Where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it. It is not unlikely that the court might have given more ample instruction in this respect, had it been requested so to do. But what was said limited the compensation to the direct consequences of the physical injury.

An instruction of this character was sustained in *Washington & Georgetown Railroad Co.* v. *Harmon,* 147 U. S. 571, 584. That there might be more or less continuous mental suffering directly resulting from a maiming of the plaintiff's person in an injury of this character was probable, and where the jury was limited to that which necessarily resulted from the injury we think there can be no valid objection or just ground of complaint. Of a charge of this character, in *Kennon* v. *Gilmer,* 131 U. S. 22, 26, Mr. Justice Gray, speaking for this court, said:

"But the instruction given only authorized them, in assessing damages for the injury caused by the defendants to the plaintiff, to take into consideration 'his bodily and mental pain and suffering, both taken together' ('but not his mental pain alone'), and such as 'inevitably and necessarily resulted from the original injury.' The action is for an injury to the person of an intelligent being; and when the injury, whether caused by willfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases." We find no error in the charge in this respect.

As to the alleged error in charging the jury that damages could not be recovered in excess of the sum claimed in the declaration, the court was careful to say to the jury that the sum claimed should not be taken as a criterion to act upon, but that it was only a limit beyond which they could not go. We cannot see how the plaintiff in error was prejudiced by this instruction.

The judgment of the Court of Appeals is

Affirmed.

OPINIONS PER CURIAM, ETC., FROM APRIL 17 TO MAY 28, 1906.

No. 253. WISHKAH BOOM COMPANY, APPELLANT, *v.* THE UNITED STATES. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. Argued April 25 and 26, 1906. Decided May 14, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Haseltine* v. *Central Bank,* 183 U. S. 130; *Schlosser* v. *Hemphill,* 198 U. S. 173; *United States* v. *Krall,* 174 U. S. 385; *McLish* v. *Roff,* 141 U. S. 661; Act of August 13, 1888, 25 Stat. 433, c. 866, sec. 1; *United States* v. *Sayward,* 160 U. S. 493, 498. *Mr. Austin E. Griffiths* for appellant. *The Attorney General* and *Mr. Milton D. Purdy, Assistant to the Attorney General* for appellee.

No. 631. W. E. TRENCHARD ET AL., APPELLANTS, *v.* F. KELL ET AL. Appeal from the Circuit Court of the United States for the Eastern District of North Carolina. Motion to dismiss submitted April 30, 1906. Decided May 14, 1906. *Per Curiam.* Dismissed for the want of jurisdiction. *Maynard* v. *Hecht,* 151 U. S. 324; *Colvin* v. *Jacksonville,* 158 U. S. 456; *The Bayonne,* 159 U. S. 687; *United States* v. *Rider,* 163 U. S. 132, 139; *Chamberlin* v. *Peoria &c. Ry. Co.,* 118 Fed. Rep. 32, and cases cited. *Mr. Williamson W. Fuller* and *Mr. Herbert Noble* for appellants. *Mr. F. H. Busbee* and *Mr. Robert M. Hughes* for appellees.

No. 216. THE INTERSTATE COMMERCE COMMISSION, APPELLANT, *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY ET AL. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Argued April 10

and 11, 1906. Decided May 21, 1906. Decree affirmed with costs by a divided court. (Mr. Justice Holmes took no part in the consideration of this case.) *The Attorney General, Mr. John G. Carlisle* and *Mr. L. A. Shaver* for appellant. *Mr. Adelbert Moot, Mr. George C. Greene, Mr. George W. Wall, Mr. George F. Brownell, Mr. Frederick W. Stevens* and *Mr. Edgar J. Rich* for appellees.

No. 249. THOMAS C. GUTIERREZ ET AL., APPELLANTS, *v.* THE TERRITORY OF NEW MEXICO EX REL. THOMAS J. CURRAN ET AL. Appeal from the Supreme Court of the Territory of New Mexico. Submitted April 25, 1906. Decided May 21, 1906. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Albright* v. *Sandoval*, 200 U. S. 9. *Mr. W. B. Childers* for appellants. *Mr. Frank W. Clancy* for appellees.

