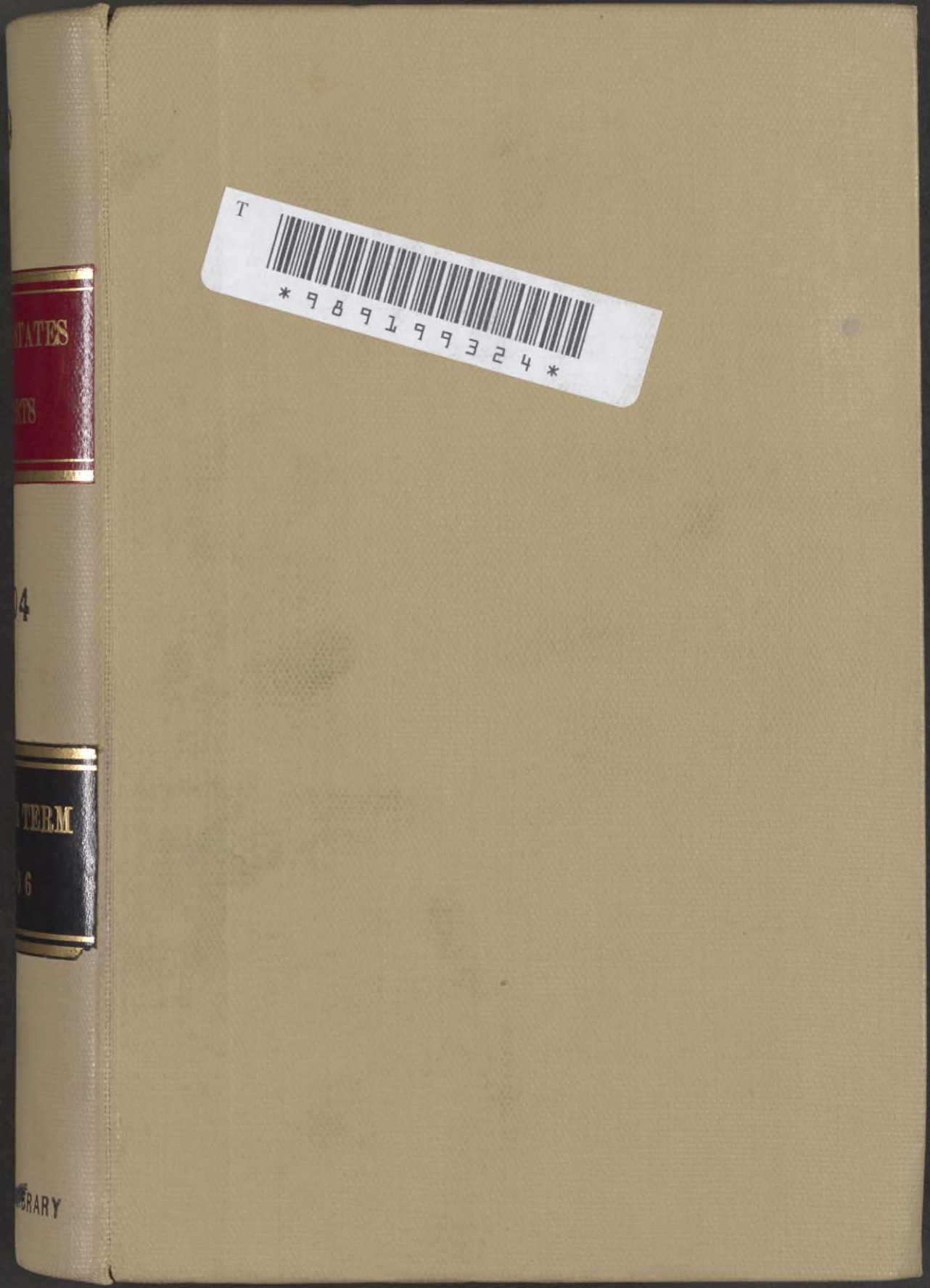
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UNITED STATES REPORTS

VOLUME 204

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1906

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1907

JUSTICES

OF THE

SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER, 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, Associate Justice.[2]

CHARLES J. BONAPARTE, Attorney General.
HENRY MARTYN HOYT, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

[1] For allotment of the Chief Justice and Associate Justices among the several circuits see next page.

[2] Appointed December 17, 1906; took no part in any of the decisions reported in this volume argued or submitted prior to that date, or in any decisions in suits in which he had appeared for the United States as Attorney General.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, DECEMBER 24, 1906.[1]

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term, 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, William H. Moody, 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.

[1] For the last preceding allotment see 202 U. S. vii.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1906.

JEROME *v.* COGSWELL.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 80. Argued November 2, 1906.—Decided January 7, 1907.

Where the stock of a national bank is reduced pursuant to § 5143, Rev. Stat., but beyond the amount required to meet an impairment of capital, and the reduction is made by charging off doubtful assets to the amount of the reduction, the stockholders of record on the day of the reduction are entitled to the assets thereby set free, which, and their proceeds, may be set apart as a trust fund for such stockholders. And transfers of stock made after the reduction do not carry the interest of the original stockholders in that fund.

78 Connecticut, 75, affirmed.

THE Second National Bank of Norwich, Connecticut, was a banking association, organized and existing under the laws of the United States, with a capital stock of $300,000.

As stated, in substance, by the Supreme Court of Errors of Connecticut, the directors having voted to recommend a reduction of the capital stock from $300,000 to $200,000, were advised by the Comptroller of the Currency that it would be approved, "provided so much of the amount as is necessary is used to charge off bad, doubtful and unproductive assets, the difference only being paid to the shareholders in cash,"

and that "the shareholders of a national bank, upon a reduction in capital stock, are entitled to either receive the cash or the charged-off assets, and neither can be withheld without their consent." The Comptroller also informed the president of the bank: "The assets belong to the stockholders of record, and a trust fund must be created, so that those assets may be distributed among the stockholders of record when your capital is reduced." The stockholders, in May, 1900, voted to make the reduction, and the president first, and then the directors, filed with the Comptroller a written statement that "the whole amount of the reduction, viz., $100,000, will be used for the purpose of charging off bad, doubtful and unproductive assets, no money to be paid to the shareholders unless realized from said assets, which are to be set aside and collected for the benefit of the shareholders of record at date of the issuance of the Comptroller's certificate approving the reduction." The Comptroller gave his certificate, dated June 9, 1900, approving the reduction, without any qualifications.

"On June 27th a schedule of certain assets of the bank, each item being given a valuation, and the total valuations of all amounting to $100,307.86, was presented to the directors, who thereupon voted that the assets so scheduled, 'which assets are considered either bad or doubtful, and on account of which the capital stock of the bank has been reduced from $300,000 to $200,000, be set aside from the other assets of the bank and be held by it in trust for the stockholders of record on the ninth day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date.'

"Thereupon the account with capital stock on the books of the bank was credited with a reduction of $100,000, and the items named in the schedule above described were charged to the account of profit and loss at the valuation of $100,307.86. Some of the items were of real estate; the rest were not well

secured; and all were those referred to in the directors' statement to the Comptroller dated June 9th.

"This left the bank with good assets worth over $240,000.

"The bank thereafter, until its charter expired in 1903, kept a separate account relating to the assets included in the schedule, entitled 'Stockholders' Trust,' in which were credited all collections and charged all expenditures arising in connection with endeavors to realize upon them.

"Two of the scheduled items represented claims for a larger amount; the valuation affixed to each representing the estimated loss upon it. The same claims were also entered in the books of the bank, as part of its remaining capital, at a valuation for each equal to the difference between its face and the valuation assigned to it in the schedule.

"The receiver has received $20,240 on account of the scheduled assets. Some of them also remain uncollected, but have a value. To one of the items, entered as 'Demand loans, E. A. Packer, $15,647.50,' belonged certain railroad stock held as collateral security. A note for over $1,000, made by 'C. P. Cogswell, trustee,' and discounted by the bank to pay an assessment on this stock, was included in the reduced capital of $200,000, and in March, 1903, was paid off from the proceeds of sales of the stock; leaving a balance of such proceeds, which was included in the $20,240 above mentioned.

"All the certificates representing the shares in the original capital were, on or about July 1, 1900, exchanged by the holders for certificates in favor of each for two-thirds of the number of his original shares."

The charter of the bank expired by lapse of time February 24, 1903, and its affairs were being settled in the manner provided by law, when a complaint in equity was filed by a stockholder in the Superior Court of Connecticut, asking for the appointment of a receiver to wind up its affairs, because of alleged misappropriation, and a receiver was appointed. The receiver filed a petition with the court, stating that in May, 1900, the capital stock of the bank was reduced from

$300,000 to $200,000, and that thereupon assets of the face value of $100,000 were charged off and set aside, and that a question had arisen as to whether the proceeds of those assets be distributed to the stockholders of record at the time of the reduction or of the expiration of the charter.

Claims to the charged-off assets by virtue of ownership of original stock when capital was reduced; of such stock, although it had been surrendered and new stock issued; and of stock after the reduction; were filed.

The Superior Court held that those assets belonged to the bank and should be distributed to the stockholders of record at the expiration of its charter.

The Supreme Court of Errors adjudged that the stockholders of record at time of reduction were entitled to the charged-off assets, and reversed the judgment of the Superior Court with directions to distribute accordingly. 78 Connecticut, 75.

Whereupon this writ of error was brought.

Mr. Donald G. Perkins, with whom *Mr. William H. Shields* was on the brief, for plaintiff in error:

This case presents a question within the jurisdiction of and reviewable by the Supreme Court of the United States under U. S. Statutes, § 709. *Williams* v. *Bruffy*, 102 U. S. 248.

The rights and privileges claimed by plaintiff in error depend upon his stock certificates issued by a national bank, and all his rights were governed and controlled by the laws of the United States, and they were necessarily involved in the question before the court, and determined by its decision. *Starin* v. *New York*, 115 U. S. 248; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 309; *Wilson* v. *Marsh*, 2 Pet. 245; *Crowell* v. *Randall*, 10 Pet. 368; *Furman* v. *Nichol*, 8 Wall. 56; *Williams* v. *Hurd*, 140 U. S. 529; *Forks National Bank* v. *Anderson*, 172 U. S. 573; *McCormick* v. *Market National Bank*, 165 U. S. 538; *Waite* v. *Dowley*, 94 U. S. 532; *Kaukauna* v. *Green Bay*, 142 U. S. 269; *Logan Co. Bank* v. *Townsend*, 139 U. S. 67; *Swope*

v. *Leffingwell*, 105 U. S. 3; *California Bank* v. *Kennedy*, 167 U. S. 366; *Green Bay &c. Co.* v. *Patten Paper Co.*, 172 U. S. 58; *Yazoo &c. R. Co.* v. *Adams*, 180 U. S. 15; *Home for Incurables* v. *New York*, 187 U. S. 155.

The determination of the rights of stockholders to a distribution of the assets depends upon the effect of the reduction of capital, the approval of the Comptroller and the vote of the directors in relation to the charged-off assets. The capital of the bank was reduced from $300,000 to $200,000.

The requirement and purpose of the Comptroller were that reduced capital be used to charge off bad debts so far as necessary and the excess only paid in cash to the stockholders. The intent and purpose of the reduction was to charge off the amount of bad and doubtful debts in the schedule and cover any impairment of capital and still leave the bank with a fair surplus.

There was no relation or identity, either in fact or law, between the reduction and any specific property of the bank.

There was no lien or charge in law or equity, in such a case, against the assets, and if so, no power in the directors to create one. A reduction of capital stock to set free unemployed capital would not vest title in stockholders to any specific assets.

Assuming that an equitable title vested in the stockholders to the assets actually charged off, it is apparent that they are not entitled in equity to the assets not fully charged off, but carried in and necessary to make up new capital.

The directors had no power to set apart any specific assets for the stockholders of record. Rev. Stat. § 5143; *Commercial Nat. Bank* v. *Weinhard*, 192 U. S. 249; Rev. Stat. §§ 5134, 5142, 5143; *McCann* v. *First Nat. Bank*, 112 Indiana, 358; 1 Cook on Corporations, 5th ed., § 289; 2 Thompson, Com. on Corporations, § 2119; 2 Morawetz on Priv. Corp., §§ 224, 226; *Jermain* v. *Lakeshore*, 91 N. Y. 483; *Gifford* v. *Thompson*, 115 Massachusetts, 478.

The shareholders at reduction, by transferring their shares, transferred all their rights in capital.

Mr. Frank T. Brown, with whom *Mr. Hadlai A. Hull* was on the brief, for defendants in error:

When the capital stock of a national bank is reduced and there is no impairment of its capital, there must be a distribution of assets among the stockholders of record at the date of the reduction. Pratt's Digest, ed. 1905, p. 41; 2 Thompson on Corp., § 2118; 5 Cycl. Law & Pro., 436; *Strong* v. *Brooklyn R. R. Co.,* 93 N. Y. 426.

When the net actual capital of a national bank applicable to capital stock is insufficient to make the stock worth par and a reduction of capital stock is made, but to an extent greater that is necessary to meet the impairment, so much of the net actual capital as is not necessary to make the reduced stock worth par, should be distributed among the stockholders of record at the date of the reduction.

It is within the authority of the Comptroller of the Currency to condition his approval of the reduction of capital stock on the adoption of such measures as he may think proper to do justice to the holders of the original shares.

The right of the stockholders to a distribution is not, however, dependent upon any action of the Comptroller, but belongs to them under the law independently of any action on the Comptroller's part.

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

This is not a case involving the rights of creditors or of minority stockholders as such, but a case raising the bare question to whom assets remaining on a valid reduction of the capital stock of a national bank belong.

The National Banking Act (Title LXII, Rev. Stat.) provides:

"Sec. 5143. Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount

required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

The reduction in this case was accomplished at a time when the bank was not being wound up, by the required vote of the stockholders and with the approval of the Comptroller of the Currency, and the new shares on the basis of the reduction were accepted by all the stockholdors.

The bank was left with good assets of more than $240,000, or, in other words, with an unimpaired capital stock of $200,000 and a surplus of twenty per cent, that is, $40,000, exclusive of the assets, the distribution of which is the matter in controversy. These assets were set apart in compliance with the requirement of the Comptroller that certain bad, doubtful and unproductive assets should be charged off or set aside for the benefit of those who were stockholders at the date of the approval. This requirement, though not stated in the certificate of approval, was evidently, on the facts, made a condition thereof and presumably in accordance with the practice of the Comptroller's office, and was imposed to the end that justice might be done to the owners of the original shares.

It is said that the original capital of the bank of $300,000 was impaired prior to the reduction, say to the extent of $30,000, as shown by adding to the $240,000 the value of the scheduled assets, estimated at $30,000.

As a general rule, it may be admitted that where capital stock is impaired and a reduction is made merely to meet that impairment, there can be no distribution. But that is not this case, in which the stockholders of record June 9, 1900, had a right to require a distribution among them of an excess upon reduction in proportion to their respective holdings. In the language of the Connecticut Supreme Court: "The

right to receive what might ultimately be realized from the fund thus set apart became therefore irrevocably vested in those who were shareholders on June 9, 1900, and they or their assigns are now entitled to whatever is to be distributed from it."

It follows, as held, that the transfer of shares after the reduction of June 9, 1900, did not carry any right to an interest in the special trust fund, the proportionate interests therein having vested in the then shareholders as individuals. The result is unaffected by the fact that distribution in cash may have been contemplated as the assets set aside were realized upon.

The conclusion at which we have arrived dispenses with the necessity of discussing other questions suggested.

Judgment affirmed.

OLD WAYNE MUTUAL LIFE ASSOCIATION OF INDIANAPOLIS *v.* McDONOUGH.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 57. Argued October 25, 1906.—Decided January 7, 1907.

A statute of Pennsylvania provides: "No insurance company not of this State, nor its agents, shall do business in this State until it has filed with the Insurance Commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Insurance Commissioner, or the party designated by him, or the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State so designated such process may thereafter be served on the Insurance Commissioner." An insurance company of Indiana issued a policy of insurance upon the life of a citizen of Pennsylvania, the beneficiaries being also citizens of that Commonwealth. The contract of insurance was made in Indiana without the insurance company having filed the stipulation required by

the local statute as to service of process upon the Insurance Commissioner of Pennsylvania. A suit was brought on the contract in a Pennsylvania court, process was served on the state Insurance Commissioner alone, a personal judgment taken against the insurance company, and suit brought on that judgment in an Indiana court. The company did some business in Pennsylvania which had no relation to the contract made in Indiana. *Held,* that:

1. If the defendant had no such actual legal notice of the Pennsylvania suit as would bring it into court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania court was without jurisdiction to render a personal judgment against the company.
2. The constitutional requirement that full faith and credit be given in each State to the public acts, records and judicial proceedings of every other State is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law.
3. If the conclusiveness of a judgment or decree in a court of one State is questioned in a court of another government, Federal or state, it is open, under proper averments, to inquire whether the court rendering the decree or judgment had jurisdiction to render it.
4. Where an insurance company or corporation of one State goes into another State to transact business in defiance of its statute as to service of process, it will, in an action against it in such State, be held to have assented to the terms prescribed by the local statute for service of process in respect to business done in that State, but its assent in that regard will not be implied as to business not transacted in that State.
5. If a personal judgment be rendered in one State against a corporation of another State, bringing such corporation into court, that is, without any legal notice to the latter of the suit, and without its having appeared therein in person or by attorney or agent, it is void for want of due process of law.

164 Indiana, 321, reversed.

THE facts are stated in the opinion.

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

The Pennsylvania judgment is invalid, outside of that State at least, because it does not appear that when process was served on the insurance commissioner the plaintiff in error was doing business in Pennsylvania. *Barrow Steamship Co.* v. *Kane,* 170 U. S. 111; *St. Clair* v. *Cox,* 106 U. S. 350; *Fitzgerald*

Co. v. *Fitzgerald*, 137 U. S. 98, 106; *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Goldey* v. *Morning News*, 156 U. S. 519.

Return of service upon an officer of a foreign corporation is insufficient unless it appears from the return or from the record that the company is doing business in the State when the suit is begun. *Central Grain & Stock Exch.* v. *Board of Trade*, 125 Fed. Rep. 467.

In the suit brought in Indiana on the Pennsylvania judgment it was averred in the complaint that the defendant is now and on December 3, 1897, and long prior and subsequent thereto, was engaged in the transaction of business in Pennsylvania, soliciting applications for insurance from and issuing policies to residents of said State. This is one of the material allegations denied by paragraph 1 of the answer in the case. No evidence was offered to support this averment, and it would seem that on this account alone, the judgment below should be reversed, nor is sufficient evidence on this subject found in the transcript of the judgment in the Pennsylvania suit. While the plaintiff's statement of claim in the Pennsylvania court, which was filed when the original summons was issued, did indeed set forth that the policy sued on was executed and delivered at Scranton, Pennsylvania, this averment does not help the defendant in error. A single transaction does not constitute doing business in the State. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Ammons* v. *Brunswick-Balke Collender Co.*, 141 Fed. Rep. 570; *State* v. *Robb*, 106 N. W. Rep. 406; *Jameson* v. *Simonds Law Co.*, 84 Pac. Rep. 269.

The Pennsylvania judgment is invalid because the statute under which process was served on the insurance commissioner does not provide for any notice to the foreign corporation.

A State may exclude altogether a foreign corporation, or may, in general, allow it to do business within its territory upon such terms as it deems proper. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Railroad Co.* v. *Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369.

A judgment rendered in a state court, without personal service on the defendant, may be a good judgment, even *in personam*, against such defendant in that State, but void everywhere else. *Goldey* v. *Morning News*, 156 U. S. 518; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 111; *Grover* v. *Radcliffe*, 137 U. S. 287; *La Fayette Ins. Co.* v. *French*, 18 How. 406.

Due process of law requires notice and an opportunity to be heard. *Lasere* v. *Rochereau*, 17 Wall. 437; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *McVeigh* v. *United States*, 11 Wall. 259.

The right of a State to determine the conditions upon which it will permit foreign corporations to carry on their business within its borders may be affected by the Constitution of the United States. The power of the State in this regard is subject to such limitations on her sovereignty as may be found in the fundamental law of the Union. *Ducat* v. *Chicago*, 10 Wall. 410, 415.

A corporation lawfully doing business in a State is no more bound by a general unconstitutional statute than a citizen of the State. *Cargill Co.* v. *Minnesota*, 180 U. S. 452; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 409.

While a foreign corporation must comply with state laws, invalid state laws, contrary to the Constitution of the United States, cannot be imposed as a condition upon the right of such a corporation to do business within the State. *Dayton Coal & Iron Co.* v. *Barton*, 183 U. S. 23.

The right of a State to allow foreign corporations to do business in the State on such terms as it pleases is "subject always of course to the paramount authority of the Constitution of the United States." *Hooper* v. *California*, 155 U. S. 648, 656. See also *Insurance Co.* v. *Morse*, 20 Wall. 445, 451, 455; *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535; *Southern Pac. R. R. Co.* v. *Denton*, 146 U. S. 202; *Barron* v. *Burnside*, 121 U. S. 186; *Swan* v. *Mutual Reserve &c. Assn.*, 100 Fed. Rep. 922; *Pinney* v. *Providence Loan Co.*, 106 Wisconsin, 402; *Rothrock* v. *Insurance Co.*, 161 Massachussetts, 425; *Carroll* v. *N. Y., N.*

H. & H. R. R. Co., 46 Atl. Rep. 708; *Wilson* v. *Seligman*, 144 U. S. 45; *Vallee* v. *Dumurgue*, 4 Exch. 290; *Copin* v. *Adamson*, 9 L. R. Exch. 345, affirmed on appeal, Exch. Div. 17.

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

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action in an Indiana court against the plaintiff in error upon a judgment against it in a Pennsylvania court. The decisive questions in the case have reference to the clause of the Constitution of the United States, requiring full faith and credit to be given in each State to the public acts, records and judicial proceedings of other States, and, also, to the clause forbidding the deprivation by a State of life, liberty or property, without due process of law. There was a judgment for the plaintiffs, which was affirmed by the Supreme Court of the State.

The questions before us arise out of the facts now to be stated.

On the twenty-second day of February, 1900, the defendants in error brought an action in the Court of Common Pleas of Susquehanna County, Pennsylvania, against the Old Wayne Mutual Life Association of Indianapolis, an Indiana corporation, upon a certificate or policy of life insurance dated December 3, 1897, whereby that association agreed to pay to Winnifred Herrity and Sarah McDonough of Scranton, Pennsylvania, or their legal representatives, the sum of $5,000 upon the condition, among others, that if the person whose life was insured—Patrick McNally, of Scranton, Pennsylvania—should die within one year from the date of the certificate, then Herrity and McDonough should not receive more than one-fourth of the above sum. McNally died on the fourteenth day of November, 1898.

A summons, addressed to the sheriff of Susquehanna County, Pennsylvania, was sued out and the following return thereof was made: "Served the Old Wayne Mutual Life Association

of Indianapolis, Indiana, an insurance company incorporated under the laws of the State of Indiana, by giving, September 26, 1900, a true and attested copy of the within writ to Israel W. Durham, Insurance Commissioner for the State of Pennsylvania, and making known to him the contents thereof, the said association having no attorney in the State of Pennsylvania upon whom service could be made." It does not appear, if the fact be material, that any notice of this summons was given by the Commissioner to the defendant.

Subsequently, the plaintiff filed a declaration or statement in the Pennsylvania case, which contained, among other things, the following: "That the said The Old Wayne Mutual Life Association of Indianapolis, Indiana, defendant, is a mutual life insurance association, foreign to the State of Pennsylvania, to-wit: of the State of Indiana, as aforesaid, and as such has been doing business of life insurance in the State of Pennsylvania, more particularly in the counties of Susquehanna and Lackawanna, in said State of Pennsylvania, issuing policies of life insurance to numerous and divers residents of said counties and State for many years, upon application therefor taken in said counties of Susquehanna and Lackawanna, and was transacting such business of life insurance in said State and counties on the third day of December, 1897, and before and since till July 5, 1900, and after. That the said The Old Wayne Mutual Life Association has no duly appointed agent in said county of Susquehanna, State of Pennsylvania, for the acceptance of service of process other than the Commissioner of Insurance of the State of Pennsylvania. The writ of summons in this action, duly issued by the Court of Common Pleas of Susquehanna County, directing the said defendant, The Old Wayne Mutual Life Association of Indianapolis, Indiana, to appear and answer, was legally and duly served on the Commissioner of Insurance of the State of Pennsylvania on the twenty-sixth day of September, 1900, the said Commissioner of Insurance for the State of Pennsylvania being the proper person for service in this case."

This was followed by a notice in that case addressed to the Insurance Commissioner, and stating that judgment would be taken if no appearance was entered or an affidavit of defense filed by the association within fifteen days after service of that notice. At a later date, the Insurance Commissioner not having appeared, and no affidavit of defense having been filed, judgment was taken against the life association, by default, April 16, 1901.

The present action was brought on that judgment. The complaint in this case, filed June 21, 1900, alleged that the defendant association was on the third day of December, 1897, and long prior and subsequent thereto engaged in the transaction of business in Pennsylvania. After setting out the provisions of the statute of Pennsylvania (to be presently referred to), the issuing of the policy, the death of McNally, and the making of the requisite proofs of loss, the complaint alleged that process in the Pennsylvania case was served upon the Insurance Commissioner for Pennsylvania, "the said defendant having no other agent or attorney upon whom process could be served in said State of Pennsylvania."

The defendant demurred to the complaint as insufficient in law, but the demurrer was overruled. It then filed its answer, denying "each and every material allegation" in the complaint. In a separate paragraph it alleged that its only offices for the transaction of business were, and at all times had been, at Indianapolis, Indiana, where its officers had always resided; that it had never been admitted to do business in Pennsylvania, and never had an office or agency there for the transaction of business; that no one of its officers or agents was in that Commonwealth at the date of the alleged suit, nor had been there since; that no summons was ever served upon it at any time, and that it did not appear in that action; that no one ever appeared for it there who had authority to do so; and that the first notice or knowledge it ever had of the alleged judgment against it was long after the day when it appears to have been rendered.

The plaintiffs replied, denying each and every material allegation of the answer.

The plaintiff in error insists that the Pennsylvania court had no jurisdiction to proceed against it; consequently, the judgment it rendered was void for the want of the due process of law required by the Fourteenth Amendment. If the defendant had no such actual, legal notice of the Pennsylvania suit as would bring it into court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania court was without jurisdiction, and the conclusion just stated would follow, even if the judgment would be deemed conclusive in the courts of that Commonwealth. The constitutional requirement that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." *Scott* v. *McNeal*, 154 U. S. 34, 46. No State can, by any tribunal or representative, render nugatory a provision of the supreme law. And if the conclusiveness of a judgment or decree in a court of one State is questioned in a court of another government, Federal or state, it is open, under proper averments, to inquire whether the court rendering the decree or judgment had jurisdiction to render it.

Such is the settled doctrine of this court. In the leading case of *Thompson* v. *Whitman*, 18 Wall. 457, 468, the whole question was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one State may be questioned in a collateral proceeding in another State,

notwithstanding the averments in the record of the judgment itself. The court, among other things, said that if it be once conceded that "the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent." This decision was in harmony with previous decisions. Chief Justice Marshall had long before observed in *Rose* v. *Himely*, 4 Cranch, 241, 269, that upon principle the operation of every judgment must depend on the power of the court to render that judgment. In *Williamson* v. *Berry*, 8 How. 495, 540, it was said to be well settled that the jurisdiction of any court exercising authority over a subject "may be inquired into in every other court when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings," and that the rule prevails whether "the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States." In his Commentaries on the Constitution, Story, referring to *Mills* v. *Duryee*, 7 Cranch, 481, 484, and to the constitutional requirement as to the faith and credit to be given to the records and judicial proceedings of a State, said: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Con-

stitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." In the later case of *Galpin* v. *Page*, 18 Wall. 350, 365, 366—decided after, but at the same term as, *Thompson* v. *Whitman*—the court, after referring to the general rule as to the presumptions of jurisdiction in superior courts of general jurisdiction, said that such presumptions "only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred." In the same case: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

The question of the jurisdiction of the Pennsylvania court being then open, on this record, let us see what presumptions arise from the showing made by it.

The complaint in this case, as we have seen, alleged that on the third day of December, 1897,—the date of the insurance certificate—as well as prior and subsequent thereto, the defendant association engaged in business in Pennsylvania, soliciting applications for insurance and issuing policies to residents of that Commonwealth. The answer denied each and every material allegation in the complaint, and such a

denial under the Indiana Code of Civil Procedure was sufficient to put the plaintiffs upon proof of every fact that was essential in establishing their cause of action. Thornton's Indiana Code, art. 10, § 47; Title Pleadings; Rev. Stat. § 914.

The burden of proof was therefore upon the plaintiffs to show by what authority the Pennsylvania court could legally enter a personal judgment against a corporation which, according to the complaint itself, was a corporation of another State and was not alleged to have appeared in person or by an attorney of its own selection or to have been personally served with process. This burden the plaintiffs met by introducing in evidence a complete transcript of the record of the action in the Pennsylvania court from which it appeared: 1. That the defendant association was sued in the Pennsylvania court as a life insurance association of Indiana, was alleged to have been engaged in business in Pennsylvania, and was so engaged before and after the certificate of insurance in question was issued. 2. That the summons in that action was served on the Commissioner of Insurance for Pennsylvania, the defendant association not having appointed an agent in that Commonwealth upon whom process could be served nor having appeared by an attorney or representative. 3. That the Insurance Commissioner not having appeared in the action, judgment was taken against the defendant; and that is the judgment here in suit.

It was further made to appear in the present action that when the contract of insurance was executed, as well as before and since, it was provided by a statute of Pennsylvania, approved June 20, 1883, P. L. 134, amendatory of a previous statute of that Commonwealth establishing an Insurance Department, as follows: "No insurance company, not of this State, nor its agents, shall do business *in this State* until it has filed with the Insurance Commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the Insurance Commissioner, or the party designated by

him, or the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State so designated, such process may thereafter be served on the Insurance Commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this State, and that such service of process according to this stipulation shall be sufficient personal service on the company. The term process shall be construed to mean and include any and every writ, rule, order, notice or decree, including any process of execution that may issue in or upon any action, suit or legal proceeding to which said company may be a party by themselves, or jointly with others, whether the same shall arise upon a policy of insurance or otherwise, by or in any other court of this Commonwealth having jurisdiction of the subject matter in controversy, . . . and in default of an agent appointed by the company as aforesaid, then the officer so charged with the service of said process, shall, in like manner, deputize the sheriff, constable or other officer aforesaid of the county where the agent, if any there be, named by the Insurance Commissioner, may reside, to serve the same on him; and in default of such agent named by the Insurance Commissioner, as aforesaid, then in like manner to deputize the sheriff, constable or other officer as aforesaid of the county where the office of the Insurance Commissioner may be located, to serve the same on him, and each and every service so made, shall have the same force and effect to all intents and purposes as personal service on said company, in the county where said process issued; . . ."

The defendant association introduced no evidence. If looking alone at the pleadings in the Pennsylvania suit it be taken that at the time of the contract in question the

Indiana corporation was engaged in transacting, at least, *some* business in Pennsylvania, without having complied with the provisions of the above statute of that Commonwealth—that is, without having filed with the Insurance Commissioner the written stipulation required by that statute—still, plaintiffs cannot claim, on the present record, the full benefit of the general rule that the judgment of a court of superior authority, when proceeding within the general scope of its powers, is presumed to act rightly within its jurisdiction; that nothing shall be "intended to be out of the jurisdiction of a superior court but that which specially appears to be so." *Peacock* v. *Bell*, 1 Saunders, 73, 74. When a judgment of a court of superior authority is attacked collaterally for the want of jurisdiction, such a presumption cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting. We make this observation in view of the fact, distinctly shown by the plaintiffs themselves, that the policy of insurance and contract in question was, in fact, executed in Indiana and not in Pennsylvania. The policy sued on provided as one of its conditions that "for all purposes and in all cases this contract shall be deemed to have been made at the special office of this association in the State of Indiana, U. S. A., and all benefits and claims thereunder shall be payable at such office." Besides, to the complaint or petition in the Pennsylvania court was appended the following memorandum signed by the attorney for the plaintiffs: "The above contract of insurance is governed by the laws of the State of Indiana, the contract having been entered into at Indianapolis." And when the suit was brought in Pennsylvania the plaintiffs were confronted with the condition in the policy that "it is expressly understood and agreed that no action shall be maintained nor recovery had for any claims under or in virtue of this policy, after the lapse of six months from the death of said member," McNally. More than six months had elapsed after McNally's death before the suit was instituted in Pennsylvania. In order to obviate this difficulty the plaintiffs in

their declaration or statement in assumpsit, in the Pennsylvania court, alleged that the contract of insurance was governed by the laws of Indiana, "the contract having been entered into at Indianapolis, Indiana;" also, that "said policy of insurance and the contract touching the issuing the same were executed in the State of Indiana, in which State all provisions limiting liability on policies where suit is not brought within a certain time are held void and of no account." The plaintiffs cannot, therefore, be heard now to say that the contract was not, in fact, made in Indiana. What they alleged in the Pennsylvania suit precluded the idea that the contract of insurance was made in that Commonwealth. Indeed, if they had alleged that the business was transacted in Pennsylvania their action on the contract would have been defeated by the condition in the policy that no suit thereon could be brought on it after the expiration of six months from the death of the person whose life was insured.

But even if it be assumed that the insurance company was engaged in *some* business in Pennsylvania at the time the contract in question was made, it cannot be held that the company agreed that service of process upon the Insurance Commissioner of that Commonwealth would alone be sufficient to bring it into court in respect of *all* business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania. Undoubtedly, it was competent for Pennsylvania to declare that no insurance corporation should transact business within its limits without filing the written stipulation specified in its statute. *Lafayette Ins. Co.* v. *French,* 18 How. 404; *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648, 653, and authorities cited; *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28, 45. It is equally true that if an insurance corporation of another State transacts business in Pennsylvania without complying with its provisions it will be deemed to have assented to any valid terms prescribed by that Commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should

have done in order that it might lawfully enter that Commonwealth and there exert its corporate powers. In *Railroad Company* v. *Harris*, 12 Wall. 65, 81, the question was as to the jurisdiction of the Supreme Court of the District of Columbia of a suit against a corporation in Maryland, whose railroad entered the District with the consent of Congress. This court said: "It (the corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it does business there it will be presumed to have assented and will be bound accordingly." This language was cited and approved in *Railway Company* v. *Whitton*, 13 Wall. 270, 285. The same question was before the court in *Ex parte Schollenberger*, 96 U. S. 369, 376, and the principle announced in the *Harris* and *Whitton cases* was approved. In the *Schollenberger case* the Pennsylvania statute here in question was involved. To the same effect are the following cases: *Ehrman* v. *Teutonia Ins. Co.*, 1 McCrary, 123, 129; *Knapp, Stout & Co.* v. *Nat. Mut. Fire Ins. Co.*, 30 Fed. Rep. 607; *Berry* v. *Knights Templars' & Masons' Life Indemnity Co.*, 46 Fed. Rep. 439, 441, 442; *Diamond Plate Glass Co.* v. *Minneapolis Mut. Fire Ins. Co.*, 55 Fed. Rep. 27; *Stewart* v. *Harmon*, 98 Fed. Rep. 190, 192.

Conceding then that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that Commonwealth—"in this State." While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute

which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another State, although citizens of the former State may be interested in such business.

As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the Insurance Commissioner, without any legal notice to the defendant association and without its having appeared in person, or by attorney or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment,[1] we hold that the judgment in Pennsylvania was not entitled to the faith and credit which by the Constitution is required to be given to the public acts, records and judicial proceedings of the several States, and was void as wanting in due process of law.

The judgment of the Supreme Court of Indiana must, therefore, be reversed, with directions for further proceedings not inconsistent with this opinion.

It is so ordered.

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[1] *Ex parte Virginia*, 100 U. S. 339, 346, 347; *Neal* v. *Delaware*, 103 U. S. 370; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Gibson* v. *Mississippi*, 162 U. S. 565; *Chicago, Burlington &c. R. R.* v. *Chicago*, 166 U. S. 226, 233, 234.

WILSON *v.* SHAW, SECRETARY OF THE TREASURY.

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

No. 43. Argued October 19, 1906.—Decided January 7, 1907.

Where the bill is solely to restrain the Secretary of the Treasury from paying specific sums to a specific party this court may take judicial notice of the fact that such payments have actually been made and in that event whether rightfully made or not is a moot question.

While the courts may protect a citizen against wrongful acts of the Government affecting him or his property, the remedy is not necessarily by injunction, suit for which is an equitable proceeding, in which the interests of the defendant as well as those of the plaintiff will be considered.

Subsequent ratification is equivalent to original authority; and where Congress authorizes the acquisition of territory in a specific manner from a specific party, and it is otherwise acquired, the subsequent action of Congress in enacting laws for the acquired territory amounts to a full ratification of the acquisition, and the action of the Executive in regard thereto; and the concurrent action of Congress and the Executive in this respect is conclusive upon the courts.

The courts have no supervising control over the political branch of the Government in its action within the limits of the Constitution.

The title of the United States to the Canal Zone in Panama is not imperfect either because the treaty with Panama does not contain technical terms used in ordinary conveyances of real estate or because the boundaries are not sufficient for identification, the ceded territory having been practically identified by the concurrent action of the two interested nations.

Under the commerce clause of the Constitution, Congress has power to create interstate highways, including canals, and also those wholly within the Territories and outside of state lines.

The previous declarations of this court upholding the power of Congress to construct interstate or territorial highways are not *obiter dicta;* and to announce a different doctrine would amount to overruling decisions on which rest a vast volume of rights and in reliance on which Congress has acted in many ways.

25 App. D. C. 510, affirmed.

In a general way it may be said that this is a suit brought in the Supreme Court of the District of Columbia by the appellant, alleging himself to be a citizen of Illinois and the owner of property subject to taxation by the United States,

to restrain the Secretary of the Treasury from paying out money in the purchase of property for the construction of a canal at Panama, from borrowing money on the credit of the United States, from issuing bonds or making any payments under the act of Congress, June 28, 1902, 32 Stat. 481, providing for the acquisition of property and rights from Colombia and the canal company and the construction and operation of the canal and the Panama Railroad. The Republic of Panama and the New Panama Canal Company of France were named parties defendant, but they were not served with process and made no appearance. A demurrer to the bill was sustained, and the bill dismissed. This decree was affirmed by the Court of Appeals, from whose decision this appeal was taken.

Mr. Warren B. Wilson, appellant, *pro se:*

The doctrine is fully established that in proper cases, compulsory process, both mandamus and injunction, may be issued by the courts at the suit of private persons interested, to require such officials to do or refrain from doing, in their official capacity, things which the court can see it is their positive legal duty to do or not to do. *Marbury* v. *Madison*, 1 Cr. 137; *Kendall* v. *United States*, 12 Pet. 524; *United States* v. *Schurz*, 102 U. S. 378; *United States* v. *Black*, 128 U. S. 40; *United States* v. *Bayard*, 4 Mackey, 312; *Noble* v. *U. R. L. R. R. Co.*, 147 U. S. 165.

That a bill to restrain an unlawful disbursement of public funds or issue of public obligations is a proper case, and a private citizen has the necessary special interest to enable him to sustain such a bill as the present, is also clear. *Crampton* v. *Zabriskie*, 101 U. S. 601; Dillon on Mun. Corp., §§ 914–923; *Louisiana Board* v. *McComb*, 92 U. S. 531; *Rippe* v. *Becker*, 56 Minnesota, 100; *Pennoyer* v. *McConnaugh*, 140 U. S. 1; *Burke* v. *Snively*, 208 Illinois, 320; *The Liberty Bell*, 23 Fed. Rep. 831.

The suit is not a suit against the United States.

The cases already cited and the practically uniform course

of authority, establish that suits of this character to restrain public officials from misapplying public money are not open to this or any other objection. The State, or the United States, as the case may be, has an interest in the question whether the funds in the treasury shall be preserved for lawful uses or wasted in unlawful uses, and in a similar case a private corporation would be made defendant.

But the legal impossibility of making the State or United States a party in such cases does away with the necessity and a decree may be had against the official. *Osborn* v. *Bank of U. S.*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Dodge* v. *Woolsey*, 18 How. 331; *Allen* v. *B. & O. R. R. Co.*, 114 U. S. 311; *Virginia Coupon cases*, 114 U. S. 269; *United States* v. *Lee*, 106 U. S. 196, 212–215; *Tindal* v. *Wesley*, 167 U. S. 204.

The thing sought to be prevented here is exactly of the kind that has been constantly controlled, namely, an unlawful expenditure of the public money, and issue of public bonds not in exercising administrative discretion, and not in government at all, but in an unauthorized business venture. A case involving that question is one of private right, as to which the courts should and do give judgment, and not a political one, upon which they do not pass. *Crampton* v. *Zabriskie*, 101 U. S. 601; Dillon on Mun. Corp., §§ 914–924; *Rippe* v. *Becker*, 56 Minnesota, 100; *Burke* v. *Snively*, 208 Illinois, 328.

The treaty with Panama is not a performance of the conditions of the act of Congress because: Whatever has been acquired has not been acquired in the way required by the statute, *i. e.*, not by treaty from Colombia. And the things required to be acquired by treaty from Colombia have not been acquired at all, either from Colombia or Panama. It is not a compliance, because what was acquired was not acquired by treaty from Colombia. The statute in terms, requires the property and rights described to be obtained by treaty from the Republic of Colombia; and in that event, the other conditions being met, purports to authorize a payment to the Republic of Colombia.

It is not a compliance with the terms used, that these rights

and privileges shall have been obtained by force from the Republic of Colombia, or by treaty or otherwise from anyone else; nor does this act in terms authorize under any conditions the payment of any money to the Republic of Panama.

The treaty with Panama is not a compliance with the conditions precedent set out in the act, because the things required to be acquired from Colombia have not been acquired at all from Colombia or Panama. The boundaries of the strip supposed to be conveyed by the treaty with Panama, are not defined in that treaty, nor are any means afforded by which they can be defined. The grant is, therefore, void for uncertainty.

This condition precedent has, further, not been complied with, because the President has not acquired, for and on behalf of the United States the perpetual control of a strip of land six miles wide, including jurisdiction to make police and sanitary laws, and establish judicial tribunals to enforce them.

Congress has under the Constitution no authority to employ the public funds arising from all sources, including taxes, imposts and duties, laid and collected, money borrowed on the credit of the United States, and the proceeds of the disposition of the territory and other property of the United States, in making or buying and operating commercial canals and railroads and conducting like enterprises, in foreign countries.

This measure can derive no support from the power to regulate commerce among the several States, with foreign States and with the Indian tribes.

The power is to regulate, not to carry on, commerce. The power to regulate commerce is the power to prescribe the rule according to which it shall be carried on or governed. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Cooley* v. *Port Wardens*, 12 How. 299; *Welton* v. *Missouri*, 91 U. S. 279; *Tiernan* v. *Rinker*, 102 U. S. 123; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Interstate Comm. Comm.* v. *Brimson*, 154 U. S. 447; *E. C. Knight Co.* v. *United States*, 156 U. S. 1; *Addyston Pipe &c. Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197.

The power is to regulate not to carry on commerce, and the power to carry on commerce cannot be implied from the power to regulate it.

The term "implied powers" in general use, is unfortunate and inaccurate. The better term is that used in *Gibbons* v. *Ogden*, "included," or "comprehended powers."

A grant of powers to do one thing implies no power to do anything else. It includes a full choice of means, but the thing proposed to be done must always be the particular thing authorized; thus, navigation is commerce. Consequently Congress may regulate navigation, "because in regulating navigation, it is regulating commerce." *Gibbons* v. *Ogden*, 9 Wheat. 1.

The measure can derive no support from the power to establish postoffices and post-roads. It is not even attempted by this statute to establish this canal as a post-road. The general statute, making all canals post-roads while the mail is carried on them, means all canals in the United States.

The measure can derive no support from the power to declare war, which, as construed in *McCullough* v. *Maryland*, 4 Wheat. 407 and *Miller* v. *United States*, 11 Wall. 268, means the power to declare and carry on war. That means the whole power of the United States—both the power of the President and Congress.

The power is to carry on war, not to carry on commerce. This is commerce; transportation is commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Joint Traffic Assn.* v. *United States*, 171 U. S. 515.

The measure can derive no support from the provision that "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

Mr. Assistant Attorney General Russell, Mr. Glenn E. Husted and *The Solicitor General* for appellee:

Complainant is without right to sue.

There is no averment that he pays to the United States any

taxes whatever. But if he is a taxpayer he is not entitled to bring such a suit unless he shows some direct and special injury to himself above that suffered by others. *Grant* v. *Cooke*, 7 D. C. Rep. 166; *State* v. *Thorson* (S. D.), 33 L. R. A. 584; 1 Beach, Mod. Eq. Juris., §§ 641, 642; 1 High on Injunction, § 9; *Georgetown* v. *Alex. Canal Co.*, 12 Pet. 91, 99.

The payments sought to be enjoined having been made and thirty million dollars in bonds issued, of which the court will take judicial notice, this attempt to restrain payment is largely a moot question, which the court will not consider. *Mills* v. *Green*, 159 U. S. 651; *Am. Book Co.* v. *Kansas*, 193 U. S. 49, 52; *Cheong Ah Moy* v. *United States*, 113 U. S. 216.

Title to the canal strip having been acquired, this suit in effect seeks to restrain the Government from improving its property. The United States is therefore a necessary party. It has not consented to be sued and cannot be sued without its consent. *Belknap* v. *Schild*, 161 U. S. 10; *International Supply Company* v. *Bruce*, 194 U. S. 601; *Oregon* v. *Hitchcock*, 202 U. S. 60.

That this court will not attempt to enjoin the enforcement by the Executive of a statute simply because it is alleged to be unconstitutional is too well established to call for argument. *Mississippi* v. *Johnson*, 4 Wall. 475; *Sutherland* v. *The Governor*, 29 Michigan, 320, 329; *Georgia* v. *Stanton*, 6 Wall. 50; *Decatur* v. *Spaulding*, 14 Pet. 497, 515.

The treaty with the Republic of Panama complies with the Spooner Act, if such compliance is necessary. This court has frequently affirmed the principle that statutes should be given a reasonable construction and application. *United States* v. *Kirby*, 7 Wall. 482, 486–487; *Blake* v. *National Bank*, 23 Wall. 309, 320; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *In re Chapman*, 166 U. S. 661, 667; *Bate Ref. Co.* v. *Sulzberger*, 157 U. S. 1, 37; *Collins* v. *New Hampshire*, 171 U. S. 30, 34; *Knowlton* v. *Moore*, 178 U. S. 41, 77; *Interstate Comm. Comm.* v. *Baird*, 194 U. S. 38.

The Spooner Act, the treaty with Panama, and the construc-

tion of the canal are not unconstitutional. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 334; *California* v. *Central Pac. Co.*, 127 U. S. 1; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 530; *Gilman* v. *Philadelphia*, 3 Wall. 713.

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

If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit, $40,000,000, to the Panama Canal Company, and $10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take judicial notice, that those payments have been made and that whether they were rightfully made or not is, so far as this suit is concerned, a moot question. *Cheong Ah Moy* v. *United States*, 113 U. S. 216; *Mills* v. *Green*, 159 U. S. 651; *American Book Company* v. *Kansas*, 193 U. S. 49; *Jones* v. *Montague*, 194 U. S. 147.

But the bill goes further and seeks to restrain the Secretary from paying out money for the construction of the canal, from borrowing money for that purpose and issuing bonds of the United States therefor. In other words, the plaintiff invokes the aid of the courts to stop the Government of the United States from carrying into execution its declared purpose of constructing the Panama Canal. The magnitude of the plaintiff's demand is somewhat startling. The construction of a canal between the Atlantic and Pacific somewhere across the narrow strip of land which unites the two continents of America has engaged the attention not only of the United States but of other countries for many years. Two routes, the Nicaragua and the Panama, have been the special objects of consideration. A company chartered under the laws of France undertook the construction of a canal at Panama. This was done under the superintendence and guidance of the famous Ferdinand de Lesseps, to whom the world owes the Suez Canal. To tell the story of all that was done in respect

to the construction of this canal, prior to the active intervention of the United States, would take volumes. It is enough to say that the efforts of De Lesseps failed. Since then Panama has seceded from the Republic of Colombia and established a new republic which has been recognized by other nations. This new republic has by treaty granted to the United States rights, territorial and otherwise. Acts of Congress have been passed providing for the construction of a canal, and in many ways the executive and legislative departments of the Government have committed the United States to this work, and it is now progressing. For the courts to interfere and at the instance of a citizen, who does not disclose the amount of his interest, stay the work of construction by stopping the payment of money from the Treasury of the United States therefor, would be an exercise of judicial power which, to say the least, is novel and extraordinary.

Many objections may be raised to the bill. Among them are these: Does plaintiff show sufficient pecuniary interest in the subject matter? Is not the suit really one against the Government, which has not consented to be sued? Is it any more than an appeal to the courts for the exercise of governmental powers which belong exclusively to Congress? We do not stop to consider these or kindred objections; yet, passing them in silence must not be taken as even an implied ruling against their sufficiency. We prefer to rest our decision on the general scope of the bill.

Clearly there is no merit in plaintiff's contentions. That, generally speaking, a citizen may be protected against wrongful acts of the Government affecting him or his property may be conceded. That his remedy is by injunction does not follow. A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered as well as those of the plaintiff. Ordinarily it will not be granted when there is adequate protection at law. In the case at bar it is clear not only that plaintiff is not entitled to an injunction, but also that he presents no ground for any relief.

He contends that whatever title the Government has was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. The title to what may be called the Isthmian or Canal Zone, which at the date of the act was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of Panama. The latter was recognized as a nation by the President. A treaty with it, ceding the Canal Zone, was duly ratified. 33 Stat. 2234. Congress has passed several acts based upon the title of the United States, among them one to provide a temporary government, 33 Stat. 429; another, fixing the status of merchandise coming into the United States from the Canal Zone, 33 Stat. 843; another, prescribing the type of canal, 34 Stat. 611. These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the Government in its action within the limits of the Constitution. *Jones* v. *United States*, 137 U. S. 202, and cases cited in the opinion; *In re Cooper*, 143 U. S. 472, 499, 503.

It is too late in the history of the United States to question the right of acquiring territory by treaty. Other objections are made to the validity of the right and title obtained from Panama by the treaty, but we find nothing in them deserving special notice.

Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, "grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said

canal." By article 3, Panama "grants to the United States all the rights, power and authority within the zone mentioned and described in article 2 of this agreement, . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal. It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.

Further, it is said that the boundaries of the zone are not described in the treaty; but the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter. The fact that there may possibly be in the future some dispute as to the exact boundary on either side is immaterial. Such disputes not infrequently attend conveyances of real estate or cessions of territory. Alaska was ceded to us forty years ago, but the boundary between it and the English possessions east was not settled until within the last two or three years. Yet no one ever doubted the title of this republic to Alaska.

Again, plaintiff contends that the Government has no power to engage anywhere in the work of constructing a railroad or canal. The decisions of this court are adverse to this contention. In *California* v. *Pacific Railroad Company*, 127 U. S. 1, 39, it was said:

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and

military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as Federal corporations. See *Pacific Railroad Removal cases*, 115 U. S. 1, 14, 18."

In *Luxton* v. *North River Bridge Company*, 153 U. S. 525, 529, Mr. Justice Gray, speaking for the court, said:

"Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 411, 422; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 861, 873; *Pacific Railroad Removal cases*,

115 U. S. 1, 18; *California* v. *Pacific Railroad,* 127 U. S. 1, 39. Congress has likewise the power, exercised early in this century by successive acts in the Cumberland or National road, from the Potomac across the Alleghanies to the Ohio, to authorize the construction of a public highway connecting several States. See *Indiana* v. *United States,* 148 U. S. 148."

See also *Monongahela Navigation Company* v. *United States,* 148 U. S. 312.

These authorities recognize the power of Congress to construct interstate highways. *A fortiori,* Congress would have like power within the Territories and outside of state lines, for there the legislative power of Congress is limited only by the provisions of the Constitution, and cannot conflict with the reserved power of the States. Plaintiff, recognizing the force of these decisions, seeks to obviate it by saying that the expressions were *obiter dicta,* but plainly they were not. They announce distinctly the opinion of this court on the questions presented, and would have to be overruled if a different doctrine were now announced. Congress has acted in reliance upon these decisions in many ways, and any change would disturb a vast volume of rights supposed to be fixed; but we see no reason to doubt the conclusions expressed in those opinions, and adhere to them. The Court of Appeals was right, and its decision is

Affirmed.

BACHTEL *v.* WILSON, SHERIFF.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 446. Argued November 14, 15, 1906.—Decided January 7, 1907.

The highest court of a State is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statutes.

Where the highest court of a State has, without opinion, sustained the validity of a state statute and there were at least two questions of construction before it, one of which excluded all Federal objections on which its decision can rest, until it is shown which construction the state court accepted, this court cannot hold the statute to be unconstitutional.

While a state legislature may not arbitrarily select certain individuals for the operation of its statutes, the selection in order to be obnoxious to the equal protection clause of the Fourteenth Amendment must be clearly and actually arbitrary and unreasonable and not merely possibly so.

Writ of error to review 74 Ohio St. 524, dismissed.

THE sole question in this case, as stated by counsel for plaintiff in error, is whether the following section of the statutes of Ohio contravenes section 1 of the Fourteenth Amendment of the Constitution of the United States:

"Every president, director, cashier, teller, clerk or agent of any banking company who shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of such company, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any notes, bonds, drafts or bills of exchange, mortgage, judgment or decree, or shall make any false entry in any book, report or statement of the company, with intent in either case to injure or defraud the company, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the company, or any agent appointed to inspect the affairs of any banking company in this State, shall be guilty of an offense, and, upon conviction thereof, shall be confined in the peni-

tentiary, at hard labor, not less than one year nor more than ten years." Section 30, Act of March 21, 1851, entitled "An act to authorize free banking," as amended April 24, 1879, 76 O. L. 74; 2 Bates' Annotated Ohio Statutes, 6th ed., §§ 3821–3885.

Plaintiff in error, who was cashier of the Canton State Bank, a bank incorporated under the above "free banking" act, was indicted in the Court of Common Pleas of Stark County for a violation of this section. A demurrer to the indictment having been overruled, he, before arraignment, sued out a writ of *habeas corpus* in the circuit court of that county. Thereafter the final judgment of the Supreme Court of the State in that proceeding having been adverse, he brought the case here on this writ of error.

Mr. William A. Lynch for plaintiff in error:

The prosecution of plaintiffs in error under section 30, as amended in 1879, violates section 1 of the Fourteenth Amendment. If the court holds that section 30 includes only the officials and agents of the so-called free banks, then this statute and these prosecutions deprive the plaintiffs in error of their liberty without due process of law and deny to them the equal protection of the laws, because the statute is enforcible against a very small part of a class of persons all of whom act under similar conditions and circumstances; if the court holds that section 30 includes the officials and agents of all incorporated banks, but excludes those of unincorporated private banks, the same discrimination is presented in principle, and the same result should follow. *Caldwell* v. *Texas*, 137 U. S. 692; *Railroad Co.* v. *Matthews*, 174 U. S. 96; *Railway Co.* v. *Ellis*, 165 U. S. 150; *Giozza* v. *Tiernan*, 148 U. S. 657.

The legislature has no power to treat the officials and agents of the so-called free banks as a class by themselves. It cannot create a class where none naturally exists. Classification cannot be made arbitrarily, but must be based upon some

difference which bears a just and proper relation to the attempted classification. *Railway Co.* v. *Ellis*, 165 U. S. 150; *Railroad Co.* v. *Matthews*, 147 U. S. 96, 104; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 539.

Mr. Charles C. Upham and *Mr. John W. Craine* for defendant in error:

The Fourteenth Amendment was not intended to repeal or annul existing legislation or special laws, existing at the time of its adoption, and when it was adopted the "Free Banking Act" remained as much unimpaired as it was prior to the adoption of that Amendment. While § 30 of the "Free Banking Act of 1851," Rev. Stats. §§ 3821–3885, was amended April 24, 1879, if that amendment is constitutional, well and good; but if it is unconstitutional the repealing clause falls with the amendment, and the original act is restored. This has been the uniform holding of the Supreme Court of Ohio, which is the conclusive judge of state enactments. 67 Ohio St. 303, 306; 66 Ohio St. 482, 488; 60 Ohio St. 273.

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

Counsel predicate the unconstitutionality of this statute, not on its provisions standing by themselves, but on its relation to other statutes.

On February 26, 1873 (70 O. L. 40), an act was passed in terms incorporating savings and loan associations, but with powers such as in fact authorized the carrying on of ordinary commercial banking. Under this statute a few institutions were organized. In 1880 a general incorporation law was enacted (Rev. Stat. Ohio, 1880, § 3235 and following), and under it many banks were formed. In addition the banking statistics of the State show that there are several banks owned by unincorporated stockholders, copartnerships or individuals. Now, in no statute, save the free banking act, is there any

section with provisions kindred to those in section 30 above quoted, and the contention is that the plaintiff in error was denied the "equal protection of the laws" guaranteed by the Fourteenth Amendment, in that he was subject to prosecution and punishment for matters and things which, if done by a cashier of any similar institution, whether unincorporated or incorporated under the statutes of Ohio other than the free banking act, would not subject him to punishment. The cashiers of such other institutions are charged with duties substantially the same as those of this plaintiff in error, and yet the one may be punished for a violation of those duties and the others not. Can the State single out a few men and punish them for acts, when for like acts others are free from liability?

No opinion was filed by the Supreme Court of the State, and we, therefore, are not advised of the grounds upon which that court held section 30 valid; yet that court did hold it valid, and in the face of the same objections that are made to it here. If "any banking company," as found in the free banking act, is applicable to every banking institution, no matter under what statute organized, there is no violation of the equal protection of the laws. Counsel for plaintiff in error contend that the Supreme Court could not have given so broad a meaning to those words, because they are in a section treating of crimes, and the rule of strict construction, which is universal in respect to criminal statutes, forbids its extension to institutions other than those incorporated under the act of which it is a part; because the title of the original act, "An act to authorize free banking," limits the scope of the statute, and therefore the applicability of every section therein; and, further, that as the free banking act, as originally passed, was only to be in force until the year 1872, it is improbable that a criminal provision of general application should be inserted in an act so limited in the matter of time. On the other hand, it is contended by the defendant in error that the words in section 30, "any banking company," em-

brace all banking institutions in the State of Ohio, whether incorporated under the free banking act or not, and this because the words themselves are broad and comprehensive, because there is no other provision in the statutes for punishing those who commit the offenses named in said section, and it cannot be supposed that the legislature intended that other like officials should be immune from punishment, and also because section 30, both in the original act and also in the Revised Statutes, has no apparent connection with, in no way modifies or affects any other sections, and might as well have been placed in the criminal code or by itself in the statutes.

But we are not called upon to decide which is the correct interpretation. The Supreme Court of a State is the ultimate tribunal to determine the meaning of its local statutes. We are not to assume that that which seems more reasonable to us also seemed more reasonable to and was adopted by it. Before we can pronounce its judgment in conflict with the Federal Constitution it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was. It surely is not unworthy of consideration that the legislature, having before it the question of punishment for offenses committed by banking officers, having made provision therefor by one section in which it used the term "any banking company," may have believed that thereby it had included in its punitive provisions all banking institutions, and that a repetition of that section in other statutes was unnecessary. We do not decide that this was so, but we do hold that in view of the silence of the Supreme Court we are not justified in assuming that it held that it was not so.

Further, if we assume that the Supreme Court was of the opinion that section 30 was limited in its applicability to institutions incorporated under the free banking act, a question will then be whether the selection of officers of those institutions and subjecting them to punishment, when the officers of all other banking institutions, guilty of similar offenses, are

not so subject, is a denial of the equal protection of the laws. The power of a state legislature to select certain individuals for the operation of a statute is not an arbitrary power, one that it can exercise without regard to any principle of classification. And yet there is a power of selection. The Fourteenth Amendment was not designed to prevent all exercise of judgment by a state legislature of what the interests of the State require and to compel it to run all its laws in the channels of general legislation. It may deem that social and business conditions, without penal legislation, afford ample protection to the public against wrongdoing by certain officials, while such legislation may be deemed necessary for like protection against wrongdoing by other officials charged with substantially similar duties. The duties of a county or city treasurer may be very like those of the treasurer of a charitable or business corporation, and yet if the legislature prescribed penalties for misconduct of the former and none for similar misconduct of the latter it would be giving the amendment extreme force to make it efficient to overthrow the statute and thus relieve all treasurers from punishment. In short, the selection, in order to become obnoxious to the Fourteenth Amendment, must be arbitrary and unreasonable, not merely possibly, but clearly and actually so. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. Would the singling out for punishment of the officers of the free banks be an arbitrary selection? The free banks, though they may be like other banking institutions, are not in all respects the same.

But here, too, we are not called upon for an absolute decision, nor do we deem it necessary to determine whether there be such differences as will sustain the imposition of punishment of their officers, when none is cast upon the like officers of other banks. We only refer to these matters to indicate that there were at least two questions before the Supreme Court involving the validity of section 30, one of which, at least, presents no matter of a Federal nature, and in respect to each of which something may be said one way

and the other, and until it is shown what the Supreme Court did in fact decide, it is impossible to hold that the section as construed by it is in conflict with the Federal Constitution.

Under those circumstances it is clear that we have no jurisdiction, *Johnson* v. *Risk*, 137 U. S. 300, and cases cited in opinion, and the writ of error is

Dismissed.

BACHTEL *v.* WILSON, SHERIFF.
MILLER *v.* SAME.
DAVIS *v.* SAME.
VAN HORN *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Nos. 447, 448, 449 and 450. Argued November 14, 15, 1906.—Decided January 7, 1907.

Bachtel v. *Wilson*, *ante* p. 36, followed.

THE facts appear in the statement of the previous case which was argued simultaneously herewith.

Mr. William A. Lynch for plaintiffs in error.[1]

Mr. Charles C. Upham and *Mr. John W. Craine* for defendant in error.[1]

MR. JUSTICE BREWER delivered the opinion of the court.

The same question controls these cases as the one just decided, and, for the reasons given in the foregoing opinion, they are

Dismissed.

[1] For abstracts of arguments see *ante*, pp. 37, 38.

KANN *v.* KING.
WEBB *v.* KING.

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

Nos. 16, 17. Argued March 8, 9, 1906.—Decided January 7, 1907.

Whatever power a court of equity may have to relieve a tenant from forfeiture for breach of covenant to pay taxes, it cannot require the owner to risk the loss of his property by compelling him to contest the validity of an irredeemable tax title, based on taxes not paid by the tenant, so that if the title be invalid the tenant may pay the taxes and be relieved of the forfeiture, nor is this rule affected by the fact that the tax title is held by a third party.

Where the forfeiture from which relief is sought has been occasioned by gross negligence of the person seeking relief the default is not one brought about by accident or mistake.

Even if default in complying with a covenant has been brought about by accident or mistake, in the absence of culpability of the other party a court of equity will not relieve the party in default from forfeiture unless it can be done with justice to the innocent party.

Where a lease contains a covenant to pay taxes, the fact that the owner has on some occasions collected the amount from the tenant and himself paid the taxes does not relieve the tenant from the obligation to pay the taxes according to the lease, or, where it appears that his failure to do so was not the result of the owner's conduct, relieve him from the forfeiture resulting from his breach of the covenant to pay them.

Where a tenant is in default and his lease subject to forfeiture for nonpayment of taxes for which the property has been sold, and before the landlord determines to avail of the forfeiture, he offers to condone it provided the tenant commence proceedings to have the outstanding tax title declared invalid and secure him from loss in case it be sustained and the tenant refuses so to do, no principle of equity prevents the landlord, or renders his action fraudulent, in taking any course most conducive to his own interest and not forbidden by law to regain possession of the premises and to obviate the danger of a contest as to the validity of the tax sale.

25 App. D. C. 182 reversed.

THE facts are stated in the opinion.

Mr. William G. Johnson for appellants, Kann.

This court should not undertake to determine the question of the validity of the tax title.

If the adjudication of its invalidity is essential to complainant's right to relief, that inquiry should never have been entered upon, but the bill should, for that reason alone, have been dismissed.

Admitting the right of the court in this proceeding to try the validity of the tax title at the suit of the tenant would result in this obvious anomaly, namely:

If the court found the tax title to be valid, which it must be conceded it could do if it can adjudicate upon it at all, instead of placing the parties in *statu quo*, the essential purpose of the relief from forfeiture, the court would be compelled to complete the mischief originating in the tenant's default and destroy the title of both lessor and lessee.

Mr. R. Ross Perry, with whom *Mr. R. Ross Perry, Jr.* and *Mr. E. S. Theall* were on the brief, for appellant, Webb:

The pleadings and testimony do not establish such a case as entitles the complainant to relief in a court of equity against an admitted forfeiture of a lease by breach of a covenant on the part of the lessee (complainant) to pay all taxes accruing during the demised term. *Bowser* v. *Colby*, 1 Hare, 109, 134; *Home* v. *Thompson*, Sause & Scully's Rep.; *Rolfe* v. *Harris*, 2 Price, 206 (220); *White* v. *Warner*, 2 Merivale, 459; *Green* v. *Bridges*, 4 Simmons, 96; *Reynolds* v. *Pitt*, 19 Vesey, 134; *Gregory* v. *Wilson*, 9 Hare, 683; *Nokes* v. *Gibbons*, 26 L. J. Ch. 433; *Job* v. *Bannister*, 2 K. & J. 374.

All considerations applicable to a failure to insure apply with augmented force to a failure to pay taxes. Fire does not destroy title; a tax sale does.

Prior to the passage of the conveyancing act, the law was settled in England that save in cases of fraud, accident and mistake, equity will not interfere when the measure of compensation is uncertain, save where the breach concerns a covenant to pay rent. A breach of a collateral covenant does not admit of a certain measure of compensation. A lessor contracts in view of the law. His contract right to have a

collateral contract performed under penalty of forfeiture is a right of property and cannot be taken from him, save by process of condemnation.

It has been explicitly decided that, where due payment of taxes is one of the covenants of a lease, and the taxes are allowed to become delinquent by the lessee or his assigns, no demand for their payment by the lessor is necessary before declaring a forfeiture, and that equity will not relieve against the forfeiture of a lease for breach of covenant when the breach has been culpable, long persisted in, and detrimental. *Bacon* v. *Park*, 19 Utah, 46; *Baldwin* v. *Reese*, 6 Ohio Decisions, (Reprint), 556. See also *Clark* v. *Barnard*, 108 U. S. 436; *Klein* v. *Insurance Co.*, 104 U. S. 88; *Thompson* v. *Insurance Co.*, 104 U. S. 252; *Skinner* v. *Dayton*, 2 Johns. Ch. 526; *Baxter* v. *Lansing*, 7 Paige's Ch. Rep. 350; *Dunklee* v. *Adams*, 20 Vermont, 415; *Ottawa Road Co.* v. *Murray*, 15 Illinois, 336.

Such a breach of a covenant to pay taxes is not one that can be compensated to a landlord. *Hand* v. *Suravitz*, 148 Pa. St. 202; *Trinity Church* v. *Higgins*, 48 N. Y. 532; Fry on Specific Performance, § 41; *Hill* v. *Barclay*, 18 Ves. 63.

Where the tenant has covenanted to pay all accruing taxes upon the demised premises, no duty rests upon the landlord, as between the tenant and himself, to keep watch upon the tenant's possible defaults and to avoid their consequences. The true construction of the contract is that such taxes shall be paid in the ordinary course of collection, and shall not become in any way a burden on the lessor. *Allen* v. *Dent*, 72 Tennessee, 680. Such being the case, on no principle of law can it be said to be the duty of the landlord in such a case to anticipate the tenant's default, or to supervise him in the discharge of his covenanted duty, or to remedy his breach of covenant by positive action upon the lessor's own part and at his own expense.

The lessor's conduct in herself paying the taxes and then having the lessee refund them to her was at the most a gratuitous act of favor on her part, for which she received no con-

sideration. It still remained the lessee's covenant duty to herself in the first instance to pay these taxes when due to the corporate authority. This line of conduct on the lessor's part did not divest her of her right to at any time require the lessee to literally perform her covenant.

Where the tenant has not only allowed the demised premises to be sold for taxes, but has continued his breach until a tax deed for the demised premises has issued to an assignee of the purchaser, the tenant cannot litigate the question of the validity of that tax sale with the holder of the tax title at the risk of the landlord. *Bacon* v. *Park*, 19 Utah, 46.

Mr. J. J. Darlington and *Mr. Leon Tobriner* for appellee:

The tax title is clearly invalid and presents no obstacle to relief. 28 Stat. 282; *Williams* v. *Peyton*, 4 Wheat. 77, 79; *Ronkendorff* v. *Taylor's Lessee*, 4 Pet. 349, 359; *Marx* v. *Hanthorn*, 148 U. S. 172, 180; *Early* v. *Doe*, 16 How. 617, 618; *Sargent* v. *Bean*, 7 Gray, 125; *Desmond* v. *Babbitt*, 117 Massachusetts, 235; *Milner* v. *Clarke*, 61 Alabama, 258; *Ex parte Thacher*, 3 Sneed, 344.

Even if valid, the circumstances attending its purchase, and the purposes of its acquisition and for which it has been attempted to be used, are such as to prevent its being allowed to stand in the way of relief in a court of equity.

The bill makes no persons parties who are not interested in each of the two questions it presents, namely, whether the tax title is valid, and whether the forfeiture shall be relieved against and the lease continued; and for this reason alone, as well as for others stated, it is not multifarious. *Gaines* v. *Chew*, 2 How. 619; *Oliver* v. *Piatt*, 3 How. 411; *Barney* v. *Latham*, 103 U. S. 214; *Payne* v. *Hook*, 7 Wall. 432; *Hoe* v. *Wilson*, 9 Wall. 501; *McArthur* v. *Scott*, 113 U. S. 391; *California* v. *Southern Pac. Co.*, 157 U. S. 249.

The courts below did not exceed their jurisdiction, either in principle or under the great weight of authority, in holding that breach of a covenant to pay taxes may be relieved against

in equity where there has been no tax sale, valid for any purpose, and where, therefore, the taxes may still be paid and the *status quo* fully restored. *Lundin* v. *Schaeffel*, 167 Massachusetts, 465; *Sanborne* v. *Woodman*, 5 Cush. 36; *Giles* v. *Austin*, 62 N. Y. 491; *McTier* v. *Osborn*, 146 Massachusetts, 499; *Garner* v. *Hannah*, 6 Duer, 273.

See, also, for additional cases in which relief was granted against attempted forfeitures for forgetful or negligent omission to pay taxes, *Noyes* v. *Anderson*, 124 N. Y. 175; *McClartey* v. *Gokey*, 31 Iowa, 506; to make repairs within the time limited, *Bargent* v. *Thompson*, 4 Giff. 473; to improve by the erection of a building, *Hagan* v. *Beck*, 44 Vermont, 286; to maintain a gas supply pipe, *South Bend Oil Co.* v. *Edgell*, 86 Am. St. Rep. 43; omission to pay an incumbrance assumed, *Hancock* v. *Carleton*, 6 Gray, 39; *Kopper* v. *Dyer*, 59 Vermont, 477; *Steel* v. *Branch*, 40 California, 3, 11; covenants not to assign until improvements are completed, *Grigg* v. *Landis*, 21 N. J. Eq. 494, 510–512.

Even if, under ordinary circumstances, the law were otherwise, as to the general power to relieve against forfeiture for breach of such a covenant, the evidence warranted the court's finding in fact that the default in the case at bar was largely, if not principally, occasioned by the lessor's own inadvertence, oversight or negligence, and its finding in law that a default, so occasioned, should not be taken advantage of for the sole purpose, confessed on the record, of getting rid of the unexpired term and of obtaining a higher rent.

Mr. Justice White delivered the opinion of the court.

These appeals are from a decree of the Court of Appeals of the District of Columbia, which adjudged that a tax-sale of certain real estate in the District was void, and which relieved the lessee of the premises from a threatened forfeiture of the lease, asserted to have resulted from the failure of the tenant to pay the taxes to enforce which the tax-sale was made. The complainant in the original bill was Caroline King, the lessee

of the premises, and the defendants were Marianne A. B. Kennedy (the lessor) and Louis Kann, Sigmund Kann and Myer Cohen, whom it was alleged claimed to be either the equitable or legal owners of the tax-title in question. The defendant Kennedy died the day the bill was filed, and Henry Randall Webb, as her executor, and Maria G. Dewey, as her heir at law, were substituted as defendants.

The lessor prosecuted an appeal from an order granting an injunction *pendente lite*, restraining him, among other things, from prosecuting landlord and tenant proceedings, based upon a right of reëntry arising from the alleged forfeiture caused by the non-payment of taxes and tax sale referred to in the bill. The Court of Appeals on the face of the bill sustained the order of injunction. 21 App. D. C. 141. The cause having been put at issue by separate answers asserting the right of the lessor to forfeit and the right of the holders of the tax title was tried on the merits and was decided in favor of the complainant. It was taken to the Court of Appeals on behalf of all the defendants except Mrs. Dewey, and the decree of the lower court, adjudging the tax sale to be void and relieving from the alleged forfeiture, was affirmed. 25 App. D. C. 182.

The origin of the controversy and the facts as to which there are no dispute are as follows:

The property in controversy, No. 715 Market Space, in the City of Washington, was owned by and assessed for taxation in the name of Maria T. Gillis at the time of her death, intestate, in 1871. Marianne A. B. Kennedy, as the heir at law of Mrs. Gillis, took possession of the property as owner, without any administration upon the estate of Mrs. Gillis. After the death of Mrs. Gillis, continuously up to the making of the tax-sale hereafter referred to, the property remained on the public records and continued to be assessed in the name of Mrs. Gillis, except that a small portion of the rear end of the premises was, at a time not shown, but prior to the tax-sale before referred to, assessed for taxation in the name of Mrs. Kennedy and her husband.

In 1890, Mrs. Kennedy leased in writing the premises to Henry King, Jr., the husband of complainant, for use as a fancy dry-goods store, and by several extensions the period of expiration of this lease came to be October 1, 1908. By the lease the lessee, his executors and administrators or assigns, were bound, "during the continuance and until the end and determination of the said term, for which the said premises are demised, to pay or cause to be paid in each and every year thereof the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government." The right to terminate the lease and to reënter upon the breach of any of the conditions was stipulated. When the lease was made King, the lessee, was engaged in the dry-goods business in a store on Seventh street, not far from the Market Space store. Under the lease he entered into possession of the Market Space store and carried on, in addition, business there until his death on August 18, 1897. Sanctioned by an order of the Probate Court, an assignment of the lease covering the store on Market Space was made to Caroline King, the widow. The business was thereafter conducted for a time solely in her name. She did not, however, actively supervise it. Her elder son, Harry King, who had been, during the latter years of his father's life, in general charge of the business for his father, remained in that capacity, after the death of the father, as the representative of his mother, assisted at the Market Space store, in a subordinate capacity, by a brother, Joseph King, who, during the father's life, had also, in a subordinate capacity, been engaged in business at that place. From the making of the lease in 1890 to the death of King in 1897 it was the habit of Mrs. Kennedy, when the tax on the Market Space store was about to become payable, to request the lessee to send her a check for the amount of the tax, and on the receipt thereof the tax was paid either by Mrs. Kennedy or her agent. This course was not, however, followed, after the death of King. The first installment of taxes which fell due in November, 1897, soon after the

death of King, was directly discharged by Mrs. King, who took and retained the receipt. This was done at the request of Mrs. Kennedy, who called at the Market Space store about Christmas, 1897, and asked that the tax be paid. From that time no request was made by the lessor to the tenant, as the taxes fell due, to send her the money to enable her to pay them, nor is it shown that any express demands were made that the tenant pay the taxes directly. From the time of the payment by the tenant, near the close of 1897, of the first installment of taxes which fell due after the death of her husband, until the summer of 1900, a period of more than two and a-half years, no taxes whatever were paid upon the leased premises. In the interval the following taxes became overdue:

Second installment of tax for 1898, due in May, 1898;
First installment of tax for 1899, due in November, 1898;
Second installment of tax for 1899, due in May, 1899;
First installment of tax for 1900, due in November, 1899; and,
Second installment of tax for 1900, due in May, 1900.

On July 24, 1900, the two installments of the tax for 1900, due in November, 1899, and May, 1900, with accrued penalties, were paid by the tenant under the following circumstances: As testified by Harry King, he being concerned over past due taxes, owing on a large number of tracts of real estate owned by the estate of his father, it "occurred" to him to have the "bookkeeper go down to the tax office and inquire for the tax bills of 715 Market Space." The bookkeeper went and subsequently reported that the two installments for 1900 were due, and Harry King paid them. The nature of the inquiry made by the bookkeeper at the tax office, and what occurred, is the subject of controversy, and we pretermit its consideration. Nearly a year after, in May, 1901, the two installments of taxes for 1899, due in November, 1898, and May, 1899, with interest and penalties, along with the taxes for 1901, were paid by the tenant. The payment of the 1899 taxes was by way of redemption of a sale of the property for such taxes made on April 12,

1900. There is no doubt that the payment of the arrears for 1899 was a result of the visit by the bookkeeper to the tax office. It will be observed that the payments which were made in 1900 and 1901, of taxes which were in arrears, did not embrace the second installment of the tax of 1898, due in May, 1898. To enforce that installment a sale had been made in April, 1899, and a certificate was issued to the purchaser a few days thereafter, which was subject to a right of redemption during a period of two years. In other words, when the installments of taxes which were in arrears were paid on July 24, 1900, the property had been sold for the last half of the tax of 1898, and when the payment was made in 1901 of the arrears for 1899 the period for redemption had elapsed.

On July 25, 1901, Mrs. King received a letter sent from Rochester, New York, by one Wiltsie, stating that he had bought the property in April, 1899, at a tax sale to enforce the tax for the second half of the year 1898, and that he was entitled to a deed of the property, but would surrender the tax certificate if immediate payment was made of the amount of his, Wiltsie's, advance, viz., $143.93, together with the statutory interest at the rate of fifteen per cent, and a charge for releasing to be agreed upon. Harry King replied to this letter on July 30, 1901, and asked to be informed of the charge for redemption. Wiltsie answered on August 1, 1901, calculating the statutory interest at $50.38, and naming $100 as his fee or charge for releasing. To this letter reply was made that Harry King was out of town, and that on his return the letter of Wiltsie would be laid before him. On September 17, 1901, Wiltsie wrote King, and called attention to the fact that he had not heard from him, and requested to be informed by return mail when the matter would have attention. To this, King replied, objecting to the charge of $100 for releasing, and stated that in his opinion $50 would be an equitable charge. The letter concluded as follows:

"Unfortunately we have paid you quite a considerable amount of money in the past for tax-sales. We are not in-

terested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check."

It was replied on September 24, 1901, that if the matter was attended to promptly $75 would be accepted for the release certificate, and that the papers had been sent to the Central National Bank of Washington where, on payment of $272.90, they would be delivered up.

Neither Mrs. King nor her representatives, after learning in July of the sale of the property and of the outstanding tax title, gave any notice of that fact to the lessor, nor did they apparently concern themselves further about the matter, until the purchase of the certificate from Wiltsie, as hereafter stated, by Cohen, one of the defendants.

Both the Kann defendants carried on business on Market Space, having stores on each side of the property leased to King, and the situation was therefore such that the possession of that property was particularly advantageous to the Kanns. Indeed, they had at some previous time stated to Webb, the attorney of the lessor, that if they could obtain a long lease of the premises they would be willing to pay a rent much in advance of that paid by Mrs. King. Some time in September, 1901, one Knight called upon the Kanns and informed them that the property at 715 Market Space had been sold for taxes. They referred him to Webb, the attorney of the lessor. Knight called upon Webb, said to him that Wiltsie had bought the property at the tax sale, and solicited employment to set aside the sale. Webb on the next day made inquiry, and discovered the fact of the sale and the outstanding certificate and the lapse of the period of redemption. He informed the lessor of the fact and of her right to forfeit the lease. Mrs. Kennedy, who was advanced in age, being nearly eighty years old, was perturbed, and, in a letter to Webb, expressed solicitude as to obtaining a new tenant in case the lease of Mrs. King was forfeited. As a result of the conferences and the correspondence between Mrs. Kennedy and her counsel, the latter called on Cohen,

another defendant, who was the attorney of the Kanns, and desired to know whether the Kanns were yet willing to lease at an increased rent, and was informed they were. Shortly after Cohen advised the Kanns to purchase the Wiltsie tax-certificate, and upon their giving him authority to use his discretion in the matter he determined to go at once to Rochester to accomplish that purpose. He communicated his intentions to Webb, who endeavored to dissuade him. Cohen went to Rochester. The papers which had been sent to Washington in consequence of the correspondence between Wiltsie and King were returned to Rochester. Cohen bought the certificate, took an assignment of the same in October, 1901, and, returning to Washington procured a tax-deed for the property from the Commissioners of the District, which was duly recorded. Thereafter Mrs. Kennedy notified Mrs. King of her intention to reënter because of the forfeiture of the lease resulting from the sale of the property for the non-payment of taxes. Harry King then called at the bank to take up the certificate, and found that it had been returned to Wiltsie. Negotiations ensued between Mrs. King and Mrs. Kennedy, looking to a compromise of the matter, and a letter was written by the counsel of Mrs. King to Mrs. Kennedy, asking to be permitted to use her name in proceedings to be brought to cancel the tax-sale. This was declined. At all times Mrs. King insisted upon her right to continue in possession under the lease despite the default. The Kanns notified Mrs. Kennedy that they were the real holders of the tax-title, and would attempt to enforce their rights under it unless a lease of the property was made to them at the previously suggested increased rental. The counsel of Mrs. Kennedy, Webb, advised making such a lease. Placed between the threatened assertion by the Kanns of the tax-title, unless they obtained a lease, and the insistance of Mrs. King that she was entitled to retain the property under her lease, Mrs. Kennedy wavered. The result was a letter addressed by Webb, the counsel for Mrs. Kennedy, to the counsel for Mrs. King, submitting a proposition of compromise, which was in substance

that Mrs. Kennedy would waive the forfeiture upon condition that Mrs. King promptly commenced and prosecuted proceedings to have the tax-deed to Cohen declared a nullity or defend against any claim under the tax title, and upon the further condition that Mrs. King furnish a bond with sufficient surety to pay the sum of seventy thousand dollars in the event that the tax title was held to be valid. Counsel for Mrs. King in writing declined this offer. The letter doing this made no counter proposition, but referred to and did not expressly withdraw the previous offer of Mrs. King, if she were allowed the use of Mrs. Kennedy's name, to conduct proceedings to vacate the tax title. In addition the letter, which was quite lengthy, expressly stated the opinion of the counsel of Mrs. King to be that the tax title was void and could be set aside. It insisted that Mrs. King would be relieved by a court of equity from the forfeiture alleged to have resulted from her inadvertent omission to pay the tax, and besides stated various grounds, which, it was deemed, placed Mrs. Kennedy in a position where she could not, as against Mrs. King, ask to be protected against the risk, if any, of the outstanding tax-title held by the Kanns. These grounds were, in substance, that the tax-certificate had been bought by the Kanns at the instance of the counsel of Mrs. Kennedy, for the purpose of making sure of a forfeiture of Mrs. King's rights, and with the knowledge that negotiations were pending between Mrs. King and Wiltsie, and for the purpose of forestalling the acquisition by Mrs. King of the tax-certificate.

The negotiations having failed, Mrs. Kennedy commenced landlord and tenant proceedings to recover possession. Before the time set for the trial of the proceedings Mrs. King commenced this suit, which, as we at the outset stated, sought to have the tax-title declared void, to have complainant relieved from the forfeiture, and for an injunction restraining the prosecution of a landlord and tenant proceeding.

That a court of equity, even in the absence of special circumstances of fraud, accident or mistake, may relieve against a

forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee, is elementary. *Sheets* v. *Selden*, 7 Wall. 416. But that principle cannot control this case, even if it be conceded, for the sake of argument, that it applies to collateral covenants in leases, such as the obligation to repair, to insure, (and even to pay taxes), said in the *Sheets case* to be settled in England adversely to such right, but to be an open question in this country, and as to which there may be differences of opinion in state courts of last resort. *Noyes* v. *Anderson*, 124 N. Y. 175; *Giles* v. *Austin*, 62 N. Y. 486, 491; *Gordon* v. *Richardson*, 185 Massachussetts, 492; *Lundin* v. *Schaeffel*, 167 Massachusetts, 465; *Mactier* v. *Osborn*, 146 Massachusetts, 399; *Tibbetts* v. *Cate*, 66 N. H. 550; *Bacon* v. *Park*, 19 Utah, 246. We say this, because the general principle, as declared in the *Sheets case*, rests upon the ground that "the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete." When the foundation upon which the doctrine is based is borne in mind it becomes apparent that it affords no ground for the contention that it is applicable to a case where the failure to perform a covenant to pay taxes has led to a tax-sale, ripening into a *prima facie* irredeemable title held adversely to the lessor. In other words, the doctrine lends no support to the proposition that a court of equity can require an owner to risk the loss of his property by compelling him to engage in a contest involving the validity of an irredeemable tax-sale, for the purpose of endowing the tenant with the right, if the tax-title be held invalid, to pay the taxes and thus be relieved of a forfeiture. To extend the principle to such a degree would be destructive of rights of property, since it would subject everyone who made a lease of his property, containing a covenant by the lessee to pay taxes,to the hazard of the loss of his title, if only the tenant chose to violate the covenant, and thus give rise to the coming into existence of a tax-title, *prima*

facie valid and irredeemable in character. And the force of these considerations is not avoided by the reasoning which led the court below to its conclusion or by the arguments at bar advanced to support that conclusion.

Thus, the court, in its opinion, considering the paramount issue to be the validity of the tax-sale, first disposed of that question, and, concluding that the sale was void, proceeded to determine its power to grant relief from the forfeiture, upon the hypothesis that there never had been a tax-sale, that the taxes were still due, and could be paid, and that the tenant was willing to pay them. But thus to contemplate the controversy was to assume the very question for decision, that is, the power of a court of equity, in order to relieve from a forfeiture, to endow a tenant with the right to create, at the risk of the owner, a primary controversy, viz., to compel the owner against his will to jeopardize his title by testing the validity of the irredeemable tax-sale, a hazard which the owner was desirous of avoiding. The paramount issue was not, as assumed, the invalidity of the tax-sale as a mere abstract question, but, we repeat, was the right of the tenant to invoke at the hands of the court a determination of that question at the risk of the owner. And this view is not changed by saying that the decision at the instance of the tenant as to the validity of an irredeemable tax-title, held by a third person, was an incident to the right of the tenant to be relieved from the forfeiture, for to so say is but to destroy the foundation upon which the right to relief from the forfeiture rested, that is, the ability of the tenant when applying for relief to make complete compensation. And the misconception of the general doctrine just pointed out pervades the argument at bar of the appellee. Thus while no authority is referred to sustaining the right of a tenant to test the validity of an outstanding *prima facie* irredeemable tax-deed, caused to exist by the default of the tenant, the ultimate result of the contentions is to assume that principle as established and to predicate rights upon that hypothesis. In other words, in substance, by a *petitio principii*, the propositions

urged treat the outstanding tax-title as void and proceeded to demonstrate the right to relief under that assumption.

There being, then, no foundation for the contention that it was within the ordinary power of a court of equity to relieve from the forfeiture, we come to consider whether the case as made by the record is brought within the general authority of a court of equity to relieve in cases of fraud, accident or mistake. We put out of view, for ulterior consideration, the question of fraud, and therefore presently examine only the contentions as to the existence of the elements of accident or mistake. In considering this subject two propositions are obvious: First, where the forfeiture from which relief is sought has been occasioned by the gross negligence of the person claiming to be relieved, the default so occasioned is not one brought about by accident or mistake; and, second, that even where accident or mistake has been shown, especially in the absence of culpability or fraud on the part of the other party, a court of equity will not grant relief from the forfeiture, unless it can be done with justice to that party.

Referring to its opinion on the appeal from the order granting an injunction *pendente lite*, and in effect reiterating the view therein expressed, that the averments of the bill justified the relief prayed, the court in its opinion on the final hearing said:

"But the testimony makes it more plain than even the allegations of the bill of complaint did that she is entitled to the relief which she asks. The testimony shows quite conclusively that, while the lease required the annual taxes on the property to be paid by the lessee, yet the invariable custom of the lessor down to the time of the default had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes of the second half of the year 1898, in connection with which the default occurred, the lessor failed for some reason to make the usual demand for the money wherewith to pay the taxes; and the lessee was in the midst of financial trouble and distress caused by the recent death of her husband, who had been the lessee down to the

time of his death. The record shows to us quite plainly that the default of the lessee was excusable under the circumstances; and that no harm would be done to any one by her relief from the nominal forfeiture which she has incurred."

By this reasoning it was assumed the case was brought within the grounds of relief for accident or mistake upon two inferences, both treated as alleged in the bill and established by the testimony: first, the prior practice of the lessor in calling upon the tenant to hand her the money to pay the taxes and then herself paying them; and, second, the failure of the lessee, after this practice was discontinued, to call to mind that the tax was due and payable, owing to her disturbed state of mind at that particular time. In the argument at bar reliance is principally rested upon the first of these grounds, and indeed it is insisted that the testimony goes much further than implied by the court below, and demonstrates that the conduct of the lessor was such as to mislead the lessee, and thereby estop the former from asserting the forfeiture.

Let us consider separately the two grounds: First, accident or mistake as engendered by the course of dealing of the lessor, and, second, accident or mistake arising from oversight, the alleged result of the particular circumstances surrounding the tenant at the time of the failure to pay the taxes. As to the first ground it would seem to be an afterthought, since it was not suggested in the correspondence between the parties immediately preceding the litigation that Mrs. Kennedy by her conduct had in anywise led to the default of the tenant. To the contrary, that view was excluded, for in the letter written to Mrs. Kennedy, dated October 8, 1901, asking authority to use her name in proceedings to be brought by the tenant to cancel the tax-sale, the attorneys of Mrs. King said:

"We assume that you are aware that your tenant has always paid the taxes upon the demised premises, and the failure to pay the one made the basis of the notice was an oversight, caused by the death of Mr. Henry King, Jr., which was being remedied at the time your notice was received."

And although it would seem that the court below assumed to the contrary, the fact is the bill contained no averment justifying the default in paying, upon the theory that it had been induced by the conduct of the lessor. To the reverse it was specifically stated in the fifth paragraph of the bill that the alleged single default in the payment of taxes arose "wholly through oversight and inadvertence," without in anywise charging that the conduct of Mrs. Kennedy was in whole or in part the cause of the oversight or inadvertence. Besides, in the eleventh paragraph of the bill, explicit reference was made to the letter to which we have just above referred, and it was alleged that by its terms Mrs. Kennedy was notified "that the failure to pay the taxes was simply an oversight, which was being remedied at the time the notice of refusal to accept the rent was received." True it is that the testimony shows that prior to the death of Henry King, Jr., in August, 1897, the lessor was in the habit of calling upon the tenant for the amount required to pay the tax then due or about to become due, in order that she might herself pay it. True also is it that Harry King, in testifying, made statements from which the inference can be deduced that in conducting the business for his mother, after the assignment of the lease subsequent to the death of his father, he relied upon a continuance of this practice. But it must be borne in mind these statements were made after the death of Mrs. Kennedy, who died on the day the bill was filed, and their inaccuracy is, we think, conclusively shown by the mode of dealing following the assignment of the lease and the conduct of the tenant in respect to the matter of taxes. The very first payment of taxes made after the death of Henry King, Jr., was made by the tenant herself, paying the taxes at the request of Mrs. Kennedy and retaining the receipt. Nearly three years of default followed, without any payment of taxes by the tenant whatever and without any inquiry being made by the tenant on the subject. When in July, 1900, the two defaulting installments of the tax for 1900 were paid by the tenant they were not paid at the instance of Mrs. Kennedy, or because

of any request upon her part, but because it "occurred" to the tenant to do so. When they were paid the payment embraced interest and penalties, for which the tenant could not have deemed herself responsible if the course of dealing asserted had been relied upon. Despite this fact, no proof whatever was made of any notice to Mrs. Kennedy of the fact or of any claim being made against her in the premises. And the same thing is true as to the payments made in May, 1901, of the current taxes and some of the overdue installments. Besides, when these payments were made the property had been sold for the overdue installments, but was yet subject to redemption, and the statutory interest of fifteen per cent was paid by the tenant without any intimation of a claim of any character against the lessor. Indeed, the conduct of the tenant in respect to the very tax for which a forfeiture was asserted is absolutely inconsistent with the theory that she deemed that her landlord was the cause of the default, for when notice was received by the tenant from the purchaser at the tax-sale of the outstanding irredeemable tax-certificate more than two months and a half elapsed before the purchase of the certificate by Cohen, and no complaint was made to the landlord that she had neglected to demand payment of the tax, and that in consequence the default and loss was occasioned, but a negotiation was opened to purchase the outstanding title for the account of the tenant alone. When this line of conduct is considered in connection with the fact, already stated, the conclusion is inevitable that the suggestion that the conduct of the landlord had induced the failure to pay, first made after the death of Mrs. Kennedy, is without foundation.

And the facts which we have just stated also render it impossible to conclude that the non-payment of the tax was due to a mere temporary oversight, and not to gross negligence. How can an inference of temporary oversight be possible when the long period of the failure by the tenant to pay any tax whatever is borne in mind, and when we also consider the delay of more than two months and a half which took place after

knowledge was conveyed, by the letter of Wiltsie, of the outstanding irredeemable tax certificate?

The fact that the tenant was a merchant, and of necessity kept mercantile books, is significant. The mind cannot conceive of adequate entries being made of the taxes which were belatedly paid, which would not have at once suggested those which were unpaid. The inference fairly deducible from the letter to Wiltsie—"Unfortunately we have paid you quite a considerable amount of money in the past for tax sales"—adds cogency to the irresistible inferences as to negligence.

And even if the foregoing considerations which establish the absence of accident or mistake and demonstrate the presence of gross negligence are put out of mind, and accident or mistake be assumed, for the sake of the argument nevertheless, under the circumstances of the case, a court of equity could not give relief. This follows, since the relief sought could not be afforded without subjecting the lessor to the peril of contesting the validity of the outstanding *prima facie* irredeemable tax-title.

We come to the question which we hitherto put aside for final consideration, viz., the alleged fraud. It, in any event, only involves a consideration of what took place with regard to the purchase of the tax-certificate by Cohen as the agent of the Kanns, and the circumstances surrounding and connected with that purchase and the use made of the certificate. Concerning these matters the court below said:

"We find no evidence whatever in the record of any fraud or wrongdoing perpetrated by anyone concerned. We only find the evidence of a situation created by a keen commercial rivalry and shrewd management, wholly untainted by wrongdoing, but still a situation from which injury is threatened to the complainant's rights of property, and against which she is entitled to be relieved. For that there was an arrangement between the defendants whereby the tax-certificate was to be used to oust the complainant from the property, we think is too plain to be reasonably questioned. There was undoubtedly a concurrence of effort for that purpose, perhaps no formal combina-

tion or preconcerted action. But it matters not what we call it. The undoubted fact is there was coöperation between the defendants to use the tax-certificate to the detriment of the complainant's rights; and there being such coöperation, the defense of multifariousness cannot prevail. The one purpose of the bill is to relieve the complainant from the effect of this tax-certificate and of the tax-title based upon it."

For the reason that we agree with the finding that there is no evidence whatever of any fraud or wrongdoing by anyone concerned, we are constrained to disagree with the conclusion that the complainant was entitled to relief. We say this, because we are of opinion that the relief awarded could only have been justified upon the finding that there was fraud and wrongdoing. We so conclude, because if it be accepted that there was an agreement and combination as to the certificate, entirely free from every element of fraud or wrongdoing, we fail to perceive how an agreement of that character afforded ground for granting the relief which was given. But disregarding mere forms of expression and assuming that the general finding that there was no fraud or wrongdoing was intended to be limited to intentional as distinguished from constructive fraud or wrongdoing, let us briefly review the facts concerning the acquisition and use made of the certificate, in order to fix whether such a finding is at all sustained by the record. Although we think it immaterial, as there was no evidence whatever tending to show that the lessor or her attorney procured the purchase of the certificate by Cohen, that subject may be put out of view. The irredeemable tax-certificate was in the hands of and belonged to Wiltsie. He notified the tenant that he held it more than two months and a half before the purchase by Cohen, and proffered his willingness to assign it to the tenant. As shown by the undisputed facts which we have stated, with indifference both to her own interest and the interest of the landlord, the tenant neither acted for herself by accepting the offer nor gave any notification whatever to the landlord on the subject. Cohen, as the agent of the Kanns, learned of the existence of the

irredeemable tax-sale and of the person who held the certificate. He purchased it by the authority of and for the benefit of his principals, the Kanns. By the express terms of the statute under which the certificate was issued it was assignable. Granting that the purchase was made in order to aid the Kanns in obtaining a lease of the property, in the absence of any legal duty owing by them to the tenant, we fail to perceive how the motive of Cohen or his principals could operate to make the otherwise lawful action constructively wrongful. The tenant, by whose negligent default the sale of the property had been occasioned, certainly had no exclusive preëmptive right to the purchase of the certificate, which would operate to render its purchase by anyone else in his own interest void. After the purchase of the certificate by Cohen, what was the position of the landlord? On the one hand confronted by the assertion of the tenant that the outstanding tax-title was void, that she had a right to be relieved from the forfeiture caused by the non-payment of the tax, and was entitled to continue in possession under the lease, and on the other with an offer on the part of the holder of the tax-title to quitclaim the same, and thus avoid testing its validity, if only a lease was made which would be advantageous. When it is again borne in mind that this situation was brought about by the neglect of the tenant to perform his covenant to pay the taxes, and by his procrastination in respect to acquiring the tax-certificate which had been previously offered to him, we can conceive of no principle of equity preventing the landlord from taking a course not forbidden by law which was not only most conducive to her own interest, but which besides obviated the danger of submitting her title to a contest concerning the validity of a tax-sale. But if an equitable principle could be conceived of which prevented the landlord from so acting under the circumstances stated, that principle would be inapplicable to the case before us, when one of the undisputed facts to which we have already called attention is considered. That fact is this: Before the landlord irrevocably determined to avail of the forfeiture and thus avoid

the risk to herself concerning the outstanding tax-title, she offered to condone the forfeiture, provided the tenant commenced proceedings to have the outstanding tax-title declared invalid, and also secured the landlord from loss in the event that such tax title should be sustained, which offer was declined on grounds substantially asserting that the risk resulting from the default of the tenant should be borne by the owner and not by the tenant.

The decree of the court below is reversed and the cause remanded with instructions to dismiss the bill for want of equity.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE HARLAN dissent.

GARROZI *v.* DASTAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

No. 72. Argued October 31, November 1, 1906.—Decided January 7, 1907.

Royal Insurance Co. v. *Martin*, 192 U. S. 194, followed as to the jurisdiction of this court over appeals from the District Court of the United States for the District of Porto Rico.

The party causing the removal from the local court of Porto Rico to the United States courts of a case, over which the latter would have had original jurisdiction as to all parties impleaded had it been brought there originally, cannot, after judgment against him, assert lack of jurisdiction of the United States court solely on the ground that the removal was erroneous.

Under the law of community property in Porto Rico, the wife does not, as a consequence of a judgment of divorce against her, forfeit her interest in the community.

In liquidating the community the husband is not chargeable with an obligation to return to the community sums spent by him on the ground that the expenditures were unreasonable or extravagant.

If there is any amount due a wife, against whom a judgment of divorce has been rendered, on account of her interest in the community, she is

entitled to provoke a liquidation, and to a decree against the husband for the amount so due and for alimony and expenses actually awarded to her in the divorce suit, but not for additional sums for services of counsel in the suit for liquidation.

THE facts are stated in the opinion.

Mr. Charles M. Bœrman and *Mr. Fritz von Briesen*, for appellants:

This court has jurisdiction of this case on appeal. Rev. Stat. § 702; Act of March 3, 1885, chap. 355; *Royal Ins. Co.* v. *Martin*, 192 U. S. 150.

The United States District Court for Porto Rico had no jurisdiction to hear, try or determine this case and its decree must be annulled for want of jurisdiction. *C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379; *Capron* v. *Van Noorden*, 2 Cr. 126; *Brown* v. *Keene*, 8 Pet. 112; *Jackson* v. *Ashton*, 8 Pet. 148; *Bors* v. *Preston*, 111 U. S. 252; *Dred Scott case*, 19 How. 393, 400; *Pequingnot* v. *Pennsylvania R. Co.*, 16 How. 104; *Cutler* v. *Rae*, 7 How. 729; *Continental Ins. Co.* v. *Roades*, 119 U. S. 237; *Torrence* v. *Shedd*, 144 U. S. 533; *Hanrick* v. *Hanrick*, 153 U. S. 192–198; *Neal* v. *Pennsylvania Co.*, 157 U. S. 153.

Under the Civil law a woman divorced for her adultery has no right of action for any share in the marriage community assets. Art. 73 of Civil Code in force in Cuba, Porto Rico and Philippines; Spanish Civil Code Art. 1434; French Civil Code, Art. 299; Ballinger on Community Property, § 5, p. 6.

In the liquidation of the marriage copartnership assets the legitimate expenses made by the husband during the duration of the marriage, no matter how large they were, cannot be charged against his share. Civil Code, Articles 1384, 1408, 1409, 1413, 1421.

Counsel fee and suit money cannot be given in a suit for liquidation of her share of property by a divorced wife after divorce; and in the courts of the United States counsel fee can never exceed the sum of twenty dollars. Ballinger on Community Property, § 119, note; Rev. Stat. § 823; *Drais* v. *Hogan*,

50 California, 121; *Celluloid Mfg. Co.* v. *Chandler*, 25 Fed. Rep. 9; *Troy Iron Factory* v. *Corning*, 7 Blatch. 16; *Goodyear* v. *Sawyer*, 17 Fed. Rep. 13; *Williams* v. *Morrison*, 32 Fed. Rep. 683; *Cleaver* v. *Traders' Ins. Co.*, 40 Fed. Rep. 864; *Parks* v. *Booth*, 102 U. S. 96.

Mr. Frederic D. McKenney, with whom *Mr. Francis H. Dexter* and *Mr. John Spalding Flannery* were on the brief, for appellee:

While under the law of Porto Rico a married woman, so long as the marriage relation continues and has not been terminated by divorce or death, has no right to demand the liquidation of the conjugal partnership, that principle has no application here. Although when this suit was instituted in the District Court of Ponce, and at the time of its removal into the United States District Court, the decree of divorce between complainant Dastas, and defendant Garrozi, had not been passed; nevertheless such decree had been passed and had become effective, and the marriage between the parties had been terminated thereby, long before the pleadings in this case had reached a final issue.

Under the laws in force in Porto Rico on June 9, 1902, the divorced wife was entitled to her proportionate share of the Bienes Gananciales notwithstanding the decree of divorce was founded upon her adultery. Civil Code of Porto Rico, Articles 1315, 1392, 1393, 1394, 1401, 1407, and others.

It is conceded that under the letter of the Civil Code of 1889 and of 1902 the husband is the administrator of the conjugal partnership, and that dispositions of the assets of the partnership made by him in good faith cannot be questioned by the wife, but it is expressly provided by the Code of 1889 (§ 1413) that:

"Every alienation or agreement which the husband may make with regard to said property in contravention of this Code or in fraud of the wife shall not prejudice her nor her heirs."

The court below properly held that the ascertained extravagances of Garrozi in connection with his European excursions

amounted to a fraudulent diminution of the ganancias, an alienation fraudulently against the interest of the wife, at least to the extent of $22,000 and properly charged this against his separate estate.

The allowance of counsel fees in the present case had no relation to legal services rendered in the divorce proceeding, but related solely to services rendered in the equity court in the wife's attempt to conserve the conjugal assets and to procure their liquidation pursuant to law. It was through her efforts and such services that the fraudulent transfers were set aside and the property taken into the possession of the court by the appointment of a receiver. *Trustees* v. *Greenough*, 105 U. S. 527; *Central R. R. Co.* v. *Pettus*, 113 U. S. 116.

Mr. Justice White delivered the opinion of the court.

In the District Court of Ponce, in October, 1891, through a representative (next friend), Juana Dastas, alleged to be a resident of Porto Rico and a married woman, commenced this suit against her husband, Tomas Garrozi y Pietri, as also against Juana Maria Gonzalez and Domingo Piazzi y Pietri, all three of whom were alleged to be residents of Porto Rico. We shall hereafter speak of the plaintiff as the wife and the principal defendant Garrozi as the husband.

As far as essential to be considered, the facts alleged, the cause of action relied on and the proceedings had, up to the pleading by the defendants, are summarized as follows: The marriage took place in May, 1886, and, as no antenuptial contract was made, their property relations were governed by the community system under the Code of Porto Rico. They lived together until November, 1898, when they separated, and the wife, under the direction of the husband, resided in a house provided by him. There she lived until December, 1899, when, owing to the failure of the husband to support her, she removed to Ponce.

The husband in 1901 sued for a divorce on the ground of

the wife's adultery, and she, by a reconventional demand (cross bill), prayed for a divorce on the same ground, and because of cruel treatment. In this suit the court awarded the wife $75 a month alimony *pendente lite*. This not having been paid, the wife issued execution and realized from a sale of certain furniture one month's alimony. The remainder of the alimony up to the commencement of this suit, aggregating $225, and 598 pesos, Porto Rican currency, the amount of legal expenses incurred by the wife in defending the divorce suit and which had been allowed by the court, was yet unpaid. These amounts were uncollected because of the apparent insolvency of the husband. This insolvency was, however, only apparent, because there was a large amount of real and personal property belonging separately to the husband, or to the community, which the husband had, with the object of defrauding the wife, apparently disposed of by simulated transfers to the defendants Maria Gonzalez and Domingo Piazzi. The character and extent of this property were detailed as well as the various alleged simulated contracts, which it was averred had been made concerning the same. The prayer was that the contracts in question be set aside as mere fraudulent simulations, so as to enable the wife to exert her rights therein or thereagainst. The court admitted the petition to be filed and authorized the suit by the wife in the name of her representative or next friend. Before the day for pleading the husband, alleging himself to be a citizen and subject of France, and that by operation of law the wife was of the same nationality, obtained an order for removal to the court below. Subsequently the two other defendants also prayed and were allowed a removal. On the filing of the record a motion to remand was made based upon the fact that the husband's petition for removal contained no averment of residence. The court refused to remand and allowed an amendment alleging the residence of the husband to be in France.

Without attempting to state the many pleadings which

followed, the ultimate issues, and the action of the court may be thus summarized: The petition of the wife was amended and reformed, authority being given by the court for the prosecution of the suit on her behalf by her representative or next friend. The petition in its final form was less prolix, and the allegation was added that the divorce proceeding between the husband and wife, referred to in the original petition, had gone to the Supreme Court of Porto Rico, and had by that court been finally decided, decreeing a divorce in favor of the husband. The prayer for relief was amended to conform to this situation; that is, it was prayed not only that the simulated contracts be set aside, but, further, that the community be liquidated, and the wife be awarded her share. The defense, as finally made on the part of the husband, as well as the other defendants, was an averment of the good faith and reality of all the contracts alleged to have been simulated. Moreover, the husband denied that there was community property, because nothing had been acquired during marriage which fell into the community, and because all the property which he possessed, even assuming that the assailed contracts were simulated, was separate property, either owned at the date of the marriage or thereafter acquired as a reinvestment of separate funds. It was, moreover, specially alleged that, as the divorce had been decreed against the wife on account of her adultery, she had forfeited all her interest in the community, if any community property existed. Besides, the right of the wife to compel the liquidation of the community, even if she had not forfeited her right to a participation in the community assets, if any, was specially challenged.

The court appointed an examiner, who took and reported the testimony. Under a stipulation and order the cause was referred for report to a special master upon the facts and law. Before the master reported the wife prayed a receiver and an injunction, upon averments that the two defendants, to whom it was charged the property of the husband had been seem-

ingly transferred or encumbered by simulated contracts, were dealing with the same so as to dissipate the estate and frustrate the relief prayed. A receiver was appointed, and the defendants were enjoined as prayed. The report of the special master, as to both the facts and law, substantially sustained the claims of the wife. Exceptions taken to the report were overruled and the report was confirmed. The court below adopted the facts found by the master and reiterated them in the findings in the nature of a special verdict, made for the purposes of the present appeal. By those findings all the charges of fraudulent simulation relied upon by the wife were found to be true, and, as a legal conclusion, all the property and assets to which the simulated contracts related were held to belong to the husband. Concerning the community and its liquidation, it was found, as a matter of fact, that the wife at the time of the marriage had no property, and subsequently acquired none, whilst the husband at the time of the marriage was the owner of various assets and described property, which was found to have been of the value, at the time of the marriage, of $71,500. The net property of the husband at the date of the dissolution of the marriage, including all reinvestments or avails of his separate property existing at the time of the marriage, and, allowing for community debts, was found by the court to be $77,000, thus leaving $5,500 as the acquet or gain of the community, which was subject to be divided equally between the husband and wife. In addition, the court found that during the marriage the husband had spent, out of the revenues of his property, which revenues fell into the community, the sum of $47,000, during various trips made by him to Europe, and that these expenditures by the husband, from revenue which belonged to the community, were unreasonable to the extent of $22,000. From the facts thus found, as a matter of law, it was concluded that the $22,000 should be treated as an existing acquet of the community, subject to be equally divided between the parties. The sum, therefore, of the community property for distribution was

fixed at $27,500, the wife's share, therefore, being $13,750. The court in its final decree annulled the simulated contracts, and decreed the property to which such contracts related to belong to the husband, and, fixing the sum of the community as above stated, a money decree was entered in favor of the wife for her share thereof, $13,750. The decree reserved the right of the court to make such further orders as might be necessary, the receiver was directed to make full report, and a special master was appointed with power to sell the property in the custody of the receiver, if necessary, to pay the decree in favor of the wife. On the day after the entry of the final decree, on motion of the wife, the court passed a further decree in her favor, directing the payment to her, first, of the sum of $598, awarded to her by the District Court of Ponce as her expenses in the divorce litigation, and the sum of $133.50, interest thereon to the date of the decree; second, the sum of $885, due for alimony awarded by the District Court of Ponce to the date of the decree of divorce; and, third, the sum of $1,500, on account of solicitors' fees in the pending litigation—a total of $3,116.50. The receiver was directed to pay these several sums out of any money in his hands, and in default of sufficient funds execution to enforce against the husband was authorized.

The court, in its findings, has stated the rulings which were excepted to with respect to the admission or rejection of evidence, accompanied with such portions of the evidence as it deemed adequate to enable a review of such rulings.

Before coming to the merits we must dispose of three preliminary questions. First. The suggestion of a want of jurisdiction in this court is without merit. *Royal Insurance Company* v. *Martin*, 192 U. S. 149. Second. The contention that the court below was without jurisdiction, and that the cause, therefore, should not be passed upon on the merits, but should be remanded to the court below, with directions to remand to the local court from which it was removed, is also without merit. That the case was within the original jurisdiction of

the United States District Court of Porto Rico clearly results from the broad grant of jurisdiction conferred by the third section of the act of March 2, 1901, 31 Stat. 953, c. 812, reading as follows:

"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, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

The assertion of the want of jurisdiction in the court below rests, however, not upon a denial of power in that court to have entertained the controversy if the suit had been originally brought there, but upon the contention that as a defendant other than the husband was a resident and citizen of Porto Rico, the cause was improperly removed from the local court. And the proposition goes to the extent of insisting that such want of jurisdiction may be asserted by the person who procured the removal, who resisted the effort to remand, and when the want of jurisdiction is only suggested after trial and final decree. The premise upon which these contentions are based is a portion of the text of the thirty-fourth section of what is known as the Foraker Act, act of April 12, 1900, 31 Stat. L. 84, c. 191, which provides that—

"The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the District Court of the United States [for Porto Rico] and the courts of Porto Rico."

Without so deciding, we concede, for the sake of the argument, that where the power to remove from a state court to a court of the United States is restricted by statute to a certain class of cases, a removal operated contrary to the statute

does not divest the state court of jurisdiction, and, therefore, does not confer jurisdiction on the court to which the cause has been wrongfully removed, even although the cause may have been one of which such court might have taken jurisdiction originally. So, also, we concede for argument sake that in such a case the party wrongfully procuring the removal may escape the effect of a judgment rendered against him in the forum to which he voluntarily resorted, by suggesting after judgment the want of power to remove. But these concessions are not decisive of the case at bar, because of the extent of the jurisdiction conferred upon the United States Court in Porto Rico by the act of 1901; that is to say, in consequence of the enlarged character of the jurisdiction conferred by that act, and the obvious departure which it manifests from the principles controlling the jurisdiction of a United States court as contradistinguished from a state court, we do not think the rule which demarks the line between the courts of the United States and state courts within the removal act should be held applicable to Porto Rico to the extent which might have obtained had the act of 1901 not been enacted. We conclude, therefore, that where a case is removed from the local Porto Rican court to the United States court, over which case the latter court would have had jurisdiction as to all the parties impleaded if the case had been there originally brought, even though the removal was irregular, the party who caused the removal cannot be heard after judgment against him to assert that the United States court was wanting in jurisdiction solely on the ground that the case was erroneously removed.

3. The objections to rulings made by the court in admitting and rejecting evidence are numerous. We shall not undertake to review them in detail or state at length our conclusions concerning them, contenting ourselves with saying that after examining them all we think they are without foundation, either because fundamentally unsound or because the objections concerned not the admissibility but the mere weight of

the evidence offered or rejected, or because the record is not in such a condition as to enable us to overcome the strong impression we form that no prejudicial error resulted from the rulings complained of.

The conclusive effect of the facts found below narrows the issues. Thus the finding that the contracts were fraudulent simulations sustains the legal conclusion that the property to which the contracts related belonged to the husband, and therefore that subject is put out of view. Again, as the facts found concerning the sum of the property owned by the husband at the date of the marriage and the amount owned by him at the date of the dissolution of the community by the divorce, sustain the conclusion that the difference between the two was an acquet or gain of the community to be divided equally, that question need not be further considered. In order, therefore, to dispose of the entire controversy it will be necessary to decide only four questions: First, whether the wife, as a consequence of the judgment of divorce rendered against her had forfeited her interest in the community, if there was any such interest. Second, whether error of law was committed in crediting the community with $22,000, the amount expended by the husband for traveling and medical expenses during the years 1889 and 1890, and during the years 1895 to 1898, both inclusive, upon the ground that such expenditures were unreasonable and extravagant, and therefore created an obligation on his part to return the amount to the community as an acquet or gain thereof. Third, if there was due the wife any amount on account of her interest in the community, and such interest had not been forfeited, was she entitled as a divorced wife to provoke a liquidation of the community and to a decree in her favor for the amount, if any, of her interest in such community? Fourth, did the court below err as a matter of law, in addition to giving the wife a decree for her interest in the community, in allowing her the sum of the alimony *pendente lite* decreed in her favor by the local court up to the date of the divorce, the sum of her

expenses in the divorce suit which had been approved by the local court, and an additional sum of $1,500 for the services of the counsel of the wife in the cause.

1. It may be conceded that by the law of Spain, prior to the adoption of the Spanish Civil Code, the wife against whom a judgment of divorce for adultery was decreed forfeited all right to her share in the community existing between herself and husband. But that rigorous rule was not incorporated into the Spanish Civil Code, which was in force in the island of Porto Rico when the territory was acquired. Spanish Code of 1889, War Department translation, Title 4, sec. 5, article 67 *et seq.* Such forfeiture, moreover, did not obtain in the Porto Rican Civil Code, adopted after the acquisition of the island by the United States, and which was in force in that island when the decree of divorce, which was here involved, was rendered. Civil Code of Porto Rico for 1902, title 5, chap. 5, sections 173, 174. To the contrary, the Code of 1889 provided that, in case of a divorce for adultery, the guilty spouse should forfeit or lose, not his or her interest in the community, but "all that may have been given or promised him or her by the innocent one, or by any other person, in consideration for the latter." Code of 1889, article 73, paragraph 3. And a similar provision was incorporated in the Code of 1902, as follows:

"The party against whom the judgment is rendered (of divorce) shall forfeit to the party obtaining the divorce all gifts which the other party may have conferred upon such party during the marriage, or when the same was contracted, and the innocent party shall retain everything which has been acquired from the other." Sec. 174.

Both these provisions were plainly intended to depart from the rule of forfeiture prevailing in the more ancient Spanish law and to incorporate the rule of limited forfeiture, as existing in the Louisiana (article 156) and Napoleon (article 299) Codes, a similar provision to which has been enacted in the codes of some other countries, which have modelled their

codes on the Code Napoleon. De Saint-Joseph, concordance, vol. 1, pp. 24 *et seq.* This conclusion is reinforced by the consideration that, at the time of the adoption of the Spanish and Porto Rican Codes, the provision of the Napoleon Code on that subject had been conclusively determined not to operate a forfeiture of the community property. See authorities collected in note to article 299 in the Fuzier-Herman edition of the Code Napoleon, Paris, 1896.

The argument advanced in the brief of one of the counsel, that, despite the change in the code to which we have referred, the old rule of forfeiture should be held to obtain, because of the provision of article 1417 of the Code of 1889 and section 1330 of the Code of 1902, saying: "The spouse who by bad faith has been the cause of the nullity (of the marriage) shall not have a share in the common property," rests upon a mere misconception. The provision relied on in both the codes relates, not to the dissolution of a marriage by a decree of divorce or for any other cause, but to the recognition of the nullity of a seeming marriage for causes which have operated to prevent the marriage from having ever existed. In other words, the distinction between the article relied upon and the other articles to which we have previously referred is that which obtains between a decree of a court dissolving a marriage which has existed and a decree establishing that there never had been a marriage to dissolve. The pertinency of this distinction again becomes manifest when it is observed that a similar distinction and consequence exists in the Code Napoleon.

2. Owing to an apparent ambiguity in the finding of fact concerning the liability of the husband to the community for $22,000 it becomes necessary, before reviewing the legal conclusion of the court below on that subject, to fix the exact meaning of the facts found upon which that legal conclusion was based. As a preliminary to so doing we reproduce in the margin [1] the finding of fact on the subject, as well as the legal conclusion drawn by the court therefrom.

[1] That said defendant Garrozi made several trips to Europe during the

Whilst there are expressions in the finding referred to which, isolatedly considered, might lead to the inference that it was the intention of the court to find that the husband had not expended the money, but had concealed it or yet had it in his possession, we think the context of the finding and the result of the other findings establish that the court intended to and did find that the money was expended, and that the legal conclusion as to the liability of the husband to the community was arrived at because it was deemed that the expenditure of the money by the husband was unreasonable and extravagant. We say this results from the context, because, taking the whole finding, it seems to us clear that the purpose of the court was as stated. We say also it results from the other findings, because the facts found as to the sum of the property owned by the husband at the time of the marriage

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continuance of his marital partnership, and spent large sums of money by reason thereof, which were, as near as can be determined from his testimony, the following amounts:

In 1889	$10,000 00
In 1890	7,000 00
In 1895	5,000 00
In 1896–98	25,000 00
Total	$47,000 00

Said defendant claims in his testimony that these trips to Europe and the expenditure of these large sums of money was rendered necessary by reason of his serious and continued illness. But said testimony is not substantiated by that of any other credible witness, while, if true, it could have been easily proven by the testimony of some of the physicians who attended him, and who must have had full knowledge of his condition during these times. But even granting that the journeys were necessary to defendant's health, the court is forced to the conclusion, either that said defendant has exaggerated the amounts expended or that such extravagant expenditures were not either necessary or reasonable, and hence not a proper charge against the property of the marital partnership.

It seems that twenty-five thousand dollars ($25,000.00) would have been a liberal expenditure under the circumstances for a man in defendant Garrozi's condition of life.

The court therefore concludes that twenty-two thousand dollars ($22,000.00) of the amount should be charged against the separate property of defendant Garrozi.

and the sum possessed by him at the time of the divorce exclude, by necessary implication, the possession by the husband of the $22,000.

It is provided in both the Code of 1889 (article 1412) and the Code of 1902 (sec. 1327) that the husband "is the administrator of the conjugal partnership." By the first of these codes (article 1413) this power of the husband was so complete as to endow him with authority to sell and encumber, not only all the movable, but also the immovable property of the community. In the second code, however (sec. 1328), the power of the husband to sell or encumber the immovable property is not given, except a contract to that effect is made with the consent of the wife. And by both codes all contracts of the husband in violation of definite provisions of the code or in fraud of the rights of the wife are made null and void against the wife or her heirs. Code of 1889, article 1413; Code of 1902, section 1328. The provisions in both codes making the husband the administrator of the community are here again like unto those obtaining in other countries where the community system prevails. Code Napoleon, article 1421; Louisiana Code, article 2404. The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes, but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an express provision of the early Saxon law, or from

the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. See a very full citation of authority in Journal du Palais Repertoire, verbo, Communauté, 739, 741 *et seq.*

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period. In speaking on the nature of the right of the wife, Troplong says:

"The rights of the wife are dormant during the marriage, because the husband is charged to watch over and conduct the affairs of the conjugal society. But this right, which is inert, as long as the husband is at the head of the affairs of the community, becomes active when the marital authority ceases to exist. The wife is like a silent partner, whose rights arise and reveal themselves when the partnership ceases." Troplong, Contrat de Mariage, vol. 2, p. 136, No. 855.

Under the law of France prior to the Napoleon Code the extent of the power of the husband as to the community property was so great that it was considered in theory that the rights of the wife, in or to the community, were not merely dormant during the marriage, but had no existence whatever.

In other words, the doctrine was upheld that the wife during the existence of the community had but a mere hope or expectancy, and hence no interest whatever in the property or goods of the community until the community was dissolved. Dumoulin, Sur. l'art. 25, Cout. de Paris. And from this arose the expression that the community was a partnership which only commenced on its termination. As the result, however, of the right conferred upon the wife by some of the customs of France before the Code Napoleon, and also expressly given by that code (Code Napoleon, 1443 *et seq.*), to procure a decree dissolving the community when the affairs of the husband were in such disorder as to entail risk upon the wife it is the generally accepted doctrine under the Napoleon Code that the wife's interest in the community prior to the dissolution is subsisting, though dormant. But this implies no limit on the power of the husband whilst the community exists. In other words, although the right to a separation of property arises from the reckless conduct of the husband, thus affording a means of guarding against the consequences of such conduct in the future, the right to ask a separation does not give rise to the inference that the husband, after the dissolution of the community, may be held to account for money expended by him during the community because of reckless or extravagant conduct. Speaking on this subject, Rodiere and Pont (Traité du Contrat de Mariage) say (p. 596, No. 657):

"The husband can then sell [the immovable property of the community] by onerous title; he has in this respect an absolute power, and if, in disregard of the confidence which the law reposes in him, the husband, in disposing of the property, is impelled by the wish to indulge extravagant tastes or to provide for reckless dissipation, and not by the purpose of protecting the rights of the wife, the latter, even under these circumstances, has no recourse but to obtain a judicial termination of the community."