No. 685. FRANCISCO DONES, APPELLANT, *v.* JOSE URRUTIA, WARDEN OF THE PENITENITARY OF PORTO RICO. Appeal from the Supreme Court of Porto Rico. Submitted May 14, 1906. Decided May 28, 1906. *Per Curiam.* Final order affirmed with costs. Act April 12, 1900, 31 Stat. 77, c. 191, secs. 33, 34, 35, 15; *Ortega* v. *Lara, ante*, p. 339; *Perez* v. *Fernandez, ante*, p. 80; Porto Rican Laws and Code of Civil Procedure, 1904, pp. 103, 104, 110; *Ex parte Ward*, 173 U. S. 452, 454; *United States* v. *Bellingham Bay Boom Company*, 176 U. S. 211, 214. *Mr. Frederic D. McKenney* and *Mr. J. S. Flannery* for appellant. *The Attorney General* and *The Solicitor General* for appellee.

No. —, Original. *Ex parte:* IN THE MATTER OF JAMES HAMILTON LEWIS, PETITIONER. Submitted May 21, 1906. Decided May 28, 1906. *Per Curiam.* Motion for leave to file a petition for a writ of certiorari denied. *Jones* v. *Montague*,

194 U. S. 147; *Security Insurance Company* v. *Prewitt*, 200 U. S. 446; *Mills* v. *Green*, 159 U. S. 651; *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324. *Mr. Holmes Conrad* for petitioner.

Decisions on Petitions for Writs of Certiorari from April 17 to May 28, 1906.

No. 653. JOHN B. ELLISON ET AL., PETITIONERS, *v.* THE UNITED STATES. April 23, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Edward S. Hatch* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 673. S. W. TYSON ET AL., PETITIONERS, *v.* FRANK E. CREELMAN. April 23, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William A. Gunter* for petitioners. *Mr. Robert E. Steiner* for respondent.

No. 680. J. W. FARRIOR, PETITIONER, *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. April 23, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William L. Martin* and *Mr. William A. Gunter* for petitioner. *Mr. Horace Stringfellow* and *Mr. Robert E. Steiner* for respondent.

No. 683. JOHN B. MAYER ET AL., PETITIONERS, *v.* MARGARET H. MANDEVILLE. April 23, 1906. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Aug. B. Repetto* for petitioners. *Mr. Russell Duane* for respondent.

No. 684. JOHN NORGATE, PETITIONER, *v.* THE DENVER AND RIO GRANDE RAILROAD COMPANY. April 23, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward T. Fenwick* for petitioner. *Mr. Henry A. Dubbs* and *Mr. Joel F. Vaile* for respondent.

No. 686. C. SCHMITZ, ETC., PETITIONERS, *v.* THE UNITED STATES. April 23, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert H. Washburn* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 688. FIELDS S. PENDLETON, PETITIONER, *v.* CENTRAL RAILROAD OF NEW JERSEY. April 23, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Edward E. Blodgett* for petitioner. *Mr. James J. Macklin, Mr. LaRoy S. Gove* and *Mr. Edward S. Dodge* for respondent.

No. 675. PHILADELPHIA AND READING RAILWAY COMPANY, LESSEE, ETC., PETITIONER, *v.* BENJAMIN D. WELCH, MASTER, ETC., ET AL. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John G. Lamb* for petitioner. No appearance for respondents.

No. 679. OLIN J. GARLOCK ET AL., PETITIONERS, *v.* JAMES BENNETT FORSYTH. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. W. K. Richardson* for petitioners. *Mr. Elmer P. Howe* for respondent.

No. 681. SEMET-SOLVAY COMPANY, PETITIONER, *v.* JOHN F. WILCOX. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. S. H. Holding* and *Mr. W. S. Dalzell* for petitioner. No appearance for respondent.

No. 682. CHARLES KRELLY, PETITIONER, *v.* THE AMERICAN BARK KENILWORTH, ETC. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. J. H. Brinton* for petitioner. No appearance for respondent.

No. 692. ALICE E. VAN EPPS AS ADMINISTRATRIX, ETC., PETITIONER, *v.* THE UNITED BOX BOARD AND PAPER COMPANY. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edwin H. Risley* for petitioner. *Mr. John C. Pennie* and *Mr. Francis T. Chambers* for respondent.

No. 699. CARTER, WEBSTER & COMPANY, PETITIONER, *v.* THE UNITED STATES. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edward S. Hatch* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 701. AMANDA S. WHITFIELD ET AL., PETITIONERS, *v.* ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONN. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Frank Hagerman* and *Mr. H. S. Hadley* for petitioners. No appearance for respondent.

No. 704. THE GOAT AND SHEEP SKIN IMPORT COMPANY, PETITIONER, *v.* THE UNITED STATES. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Edward S. Hatch* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

Nos. 705 and 706. OXFORD AND COAST LINE RAILROAD COMPANY, PETITIONER, *v.* UNION BANK OF RICHMOND, VA. April 30, 1906. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Thomas B. Womack* for petitioner. No appearance for respondent.

No. 710. WILLIAM E. BARBER, CLAIMANT, ETC., PETITIONER, *v.* BERNARD GUINAN. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Macklin* and *Mr. LaRoy S. Gove* for petitioner. No appearance for respondent.

No. 711. WILLIAM E. BARBER, CLAIMANT, ETC., PETITIONER, *v.* MICHAEL F. KILFOYLE. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

the Second Circuit denied. *Mr. James J. Macklin* and *Mr. LaRoy S. Gove* for petitioner. No appearance for respondent.

No. 698. HENRY E. FRANKENBERG COMPANY, PETITIONER, *v.* THE UNITED STATES. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Frederick W. Brooks* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 702. THE UNITED STATES, PETITIONER, *v.* G. FALK & BROS. April 30, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Edward S. Hatch* and *Mr. J. S. Tompkins* for respondents.

No. 643. THE GOODYEAR SHOE MACHINERY COMPANY OF PORTLAND, ME., PETITIONER, *v.* CHRISTIAN DANCEL ET AL., ADMINISTRATORS, ETC. May 14, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edwards H. Childs* and *Mr. Louis D. Brandeis* for petitioner. *Mr. J. Philip Berg* and *Mr. Roger Foster* for respondents.

No. 700. METROPOLITAN LIFE INSURANCE COMPANY, PETITIONER, *v.* CAMILLA B. TALBOTT, ADMINISTRATRIX, ETC. May 14, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Maurice E. Locke* for petitioner. No appearance for respondent.

No. 716. ALBERT H. BROWN ET AL., PETITIONERS, *v.* THE UNITED STATES. May 14, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. F. Riggs* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 723. CHARLES M. NEWTON, RECEIVER, ETC., ET AL., PETITIONERS, *v.* THE CHOCTAW AND MEMPHIS RAILROAD COMPANY ET AL. May 14, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John McClure, Mr. U. M. Rose, Mr. W. E. Hemingway* and *Mr. G. B. Rose* for petitioners. *Mr. W. F. Evans, Mr. John M. Moore* and *Mr. M. A. Low* for respondents.

No. 725. LOUIS A. CELLA ET AL., PETITIONERS, *v.* JAMES BROWN ET AL. May 14, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry W. Bond* and *Mr. William C. Marshall* for petitioners. No appearance for respondents.

No. 726. MRS. MARY JONES, PETITIONER, *v.* THE SOUTHERN PACIFIC COMPANY. May 14, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. Howard McCaleb* and *Mr. E. Howard McCaleb, Jr.*, for petitioner. No appearance for respondent.