Referring to the power of the husband over the community, Troplong says:

"This power of the husband, which effaces the personality of the wife, and which is manifested by the name of lord and master of the community, given to the husband; this power, which seems like unto an absolute sovereignty, exists as well in the relations of the spouses between themselves as in their dealings between third parties. In effect, the husband can dissipate the goods of the community; he can lose, destroy, break and dilapidate. *Martius potest perdere, dissipare, abuti;* this is an elementary axiom of the Palace (of Justice). The wife has no right to call the husband to account, no damage to obtain for his acts. Hence it is true, indeed, that the husband is more than an administrator; he is an administrator *com libera.*" Ib., p. 138, No. 158.

See to the same effect the copious collection of authority found under article 1421 of the Code Napoleon, in the Fuzier-Herman edition of that code, *supra.*

That there is a substantial similarity between the law of the community under the Napoleon Code and the law on the same subject of Spain, prior to the Civil Code, and as now existing under that and the Code of Porto Rico, was conceded in the argument of the appellant. Indeed, that argument refers to and rests on some of the provisions of the Napoleon Code. Besides, when it is considered that the ancient Spanish law, and that law as formulated in the Code of 1889 or in the Porto Rican Code of 1902, confers no authority upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs, it follows that the power of the husband under the Spanish system is in principle more extensive than it is under the Code Napoleon and the law of the countries which have followed that code. The practical identity of the husband's general authority, as head and master of the community, under the law of Louisiana, the Code Napoleon and the Spanish law was clearly expounded by the Supreme Court of Louisiana, in *Guice* v. *Lawrence*, 2 La. Ann. 226, as follows:

"The laws of Louisiana have never recognized a title in the

wife during marriage, to one-half of the acquets and gains. The rule of the Spanish law on that subject, is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has *gananciales*, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But, *soluto matrimonio*, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during marriage, *real y verdadero dueno de todos, y tiene en el efecto de su dominio irrevocable.* Febrero Adic. tomo 1 y 4, part 2d, bk. 1st, chap. 4, parag. 1, nos. 29 and 30; Pothier, Communauté, p. 35 and following; 12 Toullier, chap. 2, nos. 22 to 31; 14 Duranton, Droit, Franc., p. 281 and foll.; 10 Dalloz, Jurisp., p. 198 and fol.

"The provisions of our code on the same subject are the embodiment of those of the Spanish law, without any change. The husband is head and master of the community, and has power to alienate the immovables which compose it by an encumbered title, without the consent or permission of his wife. Civil Code, art. 2373."

True it is that in the Porto Rican Code of 1902 there was inserted a provision, previously commented on (section 1328), limiting the power of the husband to dispose of the immovable property of the community without the consent of the wife. But this express limitation as to one particular class of property, by inverse reasoning, is a reaffirmance of the power of the husband as head and master of the community in all other respects. The contention that because both by the Code of 1889 and of 1902 acts done by the husband as head and master of the community in fraud of the wife shall be void, therefore the expenses of the husband made during the community are subject to be reviewed on the dissolution of the community because of their unreasonable character is without merit. The fraud referred to of necessity relates to acts done by the

husband beyond his lawful authority, or which, if within his authority, have been done for the purpose of enriching himself or his separate estate or some third person, and which, therefore, whilst seemingly acts of community administration, are really not of that character.

3. The contention that the wife, even after the dissolution of the marriage, was without power to obtain the liquidation of the community and a payment to her of her share thereof, is based upon what is asserted to be the correct interpretation of articles 73, 1433, 1434 and 1435 of the Code of 1889. By these articles, it is insisted, where the dissolution of the marriage has been decreed because of the fault of one of the parties, the separation of property does not follow as a legal right in favor of the party for whose wrong conduct the divorce has been decreed, and may only be allowed by a court at the request or option of the one in whose favor the decree was rendered. And it is, moreover, insisted that if the divorce has been rendered in favor of a husband and against a wife for her fault, and a separation of property has been thereafter decreed at the instance of the husband, the power of the husband to administer the wife's share of the community remains whilst her interest in future acquets or gains disappears. But this reduces itself to the contention that in the case stated the community is dissolved yet continued. But whilst this reduction may point to the want of coherency in the proposition it is no reason why the code should not be enforced, if so it is plainly written. We do not stop to analyze the texts of the Code of 1889, relied on, for we think they are not controlling, even if they have the peculiar meaning contended for. We so conclude because of a change made by the Code of 1902. As we have already said, we are of the opinion that that code was in effect at the date of the rendering of the divorce decree. Now, that code not only eliminated the provisions of article 73 of the Code of 1889 relied on, but substituted a wholly different provision, directly repugnant to the contention we are considering. The provision referred to is section 173 of the Code

of 1902, saying, "A divorce carries with it a complete dissolution of all the matrimonial ties, and the division of all property and effects between the parties to the marriage." The argument made in the brief of one of the counsel that, even although the wife was entitled to a liquidation of the community and to a decree for her share the court below erred in giving a money judgment in her favor, because in any event it could only have lawfully awarded an aliquot share of the community property subject to be subsequently realized by a partition in kind or by licitation (sale) is unsound. As to the merit of the contention, if any, as a general proposition, we are not called upon in this case to express an opinion. We say this because, as a necessary result of the findings below, all the property either belonged to the husband at the date of the marriage or was afterwards acquired by him as a reinvestment of funds derived from such property owned by him at the marriage. It follows, therefore, that the rights of the wife arose simply either from an increased value of property or assets brought by the husband into marriage or as a result of the falling into the community of the revenues of the property of the husband. Under these circumstances we think the decree below was right.

4. The amount of the decree for alimony *pendente lite* and for expenses incurred by the wife in the divorce suit had been sanctioned by the local court and were binding upon the husband. We see no reason, therefore, why the court below should not have allowed those items. So far as the sum of $1,500 for counsel fees in the pending litigation which the court allowed as a charge against the husband, we have been referred to no authority sustaining the right to allow it and our own researches have enabled us to discover no sanction for such an award.

It follows that whilst the court below was right in allowing the wife the sum of $2,750 as her share of the acquets and gains of the community as established by the findings of fact, the court was wrong in allowing the $22,000, and the $1,500

attorney's fee. The decree below must therefore be reversed and the cause be remanded with directions to enter a decree for the $2,750 and the alimony and expenses incurred in the divorce suit with the approval of the court as previously allowed, but rejecting the claim for $22,000 and $1,500, the costs of this court to be borne by the appellee and those of the court below by the appellant.

Reversed and remanded.

ELDER *v.* COLORADO *ex rel.* BADGLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 132. Argued December 11, 1906.—Decided January 7, 1907.

A mere contest over a state office dependent for its solution exclusively upon the application of the constitution of the State or upon a mere construction of a provision of a state law, involves no Federal question. *Taylor* v. *Beckham*, 178 U. S. 548.

The fact that a state court has considered a Federal question may serve to elucidate whether a Federal issue properly arises, but that doctrine has no application where the controversy is inherently not Federal and is incapable of presenting a Federal question.

Writ of error to review 86 Pac. Rep. 250 dismissed.

THIS was a proceeding, in the nature of *quo warranto*, brought in a district (state) court of Colorado, to test, as between conflicting claimants (Charles W. Badgley and Charles S. Elder), the title to the office of county treasurer of the city and county of Denver. The relator (Badgley) relied upon a general election held pursuant to the general statutes of Colorado on November 8, 1904, while the defendant (Elder) claimed to be the legal incumbent of the office by virtue of his election to the office of treasurer of the city and county of Denver in May, 1904, under authority of the charter of said city and county of Denver. The question presented for decision was whether the election held in May, 1904, under the charter, of officers to per-

form the duties required of county officers in the city and county of Denver, was lawful, or whether such officers should have been voted for under the general statutes of the State at the election held in November, 1904. A determination of this question made necessary a consideration of certain provisions of article XX of the state constitution, providing for the creation, from the old county of Arapahoe and the old city of Denver and other municipalities, of a new entity to be known as the city and county of Denver, and conferring authority to provide in the charter for the appointment or election of officers of such city and county. In particular, a construction was required of a clause providing that "every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or the general law, as far as applicable." The District Court sustained a demurrer to the complaint and entered judgment for the defendant. This judgment was reversed by the Supreme Court of the State, upon the authority of *People ex rel. etc.* v. *Johnson*, 86 Pac. Rep. 233, and judgment was entered in that court in favor of the relator, 86 Pac. Rep. 250, deciding in effect that the charter provision under which defendant claimed was repugnant to the constitution of Colorado. The case was then brought here.

Mr. Robert H. Elder and *Mr. Charles R. Brock*, with whom *Mr. Milton Smith* was on the brief, for plaintiff in error:

This court has jurisdiction of this issue. The theory of jurisdiction is as follows: The people of Colorado, in amending their constitution, exercised an authority under the United States; in this case, the validity of that authority exercised was actually drawn in question; it was decisive of the issue and there was no other matter adjudged by the court below broad enough to sustain the judgment; the decision below was against the validity of that authority exercised; the question here is not for the political departments of the Federal government but for this court.

The judgment below was flagrantly erroneous. Article XX of the state constitution and particularly § 2 thereof, authorized the city and county of Denver in its charter to create the office of treasurer, and to impose upon the incumbent thereof the obligation of performing the acts and duties required of a county treasurer to be performed under the constitution and general laws of the State; and in the exercise of such authority, the guarantee of a republican form of government by the constitution of the United States has been in no wise disturbed or violated.

Mr. Henry J. Hersey for defendant in error.

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

The assignments of error are twenty-one in number. All of them rest upon the assumption that the Supreme Court of Colorado held that article XX of the state constitution, particularly sections 2 and 3, were repugnant to the provision of the Constitution of the United States guaranteeing to every State a republican form of government and to the act of Congress known as the Colorado Enabling Act, and that by such ruling rights possessed by the people of the State of Colorado and rights vested in the people of the city and county of Denver were invaded. And upon the assumption that such rulings were made all the Federal questions relied on are based.

On behalf of the defendant in error it is insisted that the Supreme Court of Colorado did not decide any question under the Constitution of the United States, but merely disposed of the case before it upon its construction of the meaning of the provision of the state constitution which was involved and upon the authority of a previous decision rendered by the Colorado court. It is not denied that in the course of the opinion of the Supreme Court of Colorado it was said that if the article of the state constitution in question was susceptible of a contrary

construction to that affixed to it by the court, it would be repugnant to the guarantee of a republican form of government, etc. This, it is said, was mere *obiter*, as the court considered and held the provision valid.

If we were to indulge in the hypothesis that the assumptions upon which the assignments of error rest were sustained by the record, and were besides to assume that at the proper time and in the proper manner it had been asserted that to hold article XX invalid would be repugnant to the Constitution of the United States, the case would yet not be within the purview of section 709, Revised Statutes. Under this section the power to review the judgment of a state court exists only in the following classes of cases: *a*. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; *b*. Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; *c*. "Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

It is plain that the case is not embraced within subdivision *a*. Nor can it be said to be embraced within subdivision *b*, for if we consider that the court below, instead of construing and upholding the constitutional provision in question, actually held it to be invalid because repugnant to the Constitution of the United States, such decision was *against* and not in favor of the validity of the article. Nor is the case embraced within subdivision *c*, for nowhere in the record does it appear that the plaintiff in error, specially or otherwise, set up or claimed in the courts of Colorado any title, right, privilege or immunity under the Constitution of the United States.

Indeed, under the circumstances disclosed, if there had been an assertion of a right, title, privilege or immunity under the Constitution of the United States it would have been so friv-

olous as not to afford a basis of jurisdiction, since it is foreclosed that a mere contest over a state office, dependent for its solution exclusively upon the application of the constitution of a State or upon a mere construction of a provision of a state law, involves no possible Federal question. *Taylor* v. *Beckham*, 178 U. S. 548. Whilst, when a state court has considered a Federal question, that fact may serve to elucidate whether a Federal issue properly arises for consideration by this court, that doctrine has no application to a case where the controversy presented is inherently not Federal, and incapable of presenting a Federal question for decision.

Writ of error dismissed.

NEWMAN v. GATES.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 137. Argued December 14, 17, 1906.—Decided January 7, 1907.

Where the highest court of the State does not pass on the merits of the case but dismisses the appeal because of defect of parties the case stands as though no appeal had been taken; and as this court, under § 709, Rev. Stat., can only review judgments or decrees of a state court when a Federal question is actually or constructively decided by the highest court of the State in which a decision in the suit can be had, no judgment or decree has been rendered reviewable by this court and the writ of error must be dismissed.

Writ of error to review 165 Indiana, 171, dismissed.

JACOB NEWMAN, George Northrop, Jr., and S. O. Levinson commenced this action in the Superior Court of Marion County, Indiana, against the defendant in error, Harry B. Gates. Recovery of the sum of $1,400 was sought upon a judgment obtained by Newman and his co-plaintiffs against Gates in the Circuit Court of Cook County, Illinois. The defendant filed an answer in two paragraphs, but as the defenses therein

asserted were ultimately abandoned they need not be detailed. A counterclaim was also filed, in which it was alleged that the plaintiffs were and for more than two years had been attorneys at law engaged in the practice of their profession at Chicago, Illinois, under the firm name of Newman & Northrop; that the Illinois judgment sued upon was founded upon a claim for legal services rendered to the defendant; that the services had been rendered in advising the defendant, as trustee, in and about the management of the property and assets of a corporation known as the American Mortar Company while in course of administration in insolvency proceedings, and that the defendant had sustained damage to the extent of two thousand dollars by reason of a breach of duty alleged to have been committed by the plaintiffs in the course of their employment in failing to obtain an order of the court in the insolvency proceedings relieving the defendant from personal liability for attorney's fees and providing for payment of his compensation, etc. It was also charged that the plaintiffs had been guilty of a breach or neglect of duty in connection with a sale of the trust property in the insolvency proceedings, whereby defendant had sustained damages in the sum of $2,500. A reply was filed to the counterclaim, in two paragraphs, one embracing a general denial and the other setting up the Illinois judgment as *res adjudicata* as to all the matters embraced in the counterclaim.

In due course the case came on for trial and the plaintiffs recovered a judgment for the amount of their claim. The case was taken to the Appellate Court of Indiana. That court reversed the judgment and remanded the case for a new trial, *Gates* v. *Newman*, 18 Ind. App. 392, and for want of authority a petition for a writ of certiorari was denied by the Supreme Court of Indiana. 150 Indiana, 59. In the opinion of the Appellate Court, as also in a dissenting opinion, the character of the counterclaim and the question whether, as respects the matters therein set forth, the Illinois judgment was *res adjudicata*, were considered at great length. Following an in-

spection of the record of the Illinois action the court held that the counterclaim stated matters which constituted something more than a mere defense to the claim asserted in the Illinois action, that it could not be said that under the plea of the general issue interposed by the defendant in that action the matters averred in the counterclaim were necessarily adjudicated, and that it was a question to be determined upon the trial whether *in fact* such matters had been theretofore litigated and determined. On the new trial the court held that certain of the issues made by the counterclaim and reply had been litigated in the Illinois action and that the Illinois judgment was *res adjudicata* as to such issues, but submitted to the jury the question of the alleged neglect of plaintiffs in failing in the insolvency proceedings to procure an order charging the trust estate with the fees in question and the compensation earned by defendant as trustee. And the court left it to the jury to determine upon a preponderance of evidence whether or not it was the law of Illinois that the failure of plaintiffs to procure such an order, if they did so fail, was a matter which was adjudicated in the Illinois action, whether evidence was introduced on such point or not, and the jury was instructed that if such was the law of Illinois recovery could not be had upon the counterclaim.

The second trial resulted in a verdict of $181.74 for the defendant Gates, that being the sum found to be due him in excess of the amount of the judgment sued upon. After the entry of judgment and before the taking of an appeal George W. Northrup, Jr., one of the original plaintiffs, died. An appeal, however, was taken to the Appellate Court of Indiana by Jacob Newman and S. O. Levinson, describing themselves as surviving partners of the firm of Newman, Northrop & Levinson. The personal representative of the deceased partner was not made a party to the appeal. The Appellate Court of Indiana overruled an objection to the sufficiency of the appeal and on the merits reversed the judgment and ordered the cause remanded for a new trial. On the petition of the

defendant Gates the Supreme Court of Indiana removed the cause into that court for decision and subsequently dismissed the appeal, holding that on account of the omission to make the personal representative of George W. Northrop, Jr., a co-appellant the appeal could not be determined upon the merits. 165 Indiana, 171. A petition for a rehearing having been denied, the cause was brought here.

Mr. Charles Martindale and *Mr. S. S. Gregory* for plaintiffs in error.

Mr. Edward E. Gates, with whom *Mr. Albert Baker*, *Mr. Edward Daniels* and *Mr. Lewis C. Walker* were on the briefs, for defendant in error.

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

A motion has been filed to dismiss the writ of error or to affirm, and we proceed at once to its consideration. Several grounds are urged in argument in support of the motion, but we do not find it necessary to do more than consider an objection based upon the absence of a Federal question.

The errors assigned are as follows:

"The Supreme Court of Indiana erred in holding and deciding:

"1. That the counterclaim set up by appellee Gates, the defendant, in the trial court, based upon a breach of the same contract of hiring, which was the basis of the action of the appellants against the appellee Gates, in the Circuit Court of Cook County, Illinois, was not adjudicated by the judgment in the Circuit Court of Cook County, Illinois, and by so deciding denied to the judgment of the Circuit Court of Cook County, Illinois, the force and effect which it has between the parties in the State of Illinois, wherein it was rendered, and denies full faith and credit to said judgment, contrary to and in

violation of Article 4, section 1 of the Constitution of the United States.

"2. That the appellee's counterclaim being valid and not merged and adjudicated by the judgment of the Circuit Court of Cook County, Illinois, it was of a nature which survived against the personal representatives of a member of the partnership of Newman, Northrop & Levinson, and that the personal representatives of the deceased partner were necessary parties to the appeal, and not having been made parties that neither the Appellate Court of the State of Indiana, nor the Supreme Court of the State of Indiana, has jurisdiction to determine the appeal and the same must be dismissed, and judgment of dismissal was so rendered. Which final judgment of the Supreme Court necessarily involved the adjudication of the claim of the appellants to the protection of Article 4, section 1, of the Constitution of the United States, 'that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' which adjudication was adverse to appellants' claim under said provision of the Constitution of the United States."

These assignments plainly import that the Supreme Court of Indiana on dismissing the appeal considered and decided a question which had been submitted to the jury on the trial, viz., whether the matters alleged in the counterclaim as the basis for a recovery over against the plaintiffs had or had not been concluded by the Illinois judgment sued upon by the plaintiffs. We do not so construe the opinion and decision of the court.

The Appellate Court of Indiana had held on the first appeal that the action of the trial court, in refusing to admit evidence in support of the counterclaim, because the Illinois judgment constituted *res adjudicata*, was error. It had further decided that the counterclaim was "based upon a breach of contract," and constituted an independent, affirmative cause of action in favor of the defendant, and that whether the questions therein involved were in fact adjudicated in the Illinois action

was a question for the jury. As a result of this ruling evidence was introduced at the subsequent trial to establish what were the questions litigated and determined in the Illinois action and the extent to which by the laws of Illinois the judgment in that case possessed conclusive force.

Now, in the opinion delivered by the Supreme Court of Indiana, on dismissing the appeal, the court did not discuss or in anywise refer to the scope and conclusive effect of the Illinois judgment. Undoubtedly, the court, in view of the law of the case as declared on the first appeal, treated the counterclaim as containing allegations of actionable breaches of duty which might have formed the subject of an independent action, and it is likewise evident that the court was of opinion that the plaintiffs were bound to perfect their appeal from the judgment upon the counterclaim, upon the hypothesis that the counterclaim set forth a valid cause of action against three individuals, viz., the plaintiffs in the main action. But substantially the court only considered and disposed of a preliminary question as to its authority to pass upon the controverted questions contained in the record before it. It found that there were in the counterclaim averments which it had been held early in the litigation required to be submitted to a jury, that the record exhibited a recovery upon the counterclaim against three persons, and that one of such persons had died after the rendition of judgment against him and his associates. Construing the statutes of Indiana, the court held that the cause of action asserted in the counterclaim survived the death of the party deceased, against whom a recovery had been had, that such cause of action could have been revived against the personal representative of the deceased, and that the personal representative was a necessary party appellant, and, not having been made a co-appellant and served with notice of the appeal, the court was without jurisdiction to pass upon the errors assigned upon the appeal. To give effect to the assignments of error we should be obliged to make the impossible ruling that, despite the overruling of a demurrer

to the counterclaim by the trial court, and the decision in respect to that pleading made by the Appellate Court on the first appeal, a mere inspection of the counterclaim so plainly demonstrates that the pleading is destitute of merit that it should be held to have been the duty of the state court of last resort to have treated the pleading as a sham and to have disposed of the appeal upon the hypothesis that the counterclaim was non-existent.

The removal of the cause from the Appellate Court into the Supreme Court of Indiana vacated the decision of the former tribunal, and after transfer the case stood in the highest court of Indiana as though it had been appealed to that court directly from the trial court. *Oster* v. *Broe*, 161 Indiana, 113. Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Writ of error dismissed.

J. B. ORCUTT COMPANY *v.* GREEN.

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

No. 116. Argued December 6, 1906.—Decided January 7, 1907.

Presentation and delivery to the trustee, within a year after the adjudication, for filing with the referee, of proof of claim is a filing within § 57 of the Bankruptcy Act as construed in connection with General Order in Bankruptcy, No. 21.

The neglect of a trustee in bankruptcy to deliver to the referee claims left with him for filing is the neglect of an officer of the court and not the failure of the creditor to file his claim.

A trustee in bankruptcy cannot file with himself proof of his own claim against the bankrupt, nor can the delivery of such proof to his own attorney for filing with the referee stand, in case of failure of his attorney so to do, in place of delivery to the referee.

THIS case comes here upon return to a writ of certiorari, issued by this court to the Circuit Court of Appeals of the Second Circuit. It is a proceeding in bankruptcy, and the question involved is one in regard to the sufficiency of the filing of certain proofs of claims against the bankrupts' estate.

The facts are these: Messrs. Ingalls Brothers were adjudicated bankrupts in proceedings in the District Court of the United States for the Northern District of New York on the third day of December, 1902. Soon thereafter one Charles Duncan was appointed trustee, and on the ninteenth day of December, 1902, he duly verified a proof of claim in his own behalf for $4,171, admitting an offset of $327. On the first of April, 1903, the J. B. Orcutt Company duly verified a proof of claim against the bankrupts' estate for $893.68, and in a short time delivered it to the trustee. At the first meeting of creditors Charles H. Dauchy Company presented to the referee a defective proof of claim against said bankrupts for $3,335.67, which was returned by the referee to said company

for correction. Prior to January 23, 1903, the Dauchy Company duly verified another proof of claim in the same amount, prepared by Henry W. Smith, the attorney for the trustee, who had volunteered to prepare the same so as to comply with the rules, and on or about March 15, 1903, the Dauchy Company delivered this proof of claim to the trustee. Prior to June 1, 1903, the trustee delivered all three claims to said Henry W. Smith, with directions to file the same with the referee, which the attorney promised to do. In this he failed. When the attorney Smith received these claims from the trustee he handed them to a clerk in his office, directing him to put them with the papers in this proceeding, and shortly after told the clerk to file the proofs of the claim with the referee. The clerk neglected to do so, and some time afterwards, upon being asked in regard to it, said that he would do so immediately. This was before the expiration of the year after the adjudication. But he again failed to make the filing. The Dauchy proof, which had been left with the attorney, is lost and cannot be found, after diligent search made by the attorney for it in his office. The other two claims, the Orcutt Company's and Duncan's own claim were found in a package of papers relating to another bankruptcy proceeding. Another proof of claim, for the same amount, was made by the Dauchy Company April 2, 1904, and, with the Duncan and Orcutt proofs, was presented to the referee for filing, each proof being accompanied by a petition, dated April 2, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3, 1903, or for such other or further relief as might be just and proper. Smith was not the attorney for any of the claimants, and his failure to file with the referee was not by virtue of any instructions to withhold such claims from filing, nor was it known on the part of any of the claimants that he had failed to file them until more than a year after the adjudication.

Upon the presentation of these claims with the petition, other creditors of the bankrupts objected to the granting of the relief asked in the petition, upon the ground that the claims

had not been seasonably presented to the court, and were barred under the provisions of section 57*n* of the Bankruptcy Act.

Upon the hearing of the petition for leave to file these proofs of claim, the referee, to whom the case had been referred, denied the petition, under the objection of other creditors, on the ground that one year having expired subsequent to the adjudication of bankruptcy and prior to the filing of the several petitions and the presentation thereof to the referee, the referee had no power to permit the filing of said proofs of claims, and that neither the referee nor the court had any discretionary power to permit either of said proofs of claims to be filed, either *nunc pro tunc* or otherwise. An order denying the relief asked was duly entered.

The referee then certified for review by the District Court the question, whether his decision was correct in refusing the relief stated by the claimants.

The District Court directed that the claims of the petitioning creditors should be filed as of the date when delivered to the trustee.

Charles H. Green, one of the creditors of the bankrupts, thereupon appealed from the order of the District Court reversing the determination made by the referee, to the United States Circuit Court of Appeals for the Second Circuit, and in his appeal, in view of the position of the trustee and his refusal himself to act in the matter, Green asked that he might be permitted to prosecute the appeal for himself and the other creditors. The District Court thereupon allowed the appeal and cited the respondents to appear in the Circuit Court of Appeals. That court, having heard the case argued, reversed the decision of the District Court, and affirmed that of the referee. A brief memorandum was filed by the court, in which it was stated that the referee had given a very full examination of the question of law involved, and that the court concurred in his interpretation of the statute, and that his opinion might be printed as a supplement to the memorandum of the court.

Mr. Charles Cowles Tucker and *Mr. Reginald S. Huidekoper*, with whom *Mr. J. Miller Kenyon* was on the brief, for petitioners:

There is no provision in the Bankruptcy Act which fixes the time within which proofs of claim must be filed. *In re Hernstein*, 10 Am. B. R. 308–320; *Hutchinson* v. *Otis*, 190 U. S. 552. The language of the Bankruptcy Act should not be altered by construction so as to work a forfeiture of the rights of these creditors. Forfeitures are not favored in law. *Marshall* v. *Vicksburg*, 15 Wall. 146; Vattel, 29th Rule of Construction; *Farmers' & Mechanics' Bank* v. *Dearing*, 91 U. S. 29.

The purpose of the Bankruptcy Act is to provide for equality in distribution among creditors and not to enforce forfeitures as against particular creditors. By placing the narrow construction upon § 57*n* contended for by the respondents, a forfeiture of the rights of certain creditors will be enforced. 26 Am. & Eng. Ency. of Law, 661.

Granted that the act limits the time within which proofs must be presented to one year after adjudication, it is sufficient if they be presented within that time to the trustee.

The trustee, being an officer of the court, his acts may well be said to be the acts of the court itself, and by filing a claim with him, it can very properly be said that the claim is filed in the court where the proceedings are pending as required by § 57*c* of the act.

Even assuming that the Supreme Court has mistaken the limitation of its power, and that the last sentence of General Order XXI (1) is invalid, upon general principles of equity the order of the District Judge should be sustained.

Mr. Herbert D. Bailey, with whom *Mr. Frank H. Deal* was on the brief, for respondents:

The word "*proved*," as used in 57*n*, contemplates and includes filing. General Order XXI (1) speaks of a deposition to prove claims, etc. This deposition is used as synonymous with proof of debt. That deposition becomes proof when it

comes regularly before the proper tribunal. Before a claim is proved, it must have come before the referee.

The trustee has no duty to perform in respect to the filing of claims. There is no provision anywhere in the act for filing claim with anyone save the referee, in referred cases. In so far as General Order XXI (1) seems to contemplate a "filing" with the trustee, it is confessedly at variance with the act. The act must prevail and where at variance therewith the General Orders are not to be considered. Collier, 4th ed. 286; *West* v. *Lea*, 2 Am. B. R. 463.

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

The question in this case resolves itself into one of the sufficiency of the presentation of proofs of claims of the creditors named in the foregoing statement. They were, in reality, presented and delivered to the trustee in bankruptcy before the expiration of one year after adjudication, but there was no actual filing of the claims with the referee until after the expiration of that time, when the attempt to file them with the petition was made as above stated.

The question turns upon the construction of some of the subdivisions of the fifty-seventh section of the Bankruptcy Act, together with the twenty-first General Order in Bankruptcy, the last part of which reads: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

Sub-section *a* of section 57 provides that "Proofs of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor; and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

Sub-section *c* provides that "Claims after being proved may,

for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred."

Sub-section *d* provides that "Claims which have been duly proved shall be allowed, upon receipt by or presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Sub-section *n* provides that "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication."

If the presentation and delivery of these proofs of claim in the case before us with the trustee was sufficient within the meaning of the Bankruptcy Act, then the referee should have proceeded to determine the question of their allowance, when presented to him, the same as if they had been filed with him personally within the year subsequent to adjudication.

We have been referred to no case in this court deciding the exact question, nor is there cited any case in the lower courts wherein it has been decided, with the exception of that of *In re Seff*, District Court of United States, Southern District of New York (not reported), where the question before us seems to have been directly before that court, and the decision was in favor of the sufficiency of the filing with the trustee. The parties hereto have cited a great many cases in the lower courts deciding questions somewhat analogous to the one now before us, but none in which this question has been decided. We, therefore, think it unnecessary to refer to them.

We are of opinion, taking into consideration the various provisions of the fifty-seventh section of the Bankruptcy Act, in connection with No. 21 of the General Orders in Bankruptcy, adopted by this court, that the presentation and delivery of proofs of claim to the trustee in bankruptcy within the year after the adjudication is a filing within the statute and the general order above mentioned.

The General Orders of this court are provided for by section

30 of the Bankruptcy Act, which enacts that, "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Under that section this court had the power to provide, as it has done in Order 21, that "Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred." There is nothing in that provision inconsistent with, or opposed to, anything stated in the bankruptcy law upon the subject, and we must, therefore, take the statute and the order and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself. The question is not whether anyone but the court or referee can pass upon a claim and allow it or disallow it. That must be done by the court or referee, but it is simply whether a delivery of a claim, properly proved, to the trustee is a sufficient filing. The law provides, sub-section *c* of section 57, that the claims, after being proved, may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee, if the case has been referred; but that does not prohibit their being filed somewhere else prior to their allowance, and the Order in Bankruptcy in substance provides that they may be filed after being proved, with the trustee. Such order is equivalent to saying that proofs of debt (or claim) may be received by the trustee. When they are so received by him they are in legal effect received by the court, whose officer the trustee is. Having been received by the trustee, under authority of law, the proofs of debt are thereby sufficiently filed so far as the creditors are concerned, and it is the duty of the trustee to deliver them to the referee. If the trustee inadvertently neglects to perform that duty it is the neglect of an officer of the court, and the creditors are in no way responsible therefor. The presentation and filing have been made within the time provided for and with one of the proper

officers, and his failure to deliver to the referee cannot be held to be a failure on the part of the creditor to properly file his proofs.

Not much benefit can be derived from an examination of the Bankruptcy Act of 1867, in reference to the provisions therein contained, granting power to the Justices of the Supreme Court to frame general orders for the purpose named. See section 10, Bankruptcy Act of 1867. We think it plain that so far as this matter is concerned the Supreme Court had full power to make the General Order it did.

Different considerations, however, apply to the one claim made by the trustee himself. We do not think that in any event a trustee could file with himself his proof of his own claim against the estate of the bankrupt. General principles of law forbid that he should so act in his own case. And his delivery of his own claim to his attorney could not make such delivery stand in the place of a delivery to the referee.

These views lead to a reversal of the order of the Circuit Court of Appeals, and the affirmance of the order made by the District Court, with the modification, refusing the filing of the proof of claim of the trustee himself.

And it is so ordered.

AMERICAN SMELTING AND REFINING COMPANY *v.* COLORADO *ex rel.* LINDSLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 143. Argued December 20, 21, 1906.—Decided January 7, 1907.

Although a State may impose different liabilities on foreign corporations than those imposed on domestic corporations, a statute that foreign corporations pay a fee based on their capital stock for the privilege of entering the State and doing business therein and thereupon shall be subjected to all liabilities and restrictions of domestic corporations amounts to a contract with foreign corporations complying therewith that they will not be subjected during the period for which they are

admitted to greater liabilities than those imposed on domestic corporations, and a subsequent statute imposing higher annual license fees on foreign, than on domestic, corporations for the privilege of continuing to do business, is void as impairing the obligation of such contract as to those corporations which have paid the entrance tax and received permits to do business; nor can such a tax be justified under the power to alter, amend and repeal reserved by the State Constitution. So *held* as to Colorado Statutes of 1897 and 1902.

30 Colorado, 275, reversed.

THE writ of error in this case brings up for review the judgment of the Supreme Court of Colorado, which affirmed the judgment of the trial court forfeiting the right of the plaintiff in error, hereinafter called the corporation, to do business as a foreign corporation within the State until a certain tax therein adjudged to be due should be paid. The corporation refused to pay the tax, and thereupon, at the instance of the District Attorney and the Attorney General of the State, a proceeding in the nature of *quo warranto* against the corporation was commenced for the purpose of obtaining a forfeiture of the franchise of the corporation for its failure to pay the "Annual State Corporation License Tax." The defense set up that the tax was a violation of the Federal Constitution as impairing the obligation of a contract, and in other particulars named. Upon the trial the court found that there was due to the State of Colorado the sum of $4,000, being the amount of the annual tax due by reason of the statute, which was held valid. A decree was thereupon entered, forfeiting the right of the corporation to do business within the limits of the State of Colorado until the tax was paid, and it was "absolutely and wholly deprived of all rights and privileges within the State of Colorado, until such tax is paid." Upon appeal to the Supreme Court of the State this judgment was affirmed, and the corporation then sued out this writ of error.

The corporation was incorporated April 4, 1899, in New Jersey, and it is permitted by its articles of incorporation to do business in other States, and to carry on a general ore reduction, milling, mining and other business mentioned in such

articles. On April 28, 1899, it duly made application to the proper state authorities of Colorado for permission to enter and transact business in that State, under the laws thereof. At this time its capital stock was $65,000,000, divided into shares of the par value of $100 each. Subsequently, and on April 8, 1901, its capital stock was increased to $100,000,000, and the certificate of such increase was duly filed in Colorado. Section 499, (Mills Annotated Statutes of Colorado), after making provision for the performance of certain conditions by a foreign corporation entering the State, continued, "and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." Section 500 of the same statute provided that a foreign corporation must file in the office of the Secretary of State a copy of its charter, or, if incorporated under a general corporation law, a copy of such certificate of incorporation, and such general corporation law duly certified. Section 1 of chapter 51 of the Session Laws of Colorado for 1897 provided that every foreign corporation should pay to the Secretary of State, for the use of the State, a fee of $10 if the capital stock did not exceed $50,000. If in excess of that sum the corporation was to pay "the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of certificate of incorporation, articles of association, or charter of said incorporation, joint stock company or association, in the office of the Secretary of State; and no such corporation, joint stock company or association shall have or exercise any corporate powers or be permitted to do any business in this State until the said fee shall have been paid; and the Secretary of State shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to

any such corporation, joint stock company or association, until said fee shall have been paid to him." By section 10 of chapter 52 of the Session Laws of Colorado for 1901 it was provided that no foreign corporation could "exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this State until it shall have received from the Secretary of this State a certificate setting forth that full payment has been made by such corporation, joint stock company or association, of all fees and taxes prescribed by law to be paid to the Secretary of State, and every such corporation, joint stock company or association, shall pay to the Secretary of State for each such certificate, a fee of five dollars."

In accordance with the provisions of section 1 of the Laws of 1897, above mentioned, the corporation paid, upon filing its certificate, April 28, 1899, to the Secretary of State, for the use of the State, $9,792.50 on its original capitalization; and on May 17, 1901, the further sum of $5,250 upon its increase of capital stock to $100,000,000. Thereupon the Secretary of State issued a certificate, stating the filing of the proper papers with him, and further stating that "pursuant to the provisions of section 10 of said act (1901), I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the Secretary of State and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law." This was given under the hand and official seal of the Secretary of State, and was dated on the twenty-first day of May, 1901. There were at this time no other statutes providing for the payment of any charges, fees or taxes for coming into and doing business in the State of Colorado.

The corporation, upon entering the State in 1899 under its permission to enter and transact business therein, immediately commenced to erect a plant for the purpose of carrying on its business as a corporation, and before the commence-

ment of these proceedings it had invested for that purpose in the State sums amounting to more than $5,000,000. At the time the corporation was permitted to enter and carry on its business in the State the statute of Colorado provided that the term of life of corporations formed under the laws of that State should be twenty years. After the corporation had been doing business for some three years, and on March 22, 1902, the legislature of Colorado passed an act in relation to taxes. Session Laws of Colorado for 1902, 43, 160, etc.

Section 64 of that act provided that all domestic corporations should thereafter and on or before the first day of May of each year, or at the time of obtaining such charter or certificate of incorporation, pay "an annual state corporation license tax," to the Auditor of the State, of two cents upon each one thousand dollars of its capital stock.

Section 65 provided that every foreign corporation which had theretofore obtained "the right and privilege to transact and carry on business within the limits of the State of Colorado shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this State, pay annually . . ." a state license tax of four cents upon each one thousand dollars of its capital stock.

Section 66 provided that every corporation which should fail to pay the tax provided for in sections 64 and 65 (*supra*) should forfeit its right to do business within the State until the tax was paid, and should be deprived of all rights and privileges, and the fact of such failure might be pleaded as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporations, in any court of competent jurisdiction within the limits of the State, until such tax was paid.

This corporation refused to pay, and the State, through its District Attorney and Attorney General, commenced this suit for the purpose of forfeiting its right to remain in that State, unless and until it paid the money under the statute of 1902.

Mr. Thomas Thacher and *Mr. Charles W. Waterman*, with whom *Mr. Joel F. Vaile* and *Mr. William W. Field* were on the brief, for plaintiff in error:

The law of 1902 is void because it would impair the obligation of the contract between the corporation and the State of Colorado which resulted from compliance by the former with the laws of the latter relating to foreign corporations, including the payment to the State in April, 1899, of $9,792.50 and the payment in May, 1901, of $5,250, on increase of stock.

A binding contract between the State and the corporation was thus made—a contract based upon a valuable and substantial consideration.

The intention of the Colorado law was to create substantial uniformity as to corporations, whether originally incorporated in or out of the State, which have complied with its conditions for acquiring the right of incorporation within its boundaries. *Iron Silver Mining Co.* v. *Cowie*, 31 Colorado, 540.

The franchise being substantially the same as the corporate franchise of a domestic corporation, the grant thereof, being made for a valuable consideration, is a contract within the protection of the Constitution. *Powers* v. *Detroit &c. Ry. Co.*, 201 U. S. 543.

The contract was that, in consideration of the payments made, the corporation should have the right to do business in the State as a corporation for twenty years, subject, of course, to the same liabilities, restrictions and duties as domestic corporations. *Home for Friendless* v. *Rouse*, 8 Wall. 430.

The law of 1902 must be condemned as impairing the obligation of such contract, unless it can be justified under the provision by which alone the grant is limited, that the corporation shall be subjected to the liabilities, restrictions and duties imposed on like domestic corporations.

It cannot escape condemnation upon the charge that it impairs the obligation of contract, by reference to the reservation of power to alter, revoke or annul corporate charters. Art. 15, § 3, Constitution of Colorado.

The power to alter or revoke is not absolute. It is materially qualified.

There is a wide distinction between the power to alter or annul here reserved, and the unrestricted reserved power in the laws and constitutions of many States. *Vicksburg* v. *Vicksburg Water Works Company*, 202 U. S. 453. As clearly as in that case the burden here sought to be imposed works injustice to the corporators of defendant. It compels them to pay again and to pay twice as much as like domestic corporations for the power to continue to carry on its business during the twenty years for which it received a franchise.

Nor can it escape such condemnation by reference to the taxing power of the State.

Liability to taxation is common to all persons, natural or corporate, with respect to their property in the State, except in case of special exemption. This company does not claim exemption from taxation; it merely denies the power of the State to make it buy again what it has already bought and paid for. The legislature may tax the franchise, as it may tax other property, but it cannot destroy the title thereto, or require it to be bought again as a condition of its further enjoyment. If land is sold by the State, the legislature may tax the land, but it cannot recall the title, or require a further payment to be made as a condition of its further use.

In respect to the meaning and effect of the law of 1902, this court will not be concluded by the opinion of the Supreme Court of Colorado. *Atch., Top. & S. F. Ry. Co.* v. *Matthews*, 174 U. S. 100; *Sterns* v. *Minnesota*, 179 U. S. 223; *Powers* v. *Detroit &c. Ry. Co.*, 201 U. S. 543.

Mr. N. C. Miller, Attorney General of the State of Colorado, for defendant in error:

The statutes under which this corporation was required to pay a fee for filing a certified copy of its articles of incorporation do not constitute a contract of exemption from any form

of taxation. Chap. 51, Session Laws of Colorado, 1897; Const. of Colorado, § 3, art. XV.

The right to do business is subject to taxation. If this is so, then the constitution prohibits the legislature from making any contract of exemption with corporations. The legislature cannot make a contract with a corporation, express or implied, that would exempt it from any of the ordinary forms of taxation. If the legislature, at the time of admitting this corporation, had not seen fit to tax the business carried on by the corporation, there is certainly no contract agreeing never to resort to this form of taxation.

A corporation claiming to be exempt from any form of taxation must show a clear and unequivocal provision to that effect, either in its charter or under the general law under which it is incorporated. *Ohio Trust Co.* v. *Debolt*, 16 How. 416; *Delaware R. R. Tax case*, 18 Wall. 206; *North. Missouri R. R. Co.* v. *Maguire*, 20 Wall. 46; *Metropolitan St. Ry. Co.* v. *New York*, 199 U. S. 1; *Wells* v. *Savannah*, 181 U. S. 531; *Bank* v. *Billings*, 4 Pet. 514; *Memphis Gas Co.* v. *Shelby Co.*, 109 U. S. 398.

The fee which a foreign corporation pays to file its articles in a State is analogous to the filing fee paid by a domestic corporation. Appellant's contention that this is a purchase price and that the State has sold something is purely an assumption and not a single authority is cited to sustain it. The case at bar is not like those corporation cases referred to by counsel where the State, impelled by the necessity of raising revenue, and expressly avowing its intention, has sold a franchise for the purpose of raising certain revenue, and inserted a clause of exemption from other taxation as an inducement to the buyer.

There is an obvious distinction between the charter of a corporation or the general statutes under which corporations file their articles, which are legislative in character and subject to alteration, amendment or repeal in pursuance of the Constitution and statutory provisions; and business contracts,

or franchises, entered into between corporations and the State or municipality. The latter is protected by all the provisions of the Federal Constitution, the same as a contract between two natural persons. But articles of incorporation filed under the constitutional provisions and statutes, such as we have cited in Colorado, are legislative in character and are subject to change from time to time. *Walla Walla* v. *Water Works Co.*, 172 U. S. 1; *Joplin* v. *Light Co.*, 191 U. S. 150.

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

It is conceded that the corporation has paid all its indebtedness for taxes or otherwise to the State of Colorado, except the amount demanded under the above-mentioned law of 1902, and that it has obeyed all the laws of the State with that exception. It is urged, however, upon the part of the corporation that, by its admission into the State, with its right to do business therein by the payment of the amount of money required for such purpose under the then existing law, a contract between the State and itself was thereby made that it should be permitted to remain therein during the term of life which the State by law allowed to corporations created by it (which was twenty years), without being again subjected to further exactions of money for what it had once paid for, viz., the right to remain and transact business in that State. Undoubtedly, if the corporation violated the laws of the State properly applicable to it, or if otherwise it gave just cause for its expulsion, it could not insist upon such a contract as a defense.

It is also conceded on behalf of the corporation that it is not entitled to any exemption from taxes which the State of Colorado can properly impose upon persons or corporations within her borders.

Having obtained permission to enter the State and do business as above mentioned the question, aside from that of the

extent of the term, is whether any contract between the State and the corporation arose under these laws and the facts above mentioned.

In 1899, when this (foreign) corporation applied for a permit to enter and do business in the State, the laws of Colorado only granted such application on the payment of a certain fee named in the statute of 1897, which was payable upon filing its certificate of incorporation in the office of the Secretary of State of Colorado, and until that payment was made and the certificate filed no such corporation was permitted to have or exercise any corporate powers, nor was it permitted to do any business in the State. Section 30 of the act of 1901 provided that, upon payment of all taxes, etc., due under the law, the Secretary of State was to issue a certificate acknowledging the fact, for which the corporation was to pay a stated fee; and until the certificate was received from the Secretary of State by the corporation it should not exercise any corporate powers or do any business in the State, as provided for by the act of 1897.

The result of these statutes was that the foreign corporation, upon filing the proper papers and paying the statutory fees and obtaining the certificate to that effect from the Secretary of State, obtained the right to enter and do business in Colorado. The act of 1901 did not increase the amount of the exaction for entering and doing business in the State, but simply provided for a certificate, acknowledging payment, from the Secretary, and it imposed the payment of a small fee for such certificate. The right obtained was a right to enter the State and do business therein as a corporation. It was also subject by statute to the liabilities, restrictions and duties which were or might thereafter be imposed upon domestic corporations of like character. Domestic corporations at that time had the right to a corporate existence of twenty years.

These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required

and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were or thereafter might be imposed upon domestic corporations of like character.

A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming in the State should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. In other words the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the State. It was not a mere license to come in the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, corporation at the same time and to the same extent.

Such being the contract, how long was it to last? Only until the State chose to alter it? Or was it to last for some definite time, capable of being ascertained from the terms of the statutes as they then existed? It seems to us that the

only limitation imposed is the term for which the corporation would have the right to continue in the State as a corporation. One of the restrictions as to domestic corporations is that which limits its corporate life to twenty years, unless extended as provided by law. The same restriction applies to the foreign corporation. *Iron Silver &c. Co.* v. *Cowie*, 31 Colorado, 450. Counsel for the State concedes that the corporation was admitted for a period of twenty years, but subject to the power of the State to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary, implication arising from the statute.

This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of two cents upon each one thousand dollars of its capital stock, while the former must pay four cents for the same right. This cannot be done while the right to remain exists. It is a violation of the obligation of an existing valid contract. *Home of the Friendless* v. *Rouse*, 8 Wall. 430.

Nor is this a case where the power given by the state constitution to the general assembly to alter, amend or annul a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the State.

A discussion as to the name or nature of the tax imposed by the act of 1902, or the former acts, is wholly unimportant with reference to the view we take of this case. After the payment of the money and the receipt of the permit to enter and do business in the State the corporation could not, as we

have said, be thereafter further taxed than was the domestic one. The tax on the latter under that act is the same in substance and effect as that upon the foreign corporation, but it is for only one-half thereof in amount. The domestic must pay "an annual state corporation license tax," while the foreign corporation must pay "a state license tax" annually. The means of enforcing payment are not different, and such means are stated in section 66 of the act of 1902.

Whatever be the name or nature of the tax, it must be measured in amount by the same rate as is provided for the domestic institution, and if the latter is not taxed in that way neither can the State thus tax the foreign corporation.

It is unnecessary to refer to the many cases cited by both parties hereto. Some of them refer to the question as to the nature of such a tax, while others decide, upon the facts appearing in them, whether there was a contract or not. As already stated, the name of the tax or its kind is not important so long as it is plain that the act of 1902 increases the liabilities of the foreign corporation over those which obtain in the case of the domestic. And in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act, and in this case we are not greatly aided by the former cases regarding taxation and legislative contract. We may, however, refer to the following out of many cases, regarding contracts as to taxation: *Miller* v. *The State*, 15 Wall. 478; *New York, Lake Erie & Western Railroad Co.* v. *Pennsylvania*, 153 U. S. 628; *Power, Auditor,* v. *Detroit &c. Railway Co.*, 201 U. S. 543.

Holding that the act of 1902 impaired the obligation of the contract existing between the corporation and the State, and is therefore void as to the corporation, it becomes unnecessary to decide the other questions discussed at the bar.

The judgment of the Supreme Court of Colorado is reversed

and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE HOLMES and MR. JUSTICE MOODY dissented.

CLEVELAND ELECTRIC RAILWAY COMPANY *v.* CLEVELAND AND THE FOREST CITY RAILWAY COMPANY.

CITY OF CLEVELAND *v.* CLEVELAND ELECTRIC RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Nos. 197, 321. Argued November 12, 13, 1906.—Decided January 7, 1907.

Grants of franchises are usually prepared by those interested in them and submitted to the legislatures with a view to obtain the most liberal grant obtainable, and for this and other reasons such grants should be in plain language, certain, definite in nature, and contain no ambiguity in their terms, and will be strictly construed against the grantee. *Blair* v. *Chicago*, 200 U. S. 400, 471.

The Ohio legislature has granted the city of Cleveland comprehensive power to contract with street railroad companies with regard to the use of its streets and length of time, not exceeding twenty-five years, for which such franchise may be granted. *Cleveland* v. *City Railway Co.*, 194 U. S. 517; *Cleveland* v. *Electric Railway Co.*, 201 U. S. 529.

The action of the city council of Cleveland, and the acceptance by the Cleveland Electric Railway Company of the various ordinances adopted by the council did not amount to a contract between the city and the company extending the time of the franchise involved in this action; and a later ordinance affecting that franchise after its expiration as originally granted is not void under the impairment clause of the Federal Constitution.

In the absence of any provision to that effect in the original franchise, the city granting a franchise to a street railway company, cannot on the expiration of the franchise take possession of the rails, poles and operating

appliances; they are property belonging to the original owner, and an ordinance granting that property to another company on payment to the owner of a sum to be adjudicated as its value is void as depriving the owner of its property without due process of law.

THIS bill was filed in the United States Circuit Court for the Northern District of Ohio on the twenty-first of March, 1905, against the City of Cleveland and The Forest City Railway Company, for the purpose of obtaining an injunction to restrain the city from carrying out a certain ordinance relating to the Garden street branch of complainant's railroad, passed by the city council January 11, 1904, on the ground that it was null and void, because it impaired the obligations of various contracts which the complainant alleged had been entered into between the complainant and the city, providing for the use until either July 13, 1913, or July 1, 1914, of certain streets by the railroad owned by the complainant, and known as the Garden street or Central avenue branch, and hereafter called the Garden street branch. The ordinance granted to The Forest City Railway Company (a stranger to the original grants) the renewal right to maintain and operate the existing street railroads through the streets named therein, which were the same streets theretofore granted to the Garden street railroad. The right was granted upon condition that the grantee should pay to the owners of the poles and other property being in the streets an amount to be agreed upon therefor, or such sum as should be finally adjudicated upon by a court. A temporary restraining order was granted. The defendants made separate answers, denying the existence of any contract between the complainant and the city upon the subject of the Garden street branch subsequent to March 22, 1905, and the Forest City Railway Company claimed under the ordinance of January, 1904, the right to take possession of such Garden street branch after March, 1905, and to use the tracks of the complainant's railroad. The case was heard upon the pleadings and various ordinances and resolutions of the council of the city.

After hearing, a decree was made by the Circuit Court (137 Fed. Rep. 111), which decreed that the right claimed by the complainant to operate its Garden street branch railroad in the streets named in the bill expired on the twenty-second day of March, 1905. It was also decreed that the ordinance of January 11, 1904, was inoperative, so far as it assumed to confer upon the defendant, The Forest City Railway Company, any legal right to take the tracks, poles, wires and appliances erected and maintained by the complainant in the streets, because such ordinance authorized the taking of the property of complainant without due process of law. The railroad company, therefore, was enjoined from interfering with the complainant in the peaceable possession of the property mentioned, and the city was enjoined from attempting in any manner, by virtue of the ordinance, to put the defendant, The Forest City Railway Company, into possession of the same. From the decree the complainant, and both of the defendants, appealed directly to this court, as involving questions arising under the Constitution of the United States. The complainant's appeal is No. 197, and is from that portion of the decree which adjudges that the right of the complainant to maintain and operate its Garden street branch railroad expired on the twenty-second of March, 1905. The cross appeal of the defendants is from that portion of the decree which enjoins The Forest City Railway Company from taking possession of the property described, and which also enjoins the city from in any manner attempting to put that company into possession thereof. It thus appears that the whole controversy turns upon the question whether the right of the Garden street railroad terminated March 22, 1905, or lasts until July 1, 1914, or possibly only until July 13, 1913.

The record shows that there are, among others, two lines of railroad belonging to the complainant, one of which is known as the Euclid avenue, sometimes called the "main" line, and the other the Garden street branch. Both lines run from east to west through the city in different, though generally parallel, streets up to the point of their intersection at Erie street and

Euclid avenue (or Prospect street), from which point west, for a short distance, to the public square and Water street, the Garden street branch is authorized to use the Euclid avenue tracks.

The following (among many other) ordinances and resolutions of the council of the city were put in evidence on the trial, together with the various resolutions of complainant, in which it accepted such ordinances and resolutions. These constitute the case between the parties, and there is no contradictory evidence. Complainant contends that the Garden street grant must be measured in time by that provided for the termination of the Euclid avenue grant.

The ordinances and resolutions relating to the Euclid avenue line will be first stated. The first is a resolution, which granted to the East Cleveland Railroad Company, a corporation incorporated February 28, 1859, for that purpose, the right to construct and operate a railroad from a point on Prospect street at its intersection with Erie street, to the eastern terminus of Prospect street, which grant was for the term of twenty years from September 20, 1859. The company having obtained the necessary consents of the property owners along the line, duly located, constructed and operated the road under that resolution and within a short time after it was authorized so to do.

This was the commencement of what is known as the Euclid avenue, or sometimes (after 1868) the main line of one of the roads owned now by the complainant.

By ordinance, April 15, 1862, the company was authorized to extend its line from the intersection of Erie and Euclid streets west to the public square.

September 15, 1879, an ordinance was passed, which granted a renewal of the franchise to the East Cleveland Railroad Company to maintain and operate its whole Euclid avenue street railroad as far as Willson avenue, on the east, for a period of twenty-five years from September 20, 1879 (September 20, 1904). This ordinance makes no reference to the Garden street line, which had then been built and was in operation, and does not mention any of the streets through which that line passed,

although the Garden street line had the right, under the ordinance of 1868, hereinafter mentioned, to use the tracks of the Euclid avenue line from the point of junction therewith westerly to its terminus.

On the fourth of April, 1883, another ordinance was passed, granting to the East Cleveland Railroad Company the right to extend, lay and operate its double track on Euclid avenue from the west line of Willson avenue easterly to the east line of Fairmount street, the right granted to terminate on the twentieth of September, 1904, "with the said renewal of that part of said company's line lying west of Willson avenue." Ordinance of September 15, 1879, above referred to.

By ordinance of March 15, 1886, another grant was made to the Euclid avenue line east of Fairmount street, which grant was to cease and terminate upon the twentieth of September, 1904, "as provided for said company's tracks in Euclid avenue, west of Fairmount street."

In order to change from animal power to electricity an ordinance was passed July 13, 1888, granting to the East Cleveland Street Railway Company the right to construct and operate an electric street railway on Euclid avenue from Willson avenue easterly to the city limits, and on Cedar avenue from a point near the Cleveland and Pittsburg Railway Company's right of way in that avenue, easterly to a point about 1,500 feet east of Fairmount street. The permission was given on the condition that the grant was to be exercised within six months from the passage of the ordinance. The grant was also upon condition that if the company, from any cause, should fail to extend the electric system over its entire main and Cedar avenue lines within eighteen months from the date of the passage of the ordinance, then the ordinance should be void. Nothing in the ordinance was to be construed as authorizing any increase in the fare for transportation over any portion of the company's line. The sixth section of the ordinance stated that the privilege of constructing the electric system, as provided in the ordinance, was granted "in consideration of the improved facilities

hereby contemplated and the large expenditures necessary to secure the same, and shall be in force for the period of twenty-five years from and after the date of the passage of this ordinance, upon its main and Cedar avenue lines." The right to change to electric power, as given by the foregoing ordinance, was confined, it will be observed, to that portion of the Euclid avenue line east of Willson avenue, and on Cedar avenue to that part lying between the Cleveland and Pittsburg Railway Company's right of way and a point 1,500 feet east of Fairmount street. Nothing west of Willson avenue is included in that grant.

On May 13, 1889, a resolution was adopted, which authorized and required the railroad company, "as soon as practicable, to extend the use of such motive power over its main and Cedar avenue lines to the westerly termini thereof." This included those lines west of Willson avenue, and under the ordinance and resolution the Euclid avenue line was changed to an electric street railroad within the times mentioned in the ordinance and resolution.

There was no extension of time granted by the resolution of 1889 for the termination of the grant on any portion of the Euclid avenue line.

On July 17, 1893, the right was given to the company to extend its road at the intersection of Prospect and Erie streets to the intersection of Prospect and Ontario streets, and also at the intersection of Superior and Seneca streets, thence along Seneca, Lake and Ontario streets, and the council imposed upon it the duty, if required by the council, of operating its cars over the entire length of any of the lines. Other duties were imposed upon it. Complainant contends that some part of this ordinance refers to a portion of the Garden street extension, and that it requires the operation of all the Garden street cars over these tracks, and the grant is to terminate at the time mentioned in the 1888 ordinance, July 13, 1913.

The above list includes the material ordinances and resolutions pertaining particularly to Euclid avenue.

After the Euclid avenue line had been built the council, on the fourteenth of January, 1868, passed a resolution granting its consent to the East Cleveland Street Railroad Company to lay down its tracks from the intersection of Prospect and Brownell streets, "to connect with the main line of its railroad," running thence through Garden and other streets to and across Willson avenue, to the eastern boundary of the city, during the period of twenty years. Willson avenue was then the eastern boundary of the city. The road could continue to use and occupy the streets, avenues and public grounds, over which its main line was then constructed and operated westerly from the junction (at Brownell and Prospect streets) of said road with the main line to its westerly terminus, for the same length of time.

This Garden street line was thereafter built, and it is asserted that it was the inception of a new and separate street railroad. It has been extended at various times since, and forms, with its various extensions, what is called the Garden street branch, and is the railroad in question.

On the thirtieth of March, 1868, the railroad company was permitted by ordinance of the village of East Cleveland to construct a branch railroad on Garden street, which would form an extension, in fact, of the Garden street line easterly through the village to the line of Wade street. The grant was for twenty years from the time of the completion of the work, which was to be completed within five years from the date of the passage of the resolution granting the right, March 30, 1868.

On the twenty-fifth of March, 1873, the council passed a resolution, in the preamble of which it was stated that the East Cleveland Railroad Company desired and proposed to connect their Garden street branch with the main line of their road, at the intersection of Erie and Prospect streets, and thereupon the council granted to the railroad company the "right to lay down a double track street railroad in Ohio street from their present track in Brownell street to Erie street, and in Erie street

from Ohio street to Prospect street, to connect with their main track at this point." This made a junction at Erie and Prospect streets, with the Euclid Avenue Railroad, instead of at Brownell and Prospect streets, a small difference as to length of road.

On the twenty-third of May, 1876, the council authorized the East Cleveland Railroad Company to extend the Garden street branch of its road at the easterly end thereof along Garden street to Baden avenue, thence to Quincy, along Quincy to New, and along New street to Garden street, there to connect with the Garden street tracks. The ordinance provided that the right therein granted should continue for twenty years from that date.

This extension placed a track in Quincy street from Baden to New street, which was a very short distance. It did make a different date for the termination of the grant than was provided for the rest of the branch, and it was to be operated "in connection with said branch and its main line." No increase of fare was to be charged by the company on any part of its branch or of its main line or extension by reason of the extension.

In the year 1880, on the twenty-second of March, the council passed an ordinance authorizing the East Cleveland Railroad Company to extend the Garden street branch of its railway, from the then existing track, at the intersection of Baden avenue and Quincy street, on and along said Quincy street, in an easterly direction to the intersection of Quincy street and Lincoln avenue, "and to equip and operate the said extension *and its Garden street branch* for the period of twenty-five years from and after the passage of the ordinance." When this ordinance was passed the eastern limits of the city of Cleveland had been extended, so that the territory covered by the grants to the Garden street line was at that time included in the city of Cleveland.

In 1885, February 9, the council passed an ordinance permitting the East Cleveland Railroad Company "to extend its

Garden street branch from the intersection of Quincy street and Lincoln avenue, in an easterly direction, to Woodland Hills avenue, . . . and equip and operate said extension as a single track railroad, with all necessary switches, turnouts and turntables" in connection with said branch and its main line, and terminating with the grant for the main line, but with the express condition that "no increase of fare shall be charged by said company on any part of its main line, or on said extension, by reason of said extension."

On the seventeenth of June, 1887, the council granted another extension to the Garden street branch, on Garden street from Baden avenue easterly to Lincoln avenue, the grant to terminate "with the grant for the Garden street main line," and no extra fare.

On the tenth of March, 1890, the council passed an ordinance which "granted the right to operate its Garden street branch by electricity" from and to the points named in the ordinance, and this grant was "to operate by electric power the said Garden street branch during the term of its present grant for said Garden street branch." Both roads were thereafter operated as electric street railroads.

On the thirtieth day of March, 1891, another ordinance was passed, authorizing the railroad company "to operate a second or additional track in and upon Central avenue (Garden street) from the east line of Willson avenue to the Cleveland and Pittsburg Railroad tracks." It was provided that the "right herein granted shall be valid until the expiration of the grants for the said company's main line."

On the twentieth of April, 1891, an ordinance was passed which authorized the railroad company to "operate a second or additional track in and upon Quincy street from New street to Woodland Hills avenue." This was part of the Garden street line. Section 3 of the ordinance contained the provision that the "right herein granted shall be valid until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to wit, July 13, 1913."

These are the material ordinances which particularly relate to the Garden street railroad.