No. 728. THE CHENIERE LAND AND LUMBER COMPANY, PETITIONER, *v.* SUGAR BROTHERS COMPANY, LIMITED, ET AL. May 14, 1906. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Allan Sholars* for petitioner. No appearance for respondents.

No. 733. Western Assurance Company of Toronto, Canada, Petitioner, *v.* Morgan City Improvement Company, Limited. May 14, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lamar C. Quintero* for petitioner. No appearance for respondent.

No. 727. Henry B. F. Macfarland et al., etc., Petitioners, *v.* Le Roy D. Walter et al. May 21, 1906. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Edward H. Thomas* for petitioners. No appearance for respondents.

No. 736. Henry P. Dodge et al., Petitioners, *v.* The Woodville White Lime Company. May 21, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William W. Dodge* for petitioners. No appearance for respondent.

No. 740. The Great Western Natural Gas and Oil Company et al., Petitioners, *v.* Leo Oppenheimer, Receiver, etc. May 21, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. Button* for petitioners. *Mr. Abram I. Elkus* for respondent.

No. 742. William A. Force, Petitioner, *v.* Sawyer-Boss Manufacturing Company et al. May 21, 1906. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William E. Warland* and *Mr. Henry Schreiter* for petitioners. *Mr. H. Albertus West* for respondents.

No. 749. ERIE RAILROAD COMPANY, CLAIMANT, ETC., PETITIONER, *v.* THE PENNSYLVANIA RAILROAD COMPANY ET AL. May 21, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert Green* for petitioner. *Mr. Charles S. Haight* and *Mr. Henry Galbraith Ward* for respondent.

No. 750. MARY V. CORTELYOU ET AL., ADMINISTRATORS, ETC., ET AL., PETITIONERS, *v.* CHARLES ENEU JOHNSON & CO. May 21, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Edmund Wetmore* for petitioners. *Mr. Francis T. Chambers* for respondents.

No. 751. GEORGE DESLIONS ET AL., PETITIONERS, *v.* LA COMPAGNIE GENERALE TRANSATLANTIQUE, ETC. May 21, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Robert D. Benedict, Mr. A. Gordon Murray* and *Mr. Joseph H. Choate* for petitioners. *Mr. Edward K. Jones* for respondent.

No. 752. THE DENE STEAMSHIPPING COMPANY, LIMITED, PETITIONER, *v.* THE TWEEDIE TRADING COMPANY. May 21, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr.*

J. Parker Kirlin and *Mr. Charles R. Hickox* for petitioner. *Mr. Charles S. Haight* for respondent.

No. 753. IRONCLAD MANUFACTURING COMPANY, PETITIONER, *v.* ORANGE COUNTY MILK ASSOCIATION; and No. 754. IRONCLAD MANUFACTURING COMPANY, PETITIONER, *v.* DAIRYMEN'S MANUFACTURING COMPANY. May 21, 1906. Petitions for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Andrew Foulds, Jr.*, for petitioner. *Mr. Henry D. Williams* and *Mr. Richard L. Sweezy* for respondents.

No. 755. MARCUS K. BITTERMAN ET AL., PETITIONERS, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY. May 21, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Louis Marshall, Mr. H. L. Lazarus* and *Mr. M. Rosenthal* for petitioners. *Mr. George Denegre* and *Mr. Joseph Paxton Blair* for respondent.

No. 606. WILLIAM T. WAGGONER ET AL., PETITIONERS, *v.* THE BANK OF AMERICA ET AL. May 28, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. O. Davis* for petitioners. *Mr. Ben M. Terrell* for respondents.

No. 761. OZAN LUMBER COMPANY, PETITIONER, *v.* UNION COUNTY NATIONAL BANK OF LIBERTY, IND. May 28, 1906. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. U. M. Rose* and *Mr. T. C. McRae* for petitioner. *Mr. Morris M. Cohn* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM APRIL 17 TO MAY 28, 1906.

No. 243. MARY JOSEPHINE SCANNELL ET AL., PLAINTIFF IN ERROR, *v.* COTE BLANCHE COMPANY ET AL. In error to the Supreme Court of the State of Louisiana. April 18, 1906. Dismissed with costs, pursuant to the tenth rule. *Mr. Branch K. Miller* for plaintiffs in error. *Mr. Alexander Porter Morse, Mr. M. J. Foster* and *Mr. Charlton R. Beattie* for defendants in error.

No. 231. THE DRAKE & STRATTON COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* JOHN MANWARING. In error to the Supreme Court of the State of Minnesota. April 18, 1906. Dismissed, per stipulation. *Mr. Thomas J. Davis* for plaintiff in error. *Mr. Roger S. Powell* for defendant in error.

No. 257. GEORGETOWN AND TENNALLYTOWN RAILWAY COMPANY OF THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR, *v.* ELIZABETH B. SMITH, ADMINISTRATRIX, ETC. In error to the Court of Appeals of the District of Columbia. April 23, 1906. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. J. J. Darlington* for plaintiff in error. No appearance for defendant in error.

No. 768. FRANCISCO RIVERA *alias* PANCHETO, APPELLANT, *v.* JOSE URRUTIA, WARDEN, ETC. Appeal from the Supreme Court of Porto Rico. May 28, 1906. Docketed and dismissed with costs, on motion of *The Solicitor General* for the appellee. No one opposing.

INDEX.

ACTION.

1. *Nature of suit as one against the United States.*

A suit brought by a Chippewa Indian on behalf of himself and other members of his tribe against the Secretary of the Interior, to enjoin him from executing the act of June 27, 1902, and to compel him to account under the act of January 4, 1889, in regard to sale and disposition of lands, the title to which is still in the Government, is in effect a suit against the United States, and in the absence of any waiver on the part of the Government of immunity from suit, the courts have no jurisdiction of such a suit. (*Oregon* v. *Hitchcock*, 202 U. S. 60 followed; *Minnesota* v. *Hitchcock*, 185 U. S. 373 distinguished.) *Naganab* v. *Hitchcock*, 473.

2. *Nature as suit against State within meaning of Eleventh Amendment.*

A suit brought by a railway company against the members of a state railway commission to restrain them from interfering with complainant's property and interstate business under a state statute alleged in the bill to be unconstitutional as imposing burdens on interstate commerce is not a suit against the State within the meaning of the Eleventh Amendment. *McNeill* v. *Southern Railway Co.*, 543.

See ADMIRALTY; CONGRESS, B 3; CONTRACTS, 3; COURTS; JURISDICTION; LOCAL LAW (PORTO RICO).

ACTS OF CONGRESS.

ALIEN CONTRACT LABOR LAW of March 3, 1903, 32 Stat. 1218, §§ 21, 25 (see Aliens): *Pearson* v. *Williams*, 281.

BANKRUPTCY, Act of 1898, § 23 (see Jurisdiction, C 4): *Bush* v. *Elliott*, 477. Sec. 67*f* (see Bankruptcy, 1): *First National Bank* v. *Staake*, 141.

COURT OF CLAIMS, Tucker Act (see Admiralty, 1): *United States* v. *Cornell Steamboat Co.*, 184.

CRIMINAL LAW, Act of July 20, 1840, 5 Stat. 394, and § 800, Rev. Stat. (see Criminal Law, 1): *Sawyer* v. *United States*, 150.

CUBA, Act of December 17, 1903 (see Customs Duties): *Franklin Sugar Co.* v. *United States*, 580.

CUSTOMS DUTIES, Rev. Stat. § 2899 (see Bonds, 1): *United States* v. *Diecker-hoff*, 302. Sec. 2977 (see Customs Duties, 2): *Franklin Sugar Co.* v.

ADMINISTRATION.

ADMIRALTY.