During March and April, 1893, the complainant herein was organized as a consolidation of several street railroads, which, it is enough to say, included, among others, the Euclid avenue and the Garden street lines, and on the twenty-second day of May, 1893, the consolidated railroad company (this complainant), through its vice-president, addressed a communication to the council, stating that the various consolidations had been made under advice of counsel, but inasmuch as some question seemed to have arisen as to the intention of the company, it was stated that the company did not claim any rights greater than the constituent companies forming the organization; that it intended to obey all ordinances to which each and all the constituent companies were subject, and that it had, since the consolidation had been effected, issued transfer checks to all persons desiring them, to enable such persons to have a continuous ride from any East Side line to any South Side or West Side line, and from any South or West Side line of the company to any East Side line, for one fare, and would continue such system of transfers where it could not better accommodate its patrons by such through lines as it might establish; and that it disclaimed all intention of charging more than one fare for any such continuous ride; "and that its aim has been and will be to give its patrons vastly improved service and accommodations by reason of such consolidation."

The council thereupon, by resolution, consented to the consolidation of the various railroad companies named in the resolution under the name of the Cleveland Electric Railway Company, upon the condition that "only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by any other of said constituent companies within the limits of the city of Cleveland; and passengers on any of such lines paying one fare shall be entitled, without extra or additional charge, to be transferred to any other of said lines and have a continuous ride thereon for said single fare." The con-

ditions contained in the resolution were thereafter accepted by the complainant in writing.

On the nineteenth day of February, 1894, the council adopted "an ordinance granting permission to the Cleveland Electric Railway and the Cleveland City Railway Company to extend their tracks in Willson avenue." This avenue runs north and south and crosses many of the avenues in which some of the constituent companies of the consolidated road had laid their tracks.

The ordinance granted each railroad company the right to extend its double track railroad along Willson avenue from and to the various points named in the ordinance, and the road was to be constructed and operated in connection with the existing tracks in Willson avenue as a double track street railroad. The two companies named in the ordinance were to jointly construct and maintain the road, and each was to have the right to occupy and use the track, wires, etc., of the other company then in Willson avenue, on such terms and conditions as the council might deem just and reasonable, unless the companies should otherwise agree. Provision was then made for the running of through cars on Willson avenue between certain points, and night cars were to be operated by the companies throughout the entire length of Willson avenue. A passenger on any car operated on any part of said Willson avenue was to have the right, on the payment of one fare, without additional or extra charge, to be transferred to any other line of either of said companies intersecting or coming to said Willson avenue, and were to have a continuous ride thereon, with the right, without additional charge, to be transferred from said second line to a car on any other line of either of these companies intersecting or coming to Willson avenue, and were to be entitled, without additional or extra charge, to be transferred to the Willson avenue line and to have a continuous ride thereon. Regulations were made for the paving of certain portions of the street by the company under the direction of the city authorities, and provision was made for widening the roadway on Willson avenue

between certain points named, and for setting back curbs, hydrants, etc., all of which was to be done at the expense of the companies, which were also to comply with and perform all the general ordinances of the city relating to street railroads, then or thereafter in force. By section 10 it was provided that the grant should be in force until the first day of July, 1914.

On the twenty-fifth of June, 1894, the council passed "An ordinance granting the Cleveland Electric Railway the right to extend and operate its double track street railroad in Quincy street from New street to Willson avenue." This ordinance provided for the extension and operation by the Cleveland Electric Railway Company of a double track street railroad on and along Quincy street, from its then present tracks thereon, westerly to Willson avenue, connecting by curves with its Willson avenue tracks. The sixth section provided that "This grant shall terminate with the grant for said company's present line in Quincy street."

These ordinances and resolutions are those which particularly relate to the extent of the grants to the railroad company for the Euclid avenue and for the Garden street lines. Other ordinances and resolutions were passed, showing, in connection with those already in evidence, as insisted upon by the complainant, the existence of a general system for the operation of the roads owned by the complainant, including the Euclid avenue and Garden street lines, as a unit, and the necessity existing for operating all of the lines in connection with each other for the life of the longest grant. And it is insisted that this was the obvious intention of the council, to be gathered from the various ordinances, among them those especially above adverted to.

Mr. William B. Sanders and *Mr. John W. Warrington*, with whom *Mr. Andrew Squire* was on the brief, for Cleveland Electric Railway Company.

The Garden street tracks involved were, and are extensions, of the "main line" of the East Cleveland Railroad Company.

The grant for the "main line" does not expire before July 13, 1913, in fact not until July, 1914.

By consistent and uniform legislation, the council has provided that the Garden street extension should be operated in connection with the "main line" and the right to operate expires with the grants for the "main line." This is expressly so provided in the ordinance of 1885, and in two ordinances in 1891.

In 1893 the council fixed the terms and conditions of the consolidation forming the appellant. The grants of the constituent companies as then provided expired as follows: Broadway & Newburgh Co., July, 1914; the East Cleveland Co., July, 1913; the South Side Street Co., October, 1913; the Brooklyn Street Co., January, 1910; and, as a condition of such consolidation, the council required thereafter the operation as an entire system of all the lines of the constituent companies, with through car service and general transfers. In order to comply with these conditions and exercise the right granted to the consolidated company, operation must be continued until the expiration of the longest grant, to-wit, July, 1914.

In 1894 the council provided for the construction by the Consolidated Company and The Cleveland City Railway Company of a cross-town line in Willson avenue, and for the operation of such line in connection with all of the lines of the Consolidated Company, including the Garden street extension. The operation so required of the Consolidated Company, the ordinance provided, should continue until July, 1914,—this being the date of expiration of the longest grant held by the Consolidated Company. The conditions of this cross-town ordinance cannot be complied with, nor can the railway company exercise the rights there granted in consideration of its expenditures in building the line, without the operation of the Garden street extension to July, 1914.

The city received full consideration for these grants, and the extensions were not for an unreasonable time: only for such time as made the right to operate an extension track

expire at the same time as the "main line" of which it was an extension, and permitted operation in connection with the cross-town line for such period as was necessary to fulfill the obligation and exercise the rights granted in the ordinance establishing such cross-town line.

The right of the appellant to operate the Garden street extension did not, as decreed below, expire in March, 1905; but by virtue of existing contracts, which cannot be impaired, appellant is entitled to operate the tracks in controversy until July, 1914.

Mr. Newton D. Baker for the city of Cleveland.

Mr. D. C. Westenhaver for the Forest City Railway Company.

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

Out of these various ordinances and resolutions arise the difficulties suggested in this case. The facts are somewhat complicated by reason of their number, and the inferences to be drawn from them are not always perfectly plain and certain. The complainant contends that, by reason of the action of the city council and the acceptance by the complainant of the various ordinances and resolutions adopted by that council, a valid contract has been entered into between the city and the complainant, by which the right to use the streets named in the ordinances by the Garden street branch has been granted to complainant up to July 1, 1914, or, if it is mistaken as to that time, that then the contract terminates on the thirteenth of July, 1913. The city contends that neither date is right, but that the contract, so far as it related to the Garden street branch, terminated on the twenty-second of March, 1905.

The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and

definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, "in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislatures with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed." *Blair* v. *Chicago*, 201 U. S. 400, 471. In the case cited this court has had occasion to state the principle of construction and to cite some of the authorities upon which it is based. This has been so lately done that it is unnecessary to more than refer to that case as authority for the doctrine above stated.

Before proceeding with an examination of the various ordinances and resolutions referred to in the foregoing statement, it is well to say that we do so upon the assumption that the legislature has heretofore granted to the city council of Cleveland most comprehensive power to contract with street railroads within its limits, with regard to the use of its streets, and the length of time for which such use may be granted, not longer than twenty-five years. *City of Cleveland* v. *Cleveland City Railway Company*, 194 U. S. 517, 533; *Cleveland* v. *Cleveland Electric Railway Company*, 201 U. S. 529, 541. Therefore, in deciding this case, we assume the validity of the contract, whatever it is, that was made. The only question involved herein is one of construction and intent.

The most important of the many ordinances and resolutions relating to the Euclid avenue line, commencing in 1859, have been referred to in the foregoing statement of facts because of the contention of complainant that the Garden street branch is nothing but an extension and, in reality, as in law, a component part of the Euclid avenue line, and that the Garden street grant is limited and governed by the time of the expiration of the Euclid avenue grant. In other words, that the grant

of 1888 to the Euclid avenue line of the right to change its motive power, and extending the termination of the grant until twenty-five years from that date, thereby extended the termination of the grant to the Garden street branch to the same time, although the whole branch road had been separately and otherwise provided for, and had never before had the same termination as the Euclid avenue line. The grant is to be implied which is to work such a change in a grant then existing in specific and direct language. The same argument is also set forth in regard to the ordinance of July 17, 1893, which will be again referred to.

Under these circumstances it is important to direct special attention to the Garden street branch.

The East Cleveland Railroad Company, having built and operated its road through the various streets mentioned in the ordinance of 1859, granting it leave so to do, became desirous of building another road in connection with the one it was then operating, but there was no statute at that time in Ohio permitting the extension of a road then built, and the company therefore in 1867, and the early part of 1868, took the same proceedings to acquire the right to build the new road that it had taken to build the former, although it did not seek a new incorporation. As a railroad company already existing, it applied to the council of the city of Cleveland for leave to construct a street railroad from the intersection of Prospect and Brownell streets, to connect with the main line of its road, and thence through various streets and along the center of Garden street, to and across Willson avenue, to the easterly boundary of the city. It procured the consents of the property owners along the line; notice for the reception of bids was published by the city as provided for in the statute, and the railroad company made a formal bid for the privilege of laying down its tracks through the various streets, and named the rates of fare which would be charged. That bid was the lowest, if not the only one, made, and it was duly accepted, and the privilege was granted to build a railroad in Garden street, and to operate

it for twenty years from the date of the adoption of the ordinance, January 14, 1868, and the company was to continue to use the western end of the Euclid avenue road as stated in the ordinance. The ordinance was accepted and the road built. At this time the grant to the Euclid avenue line expired September 20, 1879.

Referring to the procedure under which the Garden street branch was created and the permission of the city council to build the road obtained, it is plain that the branch thus built was not a mere extension or part of the Euclid avenue line, so that a grant to the latter necessarily covered the other as an inseparable part of it, but was a distinct line, with a separate route, with the exception of a short distance at the west end, where it was permitted to use the tracks of the Euclid avenue line. The termination of the right was at a different time from that provided for the Euclid avenue line. This use of the Euclid avenue tracks for a short distance did not make the Garden street branch a mere extension of the former road. Whether authorized by its charter to build the Garden street road is not important. It did so, and its right to do it was given by an ordinance of the council, which has been recognized as valid ever since. Because on some occasions it has been called a branch does not alter the weight to be given the facts stated, or turn the branch into a mere extension where it has been otherwise uniformly treated.

It is contended that by the resolution of March 25, 1873, which granted to the East Cleveland Railway Company the right to lay a double track street railroad, intersecting with its main line at Erie street and Prospect street, and thence through other streets mentioned in the resolution, the Garden street line thereby became an extension of the main line, or was recognized as a mere extension. The preamble to that resolution recites that the railroad company desires to connect the Garden street branch with the main line of their road at the intersection of Erie and Prospect streets, and to remove the other track from Brownell street, between Ohio and Prospect streets,

and therefore permission is granted to the company so to do. That resolution provided simply for changing the connection of the Garden street branch with the Euclid avenue line from Brownell street to Erie street, and for the taking up of the track on Brownell street, between Ohio and Prospect streets. It did not make the Garden street branch any more of an extension of the main line than it had been before. The branch road certainly did not become a part of the main road, simply because it ran in connection with it, or because it ran over a small portion of the tracks of that road. It remained what it started out as, a road with a separate route and a different term of life.

The grant made in 1876 to the company to extend its Garden street tracks from its then terminus at Baden street, to and along other streets towards the east, with the right to equip and operate said extension for twenty years, in connection with the said Garden street branch and its main line, had no effect upon the question we are discussing. That extension of the tracks of the Garden street branch spoken of in the ordinance was also a short one, and was to terminate at a different time from that then existing in regard to the other portion of the Garden street branch. That it was to be operated in connection with its Garden street branch and the main line did not make the branch as extended a part of the main line, or alter the fact that the branch was a separate road, although operated in connection with the main line. It is quite difficult to see why the right to operate this particular extension should have been granted for twenty years or until 1896, instead of being limited to terminate with the branch, but at any rate, the grant is in unambiguous terms, and states in so many words the length of time it is to last. Its importance is not very great, and is entirely effaced by the subsequent ordinance of 1880, which provided for the termination of the whole Garden street branch at the time specified, 1905.

By that ordinance (March 22, 1880) the question of the termination of the grant for the whole Garden street branch was distinctly settled. By it the right to extend that branch of its

railroad in an easterly direction, on and along Quincy street, was given to the company, and the right "to equip and operate the said extension and its Garden street branch" was given for the period of twenty-five years from the passage of the ordinance, but without increase of fare on any portion. This, of course, placed the termination of the whole grant to the Garden street branch on March 22, 1905. There is no ambiguity as to this grant, and the termination of the grants to the two roads was kept apart, one being September 20, 1904, the other March 22, 1905.

Much stress is laid by the complainant on the ordinance of the ninth of February, 1885, which was entitled "An ordinance to permit the East Cleveland Railroad Company to extend the Garden street branch of its railway." The company was thereby authorized to extend the Garden street branch from the intersection of Quincy street and Lincoln avenue, in an easterly direction, to Woodland Hills avenue. It was to be operated in connection "with said branch and its main line and terminating with the grant for the main line," but with no increase of fare. It is contended that the particular grant mentioned in this ordinance was to terminate with the grant for the main line, which would make it terminate September 20, 1904, instead of March 22, 1905. If this were the only question, of course the complainant would not insist that the grant to it should be shortened six months. But it is cited for the purpose of showing an intention of the council to limit the termination of the Garden street branch by the limitation then existing in regard to the Euclid avenue line. It is contended that from the time of the passage of this ordinance by the council and its acceptance by the complainant the parties thereby agreed that the extension should be operated with the main line, and that its grant for such operation should expire with the grant for the main or Euclid avenue line, and that this was in pursuance of the plan by the city to have the grants to the two roads expire at the same time. And the claim is that the subsequent ordinances must be construed in the same manner

and for the purpose of carrying out the same scheme. There is here undoubtedly some room for the contention of complainant, but we think, upon looking at all the facts in connection with this question, that the intention of the council was not that way. The Garden street branch, running from the intersection of Erie and Prospect streets, towards the east, terminated, at the time of this grant, at Lincoln avenue. This made a long line of road. By the ordinance it was lengthened from Lincoln avenue to Woodland Hills avenue, a comparatively short extension of track. The right granted to the whole branch line as far east as Lincoln avenue then terminated on the twenty-second of March, 1905, and yet by this construction of the ordinance of 1885 this small extension of track from Lincoln avenue to Woodland Hills avenue was to expire September 20, 1904. Why this difference? The ordinance did not assume in any way to alter the time of the termination of the then existing grant to the rest of the Garden street branch, but it simply limited the time of the termination of the grant for the extension then given. Hence it is difficult to see how any agreement can be found to arise from the ordinance for the simultaneous termination of all the grants to both the main line and the Garden street branch. Nor can any general scheme to have the grants of both roads terminate together be evolved from anything done by the parties up to and including 1885.

There is nothing in *Cleveland* v. *Cleveland Electric Railway*, 201 U. S. 529, 539, that covers this case. The language of the ordinance adverted to in that case is to be applied to very different facts from those existing here. We assume the ability of the council to make such a contract as complainant contends for herein, but we think none such was made in fact.

So far as can be determined from this record, there was absolutely no reason for terminating the right to use this small extension of track in September, 1904, while the rest of the branch then existing was not to terminate until six months later. It cut up the branch line in a way which it is impossible from this record to give any reason for, and accordingly, under

the then existing circumstances, it might be argued that the words, "terminate with the grant for the main line," did not mean the Euclid avenue line, but it referred to the Garden street branch, which was, as a matter of fact, the main line so far as concerned the small extension of the track from Lincoln avenue to Woodland Hills avenue. To terminate the grant for the extension at the same time with the grant for the line thereby extended would be the most obvious and natural course to pursue. It is true the ordinance itself recognizes the "branch and its main line" as constituting two different lines, and provides that the grant is to terminate with the grant for the main line. And yet the real meaning of the ordinance, when regarded in the light of the facts then existing, becomes, to say the least, ambiguous. The general provision for the termination of the grant for the whole Garden street branch, as made in 1880, ought not to be expunged by an implication arising out of such doubtful language as is found in this 1885 ordinance. But if otherwise, it results only that the particular extension expired in September, 1904, with the grant to the Euclid avenue line, which, at that period, expired on that date.

In 1887, June 17, an extension of the Garden street branch was granted, which, by the terms of the ordinance, was to terminate "with the grant for the Garden street main line," without increase of fare being charged. Here the council, it will be observed, expressly referred to the Garden street branch as the main line, and it is undoubtedly plain that it was properly so referred to. In extending the branch, and with reference to the extension, the branch would naturally be regarded and spoken of as the main line. If not done in all cases it is somewhat difficult to find any reason for it.

Again, by an ordinance passed March 10, 1890, granting leave to change the motive power on the Garden street branch, the right was given to operate that branch by electric power "during the term of its present grant for said Garden street branch." The "present grant" for the Garden street branch

was that which was granted in March, 1880, which was to terminate in twenty-five years, or March 22, 1905. Here was a clear recognition of the time when that grant expired, and there had been no ordinance or resolution of the council, since 1880, which, in our opinion, changed the termination of that grant. It is an entire mistake to say that at this time the right to operate the Garden street tracks terminated at the same time with the right of the company to operate the Euclid avenue line, or that the Garden street branch was but an extension of that line.

On the thirtieth of March, 1891, the right was granted to construct and operate a second or additional track upon Central avenue (Garden street) from the east line of Willson avenue to the Cleveland and Pittsburg Railroad tracks. It was provided in that ordinance that the right therein granted should be for and until the expiration of the grants for the said company's main line. Here again the question arises what was the meaning of the expression "main line" as used in this connection. The ordinance allowed a second or additional track in a street in which the company then had the right to use, and was using, a single track. So far as that extended grant was concerned, the main line was the rest of the Garden street branch, and the same observations that we have made heretofore in regard to the main line are operative here.

It cannot be possible that it was intended to limit the right to use the second or additional track, in the portion of the street mentioned, to a different time than that which existed with relation to the first track laid down by the company in the same street. Of course the two grants were meant to terminate at the same time.

At this time the grant to the company's Euclid avenue line had been extended so that it did not expire until July 13, 1913. Can it be supposed that the council intended that this short length of road, in which a second or additional track was to be laid, was to be operated with two tracks until 1905 and after that with one track until 1913? We think such a construction

is not permissible, and that what is meant by the language, "main line," in that ordinance, means the line which is the main line with reference to the extension therein granted, namely, the Garden street branch, and not the Euclid avenue line.

The ordinance of the twentieth of April, 1891, is somewhat important. It granted the East Cleveland Railroad Company permission to lay an additional or second track in Quincy street, from New street to Woodland Hills avenue. That street at the point indicated is part of the Garden street branch, and, as compared with the rest of the Garden street branch, is a very small portion thereof, and the ordinance only grants the right to lay an additional track. The right granted was, by the terms of section 3, to "be valid until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to wit, July 13, 1913."

It is said that the council, in such ordinance, expressly authorizes the continuation of the operation of this Central avenue (Garden street) extension until July 13, 1913, the date of the expiration of the Euclid avenue line of the company. But the language used in this ordinance as to the time of the expiration of the grant for the company's tracks on Quincy street, east of Lincoln avenue, is a clear mistake of fact. The grant, it will be observed, is not in terms an extension to July 13, 1913. The reference to that date is but the expression of an opinion that the date named is the true time of the termination of the Quincy street grants. It is not a grant extending to that date, unless the previous grants are limited to that time. Now, on April 20, 1891, the grants on Quincy street, east of Lincoln avenue, in fact terminated either in 1904 or 1905, depending upon the construction of the language of the original grant on Quincy street, made in February, 1885. That was a grant which was to expire with the termination of the grant for the main line. For the reasons already given we think that that language meant the Garden street branch, which was the main line as to that extension, and that it, therefore, ex-

pired in 1905, March 22. There was no subsequent legislation which extended that grant beyond that time.

But if it be assumed that the grant for the company's tracks on Quincy street, east of Lincoln avenue, was to terminate with the grant for the Euclid avenue line as the main line, it must be recollected that that grant on Quincy street was made February 9, 1885, to the Garden street branch, and at that time the grant to the Euclid avenue line terminated in September, 1904. The grant of 1885 was not made to terminate with the grant for the main line, *as that main line might thereafter be extended*, but it referred to that grant as it then existed, and it was to be measured by such existing grant, and not by any subsequent extension which might be granted to the Euclid avenue line.

Nor do we think the time for the termination of the Garden street branch was in any degree affected by the consolidation of the various roads in 1893. The communication from the railway company, through its vice-president, May 22, 1893, states distinctly that it "does not claim any rights greater than the constituent companies forming the organization, and that it intends to obey all ordinances to which each and all of the constituent companies were subject." Its intention to issue transfer checks, so as to have a continuous ride for one fare, gave no greater rights to the company than it theretofore had, nor did the resolution of the council, consenting to the consolidation on condition that but one fare should be charged for a continuous ride, give any greater rights to the consolidated company than each of the constituent companies had theretofore enjoyed. The consolidation does not require, in order to comply with the conditions specified in the resolution consenting to the consolidation, that the consolidated companies should be permitted to operate until the expiration of the longest grant to any of the companies. At the expiration of the grant to the Garden street branch the operation of that road might terminate, while the operation of the rest of the consolidated roads could go on perfectly well. To hold that by virtue

of the consolidation, upon the conditions stated, there was an implied extension of the grant to the Garden street branch of at least eight years, is to violate the rules of construction above referred to in regard to grants of this nature.

It is also strongly urged by the complainant that the ordinance passed soon after the consolidation ordinance, viz., the ordinance of July 17, 1893, not only imposed additional burdens on the consolidated company, but that the ordinance relates to a portion of the line originally constructed as part of the Garden street branch, and that it also required the operation of all the Garden street cars over these tracks, so that the council legislated as to the operation of the tracks upon Garden street and provided that such operation should continue until July 13, 1913. It is true the ordinance provided that the grant therein made should be limited to the above date, and there were certain conditions attached to the making of the grant, but it is quite plain to us that the ordinance could not be read as thereby extending the time for the termination of the Garden street branch without a most violent implication, based upon a very small foundation. This is made clear when it is seen that the streets through which the ordinance provides for extending the double track railroad formed no part of the line originally constructed as part of the Garden street branch. The latter road was permitted to use, for a short distance, the tracks of the Euclid avenue line from a point at the junction of Brownell street (subsequently made Erie street) with Prospect street, west to the public square. But that portion of the track of the Euclid avenue line was never part of the line originally constructed for the Garden street branch, nor did it become such because subsequently the branch road was permitted to use it for the passage of its cars to the public square. It is quite clear, therefore, that the limitation of the time for the termination of the grant provided for in the sixth section of the ordinance was not also an extension of the time for the termination of the separate grant to the Garden street branch from 1905 to 1913.

The same may be said of the ordinance of February 19, 1894,

extending the tracks in Willson avenue. While the council consented to the extension by the complainant and the Cleveland City Railroad Company of the line of railway in Willson avenue, and also to the operation of that line in connection with other lines of the consolidated company, which included the Garden street branch, yet it cannot be held that there arose from that ordinance, when accepted by the company, a contract which should extend the time on all of the roads until the expiration of the grant contained in that ordinance, July 1, 1914. By such means an implied extension of time, affecting over 200 miles of track, as is stated, would be accomplished by making these conditions in regard to the Willson avenue grant a substitute for a grant, in plain language, affecting the Garden street branch. On the contrary, we think that the effect of that ordinance was simply to make it necessary for the Garden street branch and the other roads also, to comply with the conditions set forth in the ordinance until the expiration of their respective and existing grants, but that ordinance did not thereby extend the various other railroad grants by implication. There is no such connection between the various roads as to make it necessary, in order to operate one, that all the others should be in operation as a unit, and as comprehending one indivisible system. There is nothing in this record which shows any difficulty whatever in operating the Garden street branch as separate from the rest of the so-called system, or in operating that system separate from the branch. If the council had intended to extend the time of the termination of the various grants to these railroads it surely would have said so, and not left it to such vague and uncertain presumptions.

The chief importance of the various ordinances and resolutions for the extension of the Garden street branch, coupled with the user of the tracks of the Euclid avenue line by the branch road from Erie street west to the public square, and providing for but one fare over the whole road, is to strengthen, if possible, the contention of complainant that such branch has always been treated by the city and the company as a mere

extension of the Euclid avenue line and to be operated in connection with it, so that a grant extending the time of the termination of the latter line included thereby the Garden street branch. We think the contention is not justified by the facts. The whole history of the branch line shows differently. Even in the important matter of a change of motive power, the Euclid avenue line was provided for in 1888 and 1889, while there was a separate and distinct provision made for the Garden street branch in 1890, and a statement therein made that the permission was granted to the Garden street branch during the term of the present grant to said branch.

A careful examination of the whole record leads us to the opinion that there is no error therein so far as the complainant's appeal is concerned, and the decree upon its appeal is

Affirmed.

Upon the appeal of the defendants, we think little need be said. The defendants insist that, upon the termination of the grant to the Garden street branch, the rails, poles and other appliances for operating that road, and then remaining on the various streets, became the property of the city or at least that the city had the right to take possession of the streets and of the rails, tracks, etc., therein existing. We agree with the court below in the opinion that the title to the property remains in the railroad company which had been operating the road, and we are of opinion that The Forest City Railway Company had no rights in the streets, so far as to affect the right of the complainant to its property then existing in such streets. How that property may be disposed of is not now a matter before this court. We only hold that the defendant company cannot avail itself of the provisions of the ordinance of January 11, 1904, so far as taking possession of the property of the complainant is concerned.

The decree upon the defendant's appeal is also

Affirmed.

UNITED STATES *v.* G. FALK & BROTHER.

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

No. 259. Argued December 4, 1906.—Decided January 7, 1907.

While the primary purpose of a proviso is to qualify only the provision of the statute to which it is appended a presumption of such purpose will not prevail against a demonstrative test that the legislative intent was that the proviso was of general application.

The Attorney General having construed the proviso of § 50 of the Tariff Act of 1890 as not restricted to the matter immediately preceding it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress will be held to have adopted that construction in the enactment of § 33 of the Tariff Act of 1897 and to have made no other change except to require as the basis of duty the weight of merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse.

The proviso in § 20 of the Customs Administrative Act only refers to cases in which a change in the rate of duty has been made while the merchandise is in bonded warehouse and not to difference in weight.

145 Fed. Rep. 484, reversed.

THE facts are stated in the opinion.

Mr. J. C. McReynolds, Assistant Attorney General, for the United States:

The history of legislation on the subject shows the purpose of Congress to impose duties on imports according to their weight when entered for warehousing. Tariff Act of 1854; Act of 1866, Rev. Stat. § 2970; *Merritt* v. *Cameron*, 137 U. S. 542. The Customs Administrative Act of June 10, 1890, contained nothing inconsistent with the long established practice.

To require payment of duties upon warehoused imports according to their weight at entry is not inequitable.

The statutes require one who enters a cargo of tobacco for consumption to pay in cash according to its weight then, notwithstanding the presence of a large percentage of absorbed sea-water. If on the same date a competitor, for his convenience and profit, enters a similar cargo for warehousing and

secures three years within which to pay charges, no good reason appears why he should obtain the further advantage of eliminating the sea-water as an element in the reckoning.

The proviso in section 33, act of July 24, 1897, is of general application. *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healy*, 160 U. S. 136; *United States* v. *Whitridge*, 197 U. S. 135; *United States* v. *Downing*, 146 Fed. Rep. 56, 59; *United States* v. *Shaw*, 141 Fed. Rep. 469.

Section 20, act June 10, 1890, as amended in 1902, relates to rate of duty and not time when weight shall be ascertained. *Merritt* v. *Cameron*, 137 U. S. 542; *Saltonstall* v. *Russell*, 152 U. S. 628, 633.

Mr. John G. Carlisle, with whom *Mr. Edward S. Hatch* and *Mr. J. Stuart Tompkins* were on the brief, for respondents:

Duties at the rate of $1.85 per pound are applicable only to the amount of tobacco received, and cannot lawfully be imposed on water which is never entered for consumption and which forms no part of the taxable subject. *Seeberger* v. *Wright & Lawther Co.*, 157 U. S. 183; *Lawder* v. *Stone*, 187 U. S. 281, and cases reviewed; *Marriott* v. *Brune*, 9 Howard, 619.

Under the provisions of section 20 of the Customs Administrative Act of June 10, 1890, as amended, only such duties should be levied on warehouse goods as would be payable on the goods if imported at the time of withdrawal. *Fabbri* v. *Murphy*, 95 U. S. 191; *Paris* v. *Allen*, T. D. 14689, G. A. 2411; *Hartranft* v. *Oliver*, 125 U. S. 525; *United States* v. *Goodsell Co.*, 84 Fed. Rep. 439; *Oppenheimer* v. *United States*, 90 Fed. Rep. 796; *Brown* v. *Maryland*, 12 Wheat. 419, 442; *The Brig Concord*, 9 Cranch, 387.

The proviso appended to § 33 of the Tariff Act of July 24, 1897, applies only to merchandise imported before the date when that act took effect. *Minis* v. *United States*, 15 Pet. 423; *United States* v. *Dickson*, 15 Pet. 141; *United States* v. *Slazenger*, 113 Fed. Rep. 525; Endlich on Interp. of Stat., sec. 186; *In re Downing*, 56 Fed. Rep. 470; *In re Schilling*, 53 Fed. Rep.

81; *Am. Net & Wire Co.* v. *Worthington*, 141 U. S. 468; *United States* v. *Union Pac. R. R. Co.*, 91 U. S. 72.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the question whether, upon withdrawal of imports from a bonded warehouse, duties should be collected according to their weight then or upon their greater weight when entered and imported into the country, the loss having been occasioned by evaporation of moisture.

The merchandise in question was leaf tobacco imported into the port of New York, a part before and a part after July 24, 1897. It was entered under bond for warehousing without the payment of duty and withdrawn from warehouse after the present tariff act went into effect, and was assessed by the collector for duty on the basis of weight at the time of its entry. The importers, Falk & Brother, protested and appealed from the decision of the collector to the board of general appraisers. The board affirmed the ruling of the collector on its opinion in *In re Schmidt*, G. A. 4214, T. D. 19715. Falk & Brother then instituted proceedings for review before the Circuit Court for the Southern District of New York, and that court sustained the decision of the board of appraisers. 145 Fed. Rep. 574. The Circuit Court of Appeals reversed the Circuit Court. 146 Fed. Rep. 484.

The contention of the importers is that the merchandise is subject to duty under the provisions of Schedule F of the act of July 24, 1897, based upon weight at the time of *withdrawal* from bond for consumption, under the provisions of section 50 of the act of October 1, 1890. It is contended that the proviso of the latter act has not been repealed but is in full force and effect, and is applicable to merchandise entered in bond subsequent to the passage of the act of July 24, 1897. The board of appraisers held that the proviso of section 50 of the act of 1890 was repealed by section 33 of the act of 1897.

Those sections are, respectively, as follows:

"SEC. 50. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty upon the entry or the withdrawal thereof than if the same were imported, respectively, after that day: *Provided*, That any imported merchandise deposited in bond in any public or private bonded warehouse having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of this act: *Provided further*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its *withdrawal*." 26 Stat. 624, c. 1244.

"SEC. 33. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its *entry*." 30 Stat. 213.

The Circuit Court held that those sections were not repugnant. The court said: "Neither is general in its application, but is restricted to merchandise previously imported for which

no entry has been made." The court, however, sustained the decision of the board on the ground that section 2983 of the Revised Statutes was applicable. That section is as follows: "In no case shall there be any abatement of the duties or allowance for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse."

The importers denied the application of that section, and contended that under the law, and particularly under section 20 of the Customs Administrative Act of June 10, as amended December 15, 1902 (presently to be stated), they were authorized to withdraw the merchandise from warehouse upon the payment of duties and charges based upon its weight at the time of withdrawal. The court ruled against the contention, and said: "It seems too plain for discussion that the word 'loss' (referring to section 2983), coupled as it is in the disjunctive with 'leakage,' applies precisely to such a case as the one before us. I can not find any sound reason for believing that the Congress did not have section 2983 in mind when it enacted said section 20, as amended. It is obvious that section 20, especially as amended, refers exclusively to rate rather than weight." The Circuit Court of Appeals differed from the Circuit Court in the application of section 2983. It held that the loss there provided for related solely to the loss of merchandise subject to duty, and such loss had not occurred. The court further held that the other terms of the section referred to actual reduction in the value or quantity of the merchandise itself. "It is clear," it was said, "that evaporation of moisture is not 'loss' . . . sustained by . . . merchandise." The case of *Seeberger* v. *Wright & Lawther Co.*, 157 U. S. 183, was referred to as analogous. The court also disagreed with the construction of the Circuit Court of section 20 of the Customs Administrative Act, and held that by virtue of the proviso added to that section December 15, 1902 (stated later), duties should have been assessed according to the weight of the tobacco at the time of its withdrawal.

This history of the case exhibits the contentions of the parties and the elements of the contentions, and, it will be seen, the case is one of statutory construction.

First, as to *Seeberger* v. *Wright & Lawther Co.*, 157 U. S. 183, which is urged as controlling. The importation there was flaxseed. The proof showed that the seed contained dust composed of clay, sand and gravel to an average of four per cent. The case turned upon the meaning of the word "draught" in section 2898, of the Revised Statutes. It was assumed that the word did not apply to impurities, and, it was said that the lower court was correct in assuming that the flaxseed in question which was made dutiable, under the act of 1883, at twenty cents per bushel of fifty-six pounds, less tare, meant fifty-six pounds of clean seed, or at least seed free from any impurities, such as the clay, sand and gravel in question.

The moisture which the tobacco in the case at bar absorbed can not be said to be an impurity within the meaning of that decision even though moisture in tobacco is a variable quantity and its amount can be estimated by weighing the tobacco at different times. Nor can it be considered as an independent, non-taxable substance, even though, as conceded in this case, it was absorbed on the ocean voyage. The statutes contemplate and apply to merchandise which may change in weight, and if the moisture in the tobacco in this case can be regarded as an independent substance—so much "sea-water," to use counsel's graphic phrase—a question of the application of section 50 or 33, could not arise. One or the other of those sections was considered applicable from the beginning, and the importations regarded as controlled by it, as merchandise subject to duty by weight, and necessarily there was involved the question at what time the weight should be estimated—at the time of entry or at the time of withdrawal from warehouse. To that question, then, we shall address ourselves.

It is said by counsel for the United States that, prior to October 1, 1890, duties were uniformly demanded and collected according to the weight of merchandise at original entry, citing

in support of the assertion the custom regulations of 1884 and 1899. Upon that date (October 1, 1890) the Tariff Act of 1890 took effect. Section 50, provided, as we have seen, that goods previously imported, for which no entry had been made, and goods warehoused, for which no permit of delivery had been issued, should be subject to no other duty than if the goods were imported after the day the act took effect. It was also provided that when duties were based upon the weight of warehoused merchandise the duty should "be levied and collected upon the weight of such merchandise at the time of its *withdrawal*" (italics ours). A question arose as to the scope of the proviso, whether it was restricted to the matter immediately preceding, that is, merchandise imported before the act took effect, or was of general application, applying as well to merchandise imported after as before the act took effect. The Attorney General decided that the latter was its effect. He said, 20 Ops. 80, 82: "I am aware that under former tariff acts the rule has been to levy duties upon weighable merchandise according to the weight at the date of importation, but this proviso seems to be intended to change that rule, and there seems to be sufficient reason for such change."

The executive officers of the Government followed this construction until the act of July 24, 1897, known as the Dingley Act, was passed. The construction made by the Attorney General is disputed, as applicable to section 33 of the act of 1897, and it is urged that the whole scope and meaning of that section, when reduced to its simplest terms, make goods theretofore entered under bond for warehouse subject to the duties imposed by the act upon the withdrawal thereof, when the section is construed in accordance with the rule that a proviso refers only to the provision of a statute to which it is appended. This may be conceded to be the primary purpose of a proviso, but a presumption of such purpose can not prevail to determine the intention of the legislature against other tests of meaning more demonstrative. We said in *United States* v. *Whitridge*, 197 U. S. 135 (p. 143): "While no doubt the grammatical and

logical scope of a proviso is confined to the subject-matter of the principal clause, we can not forget that in practice no such limit is observed." And the Attorney General's opinion can not be overlooked. The proviso which he construed in section 50 of the act of 1890 was reënacted in section 33 of the act of 1897. It would be extreme to hold that Congress by doing so intended to set up the technical rule relating to provisos against the construction of the Attorney General and to change that construction by repeating the very words construed. And there could have been no oversight. The practice of the executive officers for years gave emphasis and materiality to the construction. A change was made, however—a change of one word—a change recommended by the Treasury Department to increase the revenues and give greater convenience to the administration of the customs laws. The word "entry" was substituted for the word "withdrawal," and necessarily thereafter duties upon merchandise there provided for were to be based upon weight at the time of *entry*. Nor do we see that there is any contradiction of this in other provisions of the statute. Certain provisions of the Customs Administrative Act are, however, relied upon. The provisions of that act, hereafter quoted, originated in section 1 of the act of March 14, 1866, 14 Stat. 8, c. 17, and were carried into the Revised Statutes as section 2970, which provided that merchandise deposited in warehouse might be withdrawn for consumption within one year from the date of importation, upon payment of the duties and charges to which it might be subject by law at the time of withdrawal. At the expiration of one year, and until the expiration of three years, it might be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum on the amount of such duties. It was decided in *Merritt* v. *Cameron*, 137 U. S. 542, 550, 551, that that section "was intended to provide for cases in which a change of rate of duty had been made by statute while the merchandise was in bonded warehouse."

Then came section 20 of the Customs Administrative Act of June 10, 1890 (26 Stat. 140, 624, c. 407), as amended by act of October 1, 1890, providing that warehouse merchandise might be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it might be subject by law at the time of such withdrawal. The section was amended in 1902 (32 Stat. 753, c. 1), by the addition of the following proviso: "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." The Circuit Court of Appeals gave controlling force to the proviso as fixing the meaning of the section. The court said that it had held in *Mosle* v. *Bidwell*, 130 Fed. Rep. 334, "that the amendment of 1902 was declaratory of the meaning of the section prior to said amendment, and that its meaning as thus declared was that no greater or different duties" should be imposed on goods when withdrawn from warehouse than would be imposed on "other like goods imported at the time of withdrawal." Regarding this decision as conclusive the court said: "If other like goods had been imported at the time when these goods (the tobacco in question) were withdrawn, duty would have been assessed thereon according to their weight at such time." But the question in *Mosle* v. *Bidwell* was not the same as in the case at bar. The question now is not what rate of duty merchandise is subject to, or whether it is exempt from duty, but at what date its weight is to be taken as a basis of duty. And weight is a fact independent of the rate of duty. The proviso of section 20 of the Customs Administrative Act, therefore, can not be made paramount to the proviso in section 33 of the Tariff Act of 1897. Nor was that the purpose of its enactment. It was enacted to nullify the effect of the decision of the Circuit Court in *Mosle* v. *Bidwell*, by which section 20, was construed to require the payment of duties which had accrued at the time of importation, notwithstanding a change of rate or that the goods had become exempt from duty before

their withdrawal from warehouse. This construction was contrary to the general understanding of the section and the practice of the Department. This, then, is our view: the Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse.

Judgment of the Circuit Court of Appeals is therefore reversed and that of the Circuit Court is affirmed and the case remanded to the latter court.

MR. JUSTICE MOODY took no part in the decision of this case.

NEW YORK, *ex rel.* HATCH, *v.* REARDON, PEACE OFFICER OF THE COUNTY OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 310. Argued December 11, 12, 13, 1906.—Decided January 7, 1907.

The rule that the general expressions of the Fourteenth Amendment must not be allowed to upset familiar and long established methods is applicable to stamp taxes which are necessarily confined to certain classes of transactions, which, in some points of view are similar to classes that escape.

Whether a tax on transfers of stock is equivalent to a tax on the stock itself depends on the scope of the constitutional provision involved and whatever may be the rights of parties engaged in interstate commerce, a sale depends in part on the laws of the State where made and that State may make the parties pay for the help of its laws.

There must be a fixed mode of ascertaining a stamp tax, and equality in the sense of actual value has to yield to practical considerations and usage.

Although a statute, unconstitutional as to one, is void as to all of a class, the party setting up, in this court, the unconstitutionality of a state tax law must belong to the class for whose sake the constitutional protection is given, or the class primarily protected.

The protection of the commerce clause of the Federal Constitution is not available to defeat a state stamp tax law on transactions wholly within a State because they affect property without that State, or because one or both of the parties previously came from other States.

The tax of two cents a share imposed on transfers of stock, made within that State, by the tax law of New York of 1905, does not violate the equal protection clause of the Fourteenth Amendment as an arbitrary discrimination because only imposed on transfers of stock, or because based on par, and not market, value; nor does it deprive non-resident owners of stock transferring, in New York, shares of stock of non-resident corporations of their property without due process of law; nor is it as to such transfers of stock an interference with interstate commerce.

184 N. Y. 431, affirmed.

THE facts, which involve the constitutionality of the stock transfer law of the State of New York, are stated in the opinion.

Mr. John G. Milburn, Mr. John F. Dillon and *Mr. John G. Johnson* for plaintiff in error:

To tax sales of shares of corporate stock exclusively is an arbitrary discrimination in violation of the provision of the Fourteenth Amendment securing the equal protection of the laws.

The act selects from the mass of property, real and personal, in the State, one particular species, and one only, and imposes a tax upon every sale and transfer thereof. Sales of every other species of property are, and always have been, untaxed. The owners of every kind of property may freely sell it in the State of New York without paying any tax, save only the owners of shares of corporate stock. Such owners alone are selected to bear an exceptional and peculiar burden, and sales of corporate shares are arbitrarily put in a class by themselves for the purposes of this tax.

Classification of persons, property or transactions for purposes of taxation must be based on some real distinction to satisfy the constitutional guarantee of equality.

The general rule of equality is that all persons subject to

legislation "shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the limitations imposed." *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 188; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 159.

Classification for the purposes of taxation is subject to the above rule of equality. *Santa Clara Co.* v. *Southern Pac. R. R. Co.*, 18 Fed. Rep. 385; *Central R. R. Co.* v. *Board of Assessors*, 48 N. J. L. 1; *In re Pell*, 171 N. Y. 48.

There is no basis for the separation of sales of shares of corporate stock from sales of all other species of personal property for the purposes of taxation.

Shares of stock represent a proportional part of the property, real and personal, of the corporation issuing it. *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1, 13; *People* v. *Coleman*, 126 N. Y. 433, 437; *Matter of Enston*, 113 N. Y. 174, 181; *Flynn* v. *Brooklyn City R. R. Co.*, 158 N. Y. 493, 504. They are sold in the market and pass by transfer and delivery. The same is true of corporate bonds, of bills of lading representing property in transportation, of warehouse receipts representing property in storage, and of other kindred forms of property.

The act imposes a tax on sales in New York of the shares of a foreign corporation owned by non-residents, and is a taking of their property without due process of law, in violation of the Fourteenth Amendment, which invalidates the whole act.

A tax on a sale of property is virtually a tax on the property itself; a tax on the amount of sales of goods made by an auctioneer is a tax on the goods so sold. *Cook* v. *Pennsylvania*, 97 U. S. 566, 573. A tax on the privilege of selling property at the exchange and of thus using the facilities there afforded in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. *Nicol* v. *Ames*, 173 U. S. 509, 521; *Brown* v. *Maryland*, 12

Wheat. 419, 444. On the same principle a tax on income from property is a tax on the property producing it, and a tax on a bill of lading is a tax on the property represented by it. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 581; *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 283.

As the act is invalid with respect to shares in foreign corporations owned by non-residents and sold here, and as that part or operation of the act is an essential part of it and not separable from the remainder, and it is not clear that the legislature would have enacted it without including sales of shares in foreign corporations owned by non-residents, the necessary result is that the whole act must be held invalid. *Pollock* v. *Farmers' L. & T. Co.*, 158 U. S. 601, 635; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565.

This tax law is void under the commerce clause of the United States Constitution because it taxes any and every sale within the State of New York of stock in a foreign corporation, though such stock belongs to a person not a resident of the State of New York, and such sale is made by such non-resident, and though no certificates of the shares of such stock ever existed or were ever delivered to the purchaser.

If not void *in toto* this tax law is void as applied to a non-resident owner and seller of shares in a foreign corporation.

The situs of the property owned by a shareholder in a corporation is either where the corporation exists, or at the domicil of the shareholder. *Enston case*, 113 N. Y. 174, 181; *In re James*, 144 N. Y. 6, 12; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Delaware R. R. Tax*, 18 Wall. 206; *Jellenik* v. *Huron Mining Co.*, 177 U. S. 1; *Union Refrig. Co.* v. *Kentucky*, 199 U. S. 194.

This act violates the commerce clause of the Constitution. *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Asher* v. *Texas*, 128 U. S. 129; *Stockard* v. *Morgan*, 185 U. S. 27; *Tel. Co.* v. *Texas*, 105 U. S. 460.

Mr. Julius M. Mayer, Attorney General of the State of New

York, and *Mr. E. Crosby Kindleberger*, with whom *Mr. Horace McGuire* and *Mr. James C. Graham* were on the brief, for defendant in error:

The statute under consideration does not deny to the plaintiff in error and to all owners of shares of corporate stock the equal protection of the laws, contrary to the Fourteenth Amendment. *United States* v. *Thomas*, 115 Fed. Rep. 207; *S. C.* 192 U. S. 363; *Knowlton* v. *Moore*, 178 U. S. 41.

The act is not "arbitrary and discriminating" in its character and operation, and does not violate "the fundamental principles of the taxing power," which is only a way of stating that it takes appellant's property "without due process of law," against the Federal and state constitutions; and denies to the holders of the stock of corporations "the equal protection of the laws," in violation of the Fourteenth Amendment to the Constitution of the United States.

If the United States have power to levy stamp tax, States have like power. *United States* v. *Thomas*, *supra*, decides that the United States have such power.

The law does not violate the commerce clause of the Constitution either between the States or as to foreign nations. *Passenger cases*, 7 How. 283, 480; *State Tax on Foreign Held Bonds*, 15 Wall. 300, 319; *Savings Soc'y* v. *Multnomah County*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *Delaware Railroad Tax*, 18 Wall. 206, 231; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326–336; *Vermont & Canada R. R. Co.* v. *Vermont Central R. R. Co.*, 63 Vermont, 119; *Pittsburgh Coal Co.* v. *Bates*, 156 U. S. 577; *S. C.*, 40 La. Ann. 226; *Brown* v. *Houston*, 114 U. S. 622; *Woodruff* v. *Parham*, 8 Wall. 123; *Coe* v. *Errol*, 116 U. S. 517; *Standard Oil Co.* v. *Combs*, 96 Indiana, 179; *Rieman* v. *Shepard*, 27 Indiana, 288; *Carrier* v. *Gordon*, 21 Ohio St. 605; *Woodruff* v. *Parham*, 8 Wall. 123; *Am. Steel and Wire Co.* v. *Speed*, 192 U. S. 520.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to revise an order dismissing a writ of

habeas corpus and remanding the relator to the custody of the defendant in error. The order was made by a single Justice and affirmed successively by the Appellate Division of the Supreme Court, 110 App. Div. 821, and by the Court of Appeals, 184 N. Y. 431. The facts are these: The relator, Hatch, a resident of Connecticut, sold in New York to one Maury, also a resident of Connecticut, but doing business in New York, one hundred shares of the stock of the Southern Railway Company, a Virginia corporation, and one hundred shares of the stock of the Chicago, Milwaukee and St. Paul Railroad Company, a Wisconsin corporation, and on the same day and in the same place received payment and delivered the certificates, assigned in blank. He made no memorandum of the sale and affixed to no document any stamp, and did not otherwise pay the tax on transfers of stock imposed by the New York Laws of 1905, c. 241. He was arrested on complaint, and thereupon petitioned for this writ, alleging that the law was void under the Fourteenth Amendment of the Constitution of the United States.

The statute in question levies a tax of two cents on each hundred dollars of face value of stock, for every sale or agreement to sell the same, etc.; to be paid by affixing and cancelling stamps for the requisite amount to the books of the company, the stock certificate, or a memorandum required in certain cases. Failure to pay the tax is made a misdemeanor punishable by fine, imprisonment, or both. There is also a civil penalty attached. The petition for the writ sets up only the Fourteenth Amendment, as we have mentioned, but both sides have argued the case under the commerce clause of the Constitution, Art. I, section 8, as well, and we shall say a few words on that aspect of the question.

It is true that a very similar stamp act of the United States, the act of June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 448, 458, was upheld in *Thomas* v. *United States*, 192 U. S. 363. But it is argued that different considerations apply to the States and the tax is said to be bad under the Fourteenth Amend-

ment for several reasons. In the first place it is said to be an arbitrary discrimination. This objection to a tax must be approached with the greatest caution. The general expressions of the Amendment must not be allowed to upset familiar and long-established methods and processes by a formal elaboration of rules which its words do not import. See *Michigan Central Railroad Co.* v. *Powers*, 201 U. S. 245, 293. Stamp acts necessarily are confined to certain classes of transactions, and to classes which, considered economically or from the legal or other possible points of view, are not very different from other classes that escape. You cannot have a stamp act without something that can be stamped conveniently. And it is easy to contend that justice and equality can not be measured by the convenience of the taxing power. Yet the economists do not condemn stamp acts, and neither does the Constitution.

The objection did not take this very broad form to be sure. But it was said that there was no basis for the separation of sales of stock from sales of other kinds of personal property, for instance, especially, bonds of the same or other companies. But bonds in most cases pass by delivery and a stamp tax hardly could be enforced. See further, *Nicol* v. *Ames*, 173 U. S. 509, 522, 523. In *Otis* v. *Parker*, 187 U. S. 606, practical grounds were recognized as sufficient to warrant a prohibition, which did not apply to sales of other property, of sales of stock on margin, although this same argument was pressed with great force. *A fortiori* do they warrant a tax on sales, which is not intended to discriminate against or to discourage them, but simply to collect a revenue for the benefit of the whole community in a convenient way.

It is urged further that a tax on sales is really a tax on property, and that therefore the act, as applied to the shares of a foreign corporation owned by non-residents, is a taking of property without due process of law. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. This argument presses the expressions in *Brown* v. *Maryland*, 12 Wheat. 419, 444; *Fairbank* v. *United States*, 181 U. S. 283, and intervening cases,

to new applications, and farther than they properly can be made to go. Whether we are to distinguish or to identify taxes on sales and taxes on goods depends on the scope of the constitutional provision concerned. Compare *Foppiano* v. *Speed*, 199 U. S. 501, 520. A tax on foreign bills of lading may be held equivalent to a tax on exports as against Article I, section 9; a license tax on importers of foreign goods may be held an unauthorized interference with commerce; and yet it would be consistent to sustain a tax on sales within the State as against the Fourteenth Amendment so far as that alone is concerned. Whatever the right of parties engaged in commerce among the States, a sale depends in part on the law of the State where it takes place for its validity and, in the courts of that State, at least, for the mode of proof. No one would contest the power to enact a statute of frauds for such transactions. Therefore the State may make parties pay for the help of its laws, as against this objection. A statute requiring a memorandum in writing is quite as clearly a regulation of the business as a tax. It is unnecessary to consider other answers to this point.

Yet another ground on which the owners of stock are said to be deprived of their property without due process of law is the adoption of the face value of the shares as the basis of the tax. One of the stocks was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars. The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp tax. In another sense, moreover, there is equality. When the taxes on two sales are equal the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the Court of Appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the

necessity and practice of sometimes substituting count for weight. See *Bell Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232; *Merchant & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461. Without going farther into a discussion which, perhaps, could have been spared in view of the decision in *Thomas* v. *United States*, 192 U. S. 363, and the constitutional restrictions upon Congress, we are of opinion that the New York statute is valid, so far as the Fourteenth Amendment is concerned.

The other ground of attack is that the act is an interference with commerce among the several States. Cases were imagined, which, it was said, would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases it was void as to them, and, if void as to them, void altogether, on a principle often stated. *United States* v. *Ju Toy*, 198 U. S. 253, 262. That the act is void as to transactions in commerce between the States, if it applies to them, is thought to be shown by the decisions concerning ordinances requiring a license fee from drummers, so called, and the like. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stockard* v. *Morgan*, 185 U. S. 27; *Rearick* v. *Pennsylvania*, 203 U. S. 507.

But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. *Supervisors* v. *Stanley*, 105 U. S. 305, 311; *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Lampasas* v. *Bell*, 180 U. S. 276, 283, 284; *Cronin* v. *Adams*, 192 U. S. 108, 114. If the law is valid when confined to the

class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied. See *e. g. People's National Bank* v. *Marye*, 191 U. S. 272, 283.

Whatever the reason, the decisions are clear, and it was because of them that it was inquired so carefully in the drummer cases whether the party concerned was himself engaged in commerce between the States. *Stockard* v. *Morgan*, 185 U. S. 27, 30, 35, 36; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507. Therefore we begin with the same inquiry in this case, and it is plain that we can get no farther. There is not a shadow of a ground for calling the transaction described such commerce. The communications between the parties were not between different States, as in *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460, and the bargain did not contemplate or induce the transport of property from one State to another, as in the drummer cases. *Rearick* v. *Pennsylvania, supra*. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another State before they made it. It does not appear that the petitioner came into New York to sell his stock, as it was put on his behalf. It appears only that he sold after coming into the State. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made.

It is said that the property sold was not within the State. The immediate object of sale was the certificate of stock present in New York. That document was more than evidence, it was a constituent of title. No doubt, in a more remote sense, the object was the membership or share which the certificate conferred or made attainable. More remotely still it was an

interest in the property of the corporation, which might be in other States than either the corporation or the certificate of stock. But we perceive no relevancy in the analysis. The facts that the property sold is outside of the State and the seller and buyer foreigners are not enough to make a sale commerce with foreign nations or among the several States, and that is all that there is here.—On the general question there should be compared with the drummer cases the decisions on the other side of the line. *Nathan v. Louisiana*, 8 How. 73; *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622; *Emert* v. *Missouri*, 156 U. S. 296. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. *American Steel and Wire Co.* v. *Speed*, 192 U. S. 500. We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong.

Order affirmed.

OHIO VALLEY NATIONAL BANK *v.* HULITT.

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

No. 108. Argued November 16, 1906.—Decided January 7, 1907.

While the mere pledgee of national bank stock cannot be held for double liability as a shareholder so long as the shares are not registered in his name, although an irresponsible person may have been selected as the registered shareholder, the real owner of the shares may be held responsible although the shares may not be registered in his name.

Where the pledgee of national bank stock has by consent credited the agreed value of the stock belonging to the pledgor, but registered in the name of a third party who is the agent of the pledgee, on the note, and then proved his claim for the balance against the estate of the pledgor the title to the stock has so vested in the pledgee that, notwithstanding the stock has not been transferred, he is liable to assessment thereon as the owner thereof.

Where the strict compliance with the terms of a note as to sale of the collateral pledged therewith is waived by the maker, the holder who accepts the collateral at an agreed price and credits it on the note is estopped from claiming that he does not become the owner of the collateral because there was no actual sale thereof as required by the note.

These principles applied when the pledgee of national bank stock was a national bank.

137 Fed. Rep. 461, affirmed.

THIS case was begun in the United States Circuit Court by John Hulitt as receiver of the First National Bank of Hillsboro, Ohio, against the Ohio Valley National Bank, to recover the amount of an assessment upon certain shares of the stock of the Hillsboro Bank, which had become insolvent, which assessment was directed by the Comptroller of the Currency in accordance with the provisions of the National Bank Act. The case was tried upon an agreed statement of facts, from which it appears that on March 18, 1893, one Overton S. Price, for a loan of $10,000, gave his promissory note of that date to the Ohio Valley Bank, due ninety days after date, payable to his own order and indorsed by him, and deposited as collateral security for the note, among other securities, fifty shares of stock of the said First National Bank of Hillsboro, Ohio. The note had a power of sale attached to it, signed by Price, and authorizing the holder to sell or collect any portion of the collateral, at public or private sale, on the non-performance of the promise, and at any time thereafter without advertising or otherwise giving Price notice, and providing that in case of public sale the holder might purchase without liability to account for more than the net proceeds of the sale.

On December 25, 1893, Price died, leaving the note due and unpaid, and no payments have been made thereon except as hereinafter stated.

On June 18, 1894, the bank made a transfer of the pledged stock of the First National Bank of Hillsboro, and also of certain other stock in the Dominion National Bank of Bristol, Va., to one Henry Otjen, an employé of the bank, and pe-

cuniarily irresponsible. The shares were transferred on the books of the banks and new certificates issued in the name of Otjen and delivered to him on July 7, 1894. Otjen indorsed the certificates in blank. No money passed in consideration of the transfer, and none was expected, nor was any credit given or indorsed on the note by reason thereof.

The transfer was made upon the understanding and agreement between Otjen and the bank that Otjen should hold the stock as security for the indebtedness of the estate of Price upon the note, he to apply any amounts which he might realize from said stock as credits upon the note. In pursuance of this agreement Otjen subsequently paid the bank sums received from the Dominion National Bank on account of dividends received until the sale of that stock, when the proceeds of sale were likewise applied by him upon the note.

On February 19, 1896, the bank prepared proof of claim against the estate of Price, and at that time believing the stocks transferred to Otjen to afford a reasonable security for the note to the amount of $4,484, indorsed a credit for that sum upon the note, as follows: "Forty-four hundred and eighty-four ($4,484.00) dolls. paid on ac. of within note June 18, '94, being proceeds of sale of 30 shrs. stock Dominion National Bank and 20 shares of stock 1st National Bank of Hillsboro, O." The bank filed its proof of claim for the balance of the indebtedness upon the note; that no consideration was paid for said credit, and the same was not entered on the bank's books; that all dividends arising upon the distribution of the estate of Price were applied upon the note.

The Hillsboro bank continued to do business until July 16, 1896. From the date of transfer at all times the stock appeared on the books of the Hillsboro bank in the name of Otjen, there being nothing on the books to connect the Ohio Valley National Bank with the stock, or to indicate that it had any interest therein; that the defendant bank at no time performed any act of ownership, or exercised or attempted to exercise any of the rights of a stockholder in said bank, or of

the Dominion National Bank, unless the acts stated were in legal intendment of that character. The Ohio Valley National Bank procured the shares to be transferred to Otjen because it was unwilling to assume the risk of the statutory liability of a stockholder in respect thereto. The Circuit Court of Appeals held the bank liable as a stockholder, 137 Fed. Rep. 461, and directed judgment accordingly.

Mr. Robert Ramsey, with whom *Mr. J. J. Muir* was on the brief, for plaintiff in error:

The transfer to Otjen did not bring defendant into such relation to the shares as to subject it to the statutory liability. *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479; *Pauly* v. *Trust Co.*, 165 U. S. 606; *Rankin* v. *Fidelity Co.*, 189 U. S. 242.

Defendant's relation to these shares was not in any manner affected by its proof of claim against the debtor's estate.

Where a stockholder seeks by any device to disguise himself for the purpose of escaping this statutory liability, this court has always scrutinized the transaction with a jealous eye; but where a party who has never held that relation, adopts ways and means to protect himself against the danger of apparent ownership, this court has always recognized his right. Where, as in the case at bar, the party so seeking to protect himself happens to be a national bank, this court declares that there is not merely the right, but the duty of self-protection. It has gone so far as to say that national banks lack corporate power to incur the risks of a speculative enterprise, or partnership liabilities, by taking or holding corporate or syndicate shares, even though taken in satisfaction of a debt, and that estoppel will not lie to bar the defense. *First National Bank* v. *Converse*, 200 U. S. 425; *Merchants National Bank* v. *Wehrmann*, 202 U. S. 295.

Mr. Henry M. Huggins, with whom *Mr. R. T. Hough* was on the brief, for defendant in error.

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

Section 5151 of the Revised Statutes provides that the shareholders of every national banking association shall be held individually responsible, equally and ratably, not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. This section undertakes to hold all shareholders responsible, and questions have arisen under varying circumstances as to what constitutes such shareholder.

In *Anderson* v. *Philadelphia Warehouse Company*, 111 U. S. 479, it was held that the mere pledgee who had never acted as a shareholder would not be liable as such, notwithstanding the stock was transferred on the books of the bank and the certificate issued to an irresponsible person, in that instance a porter in the employment of the company, and this although the transfer had been thus made for the purpose of avoiding liability which might be incurred by the shareholders of the bank, in case of insolvency. In the course of the opinion, Mr. Chief Justice Waite, speaking for the court, recognized that the real owner might be held liable as a shareholder, but in that case the facts showed the warehouse company, sought to be held as a shareholder, was never other than a pledgee, and that notwithstanding the transfer to the irresponsible person, the real ownership of the stock remained in the original holder.

In *Pauly* v. *The State Loan & Trust Company*, 165 U. S. 606, the subject was considered at length, and it was held that one who was described in the certificate as a pledgee, and who in good faith held the shares as such, was not a shareholder subject to the personal liability imposed by section 5151. The previous cases in this court were reviewed, and, in summing up the rules relating to the liability of shareholders in

national banks, deducible from previous decisions, among other things it was said: "That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151." And again: "The object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. The courts will look at the relations of parties as they actually are, or, as, by reason of their conduct, they must be assumed to be for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for the contracts, debts and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. A mistake or error in keeping the official list of shareholders would not prevent creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association. As already indicated, those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners."