1. *Salvage; jurisdiction of Court of Claims of claim against Government.*

While a claim for salvage of Government property based on services rendered without request of any officer of the Government does not arise upon any contract, express or implied, it is properly one for unliquidated damages in a case not sounding in tort, in respect to which the claimant

B. Powers of.

1. *Constitutional power to make acts of its members offenses against United States.*

Congress has power to make it an offense against the United States for a Senator or Representative, after his election and during his continuance in office, to agree to receive, or to receive, compensation for services before a Department of the Government, in relation to matters in which the United States is directly or indirectly interested, and § 1782, Rev. Stat., is not repugnant to the Constitution as interfering, nor does it by its necessary operation, interfere with the legitimate authority of the Houses of Congress over their respective members. *Burton* v. *United States*, 344.

2. *Revenue bills; what deemed.*

Revenue bills, within the meaning of the constitutional provision that they must originate in the House of Representatives and not in the Senate are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue. *Millard* v. *Roberts*, 429.

3. *Validity of acts of* 1901 *and* 1903 *for railroad improvements in District of Columbia; character as bills for raising revenue.*

The acts of Congress of February 12, 1901, 31 Stat. 767, 774, and of February 28, 1903, 32 Stat. 909, for eliminating grade crossings of railways and erection of a union station in the District of Columbia and providing for part of the cost thereof by appropriations to be levied and assessed on property in the District other than that of the United States are not unconstitutional either because as bills for raising revenue they should have originated in the House or Representatives and not in the Senate, or because they appropriate moneys to be paid to the railway companies for their exclusive use; and assuming but not deciding that he can raise the question by suit, a taxpayer of the District is not oppressed or deprived of his property without due process of law by reason of the taxes imposed under said statutes. *Ib.*

4. *Scope of ratification by.*

A ratification by act of Congress, will not be extended to cover what was not, in the judgment of the courts, intended to be covered, because otherwise the ratification would be meaningless or unnecessary. Congress out of abundant caution may ratify, and at times has ratified, that which was subsequently found not to have needed ratification. *Lincoln* v. *United States*, 484.

See Bankruptcy, 2;
Constitutional Law, 5;
Courts, 8.

C. Intention of.

See Local Law (Porto Rico), 1.

during its life a similar contract was given to such a person and the corporation sued in the Court of Claims for reformation of its contract on ground that the omission was mutual mistake and also for loss of profits on business diverted to such person. The Court of Claims took jurisdiction and awarded damages. *Held*, by this court in reversing the judgment on the merits, while reformation of the contract is not an incident to an action at law, and can only be granted in equity under § 1 of the act of March 3, 1887, 24 Stat. 505, the Court of Claims has jurisdiction to reform a contract, and of the money claim under the contract as it should have been drawn. On the evidence in this case there was no mutual mistake justifying the reformation of the contract. *United States* v. *Milliken Imprinting Co.*, 168.

4. *Specific performance, where party has conveyed property to one who is free from equities.*

A judgment for defendant in an action for specific performance based on a finding of fact, among others, that defendant has conveyed the property to an innocent purchaser for value cannot be reversed, as specific performance is impossible where the party to the contract has conveyed the property to one who is free from equities. *Halsell* v. *Renfrow*, 287.

See CONSTITUTIONAL LAW, 1, 2;
CRIMINAL LAW, 9;
LOCAL LAW (OKLA.).

CONTRACT LABOR LAW.

See ALIENS.

CONVEYANCES.

See LOCAL LAW (OKLA.).

CORPORATIONS.

Incidents of power to mortgage franchises.

The power given under the state law to a corporation to mortgage its franchises and privileges necessarily includes the power to bring them to sale and make the mortgage effectual, and the purchaser acquires title thereto although the corporate right to exist may not be sold. *Vicksburg* v. *Waterworks Co.*, 453.

See LOCAL LAW (MISS.); STATES;
NATIONAL BANKS; TAXATION, 1.

COSTS.

1. *Allowance of costs in original actions between States.*

This court has power to allow costs in original actions and in any actions between States, the successful State may ask for costs or not as it sees fit, and there is no absolute rule that in boundary cases the costs are divided. Costs, therefore, are allowed to the defendant in this suit in

CRIMINAL LAW.

1. *Challenges; right of Government to.*

The passage of the act of July 20, 1840, 5 Stat. 394, and of § 800, Rev. Stat., granting peremptory challenges to the Government in criminal cases, has not taken away the right to conditional or qualified challenges when permitted in the State, and where it has been adopted by the Federal court as a rule or by special order. The exercise of the right is under supervision of the court which should not permit it to be used unreasonably or so as to prejudice defendant. It is not an unreasonable exercise of the priviege where, notwithstanding its exercise, neither the Government nor the defendant exhausted all of their peremptory challenges. *Sawyer* v. *United States*, 150.

2. *Trial; remarks by counsel; cure of impropriety.*

While a remark by the District Attorney in summing up that "a man under such circumstances who could drink a cup of coffee ought to be hung on general principles," is improper, if, on protest of defendant's counsel, the court stops the District Attorney, who apologizes and withdraws the remark, an exception by defendant is frivolous and the court is not open to censure for so describing it. *Ib.*

3. *Trial; statement by court constituting error.*

There is no reversible error in the court stating in a trial for murder of several persons that defendant was not charged with the murder of a person whose name is stated in the bill as having been murdered, the court also saying that if he was so charged there was no evidence to support the charge. *Ib.*

4. *Waiver by accused of privilege of silence.*

Where defendant takes the stand in his own behalf he waives his constitutional privilege of silence and the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as though he were an ordinary witness as to circumstances connecting him with the crime, and even if, as claimed in this case, the subject matter of the cross-examination has no tendency to connect the witness with the crime if it is plain that there is no injury the exception is not available. *Ib.*

5. *Indictment; sufficiency to acquaint accused with nature and cause of accusation.*

Where the indictment clearly discloses all the elements essential to the commission of the offense charged, and the averments are sufficient in the event of acquittal, to plead the judgment in lieu of a second prosecution for the same offense, the defendant is informed of the nature and cause of the accusation against him within the meaning of the Constitution and according to the rules of pleading;—and in this case the evidence was sufficient to justify the case being sent to the jury and the court below did not err in refusing to direct an acquittal, nor was

IMPAIRMENT OF CONTRACTS.

See CONSTITUTIONAL LAW, 2.

IMPORTS.

See CUSTOMS DUTIES.

INDIANS.

1. *Jurisdiction of Court of Claims under Cherokee Acts of* 1902, 1903.

Under sec. 68 of the Cherokee Act of July 1, 1902, 32 Stat. 726, as construed by the act of March 3, 1903, 32 Stat. 996, and the agreement of December 19, 1891, providing for the sale of the Cherokee outlet, the Court of Claims had jurisdiction of all claims of the Cherokee Indians against the United States, and the claims were to be reopened and reëxamined *de novo*, and the court and the accountants were to go behind statutory and treaty bars and receipts in full, and were to consider any alleged and declared amount of money promised but withheld under any treaty or law. *United States* v. *Cherokee Nation*, 101.

2. *Liability of United States to Cherokee Nation.*

The United States, as stated in the Slade & Bender account made under the agreement of December 19, 1891, and as found by the Court of Claims, is liable to the Cherokee Nation for $1,111,284.70, the amount paid for the removal of the Eastern Cherokee Indians to the Indian Territory, improperly charged to the treaty fund. *Ib.*

3. *Allowance of interest on treaty fund as to Cherokee Indians under award of Senate as arbitrator.*

The question whether interest should be allowed on this fund having been submitted, under the Eleventh Article of the Cherokee Treaty of 1846, to the Senate of the United States, and that body having by resolution found that interest should be allowed at five per cent from June 12, 1838, until paid, the amount of interest was one of the subjects of difference referred to the Court of Claims under the act of July 1, 1902, and that court had jurisdiction to allow interest, and correctly awarded it at the rate, and from the time specified, in the Senate resolution. *Ib.*

4. *Meaning of Cherokee "Tribe" as distinguished from "Nation."*

The term, Cherokee Tribe or any band thereof, as used in the act of July 1, 1902, means the Cherokee people as a people, and not the Cherokee Nation as a body politic, and the Court of Claims correctly decided that the amount awarded to the Cherokee Nation be paid to the Secretary of the Interior to be by him received and distributed to the persons entitled thereto, but such distribution should be made as to the Eastern Cherokees as individuals whether East or West of the Mississippi, parties to the treaties of 1835, 1836 and 1846, exclusive of the Old Settlers. *Ib.*

NEGLIGENCE.