And in *Rankin* v. *Fidelity Trust Company*, 189 U. S. 242, 252, the doctrine was stated that a defendant who was in fact the owner of shares of stock could not avoid liability by listing them in the name of another, notwithstanding it might do so if it were the mere pledgee of the stock; and further, that the case then under consideration turned upon the actual ownership of the shares, which question was properly left to the jury. And to the same effect are well considered cases in other courts, Federal and state. It was held that the real owner might be charged, although his name never appeared upon the books of the bank. *Davis* v. *Stevens*, 17 Blatch. 259, 7 Fed. Cas. 3653, opinion by Mr. Chief Justice Waite; *Houghton* v. *Hubbell*, Circuit Court of Appeals, First Circuit,

91 Fed. Rep. 453; *Laing* v. *Burley*, 101 Illinois, 591; *Lesassier* v. *Kennedy*, 36 La. Ann. 539.

Assuming then the established doctrine to be that the mere pledgee of national bank stock cannot be held liable as a shareholder so long as the shares are not registered in his name, although an irresponsible person has been selected as the registered shareholder, we deem it equally settled, both from the terms of the statute attaching the liability and the decisions which have construed the act, that the real owner of the shares may be held responsible, although in fact the shares are not registered in his name. As to such owner the law looks through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong.

Applying these principles to the case at bar, we think there can be no doubt of the liability of the Ohio Valley National Bank in this case. Conceding that it was exempt so long as the relation which it held to the stock was that of a pledgee, and that Otjen was the registered stockholder holding for the benefit of the bank as pledgee and not as owner, what was the attitude of the parties after the death of Price and the credit of the supposed value of the stock upon the note and its presentation for allowance and acceptance by the representatives of Price's estate? As the foregoing statement shows, the stock was originally delivered to the bank, with a power of public or private sale for the liquidation of the pledge. After the death of Price the bank caused the stock to be registered in the name of Otjen. After proof of the claim the dividends paid out of the Price estate were credited upon the note. If the bank had followed literally the authority of the power of attorney attached to the note and sold the stock at public or private sale, and itself become the purchaser, we take it there could be no question that it would thus have become the real owner of the stock, and, within the principles of the cases heretofore cited, the shareholder liable under the terms of the statute. We think what was in fact done neces-

sarily had the same effect; the bank applied the value of the stock with the consent of the pledgor, and thus vested the title in the bank.

It is urged that although the indorsement upon the note in the form in which it was presented to Price's administrator recited credit as of June 18, 1894, being proceeds of a sale of the stock, there never was a sale in fact, and that the bank is not estopped by anything shown in the case from showing the true situation and the actual transaction between the parties.

Conceding, for this purpose, that Price's representative could have insisted upon a strict performance of the power conferred in the authority given to the bank as to the disposition of the collateral, yet if the representative of Price desired to do so, there was nothing to prevent him from waiving a strict compliance with the terms named and permitting the bank to acquire title to the stock by crediting its value on the note. This is in fact what was done. Instead of selling the stock the bank, in executing the authority conferred, indorsed what it deemed the value of the stock, as of the date of the credit, upon the note, and reduced by the amount of this valuation, presented the note to the administrator of Price, who must have allowed the claim in this form, as it is specifically stated that the subsequent dividends upon the claim were paid to the bank. By this transaction, who became the real owner of the stock? Certainly not Otjen, for it is not contended that he was other than a mere holder of the stock as collateral security to the bank without any beneficial interest. Price had died, and his representative had allowed the claim, showing the application of the value of the stock as a credit upon the note. If Price's representative could have objected to the form in which the bank liquidated the pledge, he did not do so, but accepted the bank's method of divesting him of title by allowing the claim with the credit upon it. The bank thus became the beneficial owner of the stock, and had the Hillsboro National Bank continued solvent it certainly could not

have denied to the Ohio Valley Bank after this transaction the rights and privileges of a stockholder.

As we have seen, this court in construing the banking act has not limited the liability to the registered stockholders. While the registered stockholders may be held liable to creditors regardless of the true ownership of the stock, and the pledgee of the stock not appearing otherwise, is not liable, although the registered stockholder may be an irresponsible person of his choice, yet where the real ownership of the stock is in one his liability may be established, notwithstanding the registered ownership is in the name of a person fictitious or otherwise, who holds for him.

We think the Circuit Court of Appeals did not err in holding the bank, in view of the facts shown in the case, as the true owner and responsible shareholder of the stock in question.

Judgment affirmed.

ZARTARIAN *v.* BILLINGS, COMMISSIONER OF IMMIGRATION.

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

No. 120. Submitted December 7, 1906.—Decided January 7, 1907.

Naturalization acts of the United States have limited admission to citizenship to those within its limits, and under its jurisdiction.

An alien's right to acquire citizenship is purely statutory, and extension of the effect of naturalization to minor children of the person naturalized not included in the statute must come from Congressional legislation and not judicial decision.

Section 2172, Rev. Stat., and the naturalization laws of the United States, do not confer citizenship on the minor children of a naturalized alien who were born abroad and remain abroad until after their parent's naturalization; such children are aliens, subject as to their entrance to the United States to the provisions of the Alien Immigration Act of March 3, 1903, 32 Stat. 1213, and may be excluded if afflicted with contagious disease.

THE facts are stated in the opinion.

Mr. Daniel B. Ruggles for petitioner:

If the girl was not an alien within the intent and meaning of the act of March 3, 1903, the commissioner had no authority to detain or deport her, and the final order of the Circuit Court must be reversed. *Gonzales* v. *Williams*, 192 U. S. 1.

The question raised above as to citizenship or status is purely one of law. As there is no dispute as to the facts, *United States* v. *Ju Toy*, 198 U. S. 253, does not govern. The question passed on in that case by the Secretary of Commerce and Labor was in reality as to the place of birth of the petitioner, a question of fact, and the court, by a majority opinion, held that the decision of such an executive officer on a question of fact was final.

The said Mariam, or her mother in her behalf, had done everything possible to abandon her foreign allegiance in order to assume the rights incident to her father's status as an American citizen, and was within the intent and meaning of § 2174, Rev. Stat. See, also, *Boyd* v. *Nebraska*, 143 U. S. 178.

Having submitted to the allegiance of the United States at the implied invitation of that government, she cannot be regarded as an alien. *Gonzales* v. *Williams*, *supra*.

Under Rev. Stats. § 2172, if the child Mariam had landed and resided in the country a few weeks, or perhaps days, it would appear that she could maintain a claim to be regarded as a citizen by virtue of her father's naturalization. See Ruling of Dep. of State, For. Rel. 1881, p. 53; also 1885, pp. 395, 396.

Mr. Alford W. Cooley, Assistant Attorney General, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from an order of the Circuit Court of the United States for the District of Massachusetts, denying a pe-

tition for a writ of *habeas corpus* filed by Charles Zartarian in behalf of Mariam Zartarian, his daughter, who, it was alleged, was unlawfully imprisoned, detained and restrained of her liberty at Boston by the United States Commissioner of Immigration, which imprisonment was alleged to have been in violation of the constitutional rights of the said Mariam Zartarian, without due process of law and contrary to the provisions of section 2172 of the Revised Statutes of the United States, which section, it is alleged, made said Mariam a citizen of the United States by virtue of the citizenship of her father, the petitioner.

The United States District Attorney and the attorney for the petitioner stipulated the following facts:

"The petitioner, Charles Zartarian, formerly a subject of the Sultan of Turkey, became a naturalized citizen of the United States on September 12, 1896, at the Circuit Court of Cook County in the State of Illinois. That his daughter Mariam, on whose behalf this petition is brought, is a girl between fifteen and sixteen years of age, and was born just prior to the petitioner leaving Turkey. That in the latter part of the year 1904 the Turkish Government, at the request of the United States Minister at Constantinople, granted permission to the petitioner's wife, minor son, and his said daughter, Mariam, to emigrate to the United States, it being stipulated in the passport issued to them that they could never return to Turkey. That on March 22, 1905, the Hon. G. V. L. Meyer, then United States Ambassador at Rome, Italy, issued a United States passport to your petitioner's said wife and daughter. That said Mariam arrived at Boston from Naples, Italy, on April 18, 1905, and that on April 18, 1905, she was found to have trachoma, and was debarred from landing by a board of special inquiry appointed by the United States Commissioner of Immigration for the port of Boston."

The petitioner's child, Mariam Zartarian, was debarred from landing at the port of Boston under the provisions of the act of March 3, 1903, chap. 1012, 32 Stat. 1213, U. S. Com. Stat.

1901, Supp. of 1903, p. 170, entitled "An act to regulate the immigration of aliens into the United States."

Section 2 of that act, among other things, provides that certain classes of aliens shall be excluded from admission to the United States, including "persons afflicted with a loathsome or with a dangerous contagious disease." Upon the finding of the board of inquiry that said Mariam had trachoma, she was debarred from landing.

The contention is that she does not come within the terms of this statute, not being an alien, but entitled to be considered a citizen of the United States, under the provisions of section 2172 of the Revised Statutes, which provides: "The children of persons who have been duly naturalized under any law of the United States . . . being under the age of twenty-one years at the time of naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof."

As Mariam was born abroad, a native of Turkey, she has not become a citizen of the United States, except upon compliance with the terms of the act of Congress, for, wanting native birth, she can not otherwise become a citizen of the United States. Her right to citizenship, if any she has, is the creation of Congress, exercising the power over this subject conferred by the Constitution. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 702.

The relevant section, 2172, which it is maintained confers the right of citizenship, is the culmination of a number of acts on the subject passed by Congress from the earliest period of the Government. Their history will be found in vol. 3, Moore's International Law Digest, p. 467.

Section 2172 is practically the same as the act of April 14, 1802, 2 Stat. 153, which provided:

"The children of persons duly naturalized under any of the laws of the United States . . . being under the age of 21 years at the time of their parents being so naturalized . . . shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who are now

or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered citizens of the United States."

In *Campbell* v. *Gordon*, 6 Cranch, 176, it was held that this act conferred citizenship upon the daughter of an alien naturalized under the act of January 29, 1795, she being in this country at the time of the passage of the act of April 14, 1802, and then "dwelling in the United States."

The act has also been held to be prospective in its operation and to include children of aliens naturalized after its passage, when "dwelling in the United States." *Boyd* v. *Thayer*, 143 U. S. 135, 177.

The construction of this law and the meaning of the phrase "dwelling in the United States" has been the subject of much consideration in the executive department of the Government having to do with the admission of foreigners and the rights of alleged naturalized citizens of the United States. The rulings of the State Department are collected in Prof. Moore's Digest of International Law, vol. 3, pp. 467 *et seq.*

The department seems to have followed a rule established at an early period, and formulated with fullness in Foreign Relations for 1890, p. 301, in an instruction from Mr. Blaine to Minister Phelps, at Berlin, in which it was laid down that the naturalization of the father operates to confer the municipal right of citizenship upon the minor child if, at the time of the father's naturalization, dwelling within the jurisdiction of the United States, or if he come within that jurisdiction subsequent to the father's naturalization and during his own minority.

Whether, in the latter case, a child not within the jurisdiction of the United States at the time of the parents' naturalization, but coming therein during minority, acquires citizenship is not a question now before us.

The limitation to children "dwelling in the United States" was doubtless inserted in recognition of the principle that citizenship can not be conferred by the United States on the citizens of another country when under such foreign jurisdic-

tion; and is also in deference to the right of independent sovereignties to fix the allegiance of those born within their dominions, having regard to the principle of the common law which permits a sovereignty to claim, with certain exceptions, the citizenship of those born within its territory.

It is pointed out by Mr. Justice Gray, delivering the opinion in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 686, that the naturalization acts of the United States have been careful to limit admission to citizenship to those "within the limits and under the jurisdiction of the United States."

The right of aliens to acquire citizenship is purely statutory; and the petitioner's child having been born and remained abroad, clearly does not come within the terms of the statute. She was debarred from entering the United States by the action of the authorized officials, and, never having legally landed, of course could not have dwelt within the United States. *Nishimura Ekiu* v. *United States*, 142 U. S. 651.

It is urged that this seems a harsh application of the law, but if the terms of the statute are to be extended to include children of a naturalized citizen who have never dwelt in the United States, such action must come from legislation of Congress and not judicial decision. Congress has made provision concerning an alien's wife or minor child suffering from contagious disease, when such alien has made a declaration of his intention to become a citizen, and when such disease was contracted on board the ship in which they came, holding them under regulations of the Secretary of the Treasury until it shall be determined whether the disorder will be easily curable, or whether such wife or child can be permitted to land without danger to other persons, requiring that they shall not be deported until such facts are ascertained (32 Stat. 1221, U. S. Comp. Stat. 1901, Supp. of 1903, p. 185). But Congress has not said that an alien child who has never dwelt in the United States, coming to join a naturalized parent, may land when afflicted with a dangerous contagious disease.

As this subject is entirely within Congressional control, the

matter must rest there; it is only for the courts to apply the law as they find it.

It is suggested that the agreed finding of facts contains no stipulation as to the dangerous or contagious quality of trachoma, but the petition shows that the petitioner's daughter was debarred from landing because it was found that she had a dangerous contagious disease, to wit, trachoma. Furthermore, the statute makes the finding of the board of inquiry final, so far as review by the courts is concerned, the only appeal being to certain officers of the department. 32 Stat. 1213; *Nishimura Ekiu* v. *United States*, 142 U. S. 651.

Finding no error in the order of the Circuit Court, it is

Affirmed.

WECKER *v.* NATIONAL ENAMELING AND STAMPING COMPANY.

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

No. 133. Submitted December 14, 1906.—Decided January 7, 1907.

Where the Circuit Court refuses to remand, and on the plaintiff declining to recognize its jurisdiction or proceed, dismisses the case and renders judgment that plaintiff take nothing thereby and defendant go hence without day and recover his costs, the judgment is final, so far as that suit is concerned, and the question of jurisdiction can be certified to this court under § 5 of the act of March 3, 1891, 26 Stat. 827.

The right of a non-resident defendant, sued in the state court by an employé for damages, to remove the case to the Federal court cannot be defeated by the fraudulent joinder as co-defendant of another employé, resident of plaintiff's State, who has no relation to the plaintiff, rendering him liable for the injuries, and the Circuit Court can determine the question of fraudulent joinder on affidavits annexed to the non-resident defendant's petition for removal to the consideration whereof plaintiff does not object but submits affidavits counter thereto. *Alabama Great Southern Railway Co.* v. *Thompson*, 200 U. S. 206, distinguished.

Where the direct issue of fraud is involved, knowledge may be imputed to one wilfully closing his eyes to information within reach.

THE facts are stated in the opinion.

Mr. Edward C. Kehr, with whom *Mr. Richard T. Brownrigg* and *Mr. William L. Mason* were on the brief, for plaintiff in error:

In order to justify removal on the ground of improper joinder of the resident defendant, it was necessary for the removal petitioner to both allege and prove that the allegation of joint liability made in the complaint was fraudulently made. There was no evidence even tending to show such fraud. *Alabama Gt. Southern* v. *Thompson,* 200 U. S. 206; *Louisville Ry. Co.* v. *Wangelin,* 132 U. S. 599, 601; *Plymouth &c. Co.* v. *Amador &c. Co.* 118 U. S. 264, 270; *Hukill* v. *Railway Co.,* 72 Fed. Rep. 745; *Warax* v. *Railway Co.,* 72 Fed. Rep. 637; *Landis* v. *Felton et al.,* 73 Fed. Rep. 311; 2 Foster on Federal Procedure, 925, § 384.

The affidavits filed by the non-resident defendant in opposition to the motion to remand and which the court in its certificate as to the jurisdictional question says that it took into consideration in deciding that the allegations of joint liability were fraudulent, do not even charge fraud or state any facts from which an inference of fraud may be drawn, or even negative the joint liability made out by the allegations of the petition.

Mr. Charles P. Wise, Mr. George F. McNulty, Mr. James A. Seddon and *Mr. Robert A. Holland, Jr.,* for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case is certified here from the Circuit Court of the United States for the Eastern District of Missouri under section 5 of the Court of Appeals Act of March 3, 1891 (26 Stat. 827), upon a question of jurisdiction.

Conrad Wecker, the plaintiff below, brought his action in the Circuit Court of the city of St. Louis, State of Missouri, against the National Enameling and Stamping Company, Harry Schenck and George Wettengel, undertaking to recover jointly against the National Enameling and Stamping Company, a corporation of the State of New Jersey, and Schenck and Wettengel, residents of the city of St. Louis, State of Missouri. The substance of the complaint is that defendant is a corporation employing the plaintiff in the work of firing, filling, stirring, emptying and attending certain metal pots used in the melting of grease and lubricant matter in the plant of the defendant corporation; that the grease and lubricant matter was delivered by the corporation to the plaintiff in barrels of great weight—about six hundred pounds each—and it was the plaintiff's duty in the course of his employment to hoist the same to the top surface of the furnace structure, into which the pots were set, and then to dump the grease and lubricant matter into the pots.

The negligence charged against the defendant corporation consisted in allowing the pots, which were constantly filled with hot and boiling lubricants, to remain open and exposed, without covering, railing, device or means of any character to protect the plaintiff from accidentally slipping or falling into the same while engaged in the service of the corporation in the performance of his duties, and negligently failing to provide and properly place safe and sufficient hoisting apparatus for the use of the plaintiff in his employment in lifting said masses of grease and lubricant to the top of the furnace, and for failing to give the plaintiff instructions as to the proper manner of performing his duty and thereby unreasonably endangering his safety in said employment. Plaintiff alleges that, by reason of this negligence, while engaged in the performance of his duties on the twelfth of November, 1902, on the top of the furnace, he lost his balance and fell into one of the open, unguarded and unprotected pots containing hot and boiling grease and lubricant, receiving thereby great and painful in-

juries. Plaintiff below further charged that Schenck and Wettengel were employed by the corporation and charged by it with the superintendence and oversight of the plaintiff in the performance of his duty and were employed and charged by the corporation with the duty of superintending and properly planning the construction of a furnace, and with the duty of providing for said pots reasonably safe and suitable covering, railing or other device, and with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for lifting the masses of grease and lubricant to the top of the furnace, and were further charged by the corporation with the duty of instructing the plaintiff as to the manner of performing his duties, and charges negligence of Schenck and Wettengel in planning and directing the construction of the furnace structure and providing suitable covers or railings as aforesaid, and providing and placing reasonably safe and sufficient hoisting apparatus and in giving instructions as to the manner of performing plaintiff's duties, by reason whereof the plaintiff lost his balance and fell into one of the pots as aforesaid, to his great injury, and the complaint charges the joint negligence of the corporation and the defendants Schenck and Wettengel, and avers that his injuries were the result thereof, and prays judgment for damages jointly against the three defendants.

The defendant company filed its petition for a removal of the cause to the Circuit Court of the United States for the Eastern District of Missouri, which petition contained the usual averments as to the character of the suit and the right of removal and diversity of citizenship between the defendant corporation and the plaintiff, and averred that Schenck, one of the co-defendants, was also a non-resident of the State of Missouri and a citizen of the State of Illinois, and not served with process; also stated that Wettengel was, at the time of the commencement of the suit and since, a citizen of the State of Missouri; averred a separable controversy between it and the plaintiff as to the alleged negligence and as to the assump-

tion of the risk upon the part of the plaintiff. As to Wettengel, the citizen of Missouri, it was alleged in the removal petition that he was not, at the time of the accident or prior thereto, charged with the superintendence and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the furnace, or providing a reasonably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged with the duty of placing reasonably safe and sufficient hoisting apparatus, nor with the duty of instructing the petitioner in respect to his duties, as charged in the complaint, and, after stating that Schenck, like the defendant corporation, was a non-resident of Missouri and a citizen of another State, charged that Wettengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that the plaintiff well knew, at the time of the beginning of the suit, that Wettengel was not charged with the duties aforesaid, and that he was joined as a party defendant to prevent the removal of the cause and not in good faith.

After removal, plaintiff filed his motion to remand the case to the state court, on the ground that there was not in the case a controversy between citizens of different States and no separable controversy between the plaintiff and the company within the meaning of the removal act. The court, upon hearing the motion, refused to remand the cause, and afterward, plaintiff electing to stand upon his motion to remand, and refusing to recognize the jurisdiction of the United States court or to proceed with the prosecution of his case therein, upon motion of the defendant the court ordered the case to be dismissed, and rendered judgment that the plaintiff take nothing by the suit, and that the defendants go hence without day and recover their costs against the plaintiff. A bill of exceptions was allowed, and the court also certified that the only question decided by the court in the cause was that the join-

ing of Wettengel as a co-defendant with the company was palpably groundless and fictitious, and for the purpose of unlawfully depriving the defendant company of its right to remove the cause to the Federal court for trial; that for this reason the motion to remand was denied; that in deciding the motion the court took into consideration not only the complaint and petition for removal, but also the affidavits filed in support and opposition to the motion to remand; that the plaintiff refused to submit to the jurisdiction of the court and suffered a dismissal of the suit for the want of prosecution; that the question is whether the court had jurisdiction of the action.

In the first ruling upon the motion to remand, the court, in a written opinion, based its refusal upon the ground that the petition of plaintiff clearly showed that there was no joint cause of action against the company and the defendant Wettengel. Subsequently, the judge filed an opinion, in which he said that in his former opinion he made no allusion to the affidavits tending to show the fictitious and fraudulent joining of Wettengel, and that, in his opinion, the same inevitably showed that the inferences drawn from the allegations of the petition were correct, and that he might properly consider these affidavits in determining the question of removal.

It is urged by counsel for defendant in error that the writ of error should be dismissed, because there was no final judgment, and only in a case where a final judgment has been rendered can the question of jurisdiction be certified from a Circuit Court under section 5 of the Court of Appeals Act. *McLish* v. *Roff*, 141 U. S. 661, is relied upon, in which it was held that a writ of error could only be taken out after final judgment.

It is true that, after the Circuit Court of the United States maintained its jurisdiction, the plaintiff could have gone on and tried the case on its merits, and, after judgment, had there been reason for doing so, taken the case to the Circuit Court of Appeals; but, upon refusing to recognize the jurisdiction of

the Circuit Court, final judgment in the action was rendered, that the plaintiff take nothing by the suit and that the defendants go hence without day, and recover their costs against the plaintiff. Whether this judgment would be a bar to another action is not now before us; it is final, so far as the case is concerned, and terminated the action.

Section 5 of the Court of Appeals act provides that only the question of jurisdiction shall be brought to this court from the Circuit Court, and that is all that is now before us.

It is contended that this case should have been remanded upon the authority of *Alabama Great Southern Railway Co.* v. *Thompson,* 200 U. S. 206, decided at the last term of this court. In that case it was held that, upon a question of removal, where a plaintiff, in good faith, prosecuted his suit as upon a joint cause of action, and the removal was sought when the complaint was the only pleading in the case, the action as therein stated was the test of removability, and if that was joint in character, and there was no showing of a want of good faith of the plaintiff, no separable controversy was presented with a non-resident defendant, joined with a citizen of the State; in other words, if the plaintiff had, in good faith, elected to make a joint cause of action, the question of proper joinder is not to be tried in the removal proceedings, and that, however that might turn out upon the merits, for the purpose of removal the case must be held to be that which the plaintiff has stated in setting forth his cause of action. And in that case it was said:

"The fact that by answer the defendant may show that the liability is several can not change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders which are shown, by the petition for removal or otherwise, to be attempts to sue in the state courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may, and should, take such action as will defeat attempts to wrong-

fully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals."

And it was further stated in the court's opinion that there was nothing in that case to suggest an attempt to commit a fraud upon the jurisdiction of the Federal court.

Much discussion is had in this case as to whether the alleged cause of action is joint or several in its character, and whether the corporation and Wettengel could be jointly held responsible to the plaintiff upon the allegations of the complaint, but we do not deem it necessary to determine that question.

Upon the authority of the *Alabama Great Southern case, supra,* and the preceding cases in this court which are cited and applied in the opinion in that case, if the complaint is filed in good faith, the cause of action, for the purposes of removal, may be deemed to be that which the plaintiff has undertaken to make it, but in this case both parties filed affidavits upon the motion to remand, for and against the right to remove.

The petition for removal was sworn to by an agent of the company, and defendant corporation filed the affidavit of one George Eisenmayer, who testified that he was the chief engineer of the company, charged with the planning of new apparatus and the construction and repair thereof for the company, and that Wettengel was employed in the office as a draftsman, with several other persons in a similar capacity; that the sole work of Wettengel was as such draftsman, and that he had nothing to do with selecting plans or approving the same, but took the plans and ideas furnished him and made the necessary drawings for the use of mechanics, and that he had no authority to employ or discharge men or superintend work or give instructions to any of the men as to how they should perform their work. Wettengel's affidavit was also filed, in which he stated that for ten years he had been employed as a draftsman by the defendant company; that his work was performed in the office of the company; that he had no duties outside of the office or with the plaintiff; that he had

no duty of superintendence in connection with him; that he was not charged with any duty of planning or constructing the apparatus which was used in the defendant's plant; that the designing and selection thereof was made by other persons, and that his sole duty was to attend to the mechanical work of drafting, based upon the ideas and plans of others; that he had no discretion whatever as to the sort of apparatus to be used in any part of defendant's plant, nor as to the structures mentioned in plaintiff's petition; that he had nothing to do with the planning of the pots, no right to determine what they should be, or whether a railing should be used, nor what sort of hoisting apparatus should be used in connection therewith; that he had no duty in connection with the plaintiff as to how or when he should do his work, and no authority to give him instructions; in short, that his position was merely clerical and his duties confined to the making of drawings to enable mechanics to construct work from plans furnished by others in the employ of the defendant, and that he did not know the plaintiff by name, and did not know what sort of work he was doing or in what portion of defendant's plant he was engaged.

To these affidavits Wecker, the plaintiff, filed a counter affidavit, admitting that Eisenmayer was charged with the general supervision of the work and business of the company at the place plaintiff was employed and received his injury, and stating that just prior to the construction of the furnace structure he heard Eisenmayer direct Wettengel to prepare plans for a furnace to be erected where the one was built shortly after, upon which the plaintiff was at work when he received his injuries, and states his belief that the defendant Wettengel planned and directed the construction of the furnace.

Upon these affidavits the court reached the conclusion that, considered with the complaint, they showed conclusively an attempt to defeat the jurisdiction of the Federal court by wrongfully joining Wettengel.

The consideration of these affidavits clearly shows that Wettengel's employment was not that of a superior or superin-

tendent, or one charged with furnishing designs, for it is not contradicted that he was employed as a draftsman, receiving his instructions from others, nor is there the slightest attempt to sustain the allegations of the petition that Wettengel was a superintendent over the plaintiff, or had any authority to direct his work or to give him instructions as to the manner in which his duty should be performed. The testimony certainly shows no basis for these charges. The affidavit of Wecker, except as to the statement of his belief, admits that Eisenmayer was superintendent, and claims that he heard him direct Wettengel to prepare plans for a furnace structure. This is not inconsistent with the undisputed testimony as to the nature and character of Wettengel's employment in the subordinate capacity of a draftsman.

In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court.

It is objected that there was no proof that Wecker knew of Wettengel's true relation to the defendant, and consequently he could not be guilty of fraud in joining him, but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach.

It is further objected that the court should not have heard the matter upon affidavits, and should have required testimony with the privilege to cross-examine, but the plaintiff made no objection to the consideration of affidavits in support of the petition for the removal and himself filed a counter affidavit. In this state of the record there certainly can be no valid objection to the manner in which the court heard and considered the testimony.

While the plaintiff, in good faith, may proceed in the state

courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

Reaching the conclusion that the court did not err in holding upon the testimony in this case that the real purpose in joining Wettengel was to prevent the exercise of the right of removal by the non-resident defendant, we affirm the action of the Circuit Court in refusing to remand the case.

Judgment affirmed.

SHROPSHIRE, WOODLIFF & CO. *v.* BUSH.

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

No. 416. Submitted December 20, 1906.—Decided January 7, 1907.

An assignee of a claim of less than $300 for wages earned within three months before the commencement of proceedings in bankruptcy against the bankrupt is entitled to priority under § 64*a* when the assignment occurred prior to the commencement of the proceedings.

THE facts are stated in the opinion.

Mr. Charles F. Benjamin and *Mr. Rutherford Lapsley* for appellant:

The right of priority in a wage claim is a right which attaches to the debt, and not to the person or the original creditor; and the right passes by assignment to the assignee. *Trust Co.* v. *Walker*, 107 U. S. 596; *Burnham* v. *Bowen*, 111 U. S. 776; *Railroad Co.* v. *Lamont*, 16 C. C. A. 364; *S. C.*, 69 Fed. Rep. 23; *McIlhenny* v. *Binz*, 80 Texas, 1.

Mr. George D. Lancaster, Mr. John P. Tillman and *Mr. J. H. Beal,* for appellees:

The words of a statute are to be taken in their natural and ordinary sense and without any forced construction to extend their meaning. Applying this rule to the sub-section in question it is clear that Congress meant to prescribe two conditions as essential to give priority to debts due by a bankrupt; they must be debts due on account of *wages* and debts *due to* workmen.

The solicitude of Congress was for the workman, on account of the suffering which must result from the loss of his meagre wages, and did not extend to speculators who might have purchased the laborer's claims at a heavy discount.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellees are trustees of the bankrupt estate of the Southern Car and Foundry Company. The appellants, before the commencement of the proceedings in bankruptcy, acquired by purchase and assignment a large number of claims for wages of workmen and servants, none exceeding $300 in amount, and all earned within three months before the date of the commencement of the proceedings in bankruptcy. The District Court for the Eastern District of Tennessee rendered a judgment disallowing priority to these claims, because, when filed, they were not "due to workmen, clerks or servants."

On appeal to the Circuit Court of Appeals for the Sixth Circuit that court duly certified here for instructions the following question:

"Is an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against the bankrupt debtor entitled to priority of payment, under section 64 (4) of the bankrupt act, when the assignment occurred prior to the commencement of such bankruptcy proceedings?"

The question certified has never been passed upon by any

Circuit Court of Appeals, and in the District Courts the decisions upon it are conflicting. *In re Westlund et al.*, 99 Fed. Rep. 399; *In re St. Louis Ice Company*, 147 Fed. Rep. 752; *In re North Carolina Car Company* [Semble], 127 Fed. Rep. 178, where the right of the assignee to priority was denied; *In re Brown*, Federal Cases, 1974 [Act of 1867]; *In re Harmon*, 128 Fed. Rep. 170, where, on facts slightly but not essentially different, the right of the assignee to priority was affirmed.

The bankruptcy law (Act July 1, 1898, 30 Stat. 544, 563, c. 541), in section 1, defines "debt" as including "any debt, demand, or claim provable in bankruptcy." Section 64, under which priority is claimed in this case, is, in the parts material to the determination of the question, as follows:

"SEC. 64. Debts which have priority.— . . . *b*. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant; . . ."

The precise inquiry is whether the right of prior payment thus conferred is attached to the person or to the claim of the wage earner; if to the person, it is available only to him, if to the claim, it passes with the transfer to the assignee. In support of the proposition that the right is personal to the wage earner, and enforceable only by him, it is argued that it is not wages earned within the prescribed time which are given priority, but wages "due to workmen, clerks or servants;" that when the claim is assigned to another it is no longer "due to workmen, clerks or servants," but to the assignee, and therefore when presented by him lacks one of the characteristics which the law makes essential to priority. In this argument it is assumed that the wages must be "due" to the earner at the time of the presentment of the claim for proof, or at least at the time of the commencement of the proceedings in bankruptcy. Without that assumption the argument fails to support the conclusion.

But the statute lends no countenance to this assumption. It nowhere expressly or by fair implication says that the wages must be due to the earner at the time of the presentment of the claim, or of the beginning of the proceedings, and we find no warrant for supplying such a restriction. Regarding, then, the plain words of the statute, and no more, they seem to be merely descriptive of the nature of the debt to which priority is given. When one has incurred a debt for wages due to workmen, clerks or servants, that debt, within the limits of time and amount prescribed by the act, is entitled to priority of payment. The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates classes of debts as "the debts to have priority."

In this case the Southern Car and Foundry Company had incurred certain debts for wages due to workmen, clerks or servants, which were earned within three months before the date of the commencement of proceedings in bankruptcy. These debts were exactly within the description of those to which the Bankruptcy Act gives priority of payment, and they did not cease to be within that description by their assignment to another. The character of the debts was fixed when they were incurred, and could not be changed by an assignment. They were precisely of one of the classes of debts which the statute says are "debts to have priority."

The question certified is answered in the affirmative, and

It is so ordered.

NORTHERN LUMBER COMPANY *v.* O'BRIEN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS.

No. 121. Argued December 7, 1906.—Decided January 14, 1907.

The grant to the Northern Pacific Railroad Company by the act of July 2, 1864, 13 Stat. 365, was *in præsenti*, although title did not attach to specific sections until they were identified, and the grant only included lands which, on that date, were not reserved, sold, granted, or otherwise appropriated; it did not include land then included within an existing and lawful withdrawal made in aid of an earlier grant for another road, although prior to the selection by the Northern Pacific it may have appeared that those lands were not within the place limits of the grant for such other road.

When a withdrawal order properly made ceases to be in force the lands withdrawn thereunder do not pass under a grant of unreserved, unsold or otherwise unappropriated lands but become part of the public domain to be disposed of under the general land laws or acts of Congress specially describing them.

139 Fed. Rep. 614, affirmed.

THE facts are stated in the opinion.

Mr. Charles W. Bunn, with whom *Mr. James B. Kerr* was on the brief, for appellant:

As the withdrawal upon general route for the Lake Superior and Mississippi Company was set aside in 1866, the lands were free public lands when the Northern Pacific line was definitely located in 1882; and they therefore fall literally within the Northern Pacific grant, unless their withdrawal was such as to forbid their inclusion on July 2, 1864, the date of the granting act, within the term "public lands" as used in that act.

To a withdrawal precision and certainty are as necessary as to a conveyance. The particular lands withdrawn must be certain or capable of being made certain. The local officers have no authority to make withdrawals, which must rest for their validity upon an order of the Secretary or of the Com-

missioner of the General Land Office. The withdrawal in this case of "a body of lands about twenty miles in width" was wholly indefinite and uncertain. It was not helped out by the map of general route transmitted with the withdrawal order to the local land office, because that map was wholly indefinite and uncertain.

Even conceding that the withdrawal was effective, it did not shield the lands from the operation of the subsequent grant to the Northern Pacific and did not deprive them of their character as public lands within the meaning of the Northern Pacific act.

The only requirement of the Northern Pacific grant relating to or defining the lands which at its date were embraced by the act of Congress being that they should be public lands, the question is whether a reservation from preëmption entry upon general route of another railway forbids their inclusion under that term.

There is a broad distinction between a reservation upon general route and one upon definite location, which latter sort of reservation the court considered in *Northern Pacific Railroad Company* v. *Musser-Sauntry Co.*, 168 U. S. 604. A reservation upon definite location is of indemnity land necessary (or supposed necessary) to fill losses in place limits. It is essential in order to save vested rights, not only as against entries under the land laws, but as against subsequent Congressional grants. The reservation upon general route involved in this case was, upon the contrary, not one to protect or save rights. It was merely to facilitate the operations of the public land department. It covered only place lands and those needed no protection from subsequent disposal by Congress, the settled doctrine being that priority of grant gives priority of right.

In *Menotti* v. *Dillon*, 167 U. S. 703, under an act providing "that in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State, by any act of

Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State," it was held that selections by the State of lands which had been previously withdrawn, for the benefit of a railroad company which had filed its map of general route, were selections from the "public domain" within the meaning of the above quoted act, and passed as such to the State of California under the provisions of said act notwithstanding such withdrawal. The same principle was involved in the recent cases of *United States* v. *Oregon & Cal. R. R. Co.*, 176 U. S. 28, and *Wilcox* v. *Eastern Oregon Co.*, 176 U. S. 51, which should be regarded as controlling and decisive of this appeal.

Mr. J. N. Searles, for the appellees, submitted:

The withdrawal proceeding was sufficient to take this land out of the class of "public lands" mentioned in the Northern Pacific grant. The word "about" used by the Commissioner in his withdrawal letter does not render his direction indefinite or uncertain. The rule is that when the context restrains and limits the meaning of the word "about," its use does not materially impair the certainty of a description. *Adams* v. *Harrington*, 114 Indiana, 66; *Corey* v. *Swagger*, 74 Indiana, 211; *Jones* v. *Plummer*, 2 Litt. 161; *Purinton* v. *Sedgley*, 4 Maine, 283–286; *Stevens* v. *McKnight*, 40 Ohio St. 341; *Balt. Land Soc.* v. *Smith*, 54 Maryland, 204; *Sanders* v. *Morrison*, 2 T. B. Mon. 109; *Shipp* v. *Miller*, 2 Wheat. 316; *Cutts* v. *King*, 5 Maine, 482; *Bodley* v. *Taylor*, 5 Cranch, 224; *Johnson* v. *Panel*, 2 Wheat. 206.

The Northern Pacific grant did not override the departmental withdrawal and thus include the land in question among the "public lands" referred to in that act.

Mr. Justice Harlan delivered the opinion of the court.

This suit involves the title to the south half of the southeast quarter of section twenty-seven, township fifty-two north, range fifteen west, in the State of Minnesota.

The principal question in the case is whether the land in dispute was embraced by the grant of public lands made by Congress July 2, 1864, 13 Stat. 365, 367, c. 217, to the Northern Pacific Railroad Company in aid of the construction of a railroad and telegraph line from Lake Superior to Puget Sound. If it was not, then the decree of the Circuit Court dismissing the bill was right, as was that of the Circuit Court of Appeals affirming that decree.

By the act of May 5, 1864, 13 Stat. 64, c. 79, Congress made a grant of public lands to the State of Minnesota in aid of the construction of a railroad from St. Paul to the head of Lake Superior. This grant was vested in the Lake Superior and Mississippi Railroad Company, and that company on the seventh day of May, 1864, filed its map of *general* route. This map was accepted by the Land Department and a copy was transmitted May 26, 1864, to the proper local land office, which was informed of the approval by the Secretary of the Interior of a *withdrawal of lands for the Lake Superior and Mississippi* road, and that office was ordered to suspend, and it did suspend, "from preëmption, settlement and sale a body of land about twenty miles in width," as indicated on the filed map. The land in dispute was within the exterior lines of this general route of the Lake Superior and Mississippi road as defined by its map, and was *part of the land so withdrawn.*

After the acceptance of the map of general route of the Lake Superior and Mississippi Railroad, and *after* the withdrawal by the Land Department, for the benefit of that company, of the lands covered by that map, Congress, by the above act of July 2, 1864, 13 Stat. 365, 367, c. 217, declared "that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of *public land,* not mineral, designated by odd numbers, to the

amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; . . ."

In 1866, the Lake Superior and Mississippi Railroad Company filed a map of the *definite* location of its road, from which it appeared that the land in dispute was outside of the place, indemnity and terminal limits of that road as thus located.

In 1882, the Northern Pacific Railroad Company filed its map of definite location, which showed that the particular lands here in dispute were in the place limits indicated by that map.

In 1883 the latter company filed in the proper office a list of lands which it asserted were covered by the grant made to it on July 2, 1864, and on that list, among other lands, were those here in dispute.

In 1901, the Commissioner of the Land Office refused to approve and rejected the list so far as the lands now in question were concerned, upon the ground that, although they appeared, after the definite location of the Northern Pacific Railroad, to be within the primary limits of the grant made for that road by the act of July 2, 1864, they "were *excepted from the operation of said grant* because they were, *at the date of the passage of said act*, within ten miles of the probable route of the Lake Superior and Mississippi Railroad in aid of the construction of which a grant was made by the act of May 5, 1864, and *were embraced within the withdrawal of May* 26th, 1864, made on account of the last-mentioned grant." The question was taken on appeal to the Secretary of the Interior, and he also rejected the above list, rendering a decision under date of

July 16, 1901, affirming the decision of the Commissioner—the Secretary ruling that as these lands were, *at the date of the grant to the Northern Pacific Railroad Company*, already "included within *an existing and lawful withdrawal* made in aid of a prior grant," they were not to be deemed "public lands" when the Northern Pacific grant of 1864 was made, and, consequently, were not embraced by that grant. The Secretary held that the fact that a right under a prior grant did not eventually attach to the lands here in question was immaterial; "first, because the act of July 2, 1864, was a grant *in præsenti*, and second, because a reservation on account of a prior grant will defeat a later grant like that of July 2, 1864, whether the lands are needed in satisfaction of the prior grant or not." 31 L. D. 33. Under that decision the above list filed by the Northern Pacific Railroad Company was formally and finally cancelled, and these lands were never assigned to it by the Land Department.

Although the stipulation of the parties as to the facts is very lengthy, those here stated are sufficient to present the point upon which, it is agreed, the decision of the case depends.

We have seen that at the date of the grant of July 2, 1864, to the Northern Pacific Railroad Company the particular land in dispute was within the lines designated by the accepted map of the *general* route of the Lake Superior and Mississippi Railroad; and that the grant for the Northern Pacific Railroad was of "public land." Was the land here in dispute *public* land *at the date of the passage* of that act? If by reason of its having been then withdrawn by the Land Department from preëmption, settlement and sale, it was not at the date of the Northern Pacific grant to be deemed public land, did that grant attach to it when the Northern Pacific road was definitely located in 1882? These questions were answered in the negative by both the Circuit Court and the unanimous judgment of the Circuit Court of Appeals. *Northern Lumber Co. v. O'Brien &c.*, 134 Fed. Rep. 303; *S. C.*, 139 Fed. Rep. 614.

It has long been settled that the grant to the Northern

Pacific Railroad Company by the act of 1864 was one *in præsenti;* that is, the company took a present title, as of the date of the act, to the lands embraced by the terms of the grant; the words "that there be, and hereby is, granted" importing "a transfer of present title, not a promise to transfer one in the future." In *St. Paul & Pacific* v. *Northern Pacific,* 139 U. S. 1, 5, the court said "that the route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. *Schulenberg* v. *Harriman,* 21 Wall. 44, 60; *Leavenworth, Lawrence &c. Railroad Co.* v. *United States,* 92 U. S. 733; *Missouri, Kansas &c. Railway Co.* v. *Kansas Pacific Railway Co.,* 97 U. S. 491; *Railroad Co.* v. *Baldwin,* 103 U. S. 426." The same principle was reaffirmed in *Bardon* v. *Northern Pacific Railroad,* 145 U. S. 535, 543, and in many other cases which are familiar to the profession and need not be cited.

Again, no lands passed that were not, at the date of the grant, public land; that is, lands "open to sale or other disposition under general laws," not lands "to which any claims or rights of others have attached." *Bardon* v. *Northern Pacific Railroad,* above cited. At the time of the grant of 1864 to the Northern Pacific Railroad Company the lands here in dispute were, as we have seen, among those *withdrawn* by the Land Department from preëmption, settlement and sale, and were held specifically under the grant of May 5, 1864, for the Lake Superior and Mississippi Railroad. They were not, therefore, public lands embraced by the later grant to the other company.

The grant of the Northern Pacific Railroad Company spoke as of the date of the act of July 2, 1864; and that company did not acquire any title to these lands, then withdrawn, by reason of the fact that when its line, at a subsequent date, was definitely located they had become freed from the grant made by the act of May 5, 1864, to the State of Minnesota. Being at the date of the grant of July 2, 1864, *under the operation of an order of withdrawal by the Land Department,* they were not in the category of lands embraced by that grant of "public lands." When the withdrawal order ceased to be in force the lands so withdrawn did not pass under the later grant but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad land grant. There is no escape from this conclusion under the adjudged cases.

In *Kansas Pacific Railroad Co.* v. *Dunnmeyer,* 113 U. S. 629, in which the attempt was made to include within a railroad grant lands to which a homestead claim had previously attached, but which claim had ceased to exist when the line of the railroad was definitely fixed, the court, speaking by Mr. Justice Miller, said: "No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations, for forts and other purposes, which have been given up or abandoned as such reservations and were of great value; nor is it understood that *in any case where lands had been otherwise disposed of their reversion to the Government brought them within the grant. . .*"

In *Bardon* v. *Northern Pacific Railroad,* above cited, Mr. Justice Field, delivering the unanimous judgment of the court, said: "In the *Leavenworth case*" (92 U. S. 733) "the appellant, the railroad company, contended that the fee of the land was in the United States, and only a right of occupancy remained with the Indians; that under the grant the State would hold the title subject to their right of occupancy; but as that had

been subsequently extinguished, there was no sound objection to the granting act taking full effect. The court, however, adhered to its conclusion, that the land covered by the grant could only embrace lands which were at the time public lands, free from any lawful claim of other parties, unless there was an express provision showing that the grant was to have a more extended operation, citing the decision in *Wilcox* v. *Jackson*, 13 Pet. 496, 498, to which we have referred above, *that land once legally appropriated to any purpose was thereby severed from the public domain and a subsequent sale would not be construed to embrace it, though not specially reserved.* And of the Indians' right of occupancy it said, that this right, with the correlative obligation of the Government to enforce it, negatived the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere.* 'For all practical purposes,' the court added, 'they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States.' Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in *The Leavenworth case;* but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are *at the time* free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

Again, in the same case, where the contention was that the Northern Pacific grant embraced lands to which a preëmption claim had previously attached, but which claim was cancelled

after the date of that grant, the court said: "That preëmption entry remained of record until August 5, 1865, when it was cancelled, but this was after the date of the grant to the Northern Pacific Railroad Company, and also after the dates of several grants made to the State of Wisconsin to aid in the construction of railroad and telegraph lines within that State. *The cancellation, as already said, did not have the effect of bringing the land under the operation of the grant to the Northern Pacific Railroad Company; it simply restored the land to the mass of public lands,* to be dealt with subsequently in the same manner as any other public lands of the United States not covered by or excepted from the grant."

In *United States* v. *Southern Pacific Railroad,* 146 U. S. 570, 606, this court, speaking by Mr. Justice Brewer, said: "Indeed, the intent of Congress in all railroad grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as *at that time* are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands." In *Whitney* v. *Taylor,* 158 U. S. 85, 92, Mr. Justice Brewer, again speaking for the court, said: "That when on the records of the local land office there is an existing claim on the part of an individual under the homestead or preëmption law, which has been recognized by the officers of the Government and has not been cancelled or set aside, the tract in respect to which that claim is existing *is excepted from the operation of a railroad land grant* containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of its validity was a matter to be settled between

the Government and the claimant, in respect to which the railroad company was not permitted to be heard." In *Spencer* v. *McDougal*, 159 U. S. 62, 65, the court referred to *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, in which the question arose whether a grant of public lands, on each side of Des Moines River, in aid of navigation, terminated at the mouth of Raccoon Fork or extended along the whole length of the river to the northern boundary of the State, and said: "The land department ordered that lands the whole length of the river within the State should be withdrawn from sale. In the course of subsequent litigation it was decided by this court that the grant terminated at the mouth of the Raccoon River. But in the case cited it was held that the withdrawal by the land department of lands above the mouth of the Raccoon River was valid, and that a subsequent railroad grant, with the ordinary reservation clause in it, *did not operate upon lands so withdrawn.*" So, in *Northern Pacific Railroad* v. *Musser-Sauntry Co.*, 168 U. S. 604, 607, 611: "But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's map of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is definitely fixed. The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Wolsey* v.

Chapman, 101 U. S. 755, and cases cited in the opinion; *Hamblin* v. *Western Land Company*, 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 17, 18; *Wisconsin Central Railroad* v. *Forsythe*, 159 U. S. 46, 54; *Spencer* v. *McDougal*, 159 U. S. 62. . . . All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant—the latter having such words of exception and limitation as are found in the grant to the plaintiff—*it operates to except the withdrawn lands from the scope of such later grant.*" The doctrines of these cases were recognized in the recent case of *Northern Pacific Railway* v. *Lacey*, 174 U. S. 622.

In view of these decisions it is clear that as the lands in dispute were, at the date of the grant to the Northern Pacific Railroad Company, withdrawn, of record, for the benefit of the Lake Superior and Mississippi Railroad, under a prior grant, they were not public lands within the meaning of the later grant, and did not come under it, when or because it was subsequently ascertained that they were without the line of the definite location of the road of the Lake Superior Railroad Company, and within the place limits of the Northern Pacific as defined by its map of definite location. When freed from the operation of the accepted map of general route filed by the Lake Superior and Mississippi Railroad Company, they did not come under the operation of the later grant to the Northern Pacific Railroad, but became a part of the public lands constituting the public domain and subject only to be disposed of under the general laws relating to the public lands. If, by the act of July 2, 1864, or before the line of the Northern Pacific Railroad was definitely located, Congress had, in terms, appropriated, for the benefit of that road, any of the lands embraced in the general route of the

other road, a different question would be presented. But it did not do so. It only granted for the benefit of the Northern Pacific Railroad lands which *then*, July 2, 1864, were public lands, and no lands were public lands, within the meaning of Congress, which, at that time, were withdrawn by the Land Department; that is, reserved for the purposes of a prior grant although such reservation turned out to have been a mistake.

The suggestion is made in this connection that the order of the Land Department was too uncertain and indefinite to have any legal force, because the direction to the local land office was to suspend from preëmption, settlement and sale "a body of land *about* twenty miles in width." We deem this suggestion without merit. The order for withdrawal referred to the diagram or map showing the road's probable route; and it is agreed that the lands in dispute are coterminous and within ten miles of the line of the general route of the Lake Superior and Mississippi Railroad, as defined by the diagram or map filed. The map, however indefinite, was intended to cover these lands. It sufficiently indicated these lands and the probable route of the road, and that was enough.

Many cases are called to our attention which are supposed to militate against the views we have here expressed. We have examined those referred to and do not perceive that any one of them decided the particular question now before us. No one of them holds that a grant, *in præsenti*, of public lands, with the ordinary reservations, embraces lands which, at the date of such grant, are under the operation of a formal order of the Land Department, of record, withdrawing them for the benefit of a prior grant in the event they should be needed for the purposes of such grant. Nor do any of them hold that the subsequent cancellation of such withdrawal order had the effect to bring them under the operation of a later grant of public lands. It is said that *United States* v. *Oregon & Cal. R. R. Co.*, 176 U. S. 28, and *Wilcox* v. *Eastern Oregon Co.*, 176 U. S. 51, should be regarded as controlling and decisive of this case for the appellant. We do not think so. The

principal point decided in those cases was that nothing in the act of 1864 prevented Congress by legislation from appropriating for the benefit of other railroad corporations lands that might be or were embraced within the *general* route of the Northern Pacific Railroad; and this for the reason that an accepted map of general route only gave the company filing it an inchoate right and did not pass title to specific sections until they were identified by a definite location of the road. Besides, in neither case was there in force, at the date of the later grant, an accepted, effective order of the Land Department withdrawing the lands there in dispute pursuant to an accepted map of the *general* route of the Northern Pacific Railroad. If there had been an order of that kind, it would still have been competent for Congress to dispose of the lands, within such general route, as it saw proper, at any time prior to the definite location of the road under the later grant. In conformity with prior decisions it was so adjudged in the two cases above cited. Those cases did not adjudge that a grant of "public land," with the usual reservations, embraced any lands which, *at the time*, were formally withdrawn by the Land Department from preëmption, settlement or sale, for the benefit of a prior grant.

We are of opinion that the Circuit Court and the Circuit Court of Appeals correctly interpreted the decisions of this court and did not err as to the law of the case. The judgment below must, therefore, be affirmed.

It is so ordered.

MONTANA MINING COMPANY, LIMITED, *v.* ST. LOUIS MINING AND MILLING COMPANY.

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

No. 402. Argued December 10, 11, 1906.—Decided January 14, 1907.

Where there is a question whether the jurisdiction of the Circuit Court depended entirely on diverse citizenship making the judgment of the Circuit Court of Appeals final, but a petition for writ of certiorari is pending, and the writ of error had been allowed prior to the filing of the record in the first instance, and the case is of such importance as to demand examination by this court, the question of jurisdiction of the Circuit Court need not be determined but the case reviewed on certiorari.

In this case a bond to convey, and a conveyance, made thereafter in pursuance thereof, conveying mining lands in Montana, the title to which was in dispute between the grantor and grantee (owners of adjoining claims), together with all the mineral therein and all the dips, spurs, angles, etc., were construed as not simply locating a boundary between the two claims, leaving all surface rights to be determined by the ordinary rules recognized in mining districts of Montana and enforced by statutes of Congress, but as conveying all mineral below the surface including that in a vein therein which apexed in the unconveyed land of the grantor.

The common law has been kept steadily in force in Montana and under it a deed of real estate conveys all beneath the surface unless there be words of exception or limitation.

A conveyance of mineral land adjoining land of the grantor which grants all the mineral beneath the surface will not be construed as not granting the mineral in a vein apexing in the grantor's unconveyed land because such vein may extend across the conveyed land to other land belonging to the grantor.

Quære whether there would not be a reserved right in the grantor to pass through the conveyed land to reach the further portion of such a vein.

A contract and conveyance of lands and subsurface minerals made in settlement of a dispute will be construed in the light of facts known at the time to the parties rather than of possibilities of future discoveries.

THE litigation between these parties has been protracted through a series of years. A brief history will help to an understanding of the present questions. Prior to 1884 Charles

Mayger had located the St. Louis lode claim in Lewis and Clarke County, Montana Territory, and William Robinson and others had located, adjoining thereto, the Nine Hour lode claim. These claims conflicted. Mayger made application for a patent. Thereupon adverse proceedings were commenced by Robinson and his associates against Mayger in the District Court of the Third Judicial District of Montana. For the purpose of settling and compromising that action on March 7, 1884, a bond was executed by Mayger to the other parties, in which he agreed to proceed as rapidly as possible to obtain a patent, and then to execute and deliver to Robinson a good and sufficient deed of conveyance of a tract described as "comprising a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim, and particularly described as follows, to wit." Then follows a description of what is known as the compromise ground, a tract including an area of 12,844.5 square feet, "together with all the mineral therein contained." Mayger proceeded to obtain a patent for the St. Louis claim, including the compromise ground, as did also Robinson and his associates, a patent to the Nine Hour claim, omitting the compromise ground. Thereafter the plaintiff in error acquired the interest of Robinson and his associates and the defendant in error the interest of Mayger. The former company demanded a conveyance of the compromise ground in accordance with the terms of the bond executed by Mayger, which, being refused, suit was brought in a District Court of the State, which rendered a decree in its favor. That decree having been affirmed by the Supreme Court of the State, the St. Louis company brought the case to this court, and on October 31, 1898, the judgment of the Supreme Court of Montana was affirmed. 171 U. S. 650. In pursuance of the decree the St. Louis company deeded the tract described in the bond, giving its boundaries, the number of square feet contained therein, and adding, "together with all the mineral therein contained. Together with all the dips, spurs and angles,

and also all the metals, ores, gold and silver-bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances."

Prior explorations, the exact date of which is not shown, but apparently long after the compromise agreement, had disclosed the fact that beneath the surface of this compromise ground there was a large body of ore which, it was claimed, belonged to a vein apexing in the territory of the St. Louis claim. This was not the discovery vein, but a secondary vein, frequently called the Drumlummon vein or lode, whose apex was between the compromise ground and the apex of the St. Louis discovery vein. Some of this ore was mined and removed by the Montana company. On September 16, 1893, a year before the specific performance suit was brought, the St. Louis company filed its complaint in the Circuit Court of the United States for the District of Montana, against the Montana company and several individual defendants, claiming to recover $200,000 for the damages sustained by the trespass of the defendants in removing the ore. In its complaint the St. Louis company alleged that it was a corporation organized under the laws of Montana, and that the Montana company was a corporation incorporated under the laws of the Kingdom of Great Britain, but nothing was said as to the residence or citizenship of the individual defendants.

On November 21, 1898, three weeks after the decision by this court in the specific performance suit, an amended and supplemental complaint was filed, which omitted the individual defendants and sought a recovery from the Montana

company alone for the ore so wrongfully removed, as alleged. On June 26, 1899, a second amended and supplemental complaint was filed, also against the Montana company alone, and asking for the same relief. To this an answer was filed, setting up the bond and deed heretofore referred to, and pleading that thereby the plaintiff was estopped from claiming any part of the compromise ground or any mineral contained therein.

Pending this litigation, and on respectively the sixth and twelfth days of December, 1898, orders were issued by the Circuit Court restraining severally each of the parties to this litigation from taking any more mineral from the disputed ground. On the second amended and supplemental complaint a trial was had in which judgment was rendered in favor of the St. Louis company for $23,209. To review this judgment, the Montana company prosecuted a writ of error from the Circuit Court of Appeals of the Ninth Circuit, which writ was dated October 7, 1899, and the judgment was affirmed May 14, 1900. 102 Fed. Rep. 430; 42 C. C. A. 415. The St. Louis company took out a cross writ of error from the Circuit Court of Appeals dated January 30, 1900, and that court reversed the judgment October 8, 1900, and remanded the case for a new trial as to the recovery sought for the conversion and value of certain ores, which had been excluded by the Circuit Court from the consideration of the jury. 104 Fed. Rep. 664; 44 C. C. A. 120. The parties then brought, by separate writs of error, these two decisions of the Court of Appeals to this court, on consideration whereof this court held that the judgment in the Circuit Court was entirely set aside by the second decision of the Court of Appeals, and therefore dismissed both cases on the ground that there was no final judgment. 186 U. S. 24.

Whereupon the Court of Appeals sent down to the Circuit Court a mandate setting aside the judgment *in toto*, and ordering a new trial. This new trial was held on May 31, 1905, and resulted in a judgment in favor of the St. Louis company for

$195,000, which judgment was affirmed by the Circuit Court of Appeals, to reverse which decision the Montana company sued out this writ of error.

After this last decision by the Court of Appeals the Circuit Court on the application of the St. Louis company set aside the order which restrained it from extracting ore from the disputed territory. Thereupon the Montana company filed its application in this court for a reinstatement of that order and that it be continued in force until the final termination of the litigation.

The St. Louis company filed a motion to dismiss the writ of error sued out by the Montana company on the ground that the jurisdiction of the Circuit Court depended entirely on diverse citizenship, and therefore the decision of the Circuit Court of Appeals was final. The Montana company then made application for a writ of certiorari, which application was passed for consideration to the final hearing of the case.

Mr. Charles J. Hughes, Jr., with whom *Mr. W. E. Cullen*, *Mr. Aldis B. Browne* and *Mr. Alexander Britton* were on the brief, for plaintiff in error:

The bond, the judgment and the deed are absolutely conclusive of the rights of these parties in the present action in the compromise ground. 2 Black on Judgments, 503-505; *Cromwell* v. *Sac County*, 94 U. S. 351, 354; Freeman on Judgments, 284, and cases cited; *Casey* v. *Penna. Asphalt Pav. Co.*, 109 Fed. Rep. 744; *New Orleans* v. *Citizens Bank*, 167 U. S. 371; *Ball* v. *Trenholm*, 45 Fed. Rep. 588; *S. C.*, aff'd, 114 Fed. Rep. 189.

Where the facts relied on are substantially the same, the fact that a different form or measure of relief is asked in the subsequent action will not deprive the parties of the protection of the prior findings and judgment in their favor. *Green* v. *Rogers*, 158 U. S. 478, 502; *Nat'l F. & P. Works* v. *Oconto C. W. S. Co.*, 113 Fed. Rep. 793, 803.

Any right, fact, or matter in issue and directly adjudicated

upon or necessarily involved in the determination of an action is absolutely *res adjudicata*, and cannot be relitigated between the parties or their privies, whether the claim or demand, purpose, or subject-matter of the two suits be the same or not. *Burk* v. *Beverley*, 1 How. 134; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Sou. Pac. R. Co.* v. *United States*, 168 U. S. 1; *Mitchell* v. *Chicago Nat'l Bank*, 180 U. S. 471; *Sou. Pac. R. Co.* v. *United States*, 183 U. S. 519; *Landen* v. *Merchants' Bank*, 186 U. S. 458; *Russell* v. *Lamb*, 49 Fed. Rep. 770; *Norton* v. *House of Mercy*, 101 Fed. Rep. 384; *Estill Co.* v. *Embry*, 112 Fed. Rep. 882; *Eastern Bldg. & Loan Assn.* v. *Welling*, 116 Fed. Rep. 100; *Ætna Life Ins. Co.* v. *Hamilton Co.*, 117 Fed. Rep. 82; *Green* v. *Thornton*, 130 California, 482; *Betts* v. *Starr*, 13 Am. Dec. 94, and note; *Baxter* v. *New England Marine Co.*, 6 Massachusetts, 277; *Burke* v. *Miller*, 4 Gray, 114; *Chamberlin* v. *Preble*, 11 Allen (Mass.), 370; *Burlen* v. *Shannon*, 90 Massachusetts, 200; *Stockwell* v. *Silloway*, 113 Massachusetts, 384; *Sly* v. *Hunt*, 159 Massachusetts, 151.

The judgment in the specific performance case, though rendered in a state court, was binding in the Federal courts. Constitution of the United States, Art. I, sec. 4; Rev. Stat. § 905.

The judgment in the specific performance case expressly directs a conveyance of the compromise ground by metes and bounds, together with all the mineral therein contained. The most important thing in a mining claim is the mineral therein contained. A strip of barren mountain side thirty feet in width and four hundred feet in length is of no value to anybody for any purpose without the minerals therein contained. The words "together with," in connection with the previously mentioned subject in a deed or power, operate to enlarge, and not to restrain, that which was previously granted. *Winter* v. *Loveden*, 1 Lord Raymond, 267; *Cardigan* v. *Armitage*, 2 Barn. & Cres. 197; *Panton* v. *Taft*, 22 Illinois, 166.