STATUTES.

A. CONSTRUCTION OF.

1. *Acts of Congress admitting States, as part of common system.*

Acts of Congress passed at different times for the admission of different States where their respective subjects are not identical with or similar to each other do not form part of a homogeneous whole, of a common system, so as to allow a claimant under the later act to claim that it changed the earlier act by construction, and the rule of *in pari materia* does not apply. *Louisiana* v. *Mississippi*, 1.

2. *Intention of legislature—Definition of crime.*

The intention of the legislature must govern in the interpretation of a statute. It is the legislature and not the court which is to define a crime and ordain its punishment. *Burton* v. *United States*, 344.

3. *Presumption against retrospective legislation.*

There is a presumption against retrospective legislation and words in a statute will not be construed as having such effect unless they clearly can have no other effect, and the legislative intent cannot otherwise be satisfied; and in this respect the use in the statute of the future tense must be given weight. *United States* v. *American Sugar Co.*, 563.

See APPROPRIATION OF PUBLIC MONEY;
COURTS, 6, 7;
PRACTICE AND PROCEDURE.

B. OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. OF THE STATES AND TERRITORIES.

See CONSTITUTIONAL LAW, 1;
JURISDICTION, C 3.
LOCAL LAW.

STOCKHOLDERS.

See NATIONAL BANKS, 3, 4.

SUIT.

See ACTION.

TESTAMENTARY LAW.

1. *Validity of transfer of property bequeathed.*

Where by the law of their domicil, as is the case in Louisiana, minors are represented by their father as administrator, with full power under that law to receipt for, and administer for their account, property bequeathed to them by a testator domiciled and dying in Virginia, a transfer of such property to the father as the administrator or representative of his minor children by a person having possession thereof in the District of Columbia, is valid and binding. *Darlington* v. *Turner*, 195.

2. *Liability of estate of decedent.*

Under the circumstances of this case decedent's liability for an amount invested having been fixed with accuracy as to time and amount, and it being impossible from the record to ascertain the ultimate fate of the investment, and whether it was so lost as to relieve decedent from responsibility, the court will hold the estate liable therefor with legal interest but subject to adjustment for admitted overpayments to one of the complainants. *Ib.*

TITLE.

See CONSTITUTIONAL LAW, 1;
CORPORATIONS;
JURISDICTION, C 2, 3.

TRANSFERS.

See NATIONAL BANKS;
TESTAMENTARY LAW, 1.

TRANSFER OF STOCK.

See NATIONAL BANKS, 3.

TREATIES.

1. *Treaty with Cuba of December* 11, 1902; *accrual of right to reduction of duties on imports.*

Under the treaty between the United States and Cuba of December 11, 1902, and the act of Congress of December 17, 1903, imports from Cuba were not entitled to reduction of duties imposed by the tariff act of July 24, 1897, until December 27, 1903, the date proclaimed by the President of the United States and the President of Cuba for the commencement of the operation of the treaty. *United States* v. *American Sugar Co.*, 563; *Franklin Sugar Co.* v. *United States*, 580.

2. *Treaty with Cuba; time for going into effect.*

After the treaty was amended by the Senate and the amendment accepted by Cuba the time of its going into effect was to be fixed by act of Congress and not as originally fixed by the treaty ten days after the exchange of ratifications. *Ib.*

See CUSTOMS DUTIES, 2; JURISDICTION, C 2;
INDIANS; PHILIPPINE ISLANDS.