No formal words are necessary in a deed to pass extra-lateral rights. At common law a deed to real estate passed

every interest which the grantor had in the premises described, unless some interest was expressly reserved therein. The rights transferred by the deed herein are governed by the law of Montana. The common law is in force in the State of Montana unless where repealed either expressly or by some statute in conflict therewith. *Territory* v. *Ye Wan*, 2 Montana, 479; *Territory* v. *Va. Road Co.*, 2 Montana, 96; *Butte Hardware Co.* v. *Sullivan*, 7 Montana, 312; *Palmer* v. *McMasters*, 8 Montana, 192; *Milburn Mfg. Co.* v. *Johnson*, 9 Montana, 541; *Forrester* v. *B. & M. Co.*, 21 Montana, 544, 557; Mont. Civil Code, §§ 1473, 1490, 1491, 1510, 1511, 1513.

The deed in this case is clear, definite and explicit with nothing left to interpretation or conjecture or to be supplied by matters *aliunde* the document itself. The subject-matter of the grant is a patent of the United States issued to the St. Louis mining claim as a location made upon the public mineral domain, without any indication anywhere in it that any portion of the lands conveyed by the patent of the Government is of different date as to its location from any other portion thereof. All any court can do in determining the rights of the parties in a law action such as this is would be to find what is described by the deed and to enforce its terms. There exists in the deed nothing which authorizes a resort to the nature of the property and the circumstances surrounding the execution of the deed for the purpose of ascertaining its meaning. That can only be done when the terms of the deed, its contents, render this necessary in order to determine what is conveyed by it. *Van Ness* v. *City of Washington*, 4 Pet. 232, 285; *Tiernan* v. *Jackson*, 5 Pet. 594; *St. Louis* v. *Rutz*, 138 U. S. 243; 2 Devlin on Deeds, 2d ed., § 836.

The patent in this case is the usual patent, and there is nothing in its terms which permits, suggests, or gives an excuse for investigating the prior history of the territory embraced within the claim as patented or controversies which may have raged, however bitterly, before its issuance, since they are terminated conclusively by its issuance. *Boggs* v.

Merced Co., 14 California, 279; *Waterloo Co.* v. *Doe*, 56 Fed. Rep. 685; *Calhoun Co.* v. *Ajax Co.*, 192 U. S. 499; *Lavignino* v. *Uhlig*, 198 U. S. 443, 445; *Wright* v. *Dubois*, 21 Fed. Rep. 693, 696; *Mining Co.* v. *Tunnel Co.*, 196 U. S. 337, 355; 2 Lindley on Mines, 2d ed., p. 1389, § 778.

Mr. M. S. Gunn, with whom *Mr. Arthur Brown*, *Mr. J. H. Ralston*, *Mr. Thomas C. Bach*, *Mr. J. B. Clayberg*, *Mr. F. L. Siddons*, *Mr. Ira T. Wight* and *Mr. W. E. Richardson* were on the brief, for defendant in error:

As to the claim of the plaintiff in error concerning the Federal questions which its counsel deem are involved in this writ, see *Walrath* v. *Champion Mining Co.*, 171 U. S. 293, under which defendant in error is entitled to follow outside its side lines all veins having the same dip, same direction, which apex within its premises to the extreme limit of the discovery vein of the St. Louis. Judge Hunt put that condition to the plaintiff's right to recover in his charge, and the jury have found with us, that the discovery vein extends from the 520-foot plane to the 133-foot plane. As it is established that the St. Louis discovery vein runs lengthwise of the claim and extends from one plane to the other, 520 to 133, the St. Louis Company had a right to follow the Drumlummon or incidental vein through that distance, even if a part of the apex was not within its claims.

The right of the St. Louis Company to follow its vein, although it enters at the side line and departs through the same side line, has been established by this court in other cases, the only condition being that the general direction of the claim be with and along the vein. *Last Chance* v. *Tyler*, 157 U. S. 683. There was an intimation in that case that where the claim and vein were substantially in the same direction the owner of the apex could recover ores on the dip under another claim. See also the *Del Monte case*, 171 U. S. 84; 2 Lindley on Mines, 2d ed., § 584.

Between planes 108 and 133 the vein passes, or is alleged

to pass, from the St. Louis into the Nine Hour claim of the defendant. Passing at an angle, of course the apex would be partly within and partly without the St. Louis. The St. Louis claims no right to follow the surface or any of the surface of the Nine Hour, but, going to the deep on that vein for that 25 feet, the St. Louis says that the ore belongs to it because it, being the older claim, takes the whole of the vein. The vein is indivisible, a unit, an entity. Its width is not uniform, is never uniform in any vein. The ores cannot be divided by any longitudinal demarcation or division. *The Argentine case*, 122 U. S. 484. See also *St. Louis* v. *Montana*, 104 Fed. Rep. 667; *Bunker Hill M. Co.* v. *Empire State M. Co.*, 106 Fed. Rep. 472; *Empire State M. Co.* v. *Bunker Hill M. Co.*, 114 Fed. Rep. 419; *Last Chance M. Co.* v. *Bunker Hill M. Co.*, 131 Fed. Rep. 572; *Empire State M. Co.* v. *Bunker Hill M. Co.*, 131 Fed. Rep. 591; *U. S. M. Co.* v. *Lawson*, 134 Fed. Rep. 774; 2 Lindley on Mines, 2d ed., §§ 583, 594.

No Federal question can be connected with the deed from the owners of the St. Louis to the owners of the Nine Hour of what is known as the "compromise strip." The plaintiff in error has also asked for a writ of certiorari. Such writ (it is claimed) would raise this question of that deed.

There was never any contract, or intention to contract, to sell any property, but simply to fix the boundary line between the St. Louis and the Nine Hour. The St. Louis was to be and continue to be a mining claim, retaining the right to go underneath other claims.

The pleadings, findings of fact and conclusions of law in the specific performance case constitute a complete answer to the claim now made that it was the intention of the parties to the contract that the conveyance should embrace the ore in controversy in this action.

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

The first question is, of course, the one of jurisdiction. If

the jurisdiction of the Circuit Court depended alone on diverse citizenship then, undoubtedly, the decision of the Court of Appeals was final, and the case could only be brought here on certiorari. On the other hand, if it did not depend alone on diverse citizenship, the decision of the Court of Appeals was not final, and the case is properly here on writ of error. The original complaint alleged the citizenship of the two corporations, plaintiff and defendant, but did not allege the citizenship of the individual defendants. In order to sustain the jurisdiction of the Circuit Court on the ground of diverse citizenship the citizenship of all the parties on one side must be diverse from that of those on the other. So, unless there was a Federal question presented by that complaint, as the citizenship of the individual defendants was not shown, the Circuit Court had no jurisdiction of the case. It may be that this was remedied by the subsequent first and second amended complaints, in which the individual defendants were left out, the citizenship of the two corporations, plaintiff and defendant, alleged, and to which complaints the Montana company, without raising any question of jurisdiction, appeared and answered. *Conolly* v. *Taylor*, 2 Pet. 556; *Anderson* v. *Watt*, 138 U. S. 694. Be that as it may, in view of the fact that this litigation has been twice before this court, has been protracted for many years, involves so large an amount, and also presents questions of Federal mining law, which, though perhaps not necessary for our decision, have yet been elaborately argued by counsel, we are of opinion that if the jurisdiction of the Circuit Court did, after the filing of the amended complaints, depend entirely on diverse citizenship, the case ought to be brought here by writ of certiorari. As either by writ of error or certiorari the decision of the Court of Appeals can be brought before this court, and as each has been applied for, and as the importance of the case seems to demand our examination, it is scarcely necessary to consume time in attempting to decide positively whether there was a Federal question involved, or the jurisdiction depended solely on diverse citizenship. The

writ of error was duly allowed prior to the filing of the record in the first instance, and to avoid any further question of our jurisdiction we allow the certiorari. *Pullman Car Co.* v. *Transportation Co.*, 171 U. S. 138.

We pass, therefore, to a consideration of the merits, and the first question presented by counsel—indeed, as we look at it, the pivotal question—is the proper construction of the bond and deed by which the plaintiff in error claims title to the compromise ground.

The bond described the ground, adding "together with all the mineral therein contained." The deed executed in pursuance of the judicial decree contains the same description, followed by the words above quoted and also the further words given in the statement of facts, "together with all the dips, spurs and angles," etc.

Now, the contention of the defendant in error is that the effect of the compromise followed by the bond and conveyance was simply to locate the boundary line between the two claims, leaving all subsurface rights to be determined by the ordinary rules recognized in the mining districts and enforced by the statutes of Congress.

The argument in favor of this construction is forcibly put by Circuit Judge Gilbert, delivering the opinion of the Court of Appeals, when the case was first presented to that court. 102 Fed. Rep. 430; 42 C. C. A. 415. Without quoting it in full it is to the effect that agreements and conveyances of the whole or parts of mining claims are to be construed in the light of the mining law, as, generally speaking, we construe a contract, not merely by its terms, but having regard to the subject-matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. Particular reference was made to *Richmond Mining Co.* v. *Eureka Mining Co.*, 103 U. S. 839, 846, in which this court held that a line specified in a contract between the owners of contiguous mining claims to be one "continued downward to the center of the earth was not a vertical plane, but must be construed as

extending the boundary line downward through the dips of the veins or lodes wherever they might go in their course toward the center of the earth."

Further, the argument is that the adverse proceedings were maintained by the owners of the Nine Hour claim on the theory that the strip of land so contracted to be conveyed was a portion of that claim; that if the action had gone to judgment, sustaining their contention, the result would have been simply to fix the surface line of division between the two claims, without affecting the subsurface rights. Reference was also made to the suit for specific performance brought by the present plaintiff in error, in which it alleged that the contract had been made for the purpose of settling and agreeing upon the boundary line between the two claims, and that the suit was maintained upon the theory that, as owner of the Nine Hour claim, it owned the compromise ground afterwards conveyed.

We are not insensible to the force of this argument, and also appreciate fully what is said by counsel in reference to the familiarity of the several concurring justices with mining law and contracts and conveyances made under it.

Yet, notwithstanding, we are compelled to dissent from their construction of these instruments, and to hold that something more was intended and accomplished than the mere establishment of a surface boundary line. We premise by saying that nothing can be invoked in the nature of an estoppel from the averments in the pleadings in the suit for specific performance. True, the plaintiff in error alleged that the compromise ground was a part of its mining claim, and that the bond was executed "to settle and compromise the said suit and adverse claims, and for the purpose of settling and agreeing upon the boundary line between" the two claims; but the bond itself, reciting the fact of a settlement and compromise, and an agreement by the contestants to withdraw their objections to the application for a patent, stipulates for a conveyance, after patent, of the compromise ground, "com-

prising a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim," they being, respectively, the two claims owned by the parties hereto. Further, the answer denied that the compromise ground was a part of the Nine Hour lode claim, and alleged that the then owner of the St. Louis lode claim executed the bond as a compromise of the adverse claim and suit, and to enable him to obtain a patent for the whole of his claim.

The facts in the case, as well as the allegations in these pleadings, show that the two claims conflicted; that when application was made for a patent adverse proceedings were instituted, and that rather than try the title of the respective locators to the territory in conflict, and by way of compromise, they agreed that the owner of the St. Louis claim might proceed to patent, and then convey the compromise ground to the grantors of the plaintiff in error.

It must also be noticed that the dispute between the two claims was not simply in respect to the compromise ground —at least, testimony offered to prove this was ruled out— but involved a larger area, and that the disputing parties settled by the bond, describing what was to be conveyed.

It is undoubtedly true that if the bond had simply described the surface area or fixed a boundary line between the two claims, the subsurface and extralateral rights might have been determined by the mining law. It might have been implied that there was no intention to disturb the rights given by it.

Further, while it may be true that the words "together with all the dips, spurs and angles," etc., are generally employed in conveyances of mining claims in order to emphasize the fact that not merely the surface but the extralateral rights which go with a mining claim are conveyed, yet it must be noticed that in addition to these customary words are these, found in both the bond and the deed, "together with all the mineral therein contained," and they cannot be ignored, but must be given a meaning reasonable and consistent with other parts of the instruments. It is not satisfactory to say that they

are only equivalent to those that follow, "dips, spurs," etc., that the same thing is meant by each expression. While of course repetition is possible, yet it is not to be expected; and when, in addition to the ordinary words found in conveyances of mining claims, is this extra clause, we naturally regard it as making some further grant.

The scope of this deed would not be open to doubt if only the common law was to be considered. And in this connection it may be remarked that the common law has been kept steadily in force in Montana. "The common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this Territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative authority." Laws of Montana, 1871, 1872, p. 388, ch. 13, sec. 1, substantially re-enacted in Mont. Ann. Code, § 5152. See also *Territory* v. *Ye Wan*, 2 Montana, 478, 479; *Territory ex rel.* v. *Virginia Road Co.*, 2 Montana, 96; *Butte Hardware Co.* v. *Sullivan*, 7 Montana, 307, 312; *Palmer* v. *McMasters*, 8 Montana, 186, 192; *Milburn Mfg. Co.* v. *Johnson*, 9 Montana, 537, 541; *Forrester* v. *B. & Min. Co.*, 21 Montana, 544, 556. By that law a deed of real estate conveys all beneath the surface, unless there be some words of exception or limitation. But the mining laws of both State and Territory were in force, and in construing conveyances of mining claims the provisions of those laws must be taken into account, and may add to or subtract from the rights passing by a common law conveyance of agricultural or timber lands. It is probably not necessary to specify extralateral rights in order that a conveyance of a mining claim be operative to transfer them, and yet it is not strange that the custom grew up of naming them for the sake of avoiding the possibility of disputes. While the bond made no mention of extralateral rights, yet in all probability it would have been held to pass them and the court may have thought that the single specification, "all the mineral therein contained," was liable to be construed as narrowing the conveyance so as to

include only the mineral beneath the surface, and therefore required that there should be incorporated in the deed the words "together with all the dips, spurs," etc. Yet in requiring the introduction of these words, which in terms define extralateral rights, it also retained the phrase "together with all the mineral therein contained."

To the suggestion that giving this construction to the bond and conveyance is in effect the granting of a section of a vein of mineral, the answer is that there is nothing impracticable or unnatural in such a conveyance. It does not operate to transfer the vein *in toto*, but simply carves out from the vein the section between the vertical side lines of the ground and transfers that to the grantee. The title to the balance of the vein remains undisturbed.

To the further suggestion that the owner of the apex might be left with a body of ore on the descending vein beyond the further side line of the compromise ground which he could not reach, the answer is that this assumes as a fact that which may not be a fact. The owner of the apex may be the owner of other ground by which access can be obtained to the descending vein, and it also is a question worthy of consideration whether granting a section out from a descending vein does not imply a right reserved in the grantor to pass through the territory of the section conveyed in order to reach the further portion of the vein. Those are questions which need not now be determined. This secondary vein does not appear to have been known at the time of the compromise, and while, of course, there is always a possibility of such a vein being discovered, yet parties are more apt to contract and settle upon the basis of what they know than upon the possibilities of future discovery.

The action of the parties hereto is suggestive, although not of itself decisive. This action for the recovery of ore taken out from beneath the surface of the compromise ground was pending when the suit for specific performance was brought in 1894. Nothing was done in this action from that time until

three weeks after a final decision of the specific performance case by this court, when an amended complaint was filed, and the case thereafter proceeded by ordinary stages to trial and judgment. The original complaint alleged the ownership by the St. Louis company of its mining claim and of all veins, lodes or ledges having their tops or apexes inside of its surface boundary lines, with the right to follow those veins, lodes or ledges on the dips or angles outside the side lines of the mining claim. It also alleged that the defendants entered wrongfully upon one of the veins, lodes or ledges having its top or apex within the surface location of the St. Louis claim, and which had in its dip or angle passed outside the side lines of the St. Louis claim and "entered beneath the mining property claimed or pretended to be claimed by the said defendants or some of them, and that in utter disregard of the right or title of plaintiff the said defendants ever since have been and now are extracting and taking therefrom large quantities of coarse rock and ore," etc. In other words, it sought to recover from the Montana company the value of the ore taken by the latter from a vein whose apex was within the surface boundaries of the former's claim, but which in its dip had passed outside the side lines into territory claimed by the Montana company. With that as its claim the litigation was dormant for four years. Now, if it were true that the apex of the vein was within the side lines of the St. Louis claim and the ore taken by the defendant was taken from below the surface of the compromise ground, and all that was accomplished by the compromise and bond was the establishment of a boundary line, leaving subsurface and extralateral rights undisturbed, there was no necessity of postponing the litigation until the question of title to the surface was disposed of. As we have said, we do not mean that this is decisive, because the St. Louis company may have thought that all controversies would be ended if it could once establish that the Montana company took nothing by virtue of the compromise and bond. Still the delay in the litigation is in harmony with the belief that

the words in the bond, "together with all the mineral therein contained," meant all the mineral below the surface.

The disposition of this question compels a reversal of the judgment. It may also effectually dispose of all disputes between the parties, and, therefore, it would be a mere waste of time to attempt to consider other questions which have been discussed with ability and elaboration by counsel.

In view of this conclusion it is also apparent that the order restraining defendant in error from removing ore from the disputed territory ought not to have been set aside.

The judgment of the Court of Appeals is reversed and the case remanded to the Circuit Court with instructions to grant a new trial. Further, the order restraining defendant in error from mining and removing any of the ore in dispute will be reinstated and continued in force until the final disposition of the case.

Judgment reversed and restraining order reinstated.

ERIE RAILROAD COMPANY *v.* ERIE AND WESTERN TRANSPORTATION COMPANY.

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

No. 134. Argued December 14, 1906.—Decided January 14, 1907.

Admiralty courts, being free to work out their own system and to finish the adjustment of maritime rights, have jurisdiction of an action for contribution for damages paid to third parties as the result of a collision for which both vessels were in fault. The claim is of admiralty origin.

The division of damages in admiralty extends to what one of the vessels pays to the owners of cargo on the other vessel jointly in fault.

The right of division of damages to vessels when both are in fault and the contingent claim to partial indemnity for payment of damage to cargo are separable, and the decree of division in the original suit, the pleadings in which do not set up such claim for indemnity, is not a bar to a subsequent suit brought to enforce it.

142 Fed. Rep. 9, reversed.

THE facts are stated in the opinion.

Mr. Charles E. Kremer, with whom *Mr. W. O. Johnson* was on the brief, for petitioner:

The effect of the decision of the Circuit Court of Appeals is to deprive the owner of the *New York* of a clear right to compel the *Conemaugh* to share with it the cargo loss arising out of a collision, which this court found and held to have been due to the joint fault of both vessels.

That each of two vessels held jointly at fault should equally bear the damage resulting from such negligence has been frequently decided and is a rule of damages in admiralty settled beyond all question. *Schooner Catherine* v. *Dickinson,* 17 How. 170; *North Star,* 106 U. S. 17; *Manitoba,* 122 U. S. 97; *The Albert Dumois,* 177 U. S. 240.

Nothing pleaded in this case in the way of limitation of liability under the statutes takes away or limits this rule.

Prior to the decision of the District Court, when it entered a decree on the first mandate in the original case, there was no decided case, and no established practice, that required the filing of a cross libel or petition praying for recoupment, set-off or contribution.

On the contrary in all of the following cases recoupment was allowed without such pleadings. *The Eleonora,* 17 Blatchf. 88; *Leonard* v. *Whitwell,* 10 Ben. 638; *The C. H. Foster,* 1 Fed. Rep. 733; *Atlantic M. Ins. Co.* v. *Alexander,* 10 Fed. Rep. 279; *The Canima,* 17 Fed. Rep. 271; *The Hercules,* 20 Fed. Rep. 305; *The Job T. Wilson,* 84 Fed. Rep. 149; *The Livingstone,* 104 Fed. Rep. 918; *Albert Dumois,* 177 U. S. 240; *The Manitoba,* 122 U. S. 97.

Recoupment is the right whereby mutual demands which arise out of the same transaction may be adjusted in one action. 25 Am. & Eng. Ency of Law, 547. It is of common-law origin and independent of the statutes of set-off. 4 Minor's Inst., 2d ed., 706; 1 Chitty, Pl. (16 Am. ed.), 595; 31 Am. Rep. 775; 8 Viner's Abr., Title Discount, 556. But it may be

equity early transposed. *Grand L.* v. *Knox*, 20 Missouri, 433; 1 Chitty, Pl. (14 Am. ed.), 568. It applies to common law and equity; also admiralty. *Snow* v. *Caruth*, 1 Sprague, 324; *Nichols* v. *Tremlett*, 1 Sprague, 361.

Upon what is *res adjudicata* as applied to this action, see Van Fleet on Former Adjudications, § 256; *Bulkley* v. *House*, 21 L. R. A. 247; *State Bank* v. *Bartlett*, 114 Missouri, 276; *Kœlsh* v. *Mixer*, 53 Ohio St. 207; *Cottingham* v. *Earl of Shrewsbury*, 3 Hare, 27.

This is a maritime cause of action and therefore within the jurisdiction of the admiralty court. *The Mariska*, 107 Fed. Rep. 989; *The Hudson*, 15 Fed. Rep. 162; *Dupont* v. *Vance*, 19 How. 162; *Wellman* v. *Morse*, 76 Fed. Rep. 573; *Ralli* v. *Troup*, 157 U. S. 400; *The Irrawaddy*, 171 U. S. 187.

Mr. Harvey D. Goulder and *Mr. F. S. Masten*, with whom *Mr. S. H. Holding* was on the brief, for respondent:

The libel fails to disclose any ground for the action, other than that the District Court, the Circuit Court of Appeals and this court refused in the collision case to divide the cargo damage equally between the parties at fault, although plaintiff prayed such action at different times in that cause. If it be the law that they should have done this, the error is not open to correction by independent action in the admiralty.

If petitioner had a definite fixed right under the established law of the admiralty to claim from this defendant an equal division of the damage, or to recoup up to the amount due this defendant, an error was committed in the other case which cannot now be corrected, at least in the admiralty.

The right of contribution proper exists only where two or more persons are jointly, or jointly and severally, liable to a third for the same amount, and one or more are compelled to pay more than a rightful share. It arises in the equity of equality, dictating that a common obligation should be borne equally by all obligated for its payment; that one should not,

as to others equally obligated, be obligated to sustain more than his own share. The doctrine had its origin in equity. *Derig* v. *Winchelsea*, 1 Cox, 318; 3 Pomeroy's Eq., § 1418; Sheldon on Subrogation, § 169; *B. & O. R. R.* v. *Walker*, 45 Ohio St. 577, 589. There is some doubt, under the decisions, whether contribution will be enforced at all as to joint tort-feasors. *Selz* v. *Unna*, 6 Wall. 328; *Chicago City* v. *Robbins*, 2 Black, 418.

But assuming that the right rests in contribution and also that it is immaterial that the element of equal obligation for the damage on account of which it is claimed is wanting, still petitioner has mistaken the forum. A proceeding *in rem* can only be maintained on a maritime contract or tort giving rise to a lien existing at the time the action is brought. If no lien arose, or having arisen has been waived or lost, a proceeding *in rem* will not lie. *The Sabine*, 101 U. S. 384, 388; *The Rock Island Bridge*, 6 Wall. 213, 215. It is not sufficient to support a proceeding *in rem* that the cause be maritime. The further essential element is the continuing existence of a maritime lien. Notwithstanding an original liability may be maritime, and payment may carry with it an implied or express promise or obligation on the part of another to bear the whole or a part of the amount so paid, the new promise or obligation is not maritime so as to be within the jurisdiction of admiralty. *Fox* v. *Patton*, 22 Fed. Rep. 746; *The Centurion*, 1 Ware, 490; *S. C.*, Fed. Cas., 2554.

If the right in an independent proceeding (in a proper case) lies in subrogation, then petitioner must fail in any jurisdiction. Sheldon on Subrogation, 2; *Jackson County* v. *Boylston Ins. Co.*, 139 Massachusetts, 508, 510.

Mr. Justice Holmes delivered the opinion of the court.

This is a libel in admiralty brought by the petitioner as successor in corporate identity to the Union Steamboat Company, to recover a part of a sum paid by it to the respondent

as the result of previous admiralty proceedings which came before this court several times. The former proceedings were begun by the respondent, as owner of the propeller *Conemaugh* and bailee of her cargo, to recover for damages to both by a collision between her and the propeller *New York*. After hearings below, 53 Fed. Rep, 553, 82 Fed. Rep. 819, 86 Fed. Rep. 814, it was decided by this court, on certiorari, that both vessels were in fault, and that the representatives of the cargo could recover their whole damages from the *New York*. *The New York*, 175 U. S. 187. Thereupon the District Court entered a decree dividing the damages sustained by the steamers, requiring the *New York* to pay to the *Conemaugh* on that account $13,083.33 and interest, and further required it to pay all the damages to the cargo of the latter—the insurers on cargo who had intervened receiving their share, and the *Conemaugh* receiving the residue as trustee. The owners of the *New York* then applied to this court for a mandamus directing the District Court to divide the damages to cargo. This was denied on the ground that if the court below erred the remedy was by appeal. *Ex parte Union Steamboat Company*, 178 U. S. 317. Upon that intimation an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit and after a motion to dismiss had been denied, 104 Fed. Rep. 561, the decree was affirmed. 108 Fed. Rep. 102. On a second certiorari that decree was affirmed by this court. *The Conemaugh*, 189 U. S. 363. The *New York* paid the damages and brought this suit.

The ground of the last-mentioned decree was that the claim of the *New York* was not open, and the Circuit Court of Appeals denied leave to amend the pleadings for the reason that the petitioner would be left free to assert its claim in an independent proceeding. 108 Fed. Rep. 107. In the present case the District Court followed this expression of the Circuit Court of Appeals, and made a decree giving the petitioner one-half of the damages paid by it on account of cargo. The Circuit Court of Appeals for the Seventh Circuit, however,

before which the present case came on appeal, held that the whole matter was *res judicata* by the final decree in the former cause, and ordered the libel dismissed. 142 Fed. Rep. 9. Thereupon a third certiorari was granted by this court, and the record is now before us.

The respondent set up three defenses, below and here. It argued that there was no jurisdiction in admiralty over the claim in its present form, that the petitioner had no case upon the merits, and that it was concluded by the former decree. The Circuit Court of Appeals decided against the first two points before sustaining the third. We shall take them up in their order. The jurisdiction appears to us tolerably plain. If it be assumed that the right to contribution is an incident of the joint liability in admiralty, and is not *res judicata*, it would be a mere historical anomaly if the admiralty courts were not free to work out their own system and to finish the adjustment of maritime rights and liabilities. Indeed we imagine that this would not have been denied very strenuously had the question been raised by proper pleadings in connection with the original suit. But if the right is not barred by the former decree, it would be still more anomalous to send the parties to a different tribunal to secure that right at this stage. For the decree was correct as far as it went, and, by the hypothesis, might stop where it did without impairing the claim to contribution. That claim is of admiralty origin and must be satisfied before complete justice is done. It cannot be that because the admiralty has carried out a part of its theory of justice it is prevented by that fact alone from carrying out the rest. See *The Mariska*, 107 Fed. Rep. 989.

On the merits also we have no great difficulty. The rule of the common law, even, that there is no contribution between wrongdoers is subject to exception. Pollock, Torts, 7th ed., 195, 196. Whatever its origin, the admiralty rule in this country is well known to be the other way. *The North Star*, 106 U. S. 17; *The Sterling and The Equator*, 106 U. S. 647; Adm. Rule, 59. Compare *The Frankland* L. R. Probate, [1901], 161.

And it is established, as it logically follows, that the division of damages extends to what one of the parties pays to the owners of cargo on board the other. *The Chattahoochee*, 173 U. S. 540. The right to the division of the latter element does not stand on subrogation but arises directly from the tort. The liability of the *New York* under our practice for all the damage to cargo was one of the consequences plainly to be foreseen, and since the *Conemaugh* was answerable to the *New York* as a partial cause of the tort, its responsibility extended to all the manifest consequences for which, on the general ground that they were manifest, the *New York* could be held. Therefore the contract relations between the *Conemaugh* and her cargo have nothing to do with the case. See *The Chattahoochee*, 173 U. S. 540. More specifically, the last-named vessel's liability to the *New York* is not affected by provisions in the *Conemaugh's* bills of lading giving her the benefit of insurance and requiring notice of any claim for damage to be made in writing within thirty days, and suit to be brought within three months.

It only remains then to consider whether the petitioner is concluded by the former decree. If the liability of the *Conemaugh* arises, as we have said, out of the tort, then it is said to follow that the *New York* either is attempting to split up its cause of action or to recover in excess of a decree covering the case. It is true that the *New York* was the defendant in the former suit, but the damage to the *New York* was allowed for in the division. If the allowance was by way of recoupment, then it may be said that the *New York*, by asserting a counter-claim for its damages, bound itself to present its whole claim to the same extent as if it had brought the suit; at least until it had neutralized the claim made against it in the *Conemaugh's* own right. If the allowance was because division is the very form and condition of any claim for damage to vessels in case of mutual fault, *The North Star*, 106 U. S. 17; *Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Navigation Co.*, 7 App. Cas. 795, 801, 806, and the mutual rights

cancel each other *pro tanto* as they arise, just as in an account current, as distinguished from set-off, then it might be contended that the claim in respect of the payment of damage to cargo is an item in the same account with the one for damage to the ship, and that a decree as to one involves a disposition of the other, and makes the whole matter *res judicata*. See *The Manitoba*, 122 U. S. 97, 111.

But whatever be the technical theory, the right of a defendant to a division of the damage to the vessels when both are in fault, and its contingent claim to partial indemnity for payment of damage to cargo, must be separable from the necessity of the case. To illustrate. Suppose, in a cause of collision, one vessel to be sued for damage to the other vessel alone. It could not set up the possibility that the cargo owners might sue, some time within six years, and suspend the decree on the ground that otherwise the defendant might be barred from demanding indemnity in case the cargo owners should sue and succeed. If cargo owners should sue one or the other vessel after a division of the damages to the vessels themselves, it must be that the libellee would be free to require the other to exonerate or indemnify it to the same extent as if no such division had taken place. It would be impossible to do justice otherwise. As to the English law see *Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Navigation Co.*, 7 App. Cas. 795, 806.

If we are right, then this is a strong case for holding that the petitioner is not barred. It stands adjudicated that its pleadings did not open its present claim. They could not have done so, because at that stage the petitioner not having paid, it had no claim for indemnity, but only for exoneration. It was not bound to adopt the procedure permitted to it by Rule 59. It did ask leave to amend so as to protect its rights, but was met by the argument of the respondent and the opinion of the Circuit Court of Appeals that it could bring a new suit. This court said the same thing in affirming the decree against the *New York*. "If, as between her and the *Conemaugh*,

she have a claim for recoupment, the way is open to recover it." 189 U. S. 368. The same proposition was implied in *The Juniata*, 93 U. S. 337, 340. Every consideration leads us to adhere to this statement in the circumstances of the case at bar.

Decree of Circuit Court of Appeals reversed.
Decree of District Court affirmed.

CROWE *v.* TRICKEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 71. Submitted October 31, 1906.—Decided January 21, 1907.

The statement of facts which the Supreme Court of a Territory is called on to make is in the nature of a special verdict, and the jurisdiction of this court is limited to the consideration of exceptions and to determining whether the findings of fact support the judgment.

The statement of facts should present clearly and precisely the ultimate facts, but an objection that it does not comply with the rule because it is confused and gives unnecessary details will not be sustained if a sufficient statement emerges therefrom.

Where the Supreme Court of a Territory proceeds on the bill of exceptions before it as containing all the evidence in the case below, and the record in this court shows that all the evidence was contained in the bill of exceptions, that is sufficient, even though the bill of exceptions may have failed to state that it contained all the evidence given in the case.

A broker is not entitled to commissions unless he actually completes the sale by finding a purchaser ready and willing to complete the purchase on the terms agreed on; his authority to sell on commission terminates on the death of his principal and is not a power coupled with an interest; and, in the absence of bad faith, he is not entitled to commissions on a sale made by his principal's administrator, without any services rendered by him, even though negotiations conducted by him with the purchaser, prior to owner's death, may have contributed to the accomplishment of the sale.

71 Pac. Rep. 965, affirmed.

THIS was an action brought by Crowe in the District Court of Santa Cruz County, Arizona, against Trickey, administrator of the estate of N. H. Chapin, deceased, to recover the sum of five thousand dollars as commission on a sale alleged to have been effected by Crowe for Chapin, during his life, of a one-fourth interest in a mine. The case was tried by the District Court without a jury, a jury having been waived by agreement of the parties, and that court made findings of fact and stated conclusions of law therefrom, upon which it rendered judgment in Crowe's favor, January 10, 1902, to be paid in due course of administration. From that judgment the case was carried by appeal to the Supreme Court of the Territory of Arizona, which, March 20, 1903, reversed the judgment, and remanded the case to the District Court, with directions to render judgment for defendant. 71 Pac. Rep. 965.

The record states:

"In the above entitled action the Supreme Court finds the facts to be as follows:

"I. Previous to March, 1899, a mine known as the Pride of the West Mine was owned by three parties. A man named Olsen owned one-half thereof, and Norman H. Chapin, the defendant's intestate, and Jerry Neville each owned one-fourth interest therein.

"In March, 1899, the plaintiff Crowe brought this mine to the attention of one Emerson Gee and his associate A. R. Wilfley. Subsequently, in the latter part of March, 1899, Wilfley purchased Olsen's one-half interest, and made an agreement with Chapin and Neville, in pursuance whereof a deed to the remaining one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed was to be delivered to Wilfley upon the payment by him of the sum of $100,000 in cash, on or before the 1st day of April, 1900.

"II. It was verbally agreed between Crowe on the one part, and Chapin on the other, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money

received by them for their interest in the mine, as commission for making the sale. Such deed and escrow agreement were executed by Chapin and Neville on the 1st day of April, 1899.

"III. Prior to the 1st day of April, 1900, Chapin and Neville both died.

"M. M. Trickey was appointed administrator of Chapin's estate and one Henry H. Harmon was appointed administrator of Jerry Neville's estate.

"Wilfley failed to pay the money and take the property under his option, and after the 1st day of April, 1900, at the expiration of the time mentioned in the escrow agreement, and in accordance with the terms thereof, the deed in escrow was returned to Trickey, the administrator of Chapin's estate.

"IV. Thereafter, and on the 7th day of April, 1900, upon the payment of $1,000 by Wilfley, the administrators of these two estates made another agreement with Wilfley, by the terms of which they agreed to execute a deed to a one-half interest owned by the two estates, upon the payment of the purchase price of $100,000, in specific amounts, on different dates therein expressed. This option also lapsed.

"V. After said lapse, and on the 19th day of June, 1900, M. M. Trickey, as administrator of the estate of Chapin, entered into another agreement, which was offered in evidence by the plaintiff, and appears in the bill of exceptions as 'Exhibit 3.'

"By this agreement, Trickey as administrator, gave to Wilfley an option to purchase the one-fourth interest in the mine owned by the estate of Chapin, and obligated himself to execute to Wilfley a deed for such interest upon the payment of $5,000 in cash, $5,000 within three months; the further sum of $5,000 within six months; the further sum of $5,000 within nine months; the further sum of $5,000 within twelve months; and the further sum of $25,000 within eighteen months.

"The plaintiff Crowe had nothing whatever to do with either of the last mentioned options, or with the sale of the property after the death of Chapin.

"VI. In pursuance to this option, Wilfley paid to Trickey the sum of $5,000 in cash on the 19th day of June, 1900; and the following sums on the following dates, respectively: $5,000 on September 19, 1900; $5,000 on December 19, 1900; $5,000 on March 20, 1901; $5,000 on June 17, 1901; $25,000 on December 7, 1901.

"VII. The above mentioned agreement (Exhibit 3) was only an option to purchase, and under it there was no obligation on the part of Wilfley to pay any portion of the purchase price, and no obligation on the part of Trickey to deliver the deed mentioned in the agreement until the last payment of $25,000 in December, 1901, had been made.

"VIII. On the 10th day of December, 1900, Crowe presented to Trickey, as administrator of Chapin's estate, in accordance with the law of the Territory of Arizona, his claim against the estate of Chapin for 'Ten per cent of the purchase price of the Pride of the West Mine, agreement for the sale of which was entered into about April 1st, 1899, and which said agreement of sale was made by Chapin and Neville to A. R. Wilfley, and which sale was brought about by the said George W. Crowe, upon the agreement that he was to receive ten per cent commission upon said purchase-price from said Chapin and Neville, one-half of said ten per cent being $5,000.'

"IX. This claim was rejected by the administrator, and he thereupon brought this action in the District Court of Santa Cruz County on the 25th day of January, 1901, at which time the estate of N. H. Chapin, deceased, was solvent, and amply able to pay all debts of the said estate, and the said Chapin nor the said Trickey nor any one else had paid to the plaintiff the said sum of $5,000, or any part thereof, or anything on account thereof.

"The case was tried before the court, without a jury, a jury having been by agreement of parties waived, and the court made the following findings of fact:

[Here follow findings of fact and conclusions of law by the District Court, upon which judgment was rendered in favor

of the plaintiff, and an appeal prayed therefrom to the Supreme Court as stated.]

"The only statements of fact in the record were contained in the foregoing findings of fact, and in a bill of exceptions. The said bill of exceptions, which was transmitted to the Supreme Court of Arizona with the record in this case, did not state that it contained all of the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision, nor does it otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona. The abstract of the transcript which contained the evidence stated that 'the defendant by his bill of exceptions, which contained all the evidence taken on said trial, and which is as follows:' then follows the bill of exceptions reciting the testimony of the different witnesses, covering some 23 pages, and at the conclusion thereof the following allowance:

"'The foregoing bill of exceptions was presented to me for allowance on the 24th day of January, 1902, and was by me on the same date submitted to Messrs Hereford & Hazzard, attorneys for the opposite party, who made no objection thereto, whereupon the said bill of exceptions is now by me signed, approved and allowed as of the said 24th day of January, 1902. Geo. R. Davis, Judge,' but the record contains no certificate from the clerk or court that the evidence contained in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee.

"The Arizona Supreme Court found the following facts:

"I. That the efforts of the plaintiff Crowe resulted in procuring the purchaser Wilfley not to purchase absolutely, but to take an option on the purchase of the property involved, for one hundred thousand dollars; that Crowe's principals accepted a deed to the property and placed it in escrow; that although Chapin died before the expiration of that escrow agreement,

the deed executed by him remained subject to the order of the purchaser, and that if he had availed himself of the terms of that agreement, the sale would have been completed and plaintiff Crowe would have been entitled to his commission, but that Wilfley failed to make the payment and take up the deed, and, after the expiration of the option and after Chapin's death, the deed was returned to the administrator of Chapin's estate and the transaction was closed without any sale being made.

"II. That the sale of the property that was subsequently effected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley; that before the date of the sale, Crowe's power or authority to act in the matter had been terminated, and his agency revoked by the death of Chapin.

"III. That in regard to the latter negotiations, Crowe rendered no services to Trickey, received no appointment or agreement from Trickey in reference to the matter, and took no part whatever in the ultimate sale.

"IV. That the plaintiff Crowe did not, between the 8th day of February, 1898, and the 11th day of January, 1900, bring about a sale of Chapin's interest in the property in controversy.

"V. The said A. R. Wilfley paid to the said defendant the sum of fifty thousand dollars, as follows; April 7, 1900, five hundred dollars; June 19, 1900, four thousand five hundred dollars; September 19, 1900, five thousand dollars; December 19, 1900, five thousand dollars; March 20, 1901, five thousand dollars; June 17, 1901, five thousand dollars; December 7, 1901, twenty-five thousand dollars, not for the right, title and interest of the said Norman H. Chapin but for the 'right, title and interest of the said estate of Norman H. Chapin, deceased, in and to' the said property, in compliance with the terms of the contract of sale and title bond executed to the said Wilfley by Trickey, the administrator of said estate."

[Here follow conclusions of law and judgment.]

Mr. W. C. Keegin, Mr. F. H. Hereford and *Mr. S. E. Hazzard,* for appellant:

The finding of the Supreme Court of Arizona is conclusive of the fact that none of the evidence given at the trial of the case in the District Court was preserved and carried to the Supreme Court of Arizona, except that contained in the bill of exceptions. The finding of the Supreme Court of Arizona is also conclusive of the fact that this bill of exceptions did not state that it contained all the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Supreme Court of Arizona for its decision. The finding of the Supreme Court of Arizona is also conclusive of the fact that it does not "otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona."

The Supreme Court of Arizona erred in reviewing the case upon the evidence and reversing the judgment in the absence of a showing that all of the evidence in the case was before it. *United States* v. *Copper Queen Consolidated Mining Co.,* 185 U. S. 495; *Russell* v. *Ely,* 2 Black, 575; *Gardner* v. *Babcock,* 3 Wall. 240; *Texas Pacific R. Co.* v. *Cox,* 145 U. S. 593; *Territory* v. *Flores,* 3 Arizona, 215, 77 Pac. Rep. 491; *Paul* v. *Cullom,* 2 Arizona, 16; *Territory* v. *Clanton,* 3 Arizona, 1, 20 Pac. Rep. 94; *Score* v. *Griffin,* 80 Pac. Rep. 331; 2 Ency. Pleading & Practice, 441.

Mr. Eugene S. Ives for appellees.

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

The Supreme Court of the Territory was called upon to make a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court in the admission or rejection of evidence when excepted to. Our

jurisdiction is limited to the consideration of such exceptions and to determining whether the findings of fact support the judgment. *Harrison* v. *Perea*, 168 U. S. 311; *Young* v. *Amy*, 171 U. S. 179.

The statement of facts required by the statute should present clearly and precisely the ultimate facts. And while it may be objected to the statement in this case that it does not properly comply with that rule, for it is quite confused and gives a mass of unnecessary details, yet we think the imperfections in that regard should not be held fatal as a sufficient statement finally emerges. This will be understood by reference to the statement itself, which we have set forth for that purpose.

The bill of exceptions contains some minor rulings on questions propounded to witnesses, but the exceptions thereto were not insisted upon in the Supreme Court nor considered by that tribunal, so that the question before us is whether the findings of fact support the judgment.

But several of the errors assigned are to the effect that the Supreme Court erred in considering or determining the case upon questions of fact, because the bill of exceptions failed to state that it contained all of the evidence given in the case, and the record failed "to show that the bill of exceptions contains all of the evidence given in the case, or all of the evidence bearing upon the questions involved in the decision" of the court.

The Supreme Court proceeded upon the record as containing all the evidence and we are not inclined to hold that the contention that it should not have done so is open to our consideration under the limitations of the statute. But, be that as it may, we think the records show that all the evidence was contained in the bill of exceptions and that that is sufficient even though the bill itself did not so state in express terms. *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255.

Paragraphs 1485 and 1582 of the Revised Statutes of Arizona 1901 (pp. 461, 474), provide:

"Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence, or offered in evidence and rejected by the court, need be incorporated in a statement of facts in order to make it a part of the record."

"On taking an appeal . . . the appellant . . . shall cause to be filed in the Supreme Court . . . the original record of the case, together with a copy of all minute entries made in the case, the same to be certified to by the clerk of the District Court, with the seal of the court affixed, that it contains a true copy of all minute entries made in the case, and that the papers thereunto attached are all the papers constituting the record of the case. . . ."

The clerk accordingly transmitted to the Supreme Court all of the original records and copies of the minute entries. The case, coming on for hearing, the minute entries state:

"The trial then proceeded upon the pleadings herein, in the presence of and before the court sitting without a jury, a jury having been expressly waived in open court by both parties hereto, and the plaintiff to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to wit, George W. Crowe, the plaintiff, who was duly sworn, examined and cross-examined, and thereupon the plaintiff rested his case. The defendant then, to maintain upon his part the issues herein, called as a witness the following named person, to wit, M. M. Trickey, who was duly sworn, examined and cross-examined, and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted, the same was by the court taken under advisement."

The evidence of two witnesses, Wilfley and Gee, was taken by deposition, and their depositions were sent up in the transcript. The minute entries show that only two witnesses,

Crowe and Trickey, administrator, were examined before the court, and their testimony is given in narrative form in the bill of exceptions, as well as the testimony of Wilfley and Gee. The minute entries, in speaking of the introduction of "documentary evidence," were manifestly intended to embrace depositions in that term. There is no room for presuming that any evidence was omitted, and the points to which the evidence adduced was addressed preclude such a suggestion.

We are brought then to the question of the sufficiency of the facts found to support the judgment. The findings may be summarized as follows:

Chapin and Neville each owned one-fourth of the mine, and on April 1, 1899, signed a paper addressed to the Consolidated National Bank of Tuscon, Arizona, which is contained in the bill of exceptions, and, by reference, in the statement of facts, and was couched in these terms:

"GENTLEMEN: The enclosed deed from N. H. Chapin, Marie Chapin, Jerry Neville and Refugia Neville, parties of the first part, to Arthur R. Wilfley, party of the second part, is to be delivered to the said Arthur R. Wilfley upon the payment of the sum of one hundred thousand dollars at or before the expiration of one year from the date hereof.

"And you are further directed that all moneys sent you from time to time by the said Arthur R. Wilfley, with instructions to apply the same to the payment of the aforesaid purchase money, shall be so applied and the same placed to the credit of N. H. Chapin and Jerry Neville.

"Therefore, if the said Arthur R. Wilfley shall pay or cause to be paid the sum of money above mentioned, at or before the time aforesaid, you will then deliver the said deed to the said A. R. Wilfley, his agent or assigns. Otherwise the said deed is to be held subject to the order of the said N. H. Chapin and Jerry Neville.

"Dated Washington, Arizona, April 1st, 1899."

This paper and the deed therein mentioned were deposited in escrow in the bank on that day.

The terms of the transaction had been arranged the latter part of March, and it was verbally agreed that Crowe should receive ten per cent commission on the purchase money received by Chapin and Neville.

Chapin died January 11, 1900, and Trickey was appointed administrator February 8, 1900, and qualified as such. Neville died January 3, 1900, and Harmon was appointed administrator and qualified as such.

Wilfley failed to pay the money and take the property, and after the expiration of the time mentioned in the escrow agreement the deed in escrow was returned to Trickey, admintrator.

On April 7, 1900, the administrators of the two estates made an agreement with Wilfley to execute a deed to the half interest on payment of $100,000, in amounts prescribed. This option also expired. Thereafter, and on the nineteenth of June, 1900, Trickey, as administrator of the estate of Chapin, entered into an agreement with Wilfley to convey to him the right, title and interest of the estate of Chapin in the mining property (described as a quarter interest), on payment of $50,000, in designated amounts, and these payments were subsequently made.

Crowe had nothing whatever to do with either of the last-mentioned options, or with the sale of the property after the death of Chapin.

And the claim he presented to Trickey as administrator of Chapin's estate was for $5,000, being one-half of the commission agreed to be paid to him in March, 1899, on the purchase price which would have been received by Chapin and Neville if the option of April 1, 1899, had been carried out.

In these circumstances we concur in the judgment of the Supreme Court of the Territory.

In *McGavock* v. *Woodlief*, 20 How. 221, it was laid down that in order to be entitled to commission "the broker must complete the sale, that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on." But this rule is inapplicable when the

owner refuses without sufficient reasons, to fulfill the agreement which the agent has made. *Kock* v. *Emmerling*, 22 How. 69. Even though he could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. *Holden* v. *Starks*, 159 Massachusetts, 503. Or when the agent's authority is revoked in bad faith before the completion of the sale. *Sibbald* v. *Bethlehem Iron Company*, 83 N. Y. 378. In this case the subject was much considered, and Finch, J., in delivering the opinion of the court, said, among other things:

"It is the established rule that a broker is never entitled to commissions for unsuccessful efforts. . . . The broker may devote his time and expend his money with ever so much devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions, and in such event it matters not that after his failure and the termination of his agency, what he has done proves of use and benefit to the principal. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which under later and more favorable circumstances naturally lead to, and materially assist in, the consummation of a sale. . . . This, however, must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. . . . One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed, by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith.

Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, having been granted him, the right of his principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. . . .

"If, after the broker has been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts."

In the present case what Crowe had obtained was not an absolute contract of purchase, but an option on the purchase.

The deaths of Chapin and Neville terminated the authority of Crowe to sell on commission, which was not a power coupled with an interest, that is, an interest in the property on which the power was to operate. *Hunt* v. *Rousmanier*, 8 Wheat. 174; *Walker* v. *Walker*, 125 U. S. 339.

Nevertheless, up to the first of April, 1900, if Wilfley had availed himself of the terms of the escrow agreement, the sale might have been completed and Crowe have been entitled to his commission, but Wilfley did not do so, and the deed held in escrow was returned in accordance with the terms of that agreement.

There is no legal basis for the imputation of bad faith, and it is not pretended that Crowe was employed by Trickey or rendered any service to him in the matter of the sale. The bare fact that what he had done in the former negotiations may have contributed to the accomplishment of the sale by Trickey is not enough to sustain his claim for the commission sued for.

Judgment affirmed.

CROWE *v.* HARMON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 70. Submitted October 31, 1906.—Decided January 21, 1907.

Decided on authority of *Crowe* v. *Trickey, ante,* p. 228.
71 Pac. Rep. 1125, affirmed.

Mr. W. C. Keegin, Mr. F. H. Hereford and *Mr. S. E. Hazzard* for appellant.[1]

Mr. Eugene S. Ives for appellees.

MR. CHIEF JUSTICE FULLER: This case is identical in all essential respects with that just decided, and must take the same course.

Judgment affirmed.

BALLARD *v.* HUNTER.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 123. Argued December 7, 1906.—Decided January 14, 1907.

A State may make reasonable discriminations in regard to service of process for enforcement of liens for taxes and assessments on real estate between resident and non-resident owners, providing for personal service on the former and constructive service by publication on the latter.

Land stands accountable to the demands of the State, and owners are charged with knowledge of laws affecting it, and the manner in which those demands may be enforced.

Whether provisions as to notice and service in a state statute have been complied with is wholly for the state court to determine.

Due process of law has never been precisely defined; while its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case, and proceedings in court are not always essential.

[1] For abstract of argument see *ante,* p. 234.

The laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights.

The St. Francis Basin Levee act of Arkansas of 1893 does not deprive nonresident owners of property assessed and sold pursuant to the statute of their property without due process of law or deny such owners the equal protection of the laws.

74 Arkansas, 174, affirmed.

THIS writ of error is prosecuted to review a judgment of the Supreme Court of Arkansas sustaining the validity of a sale of the lands of plaintiffs in error for levee taxes.

The State of Arkansas, by an act of its legislature passed February 15, 1893, created eight counties, or portions of eight counties, which constituted what was known as "St. Francis Basin," a levee district, for the purpose of constructing and maintaining levees against the waters of the Mississippi River, and incorporated a board of directors, giving it power to "levee the St. Francis front in Arkansas and to protect and maintain the same." The board was also authorized, for the purpose of building, repairing and maintaining the levee, to assess and levy annually a tax on all lands within the district, not exceeding five per cent of the increased value or betterment estimated to accrue from the protection given by the levee against floods from the river. The act prescribed that the landowners should determine upon the assessments and levy of the tax in a meeting called for that purpose upon notice by the board, and prescribed the procedure to be observed in the assessment and levy of the tax, and provided that the lands assessed should be entered upon the books, in convenient subdivisions, as surveyed by the United States Government, with appropriate columns showing the names and residences of owners of the lands, and mortgages of record, if any, known to the assessors; and that no error in the description of the lands should invalidate the assessments, if sufficient description was given to ascertain where the land was situated. The assessment was made a lien upon the lands in the nature of a mortgage.

Section 11 of the act was amended in 1895. As amended, it provided that a tax collector should be elected by the board of directors and be furnished a list of assessments for his county; that he should proceed to collect the assessments, and that if the assessments were not paid within thirty days a penalty of twenty-five per cent should at once attach for such delinquency. The board of directors was required to enforce the collection of the taxes by chancery proceedings in a court of the county in which the lands were situated, having chancery jurisdiction, and it was provided that the court should give judgment against the persons claiming to be the owners of the lands, if known to the board, for the amount of such assessments, interests, penalties and costs. It was further provided that if the ownership of any of the delinquent lands should be unknown to the board the lands might be proceeded against "as being owned by unknown owners;" that the judgment should provide for sale of the delinquent land for cash by a commissioner of a court after advertisement as hereafter set out; and, further, that the proceedings and judgment should be in the nature of proceedings *in rem*, and it should be immaterial if the ownership of the lands should be incorrectly alleged; that the judgment should be enforced only against the land and not against any other property. All lands for each of the counties might be included in one suit, and all delinquent owners, including those unknown, might be made defendants, notice of the pendency of the suit to be given as against non-residents of the county and unknown owners respectively by publication weekly, for four weeks prior to the day of the term of court on which final judgment should be entered for the sale of the land, in some newspaper published in the county where the suit might be pending. The form of notice which might be given is inserted in the margin.[1]

[1] "St. Francis Levee District
vs.
Delinquent Lands. } Notice.

"The following named persons and corporations, and all others having

It was provided that where the owners were unknown that fact should be stated in the published notice, and against any defendant who resided in the county, and whose ownership appeared on the records, notice should be given by the service of personal summons of the court at least twenty days before the day on which the defendant was required to answer, as set out in the summons. And the suit should stand for trial at the first term of the court after the complaint should be filed, if said four weeks in the case of a non-resident or unknown defendant, or twenty days in case of resident defendants, should expire before the first day of the term or during the term of the court to which the suit was brought, unless a continuance be granted for good cause shown, within the discretion of the court, and such continuance for good cause shown might be granted as to part of the land or defendants without affecting the duty of the court to dispose finally of the others as to whom no continuances might be granted. And it was further provided that actual service of summons should be had when the defendant was in the county or when there was an occupant upon the land. In all cases where notice had been properly given and where no answer had been filed, and the cause decided for the plaintiff, the court, by its decree, should grant the relief as prayed in the complaint, and should require the commissioner to sell the lands at the

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or claiming an interest in any of the following described lands, are hereby notified that suit is pending in the Circuit Court of ———— County, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her or its name, respectively, together with the amounts severally due from each, to wit."

Then shall follow a list of supposed owners, with a descriptive list of said delinquent lands and amounts due thereon, respectively, as aforesaid; and said published notice may conclude in the following form:

"Said persons and corporations, and all others interested in said lands, are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed, and judgment final will be entered directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law."

courthouse door, at public outcry, for cash, after first having advertised such sale weekly for two weeks consecutively, and convey to the purchasers the lands sold, the titles of which should thereupon vest in the purchaser against all persons whomsoever, saving rights to infants and insane persons. The act contained the following:

"Provided, that at any time within three years after the rendition of the final decree of the chancery court herein provided for, the owner of the lands may file his petition in the court rendering the decree, alleging the payment of the taxes on said lands for the year for which they were sold, and upon the establishment of that fact the court shall vacate and shall set aside said decree."

Section 2 of the act of 1895, amending the act of 1893, provided as follows:

"That section 13 of said act be amended so as to read as follows: Said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this State, except as herein otherwise provided, and except that neither attorneys nor guardians *ad litem*, nor any provision of section 5877 of Sandels & Hill's Digest of the Statutes of Arkansas, shall be required, and except that said suits may be disposed of on oral testimony, as in ordinary suits at law; and this law shall be liberally construed to give said assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien upon said land as against all persons having an interest therein; *Provided,* that no informality or irregularity in holding the meetings or in the description of valuation of the lands, or in the names of the owners or the number of acres therein, shall be a valid defense to such action."

Suit was brought, as provided for in the acts, and, in the complaint, plaintiff in error, A. B. Ballard, was made a defendant and named as a non-resident of Crittenden County, Arkansas. Josephine W. Ballard was not made a defendant. In the list of lands attached to and made part of the complaint the following appears:

Township 4 North, Range 7 East.

West half south east quarter section 32, T. 4 N. R. 7 E. 480 acres, assessed to A. B. Ballard—

Taxes for 1895, $19.20
" " 1896, 19.20
" " 1897, 19.20

West half north east quarter, section 32, T. 4 N. R. 7 E. 80 acres, assessed to A. B. Ballard—

Taxes for 1895, $3.20
" " 1896, 3.20
" " 1897, 3.20

North east quarter section 31, T. 4 N. R. 7 E. 160 acres, assessed to A. B. Ballard—

Taxes for 1895, $6.40
" " 1896, 6.40

A decree in due course passed against defendants. It designated the defendants who were duly served with summons, as shown by the return of the sheriff, and made default, and the defendants who were, as the decree recites, "severally, constructively summoned by publication in the newspaper published in Crittenden County, Arkansas, weekly, for four weeks before this day, proof of which has been previously filed herein, and all of the before named defendants . . . having failed to plead, answer or demur to the complaint of the plaintiff, the court, on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them in favor of the plaintiff for the amount of taxes, interest, penalty and costs due for their said lands." The court also found and recited the steps preceding the assessment of the taxes, the assessment of the same, and that "all of said taxes on said lands of said defendants are yet wholly unpaid and are delinquent." A lien was declared, and it was considered and adjudged that plaintiff recover from the defendants severally, to be enforced wholly against said lands, the amount of taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each of said defendants, respectively for

the years 1893, 1894, 1895, 1896 and 1897. A list of the lands was given, in which were the lands assessed against A. B. Ballard (described in the opinion). The lands were decreed to be sold, and it was also decreed that there should be allowed to the commissioner fees as follows:

"For furnishing printer with list of lands to be advertised, five cents per tract, and for attending and making and reporting sale, twenty-five (25) cents per tract; and there shall be allowed to the printer for publishing said notice fifty (50) cents per tract, which fee shall be taxed as costs against each several tract, to be paid by the purchaser or person discharging said lien before sale, and the said commissioner shall report his proceedings hereunder to the next term of this court."

In the report of the commissioner of his proceedings under the decree he showed that he sold the lands in section 31 to A. Hackler and the lands in section 32 to C. W. Hunter, hereafter described.

The sale was approved and the deeds made were also approved.

At September term of the court, 1899, the following order was entered:

"A. B. Ballard and Mrs. Josephine W. Ballard come by their solicitors and on their motion leave is given them to file herein their answer, motion, petition and bill of review herein, and be made parties to this suit with reference to the N. E. $\frac{1}{4}$ of Section 31, The Southwest $\frac{1}{4}$ of section 32, and the south $\frac{1}{2}$ of the North west $\frac{1}{4}$ of section 32, all in township 4 North Range 7 East, and the said pleading is ordered to be filed and they are made defendants and parties to this suit for the purposes set out in said pleadings.

"And thereupon the said C. W. Hunter, by L. P. Berry, Esq., his attorney enters his appearance herein and has ninety days given him within which to plead, answer or demur herein."

It does not appear that A. Hackler or the board of directors of the levee district ever entered their appearance or were made parties to the proceeding.

In compliance with the order, plaintiffs in error filed what is called in the record "Answer to motion of Ballard." It commences as follows:

"To the Hon. E. D. Robertson, Chancellor:

"The answer and motion of A. B. Ballard, who is a citizen of the State of Florida, residing at Tampa, and Mrs. Josephine W. Ballard, who is a citizen of the State of Georgia, residing at Atlanta, also to be taken and considered as a petition, under sections 5839–5843, Sandels & Hill's Digest, and as an original complaint, under sections 4197–4199 of same, and under sections 6120–6124 of same, and the amendments thereto, and as a bill of review under the chancery practice, as appears by the prayer herein."

It then sets out in detail the facts which constitute the basis of the assignment of errors in this court presently given, as well as specifications of errors under the constitution and statutes of the State. It prayed that the paper be considered in the several characters mentioned in its opening paragraph; that all the parties to the original suit be considered parties, including the purchasers at the sale; that the decree of the fourteenth of February, 1898, be "reviewed, reversed and vacated, and that the report of the sales and the sales be set aside and the deeds cancelled."

The case was submitted on a statement of facts, by which it was agreed that plaintiffs in error were the owners of the land on the twenty-first day of December, 1897, and that their title appeared of record. That at that date they were, and continued to be, respectively, citizens of Florida and of Georgia, and that they would testify that they had no knowledge of the suit or its pendency, or that taxes for levee purposes had been levied prior to the date of the sale of their lands and the purchase thereof by Hunter or Hackler, or "that any law on that subject had been enacted." That the clerk of the court was allowed one dollar for each of the deeds made in pursuance of the sale, and allowed the fees set out in the decree, and all said sums were taxed as costs and paid

out of the proceeds of sale. That plaintiff in error made the tenders to Hunter and Hackler, respectively, as stated in "their answer and motion filed herein on the 25th day of September, 1899, and in the manner and at the time stated, and that the said C. W. Hunter and A. Hackler, respectively, refused to receive such tenders and severally refused to state the amounts that they claimed they were entitled to receive in order to redeem the said tracts of land respectively."

It was also agreed that the record of the suit, including all orders, returns of officers, minutes of proceedings, etc., should be read in evidence, subject only to objections for irrelevancy and incompetency.

The decree of the court, after reciting the submission of the case and upon what submitted, concluded as follows: "The court orders that all the relief as prayed for in the said answer, motion, petition and original complaint of the said A. B. Ballard and Josephine W. Ballard be and the same is hereby denied and refused, and that the said answer, motion, petition and original complaint be and the same is hereby dismissed."

The Supreme Court of the State affirmed the decree.

The errors assigned are that the Supreme Court erred in not decreeing that (1) The lands of plaintiffs in error were not properly described in the complaint. (2) and (3) In not decreeing that the sale was unlawfully made, for the reason that the lands of plaintiffs in error were sold as a whole and for taxes on the whole west one-half of section 32, when plaintiffs in error did not own or claim the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of that section. (4) The decree was void because the lands were sold for sums not legally chargeable thereon. (5) That the acts of 1893 and 1895 required a notice to be given to the owners of the lands proceeded against in the suit they provided for, and no such notice was given, and the sales were therefore unauthorized and void. (6) The notice provided for by the act, assuming notice was given, was insufficient. It was not such a notice of the pendency of the suit as the act or the general law required to be given to the owners of lands resident in

the State of Arkansas and Crittenden County, where the lands were located, and to persons owning lands there similarly circumstanced and subject to the same taxation, or persons having tenants on such lands. All such persons were entitled by said act and had personal service for at least twenty days before the rendition of the decree of sale. Plaintiffs in error, respectively citizens of Georgia and Florida, were allowed and given constructive service, if any were given, only by publication in a newspaper, published in Crittenden County, and only weekly for four weeks, the first notice being, and required to be, only four weeks before the rendition of the decree. Plaintiffs in error had no personal or other notice of the suit, and did not appear therein. They were denied thereby the privileges and immunities of citizens of the United States and of Arkansas, and denied the equal protection of the laws within the State of Arkansas, and deprived of their property without due process of law, in violation of the Constitution of the United States, and the decree of sale and sales thereunder are void. (8) In not decreeing that the sales of the land of the plaintiffs in error were void and passed no title, because in the suit the laws of the State were violated in that (*a*) the complaint was deficient; (*b*) there was no sufficient affidavit made and filed to support a warning order or order for notice to plaintiffs in error; (*c*) there was no sufficient proof of publication of a warning order or notice filed or produced in court when decree of sale was made; (*d*) the decree of sale did not state, and the record did not show, the facts essential to the validity of the decree of sale as against plaintiffs in error or other lands. Thereby the plaintiffs in error, in violation of the Constitution of the United States, have been denied the benefit of such laws in this suit. (9) The decree of sale was rendered in violation of the laws of Arkansas requiring proof of evidence to support the allegations of the plaintiff as against plaintiffs in error, persons before the court only by a constructive service of process. And the decree was pronounced as based on an alleged order or decree *pro*

confesso entered in the suit, not authorized by law, and so was rendered without due process of law, in violation of the Constitution of the United States.

Mr. William M. Randolph, with whom *Mr. George Randolph* and *Mr. Wassell Randolph* were on the brief, for plaintiffs in error:

The titles claimed by the purchasers—defendants in error—to the lands in controversy, which it is conceded belonged to plaintiffs in error, but for their purchases, depend entirely on a strict compliance with the statutes referred to, Act No. 19 of the year 1893, and Act No. 71 of the year 1895, in the assessment, the levy of the taxes, and the conduct of the suit, and cannot be maintained, except by showing affirmatively, not only a substantial compliance with their requirements, but an exact compliance, from the inception of the undertaking to have the levee taxes voted by the landowners, until the conclusion of the sales under the decrees in the suit, authorized to be brought, to enforce the collection of them.

Compliance with the requirements of these statutes is essential to the validity of sales for ordinary taxes.

The courts treat them as mandatory. Blackwell on Tax Titles, 2d. ed., Ch. 5. p. 106; Black on Tax Titles, 1st ed., Ch. 3, §§ 27, 34; *Martin* v. *Allard*, 55 Arkansas, 218; *Cooper* v. *Freeman Lumber Co.*, 61 Arkansas, 42 *et seq.; Logan* v. *Land Co.*, 68 Arkansas, 248; *Hunt* v. *Gardner*, 74 Arkansas, 583; *Bonner* v. *Directors of St. Francis Levee District*, 92 S. W. Rep. 1124; *Martin* v. *Barbour*, 34 Fed. Rep. 701; *S. C.*, 140 U. S. 634; *Gregory* v. *Bartlett*, 55 Arkansas, 30; *Taylor* v. *The State*, 65 Arkansas, 595; *French* v. *Edwards*, 13 Wall. 511, *Lyon* v. *Alley*, 130 U. S. 184; Cooley on Taxation, 1st ed., Ch. 12, p. 258; *Gaines* v. *Stiles*, 14 Pet. 322, 331; *Redfork Levee District* v. *St. L., I. M. & S. Ry. Co.* (Ark.), 96 S. W. Rep. 117.

There was no authority in the statutes for combining in one suit the levee taxes for more than one year. When in the same suit the levee taxes for 1894, 1895, 1896 and 1897

were sued for, definite and distinct allegations as to the assessments and levies for each year, and the efforts to collect, and the delinquencies, and the facts authorizing the suits, should have been made. The loose and imperfect statements made in the complaint were not what the law requires. *Redfork Levee District* v. *St. L., I. M. & S. Ry. Co.* (Ark.), 96 S. W. Rep. 117.

The acts of the General Assembly, under which the suit was brought, required a notice to be given to the owners of the lands, of the suit, and no notice having been given plaintiffs in error, the decree of sale, and the sale of their lands, for want of such notice, were void.

Act No. 19 of the year 1893 and Act No. 71 of the year 1895 in question here do not provide for any proceeding strictly *in rem*. *Wilson* v. *Gaylord*, 92 S. W. Rep. 26; *S. C.*, 4 Ark. Law Rep. 341.

The provisions of the statutes, Acts of 1893, No. 19, and 1895, No. 71, and all the others on the same subject, as to the method of procedure and notice, and other like matters, are mandatory, and must be shown in this suit to have been observed technically and literally, as well as substantially, as a condition precedent to the attachment of the lien on the lands of plaintiffs in error, and the other lands assessed, and to the power to decree a sale of such lands for the payment of the levee taxes sued for, and to the right to have the lands sold for the taxes, and if the requirements of the statutes have not been so observed, the sales of the lands of plaintiff in error are, for that reason alone, void. *Patrick* v. *Davis*, 15 Arkansas, 370; *Wiley* v. *Flournoy*, 30 Arkansas, 612; *Matter of Cornelius*, 14 Arkansas, 682; *Abraham* v. *Wilkins*, 17 Arkansas, 319; *Rector* v. *Board of Improvement*, 50 Arkansas, 116; *Watkins* v. *Griffith*, 59 Arkansas, 344; *Torrey* v. *Millbury*, 21 Pickering, 640; *Sandwich* v. *Fish*, 2 Gray (Mass.), 298; *Clark* v. *Crane*, 5 Michigan, 154; *French* v. *Edwards*, 13 Wall. 506, 511; *Lyon* v. *Alley*, 130 U. S. 178, 184; *Gregory* v. *Bartlett*, 55 Arkansas, 30.

Mr. L. P. Berry, for defendants in error, submitted:

A judicial sale of lands for illegal taxes, penalty, interest and costs is not a taking of property without due process of law. *Burcham* v. *Terry,* 55 Arkansas, 398; *Doyle* v. *Martin,* 55 Arkansas, 37; *Kelly* v. *Laconia Levee District,* 74 Arkansas, 202; 85 S. W. Rep. 249; *Minneapolis &c.* v. *Debenture Co.,* 81 Minnesota, 66.

Due process of law does not require that the true owner of land be named in a judicial proceeding for the collection of delinquent taxes where the land is described in a public notice directed to an alleged owner and all others interested therein. *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389; *Davidson* v. *New Orleans,* 96 U. S. 97; *Tyler* v. *Judges,* 175 Massachusetts, 71.

The four weeks' notice, provided by the levee act, by publication to unknown owners and owners of lands who are non-residents of the county in which suit is brought, is not so unreasonable as to amount to a taking of property without due process of law, nor does it abridge the privileges or immunities of citizens of the United States, nor does it discriminate against citizens of other States, nor does it amount to a denial of the equal protection of the laws to persons within the jurisdiction of the court. *Arndt* v. *Griggs,* 134 U. S. 316; *Bellingham Bay* v. *New Whatcom,* 172 U. S. 314; *Davidson* v. *New Orleans,* 96 U. S. 97; *Tyler* v. *Judges,* 175 Massachusetts, 71; *Hager* v. *Reclamation District,* 111 U. S. 701; *Wurtz* v. *Hoagland,* 114 U. S. 606; *Fallbrook Irrigation Dist.* v. *Bradley,* 164 U. S. 112; *Bauman* v. *Ross,* 167 U. S. 548; *Hanover Nat'l Bank* v. *Moyses,* 186 U. S. 181, 192; *Manson* v. *Duncanson,* 166 U. S. 533; *Johnson* v. *Hunter,* 127 Fed. Rep. 222; *Huling* v. *Kaw Valley Ry.,* 130 U. S. 559–563.

The levee act is not a private act, but a public act, operating over a limited territory, of which plaintiffs in error were bound to take notice, and proceedings had under this levee act constitute due process of law. *Huling* v. *Kaw Valley Ry.,* 130 U. S. 559–563; *Johnson* v. *Hunter,* 127 Fed. Rep. 222.

An erroneous construction by a state court of matters

of practice under a state statute, where the statute as construed by the court provided for notice and an opportunity to be heard, is not a deprivation of property without due process of law. *West* v. *Louisiana*, 194 U. S. 263; *Thorington* v. *Montgomery*, 147 U. S. 492; *In re King*, 46 Fed. Rep. 911.

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

The assignments of error present the contention that plaintiffs in error have been deprived of their property without due process of law. One of them urges, in addition, the clauses of the Fourteenth Amendment, which prohibit a State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and from depriving any person within her jurisdiction of the equal protection of the laws. Plaintiffs in error invoke those provisions against the statutes of Arkansas, because of the different manner and time of service of summons of the suit authorized by said statutes to enforce the payment of the levee taxes. It is contended that, by requiring personal service of summons upon resident owners or occupants of lands for at least twenty days before the rendition of the decree of sale, and providing for constructive service by publication upon non-resident owners of only four weeks, a discrimination is made between owners of lands, and that non-resident owners are thereby denied the rights secured to them by the Constitution of the United States. We have no doubt of the power of the State to so discriminate, nor do we think extended discussion is necessary. Personal service upon non-residents is not always within the State's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. The land stands accountable to the demands of the State, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. *Huling* v. *Kaw Valley Railroad*, 130 U. S. 559. This accountability

of the land and the knowledge the owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service. Certainly it was not so insufficient that it can be said that a difference in the time allowed for such service was not the equivalent of that allowed to resident owners. Mixed with the contention is a charge that the notice to non-residents did not comply with the act of 1893, or the general law of the State, but this is decided against plaintiffs in error by the Supreme Court of the State, and we accept its ruling.

In passing upon the other contentions of plaintiffs in error we are brought to the consideration of what is due process of law. A precise definition has never been attempted. It does not always mean proceedings in court. *Murray's Lessee* v. *Hoboken*, 18 How. 272; *McMillen* v. *Anderson*, 95 U. S. 37. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case. *Dent* v. *West Virginia*, 129 U. S. 114; *Lent* v. *Tillson*, 140 U. S. 316; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Iowa Central R. R. Co.* v. *Iowa*, 160 U. S. 389.

In *Davidson* v. *New Orleans*, 96 U. S. 97, a proposition was laid down which has since been quoted many times. The court said, at pages 104 and 105: "That whenever, by the laws of a State or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." And Mr. Justice Bradley, in a concurring opinion, said, on pages 107 and 108, "that, in judging what is 'due process of

law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvement, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs and preferences of the people of the particular State may require." See also *Marchant* v. *Pennsylvania R. R. Co.*, 153 U. S. 380, and *Holden* v. *Hardy*, 169 U. S. 366.

In *Castillo* v. *McConnico*, 168 U. S. 674, prior decisions defining due process of law were applied to a law assessing taxes. The case involved the validity of a title derived from a tax sale made to enforce delinquent state taxes. The title thus acquired was assailed on the ground that the assessment upon which it was based was void because the property was not assessed in the name of its owner. The state law made the deed given in pursuance of the sale *prima facie* evidence of the fact that the property was subject to taxation and the fact that the taxes had not been paid, and conclusive evidence that the property had been assessed, the taxes levied and the property advertised according to law; also that the property was adjudicated and sold, as stated in the deed, and all the prerequisites of the law were complied with from the assessment, up to and including the execution and registry of the deed. The state court sustained the sale. This court, in passing upon the contention that the assessment and sale constituted a taking of property without due process of law, went behind the presumptions created by the deed, considered the alleged defects in the assessment and the advertisement and decided that a notice of thirty days by publication was due process of law. The court also decided that, although the statutes under which the assessment was made provided

for the placing of the name of the owner on the assessment roll, where such name was known, they also provided that the property assessed should be described in the assessment roll; and, therefore, that the notice required by the statute was not addressed to each person assessed, but to all persons having property subject to taxation. It was held that the statute afforded both constructive and actual notice. "It can not be doubted," it was said at page 681, "that, in the exercise of its taxing power, the State of Louisiana could have directed that the property subject to its taxing authority should be assessed without any reference whatever to the name of the owner, that is to say, by any such description and method as would have been legally adequate to convey either actual or constructive notice to the owner. As said in *Witherspoon* v. *Duncan*, 4 Wall. 210, 217: 'It is not the province of this court to interfere with the policy of the revenue laws of the States, nor with the interpretation given to them by their courts. Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes, no matter who is the owner or in whose name it is assessed and advertised, and that an erroneous assessment does not vitiate a sale for taxes.'" See also *Tupin* v. *Lemon*, 187 U. S. 51, and *Leigh* v. *Green*, 193 U. S. 79.

In view of these principles let us examine the contentions of the plaintiffs in error.

First. They charge that there is an incorrect description of the lands owned by plaintiffs in error in the original complaint and decree, in that they did not own all the lands described or sold. In the original transcript of the record there were apparently discrepancies between the lands assessed and those described in the decree. These discrepancies have been corrected by the return to a certiorari granted for that purpose, and it appears that the lands assessed and those decreed to be sold in section 32, T. 4 N., R. 7 E., were the W. $\frac{1}{2}$ and S. E. $\frac{1}{4}$, 480 acres, W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, 80 acres. Plaintiffs

in error, however, allege that they owned only the S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and contend that the two tracts owned by them made up 240 acres, and the two tracts sold by the commissioner and conveyed to Hunter, embracing such 240 acres, made 480 acres. Thus, it is urged, the lands plaintiffs in error owned were sold to pay the levee taxes on land they did not own, and their lands were thereby taken without due process of law.

This point was made in the complaint attacking the decree and sale, but was not passed on by the Supreme Court. Presumably the court regarded the point as precluded by the original decree and not a ground upon which the decree could be attacked, and this is our view. What lands were properly assessed to Ballard and what lands he owned were facts to be alleged in the original suit and established by the proof there introduced or by admission through the default of the owners of the lands. If there was error it can not be a ground for setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit does not take from it or its decree the attribute of due process. *Central Land Company* v. *Laidley*, 159 U. S. 103; *Iowa Central R. R. Co.* v. *Iowa*, *supra*. It is only with this aspect of the suit and decree with which we are concerned. No defense, therefore, which could have been made or rights which could have been taken care of in the suit can now be set up to impugn its decree.

The statutes of the State, under which the taxes were levied, virtually make the land a party to the suit to collect the taxes. It is from the lands alone, and not from their owner, that the taxes are to be satisfied, and each acre bears its part. The burden of taxation could have been easily and definitely assigned by the court. Mistakes in ascribing the ownership of the lands did not increase the taxation or cast that which should have been paid by one tract of land upon another tract. In *Doyle* v. *Martin*, 55 Arkansas, 37, it was held that it is no valid objection to a tax proceeding against land

owned by one person that it was described, not separately but as a portion of a larger tract owned by a different person. See also *Minneapolis Ry. T. Co.* v. *Minnesota D. Co.*, 81 Minnesota, 66.

Second. The fourth error assigned is that the lands were sold for sums not legally chargeable thereon. The illegal charges alleged are fees to the commissioner for furnishing the printer with a list of lands sold—fees to the commissioner for reporting the sale and to the printer for publishing notice of sale. The comment we have made above applies to this assignment of error. The act under which the suit was brought provided that notice to those interested in the delinquent lands proceeded against should specify, among other things, that a final judgment would be entered, "directing the sale of lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law." It was for the court to determine, therefore, what costs were allowed by law, and an erroneous judgment of what the law allowed did not deprive the defendants in the suit of their property without due process of law. The Supreme Court, in passing on this objection, said: "A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs. *Harry E. Kelley* v. *Laconia Levee District*, MSS. Opinions; *Johnson* v. *Hunter*, *supra*." And this decision is an answer to the other decisions of Arkansas cited by plaintiffs in error, to the effect that a sale for taxes, in excess of the amount due or embracing costs not legally due, is void. And the case at bar is also distinguishable from the cases cited from this court.[1]

Third. The fifth assignment of error is based on the contention that the Supreme Court of the State erred in not

[1] *French* v. *Edwards*, 13 Wall. 506, 514; *Walker* v. *Turner*, 9 Wheat. 541; *Moore* v. *Brown*, 11 How. 414; *Woods* v. *Freeman*, 1 Wall. 398; *McClung* v. *Ross*, 5 Wheat. 116; *Thatcher* v. *Powell*, 6 Wheat. 119; *Gage* v. *Pumpelly*, 115 U. S. 454; *Dick* v. *Foraker*, 155 U. S. 404.

deciding that plaintiffs in error were not given the notice required by the statutes of the State. This assignment of error is elaborately argued by counsel, but the distinction is not clearly made between the construction of the statutes and their effect as construed. What the statute required was for the Supreme Court to determine; whether, as determined, it constituted due process is for us to decide. The case at bar does not come within *Huntington* v. *Attrill*, 146 U. S. 651, or *Scott* v. *McNeal*, 154 U. S. 34, or the cases where the statute of a State was assailed as impairing the obligation of a contract. We come then to what was done in the suit which decreed the sale, and the discussion answers as well for the other assignments of error without specially enumerating them. The ultimate ground of all of them is that the proceedings were conducted without the notice to plaintiffs in error required by the demands of due process of law. In discussing the contention of plaintiffs in error, that they had been denied the equal protection of the laws by the different manner of service upon resident and non-resident owners of land, and the different times for appearance after service, we declared that it was competent for the State to make the distinction, and that the notice and time were adequate to give to plaintiffs in error the equal protection of the laws. They were also adequate to afford due process of law. And we will pass to the consideration of the other objections. The most important are the following: That there was no sufficient affidavit made and filed to support a warning order or order for notice to plaintiffs in error, and there was no proof of such order or notice filed or produced in court when the decree was rendered. Replying to these objections, the Supreme Court said:

"3. The act provides that notice by publication shall be given to the defendants in suits instituted for the collection of levee taxes, who are non-residents of the county where the suits are brought. The plaintiff in the complaint in the proceedings attacked in this suit stated who of the defendants

therein were non-residents of the county in which the proceedings were pending; and such complaint was sworn to. This was sufficient to authorize notice, by publication, without a separate affidavit to the same effect. It was held in *Sannoner* v. *Jacobson*, 47 Arkansas, 31, that an affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both. The complaint in the proceedings attacked contained the essentials of the affidavit and is sufficient to answer the same purpose. *Johnson* v. *Hunter*, *supra*.

"The act under which the aforesaid proceedings were instituted does not require a warning order to be entered on record, or the complaint; and if it had the proceedings could not be attacked collaterally, unless such entry was made jurisdictional, as it was in *Gregory* v. *Bartlett*, 55 Arkansas, 30, and it was not in this case. *Clay* v. *Bilby*, 78 S. W. Rep. 749."

The court held, therefore, that, under the laws of the State, an "affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both." And it was held that the complaint in the proceedings attacked did contain those essentials. If we could dispute with the Supreme Court at all upon the requirements of the laws of the State it would have to be on a clearer showing of error than is made in the case at bar. The statute provides that all or any part of the delinquent lands for a county may be included in the suit instituted in such county, and there may be included in the suit known and unknown owners; "and notice of the pendency of such suit shall be given as against non-residents owners of the county and unknown owners, respectively," by publication weekly. The time of publication is specified. The complaint showed that Ballard was the owner of the lands and that he was a non-resident of the county. It is said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county showed that she was an owner thereof. But the statute provided against

such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case.

It should be kept in mind that the laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law can not give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in *Huling* v. *Kaw Valley Railway & Improvement Company*, 130 U. S. 559, where it was declared to be the "duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences." It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied.

Our attention is directed to the case of *Johnson* v. *Hunter*, decided by the Circuit Court of Appeals for the Eighth Circuit, 147 Fed. Rep. 133, to establish that the verified complaint

in the suit to collect the levee taxes was not sufficient to sustain the service by publication. The appellants in that case were complainants in the Circuit Court in a suit to quiet their title against sales under decrees made in suits prosecuted by the St. Francis Levee District—suits identical with that with which the case at bar is concerned. The court held that an affidavit, "adapted to the terms of the levee act," and placed on record in the suit, was a prerequisite to the issuance and publication of the prescribed warning order, and was strictly jurisdictional. A number of cases were cited. Considering the terms of the levee act, the court quoted the following provisions of section 11 as amended February 15, 1893: "And provided further, actual notice of summons shall be had where the defendant is in the county or where there is an occupant upon the land." "The conditions are," the court said, "that the defendant must be a non-resident of the county, and must be absent therefrom, and that there must not be an occupant upon the land. If the defendant be a resident of the county, or be present therein, or if there be an occupant upon the land, actual service of a summons is required. . . . And a defendant may be a non-resident of the county and absent therefrom and yet the land be occupied by a tenant or other representative upon whom a summons can be served. If the land is so occupied, the act plainly calls for such service. *Banks* v. *St. Francis Levee District*, 66 Arkansas, 490, 51 S. W. Rep. 830." The court assented to the view that a complaint, properly verified, containing what was required to be set forth, would be a sufficient affidavit to sustain service by publication, but observed, "that of the three concurring conditions, without the existence of each that mode of service was not permissible, the complaints alleged the existence of one, and were altogether silent in respect to the other two, that is, that Johnson (the defendant) was a non-resident of the county, but did not state that he was not present therein or that there was not an occupant on the lands."

Referring to the case of *Memphis Land & Timber Co.* v. *St. Francis Levee District*, 70 Arkansas, 409, and the decision of the Supreme Court of the State in the case at bar, it was said: "In one the question actually considered was whether or not an affidavit for publication was necessary, rather than what it should contain, and in the other it was whether or not any affidavit and verified complaint could perform the office of such an affidavit; but in neither does the court's attention appear to have been directed to the provision, 'and provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land.' In the arrangement of the act this provision is somewhat separated from the others which it is obviously designed to modify and restrain, and, in the absence of any controversy respecting it, it may well be that it was not observed by the court." We can not concur in the supposition. We think those cases can be better explained by a different supposition. In the case at bar plaintiffs in error are not in a position to make the objection. They do not assert that, though non-residents of the county, they were present therein or that their lands were occupied by a tenant or other representatives, as was the case in *Banks* v. *St. Francis Levee District*, 66 Arkansas, 490. They on the contrary assert, and make it a ground of relief under the Constitution of the United States, that as non-residents they were discriminated against, in that the acts of 1895 did not require the same notice to be given to non-resident owners as to resident owners or to persons owning and having tenants upon the land.

Plaintiffs in error, it is true, alleged that no "sufficient affidavit of the plaintiff" was filed "stating positively or sufficiently any one of the facts" required to be stated, and that the clerk did not make on the complaint or otherwise any warning order to plaintiffs in error, or to either of them, to appear in the suit as required, or which obliged them to appear therein or bound them by the proceedings which were had therein. But there was no allegation that either of them

was in the county or that there was an occupant upon their lands. Not being defendants who were entitled to personal service, they can not urge against the decree that they were not given personal service or complain that the complaint was insufficient as an affidavit for service by publication, because it did not deny the existence of conditions which there is no pretense existed.

Another assignment of error is that "there was no sufficient proof of the publication of any warning order, or any notice to the plaintiffs in error, filed or produced in court when the decree of sale of their lands was rendered." To this contention the Supreme Court replied: "The act under which the aforesaid proceedings were instituted does not require a warning order to be entered on record or the complaint, and if it had the proceedings could not be attacked collaterally, unless such entry was made jurisdictional, as it was in *Gregory* v. *Bartlett*, 55 Arkansas, 30, and it was not in this case. *Clay* v. *Bilby*, 78 S. W. Rep. 749." And the decree recites that the defendants "were severally constructively summoned by publication, . . . proof of which has been previously filed herein." The contention of plaintiffs in error is therefore answered by *Grignon's Lessee* v. *Astor*, 2 How. 318, 319; *Sargeant* v. *The State Bank of Indiana*, 12 How. 371; *Voorhees* v. *The Bank of United States*, 10 Pet. 449; *Applegate* v. *Lexington &c. Mining Co.*, 117 U. S. 255.

The other assignments of error do not require specific mention. They are either answered by that which we have already said or do not involve jurisdictional questions.

Decree affirmed.

Mr. Justice Brewer concurs in the judgment.

EAST CENTRAL EUREKA MINING COMPANY *v.* CENTRAL EUREKA MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 141. Argued January 8, 9, 1907.—Decided January 21, 1907.

The requirement of parallelism of the end lines of a mining claim in § 2 of the act of May 10, 1872, 17 Stat. 91, Rev. Stat., par. 2320, does not apply to a patent issued on an application made prior to the passage of that act.

Where the construction by the land office of an act of Congress in regard to mining claims agrees with the decisions of the Circuit Court and the state courts, unless the meaning of the act is plainly the other way, this consensus of opinion and practice must be accorded considerable weight.

Section 3 of the act of May 10, 1872, is to be construed broadly in favor of the right of a claimant who had located prior thereto to follow all veins apexing within the surface of his claim in view of the provisions of §§ 12 and 16 that the act should not impair rights or interests acquired under the existing laws.

In the construction and effect of a conveyance between private parties this court follows the state court.

146 California, 147, affirmed.

THE facts are stated in the opinion.

Mr. Jackson H. Ralston, with whom *Mr. Philip G. Galpin*, *Mr. Frederick L. Siddons* and *Mr. William E. Richardson* were on the brief, for plaintiff in error:

Defendant in error acquired no title under act of May, 1872, Rev. Stat. § 2320, because the end lines of patent were not parallel. *Iron Silver M. Co.* v. *Elgin Mining & S. Co.*, 118 U. S. 196; *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.*, 171 U. S. 66.

At the date of the passage of the act of 1872 the defendant had acquired no existing right, under the act of 1866, to have extralateral rights on a claim with converging end lines.

Where an applicant for public land had entered his land

in the Land Office and paid his money and nothing remained to complete his title but issue of a patent, the delay of the Land Office or repeal of the law before patent issued could not deprive him of his "existing right." But, until he had made the payment of money his right did not attach. The settled rule is that until the legal title has passed, or the locator has acquired by payment of money some vested right the public lands are within the jurisdiction of the Land Department and Congress retains control. *Diffenbach* v. *Hoch,* 115 U. S. 592; *Davis* v. *Wiebold,* 139 U. S. 239.

No rights of a locator against the Government accrued to be upheld as a vested right until the Government surveyor had made the survey and the surveyor-general had approved it. Before that time the power of the surveyor to make a survey in this manner so as thereby to give extralateral rights had been cut off and he was bound to survey under the act of 1872, and according to its directions. He should have made the end lines parallel. He could only survey as the act of 1872 required. His disobedient act conferred no rights to be upheld after repeal of act of 1866. *Cragin* v. *Powell,* 128 U. S. 691.

The same principle applies to mineral lands also.

So it was held in *Del Monte M. & M. Co.,* 171 U. S. 70.

The same section of the Revised Statutes which limited the effect of the patent to a conveyance of 300 feet on each side of the ledge declared that the end lines of the claim should be parallel. The courts have decided that unless parallel, the claim carried no extralateral rights. See also *Larkin* v. *Roberts,* 54 Fed. Rep. 461; *S. C.,* 154 U. S. 507.

Mr. S. S. Burdett, with whom *Mr. Curtis H. Lindley* and *Mr. Henry Eickhoff* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a writ of error to reverse a decree in favor of the defendant in error, the original plaintiff and hereinafter called

the plaintiff, which was ordered by the Superior Court and affirmed by the Supreme Court of California. 146 California, 147. The decree was made on a bill to quiet title, upon the following facts, which appeared at the trial of the case. The plaintiff is the owner of the "Summit Quartz Mine" in California. The apex of a vein runs through this mine between and nearly parallel with the surface side lines. This vein dips under the easterly side line and enters the adjoining land of the defendants, known as the Toman ranch. The controversy concerns the portion of the vein under the defendants' land. The main ground of defense is that the end lines of the mine are not parallel but converge towards each other in the direction of the ranch, and that the plaintiff's patent was granted on November 25, 1873, when the act of May 10, 1872, c. 152, 17 Stat. 91, Rev. Stats. §§ 2320, 2322, was in force. *Iron Silver Mining Co.* v. *Elgin Mining & Smelting Co.*, 118 U. S. 196; *Del Monte Mining & Milling Co.* v. *Last Chance Mining & Milling Co.*, 171 U. S. 55, 67. But the patent was issued upon an application made on February 7, 1871, based upon two locations of March 20, 1863, and June 22, 1865, respectively. The question is whether the requirement of parallelism in § 2 of the act of 1872, Rev. Stat. § 2320, applies to such a case.

The patent of the mine recites proceedings in pursuance of the acts of 1866, 1870 and 1872, and describes and grants the premises by metes and bounds, and the exclusive right of possession and enjoyment of the same and of $1{,}165\frac{56}{100}$ linear feet of the vein throughout its entire depth, although it may enter the land adjoining, with similar rights in other veins having their apex within the surface bounds; the extralateral or outside rights in the veins being confined, as by the act of 1872, § 3, to such portions as lie between vertical planes drawn downward through the end lines of the survey at the surface, and so continued in their own direction as to intersect the exterior part of the veins. In short, the patent purports to convey the rights claimed by the plaintiff in this suit, and

also the additional rights that would have been gained by a location and patent under the act of 1872 alone. The defendants derive title from later patents issued under the laws of the United States concerning the sale of agricultural land, and admit that, if the plaintiff's patent conveyed what it purported to convey, then, subject to a question to be mentioned later, the plaintiff must prevail.

Before the act of 1872 it was not required that the end lines should be parallel; 118 U. S. 208; and when, with some dissent, it was decided that that requirement of that act made a condition to the right of a patentee to follow his vein outside of the vertical planes drawn through his side lines, the decision was confined in terms to cases where the location was made since the passage of the act. 118 U. S. 208. That there is no such condition when the patent was issued in pursuance of proceedings under the earlier statutes has been decided, so far as we know, when the question has arisen. See e. g. *Argonaut Mining Co.* v. *Kennedy Mining & Milling Co.*, 131 California, 15; *Carson City Gold and Silver Mining Co.* v. *North Star Mining Co.*, 83 Fed. Rep. 658, 669. The granting of the patent indicates what we believe to be a fact, that the construction of the act of 1872 adopted at the time by the land office agreed with the decisions of the courts. Unless, therefore, the meaning of the act of 1872 is pretty plainly the other way, this consensus of opinion and practice must be accorded considerable weight.

Apart from the last mentioned considerations we are of opinion that the act of 1872 authorized the plaintiff's patent. Under the former law the miner located the lode. *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499, 508. When the act of 1872 substituted the location of a piece of land by surface boundaries, it preserved the rights of locators to all mining locations previously made in compliance with law and local regulations, and provided that they should "have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of

all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of said surface locations." Section 3. Rev. Stats. 2322. It is argued that this refers only to possessory rights, and that when a patent was applied for it was required to conform to the new law; that under the old law the miner got but a single vein, while the new law gave him all veins having their apex within the surface, and that when he accepted this advantage he had to comply with the conditions, as otherwise he would be given a preference over later comers. It is said further that in the present case no rights had been acquired. These arguments do not command our assent, for reasons which we will state.

A broader construction of the passage quoted from § 3 is favored by other provisions in the act. It provided that the repeal of certain sections of the act of 1866 "shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office; but in such cases when adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act." Section 9. So in § 12: "Nor shall this act affect any right acquired under said act" (of 1866). And in § 16, "Provided that nothing in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws." Whatever ambiguity may be found in the first of these quotations, the last is plain. The chance of a possible advantage to outstanding applicants does not seem to us to outweigh the injustice of preventing them from getting what the law had promised as the reward for the steps they had taken in accordance with its invitation.

The provision that the act shall not impair existing rights is, perhaps, some indication that it extends to inchoate rights which constitutionally it might have impaired. At all events

it should be taken in a liberal sense. There was no sufficient reason why the United States should not be liberal and, as we have said, it was just that it should be. We are of opinion that in the present case rights had been acquired within the meaning of the act. It is said that the survey of the mineral patent was not approved or payment made to the United States until after the passage of the act of 1872. But the location had been made and the proceedings under the act of 1866 so far advanced as to exclude adverse claims. The locator had done all that he could do, and we are satisfied that the act of 1872 intended to treat parties that were in that position as having rights that were to be preserved. If Congress were unrestricted by the Constitution the word "rights" still would be the natural word to express the relation of persons to this kind of property where the facts required the officers of the Government to take the steps necessary to permit them to acquire it and they were seeking to acquire it and had manifested their intent and desire by occupation, labor and expenditures. Yet on that supposition there could be no technically legal right. We believe that Congress used the word in a somewhat popular sense, as no doubt it would have used it in the case supposed, without considering what injustice might be within its constitutional power to commit. See *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220; *Creede & Cripple Creek Mining & Milling Co.* v. *Uinta Tunnel Mining & Transportation Co.*, 196 U. S. 337, 342.

The plaintiff is not responsible for the form of the patent. It grants the rights that would have been granted under the act of 1866, and the fact that it also purports to grant all that would have been acquired by a location under the act of 1872 does not import an election by the grantee to abandon the former. We do not mean to disparage the additional grant, but, as was pointed out by the California court, the question before us does not touch that point.

The defendants rely, for a further defense, upon a quitclaim deed, from the plaintiff, of the land under which lies the por-

tion of the vein in dispute. The land was described as lying east of the mining ground known as the Summit Quartz Mine. Assuming, in accordance with its decision, that the part of the vein under this land was embraced in the patent to the plaintiff and severed from the surface, the California court held that this instrument did not purport to convey the portion of the vein beneath the surface and within the converging lines, produced, of the plaintiff's location. The court also adverted to the fact, which sufficiently appeared, that the real object of the deed was to free the defendants' title from a previous contract on their part to convey the land, and simply to replace the grantees in their former position; and it sustained a finding of the court below. The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the State. *Brine* v. *Hartford Fire Ins. Co.*, 96 U. S. 627, 636; *De Vaughn* v. *Hutchinson*, 165 U. S. 566. The assumption upon which that construction proceeded we have decided to be correct, and it is enough to add that there is nothing in the decision rendered last week in *Montana Mining Co.* v. *St. Louis Mining & Milling Co.*, *ante*, p. 204 that prevents our agreeing with the result.

Judgment affirmed.

ARMSTRONG, RECEIVER, *v.* ASHLEY.

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

No. 122. Argued December 7, 10, 1906.—Decided January 21, 1907.

Where the title of one claiming ownership of real estate in bad faith is openly questioned and attacked in actions of ejectment, neither he nor his mortgagee are entitled to an equitable lien on the property for moneys expended thereon.

One loaning money on real estate, the title to which has been, to his knowledge, attacked in an equity suit which has been dismissed without prejudice and not on the merits, takes the risk of the title and his knowledge extends

to all property described, not only in the declaration but also in amended declarations, notwithstanding the failure of the clerk, without any fault of the party filing them, to properly index the amended declarations.

Knowledge of the president of a local board of directors and of the local attorney of a building and loan association in regard to a matter coming within the sphere of their duty and acquired while acting in regard to the same is knowledge of the association, and the fact that they have committed a fraud does not alter the legal effect of their knowledge as against third parties who have no connection with, or knowledge of, the fraud perpetrated.

While one claiming to own real property cannot stand by in silence and see another expend money in improving it, he fulfils his duty by notifying the person spending the money and claiming ownership; and, in the absence of knowledge that such person is insolvent, he is not bound to ascertain whether he is making the improvements with money realized by mortgaging the premises and notify the mortgagee also.

22 App. D. C. 368, affirmed.

THIS suit was brought in the Supreme Court of the District of Columbia by the appellant, who is the ancillary receiver for the New South Building and Loan Association of New Orleans, Louisiana, hereinafter called the company, against the owners of the real property described in the bill, to establish an equitable lien upon the property for the value of improvements placed thereon with money which the company loaned to one Bradshaw for that purpose, Bradshaw claiming to be the owner at the time. After hearing, the bill was dismissed on its merits by the trial court, and the decree of dismissal was affirmed by the Court of Appeals of the District. The opinions of both courts are to be found in 22 App. D. C. 368. The receiver has appealed here.

The title to the property, which consisted of certain numbered lots in square number 939 in Washington, had been in dispute some time prior to 1891. During the year 1889, 1890 or 1891 one Aaron Bradshaw, acting, as alleged, as agent of one John H. Walter, who claimed to have acquired the title of George Walker, entered upon and took forcible possession of the lots in question, and proceeded to erect a small brick structure on the corner lot, whereby to continue to hold possession.

The respondents herein claim to be the owners of these lots, and in the latter part of 1891 they or their grantors commenced four actions of ejectment in the Supreme Court of the District to recover possession of separate and undivided interests in the designated "ink-lot" number one, and subsequently, by proper amendments, other lots in the same square, comprising the property involved herein, were included in the declarations in those actions. A statement of facts regarding the title to these various lots may be found in *Bradshaw* v. *Ashley*, 14 App. D. C. 485, and in this court, upon review of that decision, in 180 U. S. 59, 60, where the expression "ink-lot" is explained as referring to certain ink numbers on a map of the lots in square 939, on file in one of the public offices of the city, and which also had pencil numbers on it, which were different. In that litigation the Ashleys, the respondents herein, finally established their right to the possession of the property and obtained judgment to that effect against Bradshaw, defendant in the ejectment actions, in the Supreme Court of the District some time in 1897 and in this court in 1901. These respondents were thereupon placed in possession of the property, including these lots.

While the litigation in these ejectment actions was pending, and some years before judgment therein, Bradshaw, while defending them, became a stockholder in the company in order to obtain a loan from it, and succeeded, in October, 1893, in borrowing twenty thousand dollars from the company, secured by a deed of trust upon the property in litigation in the actions of ejectment other than "ink-lot" one above mentioned. The deed was duly recorded and the money was to be used for the construction of buildings, which were subsequently placed on these lots. The money was advanced to Bradshaw by the company in installments, the last being in April, 1894.

It was obtained from the company by means, as alleged, of a fraudulent combination between Bradshaw and one Walter, the president of the local board of directors of the

company at Washington, (who claimed to have been the owner at one time of the property, but whose title, whatever it was, had been acquired by Bradshaw), together with the local attorney of the company in this District. The local attorney, in carrying out the alleged fraud, sent a defective so-called "chain of title," which, nevertheless, had been accepted by the local board of the company in Washington. It omitted certain tax and other deeds under which the respondents claimed title in themselves. This defective paper was continued by other examiners of the title, but was not revised by them. The certificate regarding the title was sent, with the defective chain of title, to the company in New Orleans by the local attorney about May 26, 1893. The certificate approved the application for the loan, but such loan was not acted upon favorably at that time. Subsequently, in October, 1893, the loan was made, the company, as is stated, relying upon the certificate of the local attorney for the period which it covered, and the certificate of the other examiner for the time thereafter passing until the making of the loan. The company has insisted that it acted at all times in good faith and made its advances upon the security of the trust deed, which it supposed was perfectly good. The trial court found that before the money was paid to Bradshaw, upon the security of this trust deed, the company was aware, through its general attorney in New Orleans, of the fact that a suit in equity had (theretofore in 1890, and before the ejectment actions) been brought by the Ashleys against Bradshaw, Walter and others, in which the plaintiffs therein claimed ownership of these lots, and wherein they asked for an injunction to restrain the defendants from setting up any title to them. The bill on file in the equity suit showed a common source of title to all the lots mentioned therein, which included the lots here in question. The attorney also knew that, although the suit had been dismissed, yet it was only for want of prosecution, and was "without prejudice." The New Orleans attorney wrote to the Washington attorney, who

then had charge of the matter, calling his attention to these facts. No notice seems to have been taken of the letter, but the certificate of title by the examiner was given after its receipt. The company insists that during all the time it made advances to Bradshaw under the deed of trust it was ignorant of the existence of these ejectment actions, and at any rate did not know that they covered other than the corner lot, as described in the declarations before they were amended, and the amendments they were ignorant of, because, as is alleged, the clerk of the court in which the actions were pending had not properly kept the books so as to show the amendments and their nature, although they had been filed. The corner lot was not one of the lots upon which the buildings were erected.

The trial court, in the opinion delivered, said that the complainant charged the defendants with knowledge of the advances made by the company to Bradshaw, towards the erection of the buildings; but to this allegation the defendants interposed, in their answer (which was under oath), a positive denial. They admitted that, although wholly ignorant of the source from which the money came to construct the houses, yet soon after learning that one Childs, a contractor, was engaged in their construction they notified him in writing, January 4, 1894, that he had been represented to them as contractor and builder of the houses for which the ground had been broken, and which houses were then in course of erection, and he was thereby notified that if he, his agents or employés, entered upon the grounds they would be held liable for trespassing thereon, as they (defendants herein) were the owners of the lots and had not given him, or anyone else, the right or permission to enter thereon for the erection of houses or any purpose whatever, and that, as the improvements were not made with their authority, they would not be responsible for any liability contracted by Mr. Bradshaw.

The defendants, in their answer, also allege that it was not until in or about February, 1895, that defendants, or any of

them, learned of the advances made by the company or of the existence of the deed of trust. The trial court, in its opinion, stated that although "there was no evidence contradicting either of these denials, nor of actual knowledge possessed by the defendants of the matters thus denied, still it seems to me there is evidence in the record that facts might readily have been ascertained by them from which they might well have learned at an earlier time of the building and of the source from which the money employed was derived." While not finding that the defendants had actual knowledge of the advances made by the company, the court did impute knowledge of certain conveyances made to Bradshaw, and of the existence of the deed of trust to the company at earlier dates than those assigned in the answer, February, 1895. And in relation to an offer of compromise the joint answer alleged that after that time, viz., about May 31, 1895, during negotiations for the compromise of the differences between the parties, Mr. H. F. Beardsley, one of the defendants, wrote to the attorneys representing the company in behalf of himself and his associates, offering to sell to the company the lots upon which the houses then were "at their present market value or price, said value not to exceed the price at which similar lots (unimproved) in the same or contiguous squares are offered for sale. Upon the payment of said price, or sum, we will convey our title to them by deed or quitclaim, or make a binding agreement to so convey upon the determination of the pending suits, or a deed in *escrow*, as counsel shall advise. We will hold this offer open until the 1st of July next." This offer was not accepted, but there is nothing stating what, if any, objections were made to it.

Bradshaw had, in 1894, defaulted in his payments of amounts due for his stock in the company, which he had taken in order to procure his loan. Thereafter some arrangements were attempted between him and the company in regard to making his payments, but they fell through, and nothing could be done in the way of collecting anything on the mortgage or

deed of trust for the reason that the ejectment actions resulted unfavorably. The company, in 1899, became embarrassed and went into the hands of a receiver in New Orleans, and the same person was appointed ancillary receiver in this District, and brought this suit with leave of the court.

The Court of Appeals held that Bradshaw was an occupant of the premises in bad faith, with the fullest possible knowledge of the rights and claims of the appellees, and that it could not be supposed that the grantee of an occupant in bad faith could have any better right than his grantor had.

Some other facts are stated in the course of the opinion.

Mr. Blair Lee and *Mr. George H. Lamar*, for appellant:

The appellees, by standing by and acquiescing therein while the buildings were being erected on the property claimed by them, with the funds of the association, advanced in good faith, are estopped to deny the right of the appellant to a lien on the property to the extent of the value of the improvements. 2 Beach's Eq. 1107; *Sumner* v. *Seaton*, 47 N. J. Eq. 103; *Morgan* v. *Railroad Co.*, 96 U. S. 720; *Bryndon* v. *Campbell*, 40 Maryland, 331; *McIntire* v. *Pryor*, 10 App. D. C. 440.

The appellant, as receiver of the New South Building and Loan Association, occupies the position of a *bona fide* purchaser for value and without notice and cannot be deprived of protection in equity by the bad faith of Bradshaw, the grantor, or the fraud of the members of the local board who participated with him in fraud on the association. *Woodward* v. *Blanchard*, 16 Illinois, 432; *Searl* v. *School Dist.*, No. 2, 133 U. S. 553; *Wright* v. *Mattison*, 18 How. 50. As to notice through agent, the agent's fraud relieves his principal. Mechem on Agency, art. 723; 2 Sugden on Vendors, *p. 1043, § 20; 2 Pomeroy's Eq. Juris., art. 675. The equity suit was not notice to the company; to affect a purchaser with notice requires a close and continuous prosecution of the *lis pendens*, and this is required by Lord Bacon's rule. 2 Sugden on Vendors, p. 1046, art. 24; 1 Johns. Ch. 576.

Without reference to the connivance and estoppel of the appellees, the appellant, as receiver of the New South Building and Loan Association, as an improver in good faith, is entitled in equity to a lien on the property to the extent of the value of the improvements bestowed with the funds of the association. *Searl* v. *School District*, 133 U. S. 553; *Bright* v. *Boyd*, 1 Story C. C. 478, 492.

The opinion of the Court of Appeals in *Anderson* v. *Reed*, concedes that the doctrine of Mr. Justice Story in *Bright* v. *Boyd* has been adopted and followed by other equity courts, citing cases of *Thomas* v. *Thomas*, 16 B. Mon. 421; *Vallee* v. *Fleming*, 16 Missouri, 152; *Hatcher* v. *Briggs*, 6 Oregon, 131; *McKelway* v. *Armour*, 10 N. J. Eq. 115, and *Union Hall Association* v. *Morrison*, 39 Maryland, in all of which the opinion of Mr. Justice Story in the case of *Bright* v. *Boyd*, is accepted and emphatically endorsed.

Mr. J. J. Darlington for appellees.

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

The foregoing facts show that Bradshaw, if he were plaintiff, would have no cause of action against the defendants, based upon any allegation that he was permitted by them to build on what he thought was his own land, while the defendants stood by and did not interfere to prevent it, although knowing that the land was not his and claiming title themselves. At all times Bradshaw had knowledge that not only was his title denied, but that these defendants were asserting to the best of their ability in actions of ejectment against him, the right to the possession of, and title to, the property in question. Under such circumstances it would simply be at his own risk that he expended money on what might turn out to be other people's property, and which he knew was so claimed. His attitude in the matter would seem to have been that if he

could successfully defend the ejectment actions he could then pay the loan he had obtained from the company, while if he should prove unsuccessful in the defense it would be the company's misfortune.

The company now insists that the money was obtained from it through the fraud of Bradshaw and the others, as stated. But before coming to the question of what duty the defendants owed to the company it may be well to examine for a moment the position of the company in the transaction leading up to its loan to Bradshaw. It is true, the company asserts, that it has acted in good faith throughout the whole matter. Upon examining its position one fact is apparent and uncontradicted: Before the execution of the deed of trust, and, of course, before the advance of any of the moneys by the company to Bradshaw, the company was aware, through its general attorney in New Orleans, that a suit in equity had been commenced about March 1, 1890, by the Ashleys against Bradshaw and others, wherein they alleged their claim of ownership of the property, which included the lots in question in this case, and in which the plaintiffs sought to enjoin the defendants from setting up any title thereto. It appeared that there was a common source of title to all the lots mentioned in the bill. The bill charged fraudulent and illegal acts on the part of Bradshaw, Walter and other confederates, in undertaking to seize possession of the lots there claimed to belong to the plaintiffs therein (the defendants in this suit), and specifically described the status of the parties then existing, and denied to Walter and Bradshaw any ownership or right to the possession of the lots. The facts regarding this equity suit were presented by the general attorney for the company, in New Orleans, to the local attorney of the company in this District, and the fact that the bill had been dismissed only for want of prosecution and without prejudice was specially called to the attention of the local attorney. No action seems to have been taken regarding the contents of that letter by the local attorney after its receipt other than

to certify to the title, nor does the general attorney seem to have inquired further about the facts. The bill was, of course, on file in the clerk's office, and it showed the contention as to the title between these defendants and Bradshaw and his associates. With this knowledge, therefore, it is impossible to say that the company was ignorant of the fact of the existence of a question as to the title of Bradshaw to the premises on which he was seeking to obtain this loan. The dismissal of the bill without prejudice, for want of prosecution, would not be evidence that the title of Bradshaw was good or that the controversy had been settled. It certainly was a warning of the existence of a question as to the title, and it was, at any rate, notice enough to start the company upon some investigation of the facts as to the actual condition of the controversy respecting it. And at this time the ejectment actions had been brought and were pending. The declarations in those actions were then on file in the clerk's office of the Supreme Court of the District, and showed the actions were originally brought to recover possession of "ink-lot" one. It is true that while that particular lot did not include the premises upon which the buildings were subsequently erected, yet the source of title to all the lots was the same. Some months before the deed of trust was executed amendments to these declarations, which did include those lots, had been made and were on file in the clerk's office among the papers in those actions.

Actual knowledge of the fact of the existence of the ejectment actions in regard to "ink-lot" one is, however, denied by the company, and a like denial is made in regard to the amendments to the declarations. The local attorney had knowledge of them, or ought to have had. But so long as the company had knowledge of the equity suit and the contents of the bill therein there was enough to put the company on inquiry as to the state of the title. If under such facts the company loaned the money, it showed its willingness to take the risk of the validity and sufficiency of the title of Bradshaw.

The company denied knowledge of the amended declarations because of the alleged defect in the manner of keeping the books in the clerk's office, wherein the ejectment actions were entered, but no statement was made on the page of the docket devoted to those actions of the existence of amendments to the declarations. The amendments were, however, duly filed in the clerk's office, and the alleged failure of the clerk to properly index the amendments was no answer to the failure on the part of the searcher to examine the files for the purpose of seeing the papers in existence in the actions. In this matter we agree with the opinion of the Court of Appeals, in holding that the respondents here were in nowise responsible for the alleged failure of the clerk to make additions to the docket or index book. Nor is there any evidence that the persons acting for the company were in any way misled by such failure, to the company's detriment.

The company also insists that it ought not to be charged with any knowledge of any fact which was known only by Walter and the local attorney. The company asserts, first, that Walter and the local attorney were not its agents; and, in any event, by reason of their fraud, knowledge by the company should not be imputed to it because of the knowledge of its agents. The company asserts that Walter was simply the president of its local board, composed of the stockholders in the company residing or to be found in Washington, and that his action was not the action of an agent under such circumstances. It also asserts the same thing in regard to the local attorney, and denies liability for their acts. We think the position can not be maintained. The president and attorney were directors of the local board and had to be directors before they could hold either office, and the local directors had to be approved by the board of the main office. It was to this local board that the application was first to be made for a loan, and it was to be approved by it and transmitted at once to the main office, signed by the president, secretary and attorney of the local board on a form furnished by the

association to applicants for a loan. Transactions of a local nature were put in charge of the local attorney, who represented the company at his locality, and loans were consummated by him and papers sent to him by the company for such action as was necessary for the completion of a loan. The knowledge of the attorney and of the president of the board in regard to a matter coming within the sphere of their duty, and acquired while acting in regard to the same, and sending to the company in New Orleans their report which it was their duty to make, must be imputed to the company. The fact that those agents committed a fraud can not alter the legal effect of their acts or of their knowledge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated. There is no pretense of any evidence that the defendants had any connection with these alleged frauds, and no pretense that they had any knowledge of their existence, if they did exist. In such case the rule imputing knowledge to the company by reason of the knowledge of its agent remains.

But, even if it be assumed that the company had no more than a knowledge of the equity suit and its dismissal without prejudice, it simply shows that the company was willing to take the risk of the title, although confessedly questionable.

Upon these facts we can not see that the defendants can be held liable to the plaintiffs on account of any failure of duty on defendants' part. If the buildings were being erected by Bradshaw, there was certainly no duty on the part of defendants to notify him of their title to the property, and we can not see that there was any such duty resting upon the defendants to endeavor to find out through what sources Bradshaw obtained the money to erect the buildings, and to inform the person who was loaning the money that the defendants claimed the property as theirs.

Assuming even that the company made the loan in the *bona fide* belief that Bradshaw had title and that the claims

of the defendants to the ownership of the lots were not well founded, and also that no knowledge of the agents of the company in Washington could properly be imputed to it, and we still have the fact that the company loaned its money with knowledge of the equity suit and of the allegations of the bill therein regarding the title of the defendants and the lack of any title in Bradshaw. Imputing no knowledge to the company other than it actually possessed, the same course should be taken with the defendants. In that case we have their sworn denial, unaffected with any proof to the contrary, that they had any actual knowledge of the existence of the deed of trust or of any connection of the company with Bradshaw, or of any advances made by it to Bradshaw, until February, 1895 (long after all the moneys had been advanced), and even in regard to Bradshaw himself they notified the contractor early in January, 1894, that they owned the property and they would not be responsible for any expenditures made by Bradshaw, and that if the contractor went on he would be regarded as a trespasser.

There is no finding that Bradshaw was insolvent, or that the defendants had any knowledge of it if he were insolvent, and hence there is nothing to lead to the assumption that the defendants knew the buildings could only be erected by Bradshaw with borrowed money, and nothing to show any duty on the part of defendants to take active steps and make a search to endeavor to find out who was loaning him money, and on what security. And yet this is the contention on the part of the complainant. We think it must be regarded as an extraordinary contention and an unreasonable application of the doctrine of constructive notice. This is the language used by the Court of Appeals, and it properly describes the situation. Certainly constructive notice can not be applied to the owner of property in regard to the existence of a mortgage thereon, placed there by some one who did not own such property. The owner of real estate is under no obligation whatever to watch the records to see whether some one who

does not own his property has assumed to place a mortgage upon it or convey it by deed to some third person. The defendants knew Bradshaw was in possession and they saw buildings being erected on the lots. Were they to assume that Bradshaw was borrowing the money and that they must, therefore, go to work to find out from whom he was borrowing and notify him of the facts? They in fact knew nothing of the deed of trust, but, by imputing knowledge, the claim is made that a duty founded upon such imputed, but not upon any actual, knowledge, rested upon defendants, for the failure to discharge which the defendants ought to be held liable.

No case has been called to our attention which in any degree resembles the claim made by the company herein. The man who actually erected the buildings knew all about the state of the title, and that it was contested by the defendants in the most earnest and emphatic manner in their actions of ejectment to recover the lots. The evidence fails to show that the company was, before the money was advanced, entirely innocent of any knowledge on its part which would lead to doubt as to the ownership of the property by Bradshaw. But even its actual good faith, in the popular sense, can not charge the defendants with the duty of active investigation to discover from what source Bradshaw obtained the money to build. The simple facts are that the defendants were in possession of the property when this suit was commenced, and they ask no aid from a court of equity to place them in possession. They had recovered it in their actions at law, and a court of equity will not, even in the case of a *bona fide* improver, grant active relief in such a case. 2 Story Eq. Juris. (12th ed.) secs. 1237–1238; *Williams* v. *Gibbes*, 20 How. 535–538; *Anderson* v. *Reid*, 14 App. D. C. 54; *Canal Bank* v. *Hudson*, 111 U. S. 66, 79; *Searl* v. *School District, &c.*, 133 U. S. 553, 561, and other cases, cited by the trial judge in his opinion, and in the opinion of the Court of Appeals. The case of the company is not strengthened by its knowledge that the title of Bradshaw was questionable.

Morgan v. *Railroad Co.*, 96 U. S. 716, 720, cited, among other cases, by the appellant, has no application. The facts are so wholly different in their nature as to present a case which does not touch the principle decided herein. There was conduct on the part of the appellant which was such as to amount to fraud or misrepresentation, leading appellee to believe the existence of a fact upon the existence of which appellee acted. We find no cases in opposition to the result we have arrived at.

The decree of the court below is

Affirmed.

MERCHANTS HEAT AND LIGHT COMPANY *v.* J. B. CLOW & SONS.

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

No. 118. Argued January 15, 1907.—Decided January 28, 1907.

While a non-resident defendant corporation may not lose its right of objecting to the jurisdiction of the court on the ground of insufficient service of process by pleading to the merits pursuant to order of the court after objections overruled, it does waive its objections and submits to the jurisdiction if it also sets up a counterclaim even though it be one arising wholly out of the transaction sued upon by plaintiff and in the nature of recoupment rather than set-off.

At common law, as the doctrine has been developed, a demand in recoupment is recognized as a cross demand as distinguished from a defense.

THE facts are stated in the opinion.

Mr. W. H. H. Miller, with whom *Mr. James W. Fesler*, *Mr. C. C. Shirley* and *Mr. Samuel D. Miller* were on the brief, for plaintiff in error:

While Schott was buying material to be used in the con-

struction of defendant's plant, which was purely local, at Indianapolis, and while he was using the credit of the company in making such purchases, yet he was, in fact, an independent contractor, and as between him and the plaintiff the company was his surety only.

The mere purchasing of materials or other work he is found to have been doing in this matter in Chicago was not doing business for defendant in Illinois, in the sense of the statute and decisions, necessary to give jurisdiction. What is meant by that statute is that the foreign corporation is doing some part of the business it was organized to carry on, some part of the business which it has no right to do in a foreign State except by the procuring a license so to do.

In order to authorize service upon an agent of a foreign corporation found within the State, such agent must be there doing business for his corporation. *Goldey* v. *Morning News*, 156 U. S. 518; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Lumberman Ins. Co.* v. *Meyor*, 197 U. S. 407.

It is not enough that one be an officer of the company, or an agent; but he must be an officer or agent engaged in the business of the company in the State where the service is sought to be made effective. The question then arises in what *kind* of business of the company he must be engaged. Not every transaction in the State in the way of business will authorize service. The business done must be something in the line of that for which the corporation was organized. *Central Grain Co.* v. *Board of Trade &c.*, 125 Fed. Rep. 463; *N. K. Fairbanks & Co.* v. *Cin. &c. Ry. Co.*, 54 Fed. Rep. 420; *Wall* v. *Chesapeake &c. R. R. Co.*, 95 Fed. Rep. 398; *Fitzgerald Co.* v. *Fitzgerald*, 137 U. S. 98; *St. Clair* v. *Cox*, 106 U. S. 350; *New England Mut. Life Ins. Co.* v. *Woodworth*, 111 U. S. 138; *St. Louis Wire Mill Co.* v. *Consolidated Barbed Wire Co.*, 32 Fed. Rep. 802; *Good Hope Co.* v. *Ry. Barbed Fencing Co.*, 22 Fed. Rep. 635; *United States* v. *Telephone Co.*, 29 Fed. Rep. 37–41; *Maxwell* v. *Atchison &c. R. R. Co.*, 34 Fed. Rep. 286; *Weller* v. *Penna. R. R. Co.*, 113 Fed. Rep. 502.

As to the contention that the plaintiff in error by pleading a set-off in an amount greater than the defendant in error's claim thereby waived all objections to the jurisdiction, where a party once makes objection to the jurisdiction and reserves a right thereunder, he does not waive an illegality in the service if, after said motion is denied, he answers to the merits. Set-off is certainly part of the answer to the merits and is no waiver. *Central Grain Co.* v. *Board of Trade*, 125 Fed. Rep. 463; *Lowden* v. *American Co.*, 127 Fed. Rep. 1008.

Mr. Newton Wyeth, with whom *Mr. Warren B. Wilson* and *Mr. Walter L. Fisher* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This case comes up on the single question of the jurisdiction of the Circuit Court, which was saved by bill of exceptions and stipulation, and which is certified to this court. The defendant in error, the original plaintiff, and hereafter called plaintiff, is an Illinois corporation; the plaintiff in error is a purely local Indiana corporation, organized for the furnishing of heat, light and power in Indianapolis. The questions are whether the service of the writ was good, *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, 435, or, if not, whether the defendant submitted to the jurisdiction. The material facts are these: The service was upon one Schott in Chicago. By the laws of Illinois a foreign corporation may be served with process by leaving a copy with its general agent, or with any agent of the company. Schott had an entire contract with the defendant by which he was to build and equip the plant, assume general management of it, and operate it for the company until fully completed, "approve contracts therefor," certify bills, and have the heating plant ready for service on December 1, 1902, and finally finished by July 1, 1903. Schott was acting as general manager under this contract at the date of service, March 23, 1903, and did any purchasing

required for the company in Illinois. In the same capacity he made the contract sued upon, which was for materials to be used for equipping the plant. He made it in the city of Chicago. After the suit was begun, a motion to quash the return of service was made and overruled, and thereupon the defendants, after excepting, appeared, as ordered, and pleaded the general issue and also a recoupment or set-off of damages under the same contract, and overcharges, in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of $9,082.21.

It is tacitly conceded that the provision as to service does not apply unless the foreign corporation was doing business in the State. If it was, then, under the decisions of this court, it would be taken to have assented to the condition upon which alone it lawfully could transact such business there. *Old Wayne Mutual Life Association* v. *McDonough*, decided January 7, 1907, *ante*, p. 8. Whether the purchase of materials for the construction or equipment of its plant, as a preliminary to doing its regular and proper business, which necessarily would be transacted elsewhere in the State of its incorporation, is doing business, within the meaning of the Illinois statute, was argued at length and presents a question upon which the decisions of the lower courts seem not to have agreed. We shall intimate no opinion either way, because it is not necessary for the decision of the case in view of the submission to the jurisdiction which the facts disclose.

We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. *Harkness* v. *Hyde*, 98 U. S. 476; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202. But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But even at common law, since the doctrine has been developed,

a demand in recoupment is recognized as a cross demand as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice. *Davis* v. *Hedges*, L. R. 6 Q. B. 687; *Mondel* v. *Steel*, 8 M. & W. 858, 872; *O'Connor* v. *Varney*, 10 Gray, 231. This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense.

If, as would seem and as was assumed by the form of pleading, the counterclaim was within the Illinois statute, *Charnley* v. *Sibley*, 73 Fed. Rep. 980, 982, the case is still stronger. For by that statute the defendant may get a verdict and a judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other; and after the cross claim is set up the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown. Illinois Rev. Stats., c. 110, §§ 30, 31; *East St. Louis* v. *Thomas*, 102 Illinois, 453, 458; *Butler* v. *Cornell*, 148 Illinois, 276, 279.

There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. *De Lima* v. *Bidwell*, 182 U. S. 1, 174; *Fisher* v. *Shropshire*, 147 U. S. 133, 145; *Farmer* v. *National Life Association*, 138 N. Y. 265, 270. As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit. See *Kelly* v. *Garrett*, 1 Gilm. (Ill.) 649, 652; *Ellis*

v. *Cothram*, 117 Illinois, 458, 461; *Cox* v. *Jordan*, 86 Illinois, 560, 565.

Judgment affirmed.

MR. JUSTICE BREWER, MR. JUSTICE PECKHAM and MR. JUSTICE DAY dissent.

MONTANA *ex rel.* HAIRE *v.* RICE, STATE TREASURER.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 252. Argued January 7, 8, 1907.—Decided January 28, 1907.

Although a Federal right may not have been specially set up in the original petition or earlier proceedings if it clearly and unmistakably appears from the opinion of the state court under review that a Federal question was assumed by the highest court of the State to be in issue, and was actually decided against the Federal claim, and such decision was essential to the judgment rendered this court has jurisdiction to reëxamine that question on writ of error.

In granting lands for educational purposes to Montana by § 17 of the Enabling Act of February 22, 1889, 25 Stat. 676, to be held, appropriated, etc., in such manner as the legislature of the State should provide, Congress intended to designate, and the act will be so construed, such legislature as should be established by the constitution to be adopted, and which should act as a parliamentary body in subordination to that constitution; and it did not give the management and disposal of such lands to the legislature or its members independently of the methods and limitations prescribed by the constitution of the State.

Whether a state statute relating to the disposition of such lands and their proceeds is or is not repugnant to the state constitution is for the state court to determine and its decision is conclusive here.

Where the claim that the construction given to a state statute by the highest court of the State impairs the obligation of a contract appears for the first time in the petition for writ of error from this court, it comes too late to give this court jurisdiction of that question even though another Federal question has been properly raised and brought here by the same writ of error.

BY an act approved February 22, 1889, 25 Stat. 676, hereafter referred to as the Enabling Act, the State of Montana

was, with other States, admitted to the Union. By it grants of public lands were made by the United States to the several States admitted, of which only those made by section 17 need be stated here. By that section grants were made to the State of Montana in the following terms:

"To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; *for State Normal School, one hundred thousand acres;* for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a State Reform School, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the State, in addition to the grant hereinbefore made for the purpose, one hundred and fifty thousand acres.

" . . . *And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.*"

Provision was made in the act for the selection of the granted lands from the surveyed, unreserved and unappropriated public lands of the United States, and selections were made by the State of Montana. The constitutional convention of Montana adopted an ordinance designated as Ordinance No. 1, entitled "Federal Relations," which ordained that "the State hereby accepts the several grants of land from the United States to the State of Montana, . . . upon the terms and conditions therein provided." An act of the legislative assembly of the State of Montana, approved February 2, 1905, authorized and directed the state board of land commissioners to sign and issue interest-bearing bonds to the amount of $75,000, for the principal and interest of which the State of Montana should not be liable (section 1), and directed the state treasurer to sell the bonds (section 6). Section 7 directed that—

"The moneys derived from the sale of said bonds shall be used to erect, furnish and equip an addition to the present

State Normal School building at Dillon, Montana, and shall be paid out for such purpose by the state treasurer upon vouchers approved by the executive board of the State Normal School, and allowed and ordered paid by the state board of examiners."

The law further provided that all sums realized from the sale of, or the leasing of, or from licenses to cut trees on the lands granted for the State Normal School by section 17 of the Enabling Act should be pledged as security for the payment of the principal and interest of the bonds issued under the act, and should be set apart as a separate fund for that purpose. It was made the duty of the state treasurer to keep such money in a fund to be designated as the State Normal School fund, and to pay therefrom the principal and interest of the bonds authorized by the act.

Section 12, Article XI, of the constitution of the State of Montana is as follows:

"The funds of the State University and all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the State against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions."

The bonds authorized by the foregoing law of the State of Montana were duly offered for sale, and purchased by the state board of land commissioners themselves as an investment of the common school fund of the State.

Charles S. Haire performed valuable services as an architect in the erection of an addition to the State Normal School, obtained vouchers approved and allowed in the manner prescribed in section 7 of the state law, and presented the vouchers to the state treasurer, who declined to pay them, whereupon the State of Montana, on his relation, brought a petition in

the Supreme Court of the State of Montana against the state treasurer, praying an alternative writ of mandamus, directing the respondent to pay his claim out of the fund created by the sale of bonds aforesaid, or to show cause for the refusal. The alternative writ issued, and to it the respondent interposed a demurrer and a motion to quash. The only reason alleged by the respondent in support of his pleadings, material here, was that the act of the legislature was in violation of the constitution of Montana. The case was heard by all the judges of the Supreme Court of the State, as an original case, and it was adjudged that the alternative writ of mandamus be quashed and the proceedings dismissed, for the reasons that the act authorizing the issue of the bonds, secured by pledge of the proceeds of the lands, was a violation of section 12, article XI, of the state constitution, and that this section of the constitution was not in conflict with section 17 of the Enabling Act. Haire then petitioned the court for a rehearing, alleging the following reasons:

1. Because the opinion is inconsistent and contradictory;

2. Because the court does not give any force or effect to the requirements of section 17 of the Enabling Act, that the lands granted for a State Normal School shall be *appropriated* for the purpose for which the grant is made, and in other respects misconstrue section 17;

3. Because the court misconstrued section 12, article XI, of the constitution of Montana.

In the further development and specification, in the petition for rehearing of the second reason, it appears, in substance, that among the grounds relied upon to support it were the claims that section 17 of the Enabling Act had directed that the legislature and not the State should dispose of the granted lands; that the lands or their proceeds were appropriated by Congress to the establishment as well as the maintenance of the normal school; and that in acting in pursuance of the authority conferred by Congress the legislature was not restricted by the constitution of the State, which in that respect was subordinate

to the authority of a law of the United States. The Supreme Court of the State took the petition for rehearing under advisement, modified slightly, but not essentially, its former opinion, which had passed adversely on the claims of the petitioner set forth in the petition for rehearing, denied the rehearing and entered final judgment for the respondent. Whereupon this writ of error was brought, assigning as errors:

"I. The said court erred in holding and deciding that the act of Congress, approved February 22, 1889, providing, among other things, for the admission of Montana into the Union, and known as the 'Enabling Act,' does not authorize the legislative assembly of the State of Montana to appropriate or apply the proceeds derived from the sale or leasing of the lands granted to said State by section 17 of said act for state normal schools, or from the sale of the timber thereon, to the establishment of such schools.

"II. The court erred in holding that section 12 of article XI of the constitution of the State, as construed by said court, is not repugnant to section 17 of said act of Congress, and is valid.

"III. The court erred in holding and deciding that section 12 of article XI of the constitution of the State of Montana, as construed by said court, does not impair the obligation of the contract resulting from the acceptance of the grant of lands made to the State of Montana by section 17 of said act of Congress.

"IV. The court erred in holding and deciding that the proceeds derived from the sale of said lands and the timber thereon constitute a permanent fund, no part of which can be used to establish a State Normal School, or for any other purpose, except that of investment.

"V. The court erred in holding and deciding that the interest received from the investment of the proceeds of the sale of said lands and the timber thereon, together with the rents derived from leasing said lands, can be used only for the purpose of maintaining and perpetuating a State Normal School.

"VI. The court erred in holding and deciding that the act of the legislative assembly of the State of Montana, entitled 'An act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the State Normal School College,' approved February 2, 1905, is invalid, as being in conflict with section 12 of Article XI of the constitution of the State of Montana.

"VII. The court erred in denying the application of plaintiff in error for a writ of mandate."

Mr. M. S. Gunn for plaintiff in error:

The Enabling Act authorizes the legislative assembly of the State of Montana to appropriate the proceeds derived from the sale and leasing of the lands granted to said State, by § 17 of said act, for state normal schools, and from the sale of the timber thereon to the establishment of such schools.

If, as plaintiff in error contends, § 17 of the Enabling Act authorizes the legislative assembly of the State to appropriate the proceeds derived from the said lands to the establishment of state normal schools, then § 17 controls, notwithstanding the provisions of § 12, article XI of the state constitution as construed by the Supreme Court of the State. If a provision of a constitution or a statute of a State is inconsistent with the Constitution of the United States or an act of Congress, it is not law. Art. VI, Const. of the United States. Congress is given power to dispose of the public lands and to make all needful rules and regulations respecting them. Art. IV, § 3, Const. of the United States. Pursuant to this authority the grants in the Enabling Act were made. These grants are laws, and if § 12 of article XI of the constitution of Montana is inconsistent therewith, it must yield to the act of Congress making said grants, which is the supreme law of the land.

The acceptance of the grant contained in § 17 of the Enabling Act created a contract, and § 12 of article XI of the Montana constitution, as construed by the Supreme Court of the State, impairs the obligation of such contract. *McGehee* v. *Mathis*,

4 Wall. 143; *Missouri &c. Ry. Co.* v. *Railway Co.*, 97 U. S. 491; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Gunn* v. *Barry*, 15 Wall. 10.

Mr. Albert J. Galen, with whom *Mr. W. H. Poorman* and *Mr. E. M. Hall* were on the brief, for defendant in error.

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

The objection is made that no Federal question is presented by the record. It must, therefore, be determined whether the controversy turned in the state court upon any Federal question, and if so, whether it was raised and decided in that court in the manner required to give this court jurisdiction to reexamine the decision upon it. The jurisdiction to do this depends upon whether the case falls within that part of section 709 of the Revised Statutes, by which this court is given the authority upon writ of error to reëxamine the final judgment or decree of the highest court of a State, "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority." Our jurisdiction in this case does not exist, unless a right claimed under a law of the United States, or an authority exercised under the United States, was specially set up in and denied by the Supreme Court of Montana. A brief discussion of the facts will determine whether these conditions of jurisdiction are present. The United States granted to the State of Montana one hundred thousand acres of the public lands for a normal school, to be held, appropriated and disposed of for such purpose, in such manner as the legislature should provide. The legislature, by a law enacted in due form, did provide that bonds should be issued, secured by the

proceeds of the sale, or leasing of the lands; that the proceeds of the bonds should be used for the erection of an addition to a normal school building and paid out for that purpose on approved vouchers. In effect, though by a circuitous method, this was a devotion of the proceeds of the sale of the land to the erection of an addition to the building. Haire presented to the state treasurer, the custodian and disbursing officer of the fund, approved vouchers for his claim for services in the erection, and payment of them was refused. The State, on relation of Haire, by proceedings which were deemed appropriate in form, sought to enforce against the state treasurer the payment of the vouchers, claiming, as appears from the opinion of the state court:

First. That the legislature had authority, under a statute of the United States, namely, section 17 of the Enabling Act to deal with the lands as it did by the bond act;

Second. That the bond act was not in violation of the state constitution; and,

Third. That if it were in violation of that constitution, the law enacted in pursuance of an authority granted by the United States was valid and effective notwithstanding. All three of these claims were denied by the state court. The first and third are clearly claims of a "right under an authority exercised under the United States," and, therefore, raised a Federal question. *Maguire* v. *Tyler*, 1 Black, 195. But it is not enough that the claim of a Federal right arose upon the facts. It must also appear affirmatively that the right was "specially set up." No reference was made to any Federal right in the petition for the writ of mandamus, the demurrer, or the motion to quash, and the petition for a rehearing, where the Federal question was first brought forward by the plaintiff in error, so far as the record discloses, was denied by the court. It is not enough that the Federal question was first presented by a petition for a rehearing, unless that question was thereupon considered, and passed on adversely by the court. *Corkran Oil Company* v. *Arnaudet*, 199 U. S. 182.

But an examination of the opinion of the Supreme Court of the State shows clearly that that court decided two questions: first, that the bond act was in violation of section 12 of article XI of the state constitution, which in substance provided that all funds of the state institutions of learning should be invested and only the interest upon them used for the support of those institutions; and, second, a question stated in the opinion as follows: "But on behalf of the relator it is contended that by the terms of section 17 of the Enabling Act the lands granted to the State for normal school purposes are to be held, appropriated and disposed of exclusively for normal school purposes, in such manner as the legislature of Montana may provide, and that this act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of article XI of the constitution contravenes the provisions of section 17 of the Enabling Act, section 12 is invalid and of no force or effect," which was decided adversely to the contentions stated. The decision of both questions, as the court determined them, was essential to the judgment rendered, and the decision of the second was a distinct denial of the Federal right claimed by the plaintiff in error. Where it clearly and unmistakably appears from the opinion of the state court under review that a Federal question was assumed by the highest court of the State to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered, it is sufficient to give this court authority to reëxamine that question on writ of error. *San José Land & Water Company* v. *San José Ranch Company*, 189 U. S. 177. Applying this rule to the case, there is jurisdiction to reëxamine the claim of the plaintiff in error on its merits.

In support of it the plaintiff in error argues that the grant of all the land by the Enabling Act was by an ordinance accepted by the State "upon the terms and conditions therein provided;" that the legislature of the State was by the last

clause of section 17 appointed as agent of the United States, with full power to dispose of the lands in any manner which it deemed fitting, provided only that the lands or their proceeds should be devoted to normal school purposes; and that, therefore, in the execution of this agency the legislature was not and could not be restrained by the provisions of the state constitution. It is vitally necessary to the conclusion reached by these arguments that the Enabling Act should be interpreted as constituting the legislature, as a body of individuals and not as a parliamentary body, the agent of the United States. But it is not susceptible of such an interpretation. It granted the lands to the State of Montana, and the title to them, when selected, vested in the grantee. In the same act the people of the Territory, about to become a State, were authorized to choose delegates to a convention charged with the duty of forming a constitution and state government. It was contemplated by Congress that the convention would create the legislature, determine its place in the state government, its relations to the other governmental agencies, its methods of procedure, and, in accordance with the universal practice of the States, limit its powers. It is not to be supposed that Congress intended that the authority conferred by section 17 of the Enabling Act upon the legislature should be exercised by the mere ascertainment of its will, perhaps when not in stated session, or by a majority of the votes of the two houses, sitting together, or without the assent of the executive, or independently of the methods and limitations upon its powers prescribed by its creator. On the contrary, the natural inference is that Congress, in designating the legislature as the agency to deal with the lands, intended such a legislature as would be established by the constitution of the State. It was to a legislature whose powers were certain to be limited by the organic law, to a legislature as a parliamentary body, acting within its lawful powers, and by parliamentary methods, and not to the collection of individuals, who for the time being might happen to be members

of that body that the authority over these lands was given by the Enabling Act. It follows, therefore, that in executing the authority entrusted to it by Congress the legislature must act in subordination to the state constitution, and we think that in so holding the Supreme Court of the State committed no error.

It is further claimed by the plaintiff in error that the Supreme Court of the State erred in holding that the law under which bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the constitution of the State. Upon this question the decision of that court is conclusive, and plainly we have no power to review it.

It is further urged that the construction given by the state court to its constitution impaired the obligation of a contract, resulting from the acceptance of the granted lands by the State of Montana, and that this impairment was in violation of the Constitution of the United States. Nothing more need be said of that claim than that it appears for the first time in the petition for a writ of error from this court, and the accompanying assignment of errors. This is not sufficient to give this court jurisdiction of any Federal question (*Corkran* v. *Arnaudet*, *ub. sup.*), even though another Federal question has been properly raised and brought here by the same writ of error. *Dewey* v. *Des Moines*, 173 U. S. 193.

Other questions were argued, but the view we have taken of the case renders it unnecessary to consider them.

The judgment of the Supreme Court of Montana is therefore

Affirmed.

WALKER *v.* McLOUD.

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

No. 140. Argued January 8, 1907.—Decided February 4, 1907.

The purchaser at a sale of property forfeited and sold under a statute can only enforce his demand for the property against parties actually in possession under a *bona fide* claim of right by showing that the sale was in strict compliance with the terms of the statute; and a sale on credit is not such a compliance if the statute provides for a sale for cash.

Even though a statute providing for forfeiture and sale of buildings erected on National lands of the Choctaw Nation may be valid, the title to the buildings is not forfeited by the mere act of building but the forfeiture must be enforced by valid action; and to deny to those erecting the buildings an opportunity to be heard would deprive them of their property without due process of law.

The person insisting on the forfeiture of property by another must show some legal right to insist on it; one who has violated an ordinance does not become an outcast thereby and lose his right to defend his title to the property claimed to have been forfeited.

The illegal sale by a sheriff of the Choctaw Nation is not ratified by instructions from the chief of the Nation to employ attorneys to sustain his act, or by the subsequent statutory appropriation by the General Council of the Nation for the employment of counsel to defend all suits against the Nation involving confiscation of buildings improperly erected on national lands.

138 Fed. Rep. 394, affirmed.

THE appellant, who was plaintiff below, appeals from the judgment of the Circuit Court of Appeals (138 Fed. Rep. 394), affirming a decree of the United States Court for the Central District of Indian Territory, dismissing the appellant's bill on the merits. 82 S. W. Rep. 908.

The appellant describes this action "as in the nature of ejectment on the equity docket, instituted for the purpose of securing possession of certain buildings and the right to the occupancy of the land on which they were erected, and to quiet plaintiff in his title and possession of the same and to

remove the cloud from the title." The appellant is the executor of the will of W. H. Ansley, who was the purchaser of the buildings, hereinafter referred to, at the sheriff's sale.

The facts necessary to state in considering the question decided are as follows: The defendant McLoud is a trustee under a deed of trust, which need not now be more particularly stated, and defendant Gowen is the receiver of the Choctaw Coal and Railway Company, which was a corporation created under the laws of the State of Minnesota. By the second section of the act of Congress of February 18, 1888, 25 Stat. 35, it was granted the right to take and use for all purposes of a railway, but for no other purposes, a right of way one hundred feet in width through the Indian Territory for its main line and branch. The tenth section of the act provided that the company should accept this right of way upon the express condition that it would neither aid, advise nor assist in any effort looking towards the changing or extinguishing of the present tenure of the Indians in their land, and would not attempt to secure from the Indian nations any further grant of land or its occupancy than was provided in the act; and that any violation of the condition mentioned should operate as a forfeiture of all the rights and privileges of the company under the act.

The Choctaw Nation on October 30, 1888, passed an act, the first section of which reads as follows:

"All non-citizens not in the employ of a citizen of the Choctaw Nation and not authorized to live in the Choctaw Nation under the provisions of existing treaty stipulations, who have made or bought improvements in said nation, are hereby notified that they are allowed to sell their so-called improvements to citizens, and if such non-citizens fail to comply with this section, then it shall be the duty of the sheriffs of the counties in which such improvements may be located to advertise the same for sale in thirty days; and sell the same at the appointed time to the highest Choctaw citizen bidder for cash; one-half of which shall be paid into their respective

treasuries, and the other half into the national treasury. Provided, however, that if any such non-citizen fail or refuse to deliver the possession of such an improvement he shall be reported by the sheriff of that county to the principal chief, and by said chief to the United States Indian agent, to take proper steps for the removal and prosecution of such offender under section 2118 of the Revised Statutes of the United States. Provided, further, that a notice of sale shall be posted by the sheriff in three public places in his county, which shall be legal notice to all persons against whom this law may operate."

While the above acts were in force and during the years from 1889 to 1893, both inclusive, it is charged that the company, through its officers and agents, built certain buildings at the town of South McAlester, I. T., outside and beyond its right of way, illegally and in violation of such acts, and were using the same in behalf and in the interest of the company.

In 1895 William Ansley, who was a citizen of the Choctaw Nation, and a deputy sheriff of the county where the buildings were erected, wrote to the governor of the Choctaw Nation and subsequently made a report in regard to the buildings as being erected by the company outside of its right of way, and that they were controlled by the company, and he was then directed by the principal chief of the Choctaw Nation to proceed according to law to sell and dispose of the buildings which had been built by the company outside its right of way. The sheriff proceeded to advertise the buildings for sale according to law, and in June, 1895, sold some of them to the appellant's intestate for $270; and the sheriff accepted his note as payment, conditioned that the same should be paid as soon as the purchaser was put into or otherwise obtained possession. This note has never been paid. The property purchased was, as alleged, of the value of about $60,000, and the purchaser was the son of the deputy sheriff who made the sale. The reason the money was not paid at the time of the bid, as stated by the bidder Ansley, was that the property was held by the company and he was informed that it would take litigation

to obtain possession. Immediately after the sale the sheriff who made it reported his action to the Chief of the Choctaw Nation.

The appellant upon the trial offered in evidence the deposition of the deputy sheriff, who made the sale, in relation to this matter, in which he swore that "the Chief ratified my action as to the sale and payments of said property, and instructed me to proceed at once and employ attorneys to assist me in getting possession of the property for the purchasers, and I at once employed attorneys to assist the plaintiff, W. H. Ansley, in obtaining possession of the property sold by me as sheriff. Mosely & Smith, of Denison, Texas, a firm of lawyers, and Cole & Redwine, attorneys at South McAlester, were employed by the Chief of the Choctaw Nation to assist the plaintiff in obtaining possession of said property. In 1895 the Choctaw Council passed a special act, appropriating $1,500 to employ attorneys to represent the Choctaw Nation and to assist the plaintiff in obtaining possession of the property aforesaid. In the December following contracts employing the aforesaid lawyers were signed by Jeff Gardner, Chief of the Choctaw Nation, and all my acts as deputy sheriff aforesaid as to the sale and payments of the purchase price of the aforesaid property were accepted and ratified by the Choctaw Nation."

All that portion of the deposition above quoted was objected to on the part of the defendant, and the objection was sustained, and that portion was stricken out under the exception of appellant.

The appellant also put in evidence the act of the General Council of the Choctaw Nation, entitled "An act authorizing the principal chief to employ counsel," approved October 30, 1895, the first section of which reads as follows:

"SECTION 1. Be it enacted by the General Council of the Choctaw Nation assembled: That the sum of two thousand dollars ($2,000.00) is hereby appropriated out of any money in the National Treasury not otherwise appropriated, and

said sum to be placed to the credit of the principal chief, and to be by him used for and in behalf of the Choctaw Nation, in the employing of able and competent counsel to defend the interest of this nation in all suits now pending or that may hereafter come before the United States courts in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of property of non-citizens who are now occupying lands or buildings, or who may hereafter occupy, not in conformity to the laws of the Choctaw Nation."

Mr. W. N. Redwine, with whom *Mr. Chester Howe*, *Mr. George R. Walker*, *Mr. Preslie B. Cole* and *Mr. J. O. Poole* were on the brief, for appellant:

The sole ground on which the Circuit Court of Appeals decided this case was one which had not been passed upon in either of the courts below, viz: That the act of the Choctaw legislature, under which the sale of the property in question was made, by its terms required that said sale be for cash. That this provision not having been strictly complied with, the sale was therefore void and of no effect.

If this non-compliance with the statute was the result of the sheriff, in his executive capacity, acting on his own initiative or through ignorance or carelessness, as an examination of every case cited in support of this theory will show to have been the case, there might be some weight to this contention. But where the variance from the strict letter of the law is by agreement of the parties and of the only parties having an interest or a right to be heard, a very different question is presented. As was said in an earlier decision of this court, in a case involving the legality of the proceedings of local officers to pass the title to land and therefore similar to the case at bar, "Where the act done is contrary to the written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and

according to some order known to the king and his officers, though not to his subjects." *Strother* v. *Lucas*, 12 Pet. 438.

And in various decisions in this country this precise question has been considered, and it was held that though the statute required the sheriff to sell for cash, yet by agreement of the parties this might be altered and time allowed. 25 Am. & Eng. Ency. of Law, 2d ed., 768; *Chase* v. *Monroe*, 30 N. H. 427; *Sauer* v. *Steinbauer*, 14 Wisconsin, 70.

That the Choctaw Nation did not agree will not be contended, for it was a party to the very transaction. But it may be insisted that the Choctaw Coal & Railway Co. must be a party to such an agreement to bring the case within the rule above set forth. That would be true were it an execution debtor in sheriff's sale or owner of the equity in foreclosure proceedings. In such cases it would possess an interest which must be conserved. But such is not the case at bar. No interest in the property remained to the appellee company. It was from the beginning but an intruder, its only right in the Indian country being by virtue of the act of Congress granting it a right of way, the very terms of which provided that any act on its part "looking toward the change or extinguishment of the present tenure of the Indians in their lands, or any attempt to secure any further grant of land or its occupancy should operate as a forfeiture of all the rights and privileges of said railroad company under this act." Not only under the foregoing provision did the railway company forfeit its rights in the operation of its road in the Territory, but again and more specifically when, having been duly notified to dispose of its holdings in accordance with the act of the Choctaw legislature, approved October 30, 1888, it failed to comply with such requirements, did it lose and absolutely forfeit whatever rights and interest it may have had.

A defendant in ejectment who shows no title to the land in dispute cannot take advantage of technical imperfections in plaintiff's title. *McAllister's Lessee* v. *Williams*, 1 Tennessee, 334.

Mr. John W. McLoud and *Mr. Charles B. Stuart*, for appellees, submitted.

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

The Circuit Court of Appeals decided but one question in this case, and that one related to the validity of the sale of the property by the sheriff on credit instead of for cash. In our opinion that question was rightly decided by the court when it held such sale absolutely void, and it is unnecessary for us to refer to or decide any other.

The son of the deputy sheriff, who conducted the sale, bid off property worth $60,000 for $270, and gave his note for that amount, payable when possession was given him, or he, by some means, had otherwise obtained it. He has not yet obtained it, and the note has never been paid.

The Court of Appeals held the sale void, as in violation of the statute under which the sheriff assumed to sell. The proceedings of the sheriff were under the act of the Choctaw legislature, approved October 30, 1888, referred to in the foregoing statement. By that act it was provided that the sheriffs of the counties in which the improvements were located should advertise the improvements for sale for thirty days, and should "sell the same at the appointed time to the highest Choctaw citizen bidder for cash."

The sale was a clear violation of the provisions of the statute, under which alone there was authority to sell at all.

The appellant answers this objection by stating that the parties consented to the sale for credit instead of cash. We find no evidence of such consent, so far as the coal company was concerned or its receivers. The buildings were, as alleged by appellant, erected by the company or its receivers, although outside the right of way, and, therefore, as is claimed by appellant, they became forfeited to the Choctaw Nation. It is unnecessary to decide this question at present. But if the

property were to be taken away from the company or its receivers, on the ground of the alleged forfeiture, they certainly had the right to demand that it should be taken from them pursuant to law, and not in open violation thereof. When a party, whose only title to property depends upon its sale to him under a statute, demands possession of such property from one who is in possession under a *bona fide* claim of right, the party making such demand must show some right to it, and this obligation he does not meet, by showing that he purchased it under a sale, which was in plain violation of the very statute under which the sale took place. *Hockett* v. *Alston*, 110 Fed. Rep. 910. The coal company or the receivers, therefore, had great interest in this property, as owners, until, at least, their title was divested upon a valid sale. They never consented to any sale on credit.

The appellant asserts that the railroad or the receivers had forfeited the property by building outside the right of way, and hence they had no right to be heard as to the manner of sale, whether in violation of the statute or not. But, assuming the validity and applicability of the Indian statute, the title to the property did not become forfeited by the mere act of building. There must be at least some valid action looking towards the enforcement of the forfeiture. To assert that those who are in possession are intruders upon the land and have forfeited their property, and therefore are not entitled to be heard upon the question whether those who claim the property have complied with the law, is to say that one in possession and claiming to be the owner may be deprived of his property without due process of law. On the contrary, he is entitled to insist upon obedience to law by those who assume to take his property by reason of an alleged forfeiture. To insist upon a forfeiture the person who claims it must show some legal right to insist upon it. In case of a sovereign State or nation, its conclusion to insist upon a forfeiture for breach of a condition subsequent may be by legislation, *Atl. & Pac. R. R. Co.* v. *Mingus*, 165 U. S. 413, 431, and that legislation must be

followed in asserting and enforcing the forfeiture by those acting for the State. So the owners of this property, even if it be liable to forfeiture, may nevertheless insist upon obedience to the statute by those assuming to act under it. Their consent to its violation is most essential. They did not become outlaws by building outside of the right of way.

It is also urged on the part of the appellant that the act of the sheriff was ratified both by the principal chief and also by the Council of the Nation. The only proof of the ratification by the principal chief (even if he had power to ratify, which cannot be assumed) is given in the deposition of the appellant's intestate, referred to in the foregoing statement of facts. Therein the sheriff said that the chief ratified his action as to the sale and payments on the property, and instructed him to proceed at once to employ attorneys to assist him in getting possession of the property for the purchaser. The statement that the chief ratified his action was a mere conclusion of law. It gave no facts upon which such alleged ratification was based, and was clearly inadmissible as proof of ratification. The same witness had already testified that before the sale he was directed by the Chief of the Choctaw Nation "to proceed according to law to dispose of the buildings which had been built by the Choctaw Coal and Railway Company off of its right of way." It would hardly be supposed that he would at once ratify a violation of law in the conduct of the sale. But the proof of ratification by the principal chief is totally insufficient and is, as already said, a mere conclusion of law by the witness. And, as a separate and distinct reason, we find no proof of any power of the chief to ratify a violation of this act.

Nor is the alleged ratification by the General Council of the Choctaw Nation of any greater effect. This ratification consists in the passage by the General Council of the act approved October 30, 1895, and already referred to. It appropriates the sum of $2,000, to be used by the principal chief in the employment of counsel for the purpose of defending the interest of the Nation in all suits pending or that may thereafter come

before the United States courts, "in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of property of non-citizens who are now occupying lands or buildings or who may hereafter occupy, not in conformity with the laws of the Choctaw Nation."

Certainly there is nothing in that act which in any way ratifies or purports to ratify an illegal sale by a sheriff assuming to act under the law providing for sales by sheriffs of buildings erected on land outside the right of way of the railroad company. It appropriates money to defend the Nation in suits relative to the full and complete execution of the laws and nothing else; not a suspicion of any ratification of an illegal sale under those laws.

The record shows a gross violation of the act under which the sale was made, and an entire absence of any evidence showing a ratification of such act either by the principal chief, assuming he could ratify, or by the council of the Nation. The case is not one in which any court would strive to find a way to uphold such a proceeding.

Without going into the other questions which arise, it is sufficient to say that upon the ground above discussed the decree of the Circuit Court of Appeals is right.

Decree affirmed.

BACON v. WALKER.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 147. Argued January 10, 1907.—Decided February 4, 1907.

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public health, morals or safety; it is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the State.

Fixing in a police regulation, otherwise valid, the distance from habitations within which an occupation cannot be carried on is a legislative act with which the courts can only interfere in a case clearly of abuse of power.

A classification in grazing countries of sheep, as distinguished from other cattle, is not unreasonable and arbitrary in a regulation regarding the use of public lands within the meaning of the equal protection clause of the Fourteenth Amendment.

Sections 1210, 1211, Revised Statutes of Idaho, prohibiting the herding and grazing of sheep on, or within two miles of, land or processory claims of persons other than the owner of the sheep, having been construed by the highest court of that State as not affecting the right of the owner of sheep to graze them on his own lands but only on the public domain, is not unconstitutional as depriving the owner of sheep of his property without due process of law because he cannot pasture them on public domain, or as an arbitrary and unreasonable discrimination against the owners of sheep, as distinguished from other cattle, and is a proper and reasonable exercise of the police power of the State.

81 Pac. Rep. 155, affirmed.

THE facts are stated in the opinion.

Mr. S. M. Stockslager, with whom *Mr. W. E. Borah*, *Mr. Frank T. Wyman* and *Mr. John C. Rice* were on the briefs, for plaintiffs in error in this case and in No. 81 argued simultaneously herewith:[1]

It is the duty of the courts to prevent the exercise of arbitrary and unreasonable discriminations made under the color of the police power, though that power from its nature is not susceptible of any exact definition or limitation. It is well settled that the courts will interfere in proper cases. *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150; *Lawton* v. *Steele*, 152 U. S. 133.

The exercise of the police power must be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare, that is, to prevent the infliction of any public injury. Tiedman on State and Federal Control of Persons & Property, 505. The restraint must not be disproportionate to the danger. Freund on Police Power, 138, 482, 705.

[1] See p. 320, *post*.

With these limitations of the police power in view, it will be seen that the statute in question transcends the rightful exercise of that power. The legislature has discriminated against a long established and legitimate industry, and has assumed the right to arbitrarily give to the owner of a dwelling house on a possessory claim the right to recover damages for herding or grazing sheep upon the lands of the United States, in which he has no claim whatever.

As said in *Bedford* v. *Houtz*, 133 U. S. 320, there is an implied license, growing out of long-established custom to use the public lands of the United States for the grazing of domestic animals. See *Kelly* v. *Rhoades*, 188 U. S. 1.

When a calling is not dangerous, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation. Freund on Police Power, *supra*. Herding or grazing of sheep is not dangerous to the public, either directly or indirectly.

There is no reason for the arbitrary limit of two miles, and its imposition is therefore unjust and unlawful. *New York Sanitary Utilization Co.* v. *New York*, 61 N. Y. App. 106, cited in 8 Cyc., 1061.

There is no proper reason for the discrimination between the herding of sheep and the grazing or feeding of cattle, horses, hogs or poultry. This discrimination is not based on any difference which would make the sheep industry amenable to any restrictions, under the police power, not imposed upon the others named. McGehee on Due Process of Law, 306; *Yick Wo.* v. *Hopkins*, 118 U. S. 356; *Plessy* v. *Ferguson*, 163 U. S. 550.

There was no appearance or brief for defendant in error in this case or in No. 81.

Mr. Justice McKenna delivered the opinion of the court.

This action involves the validity, under the Constitution

of the United States, of the following sections of the Revised Statutes of the State of Idaho:

"SEC. 1210. It is not lawful for any person owning or having charge of the sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of said possessory claim.

"SEC. 1211. The owner or agent of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

Defendants in error under the provision of those sections brought this action, in the Justice's Court of Little Camas Precinct, Elmore County, State of Idaho, for the recovery of $100 damages alleged to have accrued to them by the violation by plaintiff in error of the statutes, and obtained judgment for that sum. The judgment was successively affirmed by the District Court for the county of Elmore and the Supreme Court of the State. 81 Pac. Rep. 155. The case was then brought here.

It was alleged in the complaint of defendants in error, who were plaintiffs in the trial court, that plaintiff in error caused his sheep, about three thousand in number, to be herded upon the public lands within two miles of the dwelling house of defendant in error. The answer set up that the complaint did "not state a cause of action other than the violation of sections 1210 and 1211 of the Revised Statutes of the State of Idaho," and that said sections were in violation of the Fourteenth Amendment of the Constitution of the United States. The specifications of the grounds of the unconstitutionality of those sections were in the courts below and are

in this court: (1) that plaintiff in error has an equal right to pasture with other citizens upon the public domain, and that by imposing damages on him for exercising that right he is deprived of his property without due process of law; (2) that a discrimination is arbitrarily and unlawfully made by the statutes between citizens engaged in sheep grazing on the public domain and citizens engaged in grazing other classes of stock.

These grounds do not entirely depend upon the same considerations. The first denies to the State any power to limit or regulate the right of pasture asserted to exist; the other concedes such power, and attacks it only as it discriminates against the grazers of sheep. We speak only of the right to pasture, because plaintiff in error does not show that he is the owner of the land upon which his sheep grazed, and what rights owners of land may have to attack the statute we put out of consideration. *Hatch* v. *Reardon*, *ante*, p. 152. But we may remark that the Supreme Court of Idaho said in *Sweet* v. *Ballentyne*, 8 Idaho, 431, 440: "These statutes [sections 1210, 1211, quoted above] were not intended to prevent owners from grazing sheep upon their own lands, although situated within two miles of the dwelling of another." Is it true, therefore, even if it be conceded that there is right or license to pasture upon the public domain, that the State may not limit or regulate the right or license? Defendants in error have an equal right with plaintiff in error, and the State has an interest in the accommodation of those rights. It may even have an interest above such accommodation. The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In *Clark* v. *Nash*, 198 U. S. 361, a use of property was declared to be public which, independent of the conditions existing in the State, might otherwise have been considered as private. So also in *Strickley* v. *Highland Boy Gold Mining Company*, 200 U. S. 527. In the first case there was a recognition of the power of the State to deal with and accommodate its laws to the

conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the State to work out from the conditions existing in a mining region the largest welfare of its inhabitants. And again, in *Offield* v. *The New York, New Haven & Hartford Railroad Company*, 203 U. S. 372, the principle of those cases was affirmed and applied to conditions entirely dissimilar, and it was declared that it was competent for a State to provide for the compulsory transfer of shares of stock in a corporation, the ownership of which stood in the way of the increase of means of transportation, and the public benefit which would result from that. Of pertinent significance is the case of *Ohio Oil Company* v. *Indiana*, 177 U. S. 190. There a statute of the State of Indiana was attacked, which regulated the sinking, maintenance, use and operation of natural gas and oil wells. The object of the statute was to prevent the waste of gas. The defendants in the action asserted against the statute the ownership of the soil and the familiar principle that such ownership carried with it the right to the minerals beneath and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances, oil and gas, with which the statute was concerned. It was pointed out that those substances, though situated beneath the surface, had no fixed *situs*, but had the power of self-transmission. No one owner, it was therefore said, could exercise his right to extract from the common reservoir in which the supply was held without, to an extent, diminishing the source of supply to which all the other owners of the surface had to exercise their rights. The waste of one owner, it was further said, caused by a reckless enjoyment of his right, operated upon the other surface owners. The statute was sustained as a constitutional exercise of the power of the State, on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners.

These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a State, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway Company* v. *Drainage Commissioners,* 200 U. S. 561, 592. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we cannot pronounce them insufficient on surmise or on the barren letter of the statute. We may refer to *Sifers* v. *Johnson,* 7 Idaho, 798, and *Sweet* v. *Ballentyne,* 8 Idaho, 431, for a statement of the practical problem which confronted the legislature and upon what considerations it was solved. We think, therefore, that the statutes of Idaho are not open to the objection that they take the property of plaintiff in error without due process of law, and pass to the consideration of the charge that they make an unconstitutional discrimination against the sheep industry.

Counsel extend to this contention the conception of the police power which we have just declared to be erroneous, and,

enumerating the classes discriminated in favor of as cattle, horses, hogs, and even poultry, puts to question whether in herding or grazing sheep "there is more danger to the public 'health, comfort, security, order or morality' than the classes of animals and fowls above enumerated." "What," counsel ask, "are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily, and because of its unwarrantable character, work an injury to the public? And, if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted entirely free from such danger, or do such exceptions tend to reduce the general danger?" Contemplating the law in the aspect expressed in these questions, counsel are unable to see in it anything but unreasonable and arbitrary discrimination. This view of the power of the State, however, is too narrow. That power is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited.

But the statutes have justification on the grounds which plaintiff in error urges as determinative, and on those grounds they were sustained by the Supreme Court of the State. They were deliberate enactments, made necessary by and addressed to the conditions which existed. They first (1875) had application only to three counties, while Idaho was a Territory. They were subsequently extended to two other counties and were made general in 1887. They were continued in force by the state constitution. *Sweet* v. *Ballentyne, supra.* The court said in the latter case:

"It is a matter of public history in this State that conflicts between sheep owners and cattle men and settlers were of frequent occurrence, resulting in violent breaches of the peace. It is also a matter of public history of the State that sheep are not only able to hold their own on the public ranges with other

livestock, but will in the end drive other stock off the range, and that the herding of sheep upon certain territory is an appropriation of it almost as fully as if it was actually inclosed by fences, and this is especially true with reference to cattle. The legislature did not deem it necessary to forbid the running at large of sheep altogether, recognizing the fact that there are in the State large areas of land uninhabited, where sheep can range without interfering with the health or subsistence of settlers or interrupting the public peace. The fact was also recognized by the legislature that, in order to make the settlement of our small isolated valleys possible, it was necessary to provide some protection to the settler against the innumerable bands of sheep grazing in this State."

And the court pointed out that it was not the purpose or effect of the statutes to make discrimination between sheep owners and owners of other kinds of stock, but to secure equality of enjoyment and use of the public domain to settlers and cattle owners with sheep owners. To defeat the beneficent objects of the statutes, it was said, by holding their provisions unconstitutional would make of the lands of the State "one immense sheep pasture." And further: "The owners of sheep do not permit them to roam at will, but they are under the immediate control of herders, who have shepherd dogs with them, and wherever they graze they take full possession of the range as effectually as if the lands were fenced. . . . It is a matter of common observation and experience that sheep eat the herbage closer to the ground than cattle or horses do, and, their hoofs being sharp, they devastate and kill the growing vegetation wherever they graze for any considerable time. In the language of one of the witnesses in this case: 'Just as soon as a band of sheep passes over everything disappears, the same as if fire passing over it.' It is a part of the public history of this State that the industry of raising cattle has been largely destroyed by the encroachments of innumerable bands of sheep. Cattle will not graze, and will not thrive, upon lands where sheep are grazed to any great extent."

These remarks require no addition. They exhibit the conditions which existed in the State, the cause and purpose of the statutes which are assailed, and vindicate them from the accusation of being an arbitrary and unreasonable discrimination against the sheep industry.

Judgment affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissent.

BOWN *v.* WALLING.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 81. Argued January 10, 1907.—Decided February 4, 1907.

Decided on authority of *Bacon* v. *Walker*, *ante*, p. 311.
9 Idaho, 740, affirmed.

THE facts are stated in the opinion.

Mr. S. M. Stockslager, with whom *Mr. W. E. Borah*, *Mr. Frank T. Wyman* and *Mr. John C. Rice* were on the brief, for plaintiff in error.[1]

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

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought in the Probate Court in and for Elmore County, State of Idaho, for the sum of two hundred dollars' damages sustained by defendant in error by the violation by plaintiffs in error of sections 1210, 1211 of the Revised Statutes of Idaho. The amended complaint alleged that the offense was committed by plaintiffs in error by wrongfully and negligently permitting and allowing their sheep to graze

[1] For abstract of argument see *ante*, p. 312.

within two miles of the dwelling house of defendant in error and upon the Government lands around his premises. The defense, set up by demurrer, was, as in *Bacon* v. *Walker*, *ante*, p. 311, that those sections were void under the due process and equality clauses of the Fourteenth Amendment of the Constitution of the United States. The trial court rendered judgment for the defendant in error, which was affirmed by the District Court for Elmore County and by the Supreme Court of the State. 9 Idaho, 740.

The case was argued with *Bacon* v. *Walker et al.*, and on the authority of that case the judgment is

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissent.

CITY OF CHICAGO *v.* MILLS.

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

No. 286. Submitted December 21, 1906.—Decided February 4, 1907.

Although the certificate of the Circuit Court may not state exactly how the jurisdictional question certified arose, this court can ascertain it from the record together with the opinion of the court below made a part thereof.

The jurisdiction of the Circuit Court must be determined with reference to the attitude of the case at the date of the filing of the bill.

When a citizen of one State has a cause of action against a citizen of another State which he may lawfully prosecute in a Federal court, his motive in preferring a Federal tribunal, in the absence of fraud and collusion, is immaterial.

If it does not appear that there was any collusion within the meaning of the ninety-fourth rule in equity for the purpose of conferring jurisdiction, not otherwise existing, on the Circuit Court of the United States, that court does not lose its jurisdiction of a suit brought by a non-resident stockholder, after request to and refusal by the corporation, to enjoin

the enforcement of an ordinance against the corporation, and of which the court would not have had jurisdiction had the corporation been complainant, because subsequent events make it to the interest of the corporation and its officers to make common cause with the complainant stockholder.

An admission by complainant that he expected the action to be brought in the United States court does not necessarily show collusion to confer jurisdiction.

In this case *held* on the facts that no collusion between the stockholder bringing the suit and the corporation refusing to bring it was shown that deprived the Circuit Court of jurisdiction thereover.

143 Fed. Rep. 430 affirmed.

THE facts are stated in the opinion.

Mr. James Hamilton Lewis, Mr. Henry M. Ashton and *Mr. David K. Tone* for appellant:

The undisputed evidence in this record shows that this suit was collusively brought by Mr. Mills at the instigation of and for the benefit of the People's Gas Light and Coke Company, for the purpose of conferring jurisdiction upon a Federal court in a case where such jurisdiction was otherwise wanting.

When it is sought to determine whether a suit is collusively brought for the purpose of conferring jurisdiction upon a Federal court, the question of motive becomes an important one.

Here there was every motive for instituting a collusive suit, for the conduct of the People's Company, and its officers and directors, prior to the filing of the bill of complaint by Mills, clearly demonstrated that an unsuccessful effort had already been made by them to confer upon a Federal court jurisdiction of the litigation in question.

The fact that in a case where the question of conferring jurisdiction upon a Federal court by getting up a collusive controversy is involved, the burden of proof is upon the complainant, is established by the well-considered case of *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U. S. 337.

There is no force in the contention that there was a real controversy between Mr. Mills and the directors of the People's Company when the bill in the cause was filed.

The undisputed evidence in this record shows that the corporate rights were being adequately protected by the officers of the People's Company at the time the bill of complaint was filed, and therefore a stockholder had no standing in the Federal court.

Independently of any question of collusion, the undisputed evidence in this record shows that the corporate rights of the stockholders were adequately protected by the injunction in force in the case of the *People's Gas Light and Coke Company* v. *The City of Chicago,* then pending in this court. No stockholder had any standing in court to interfere, so long as no irreparable injury was suffered or threatened, and certainly not while the board of directors were proceeding in good faith and in the exercise of their best judgment in protecting the corporate rights. That provision is established by all the authorities.

The general rule is that a majority of the stockholders of a corporation, through its board of directors, are invested with the sole power to institute suits in behalf of the corporation and to redress corporate grievances and to determine when and in what courts such suits shall be instituted, and an individual stockholder has no standing for any such purpose. *Hawes* v. *Oakland,* 104 U. S. 450–457; Morawetz on Corp., § 238.

To the foregoing rule should be added the qualification that where a corporation refuses to act and that refusal is arbitrary and wrongful and without just cause and a demand is made upon the corporation to act and it still refuses, a stockholder may institute a suit in his own name in behalf of himself and other stockholders to protect corporate rights. The mere allegation that a demand has been made upon the corporation and it refuses to act is insufficient to authorize a stockholder to begin suit. It must further appear that the refusal was *wrongful,* constituting a *breach of trust,* for although the corporate officers may have acted erroneously in refusing to bring a suit, that is not sufficient to authorize the stockholders to

proceed, so long as it appears that the corporate officers were acting in good faith, with reasonable diligence, and in the exercise of their sound discretion. *Memphis City* v. *Dean*, 8 Wall. 64, 73; *Dodge* v. *Woolsey*, 18 How. 345; *Wallace* v. *Lincoln Savings Bank*, 89 Tennessee, 633; *Samuel* v. *Holladay*, 1 Woolw., U. S. C. Ct. 400; Morawetz on Corp., § 244; *Hawes* v. *Oakland*, 104 U. S. 457, 460, 462.

Mr. William D. Guthrie, *Mr. John J. Herrick* and *Mr. I. K. Boyesen* for appellee:

The decree in the prior suit dismissing the bill for want of jurisdiction, was not a bar to a new suit in a court of the United States by the company itself, nor in any event for divisional relief under the contract, if the company elected to demand it. The company itself, therefore, could have filed in a court of the United States substantially the same bill of complaint that Mills originally filed, praying divisional relief under its alleged contract right. It follows that diversity of citizenship was not essential or controlling as the basis of the jurisdiction of the Circuit Court, and that so far as jurisdiction as a Federal court was concerned, there was really no occasion or motive for collusion. There can be no collusion without reason or motive or to subserve some purpose. *Simpson* v. *Union Stock Yards Co.*, 110 Fed. Rep. 799, 801; *Illinois Central R. R.* v. *Adams*, 180 U. S. 28, 33, 37; *Ball* v. *Rutland R. Co.*, 93 Fed. Rep. 513, 515; *Kimball* v. *Cedar Rapids*, 99 Fed. Rep. 130.

The question of collusion is, of course, to be determined by the conditions existing when Mr. Mills requested the board of directors and the stockholders of the People's Company to institute a new suit, and when he filed his bill, June 8, 1903, and not by subsequent developments. *Mollan* v. *Torrance*, 9 Wheat. 537, 539. See also *Kirby* v. *American Soda Fountain Co.*, 194 U. S. 141, 145; *Hardenbergh* v. *Ray*, 151 U. S. 112, 118; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, 144; *Mexican Central Ry.* v. *Pinkney*, 149 U. S. 194, 200.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon a question of jurisdiction of the Circuit Court of the United States for the Northern District of Illinois to entertain the suit. 26 Stat. 826. The case originated in a bill filed in that court by the complainant, Darius O. Mills, a citizen of California, as a stockholder in the People's Gas, Light and Coke Company, a corporation of the State of Illinois, to restrain the city of Chicago from enforcing a certain ordinance limiting the right of the gas company as to charges for furnishing gas.

Complainant averred a demand of the directors that an action be brought by the company to restrain the city from enforcing the ordinance, and alleged compliance with the ninety-fourth equity rule, and the refusal of the company to bring the action.

The original bill alleged that the ordinance impaired the obligation of the contract contained in the charter of the gas company, in contravention of the contract clause of the Federal Constitution; and, also, that the ordinance was illegal in that the city had no power to pass it.

The ordinance thus complained of was adopted by the city of Chicago, October 15, 1900, and provided that charges for gas in excess of 75 cents per 1,000 cubic feet should be illegal, and fixed a penalty of not less than $25 or more than $200 for each and every violation of the ordinance.

The objection made to the jurisdiction of the Circuit Court, and which is said to be established in the record and duly presented here, is based upon the allegation that the suit by Mills was brought in the Federal court by collusion between him and the gas company, and for the fraudulent purpose of invoking the jurisdiction of the Federal court concerning a controversy which was really between the company and the city of Chicago, parties lacking the requisite diversity of citizenship to maintain the suit in the Federal courts.

The record discloses that the appeal was allowed to this

court solely upon the question of the jurisdiction of the court as a Circuit Court of the United States. A certificate entered the same term at which the appeal was allowed sets forth that the city objected to the jurisdiction of the court as a Federal court, and that the appeal was prayed solely upon the question of jurisdiction of the court as a Circuit Court of the United States, and that the appeal was granted solely upon the question of jurisdiction.

Portions of the proceedings, including the testimony on the question of jurisdiction, duly signed and sealed and made part of the record, are certified to this court by certificate in the form of a bill of exceptions. *In re Lehigh Mining Manufacturing Co.*, 156 U. S. 322; *Nichols Lumber Co.* v. *Franson*, decided at this term. 203 U. S. 278.

A preliminary objection is made that the certificate does not show whether the jurisdictional question arose from insufficient amount, want of diversity of citizenship, collusion or otherwise. But we are of the opinion that an examination of the record, aided by the opinion of the court contained therein, and made part thereof, distinctly shows that the question of jurisdiction passed upon concerned the collusive character of the action of the complainant.

We think this brings the case within the ruling in *Smith* v. *McKay*, 161 U. S. 355, in which the court, looking into the character of the appeal, the certificate of the court and the certified copy of the opinion made part of the record, sustained the court's jurisdiction, citing, with approval, *Shields* v. *Coleman*, 157 U. S. 168, and *In re Lehigh Mining Manufacturing Company*, 156 U. S. 322.

The Circuit Court, after an examination of the testimony, reached the conclusion that the action was not collusive, and upon final decree granted a perpetual injunction against the enforcement of the ordinance in question. On this appeal we are only concerned with the correctness of the conclusion reached in the Circuit Court as to the question of jurisdiction. This question is before us upon this record. *Wetmore* v. *Rymer*,

169 U. S. 115. In order to determine it it is necessary to consider briefly as may be the facts shown in this record.

The ordinance in question was passed October 15, 1900. The People's Gas, Light and Coke Company, on the twenty-first of December, 1900, brought a suit in the Circuit Court of the United States for the Northern District of Illinois, seeking to enjoin enforcement of the ordinance upon the ground that it impaired the obligation of its charter contract, denied equal protection of the laws, and amounted to a confiscation of its property; and upon the further ground that no power had been conferred upon the city of Chicago by the legislature of Illinois to thus regulate the price of gas.

It is unnecessary to recite all of the proceedings of that suit in detail. The history of the litigation will be found in the opinion of the Chief Justice when the case came here from the Circuit Court on appeal, 194 U. S. 1.

To the bill as originally filed in that case the city of Chicago filed a general demurrer, and the Circuit Court, holding that no constitutional right of the company was impaired, decided that its jurisdiction would not extend to the question of the power of the council to pass the ordinance in question, and that such a question was one primarily for the state courts; thereupon the company filed an amended bill, limiting its rights to the alleged impairment of its contract. The city of Chicago also demurred to the amended bill, and upon the hearing of the demurrer it was sustained and the bill dismissed for want of jurisdiction, and a final decree was entered to that effect. An appeal was thereupon taken to this court.

When the litigation had progressed thus far, complainant Mills, who was the largest stockholder in the company, consulted counsel in New York with a view to protecting his interests. Counsel having examined the record prepared a letter dated December 16, 1902, addressed to the directors of the gas company and signed by complainant, in which he set forth that the proceedings in the suit concerning the ordinance reducing the price of gas to 75 cents per 1,000 cubic feet had been sub-

mitted to his counsel, together with a copy of the opinion of the Circuit Court, and that an appeal was then pending in the Supreme Court of the United States; the advice of his counsel that that suit might not adequately protect his interests, as the bill was dismissed for want of jurisdiction and that the Supreme Court might limit the decision of the case to the question of jurisdiction. And, further, that it did not involve the question of the power of the council of the city of Chicago to reduce the rates of the company. He then requested the institution of a suit against the city of Chicago at the earliest practicable moment for the purpose of preventing the enforcement of the ordinance, upon the ground that it impaired its charter contract and that the council had no power to pass it. The letter further expounded the necessity of resorting to a court of equity for protection of the company's rights.

The record discloses that the company's counsel came to New York, where a conference was had with the counsel retained by Mills, and a difference of opinion was developed as to the propriety and advisability of a new suit which would cover the points in difference. The result of this conference was that the company's counsel notified counsel for Mills that he should advise the board to decline the request to bring a new suit.

On January 29, 1903, the company wrote to Mills, declining to begin the suit, and sent a copy of the resolution reciting the belief of the board that for the company to institute further legal proceedings to test the validity of the ordinance of October 15, 1900, would excite public prejudice against the company, which at that time it was deemed of great importance to avoid, and afterwards, at the annual meeting of the stockholders of the company, a resolution directing the beginning of the suit was defeated.

The question of jurisdiction must be decided, having reference to the attitude of the case at the date the bill was filed, on June 8, 1903. *Kirby* v. *American Soda Fountain Co.*, 194

U. S. 141, 145, 146. As to the refusal of the company to institute a new suit, there is nothing in the record to show any concert of action between complainant and the company. At that time his counsel in New York was not concerned in the litigation in Chicago or in the appeal to this court. As the case brought by the gas company then stood, it had been dismissed for want of jurisdiction, and an appeal taken from that decree of dismissal. The case did not necessarily involve the question of contract rights, and did not embrace the question of power of the city.

In this attitude of affairs counsel might well advise that the protection of the stockholders' interest required the beginning of a suit which should embrace the vital questions in issue. There was a sharp difference of views between the representatives of Mills and those of the company's solicitors as to the advisability of bringing an action.

For the prudential reasons outlined in their letter of January 29, 1903, above referred to, the directors of the company declined to bring the suit. After the judgment of the Circuit Court was affirmed in this court, the question of the power of the city to pass the ordinance was left undecided, and was subsequently litigated to a final decree in favor of the contention made in the suit begun by Mills.

It is true that upon the hearing of the demurrer in this action the Circuit Court ordered a decree correcting its former decree in the gas company suit so as to show that the court decided the case upon the merits as to the allegations as to contract, and dismissed the bill without prejudice to the bringing of any other suit to test the power of the city.

The corrected decree was brought before this court in the then pending appeal of the gas company. 194 U. S. 1.

After the decision in this court, affirming the decree in the gas company suit, an amended bill was filed by complainant Mills, based solely upon the alleged want of power of the city council of Chicago to pass the ordinance in controversy, which resulted in the decree to which we have referred, enjoining

the enforcement of the ordinance, for the reason that the city council of Chicago had no power to pass the same.

As we have said, we think the record establishes that complainant and his counsel honestly believed that such new suit was necessary to protect the stockholders' interests. There is an entire lack of testimony to show any collusive action at the time of the beginning of the suit.

It is true that subsequent events made it to the interest of the company to make common cause with Mills against the enforcement of the ordinance in question, but when he began his suit no proceedings were pending which involved the important question of the power of the city upon which the complainant ultimately prevailed.

It is true that an officer of the company, who was the next largest stockholder to Mills, contributed to the expenses in this suit; but he testified, and there is nothing in the record to contradict him, that he paid this money from his own resources without actual repayment or any understanding with the company that he should be reimbursed.

It is true that Mills' counsel was retained in the suit in this court after the beginning of his suit in Chicago.

It is also true that, in answering to a question put in the language of the ninety-fourth rule, as to whether the suit was brought to confer upon the Circuit Court of the United States jurisdiction in a case of which it would not otherwise have cognizance, complainant answered that he so understood it, but subsequently said that he did not understand the question. This admission, intentionally made, would not necessarily show collusion. But we think that it was not the purpose of the complainant to say more than that he expected his action to be brought in the United States court. When a citizen of one State has a cause of action against a citizen of another State which he may prosecute lawfully in a Federal court, and when the suit is free from fraud or collusion, his motive in preferring a Federal tribunal is immaterial. *Blair* v. *Chicago*, 201 U. S. 400, 408, and previous cases in this court therein cited.

Upon the whole record we agree with the Circuit Court that the testimony does not disclose that the jurisdiction of the Federal court was collusively and fraudulently invoked, and the judgment below will be

Affirmed.

Dissenting: MR. CHIEF JUSTICE FULLER and MR. JUSTICE HARLAN.

KANSAS *v.* UNITED STATES.

No. 11, Original. Submitted November 12, 1906.—Decided February 25, 1907.

Where the name of a State is used simply for the prosecution of a private claim the original jurisdiction of this court cannot be maintained.

Although a State may be sued by the United States without its consent, public policy forbids that the United States may without its consent be sued by a State.

THE facts are stated in the opinion.

Mr. Chiles C. Coleman, Attorney General of the State of Kansas, *Mr. Joseph H. Choate, Mr. James Hagerman, Mr. Adrian H. Joline, Mr. A. B. Browne, Mr. John Madden* and *Mr. Joseph M. Bryson* for complainant:

It is a sufficient answer to the motion of defendants to dismiss that the State of Kansas claims by its bill to be the owner of the legal title and to have the right to maintain the suit against all the defendants, including the United States, for the reasons set forth in the bill. This claim cannot be met by a motion to dismiss, but must be met by either plea, answer or demurrer, for in that way only can the State have an opportunity of a full hearing and consideration upon the merits, according to the principles of the rules of equity, which re-

quire that the plea, demurrer or answer be set down for hearing and argument. *Sparrow* v. *Strong*, 3 Wall. 105; *Semple* v. *Hagar*, 4 Wall. 433; *Blythe* v. *Hinckley*, 180 U. S. 337; *Morning Star* v. *Cunningham*, 110 Indiana, 328; *Ruddock* v. *Gordon*, Quincy (Mass.), 38.

The legal title to the lands granted is by the terms of the granting acts vested in the State of Kansas for the use and benefit of the Missouri, Kansas and Texas Railway Company by relation from the date of the grant, and this legal title of the State of Kansas to the granted lands in the Indian Territory has never been divested and is now vested in the State of Kansas.

The grants were *in præsenti* to the State of Kansas for the use and benefit of the railway company, effective from the dates of the grants, and attached, when the road was constructed, to the particular lands in controversy, and by the doctrine of relation the legal title of the State dates from the grants.

The United States and each one of the separate States may sustain the character of trustee, and have the legal capacities to take and execute trusts for every purpose. Perry on Trusts, § 41; *McDonald* v. *Murdock*, 15 How. 400; *United States* v. *Michigan*, 190 U. S. 379; *Van Wyck* v. *Knevals*, 106 U. S. 360 *et seq.*

In the case at bar it is the duty of the State of Kansas, as trustee for the railway company, to defend, uphold and protect the title which was granted to it and to see that the lands go to the beneficiary of the trust. The legal title did not pass to the railroad company upon the construction of the road. *Van Wyck* v. *Knevals*, 106 U. S. 360.

No patent has issued to the railway company, and hence the legal title conveyed by the granting act to the State still remains in the State. The State of Kansas is hence the indispensable party complainant and can pray the demanded relief.

Van Wyck v. *Knevals*, *supra*, is direct authority that the

title to the granted lands is vested in the State of Kansas, for the land grant there construed is in practically the same words as §§ 1, 3 of the land grant of 1866 to the State of Kansas for the use of the railway company.

There is no Federal statute of uses, nor is there any Federal common law. The lands in question are not situated in Kansas or any other State. Under the decisions of the courts, both English and American, the statute of uses was never held to execute the trust or pass the legal title to the *cestui que trust* where the trust created was such that it was necessary that the trustee should continue to hold the legal title in order to carry out and effectuate the purposes of the trust. The statute of uses has never been considered to execute the trust where the trust was created for the express purpose of preserving a contingent remainder. Perry on Trusts, §§ 305, 309; *Biscoe* v. *Perkins*, 1 Ves. & B. 485; *Barker* v. *Greenwood*, 4 M. & W. 431; *Vanderheyden* v. *Crandall*, 2 Denio, 9; *Laurens* v. *Jenney*, 1 Spears, 365; Co. Litt., 265 a. 2, 337 a. n. 2.

The provisions of § 3, even though they apply to the lands in the Indian Territory, in no way affect the grant to the State. *Van Wyck* v. *Knevals*, 106 U. S. 360, 364; *St. Paul & Pac. R. R.* v. *Northern Pac. R. R.*, 139 U. S. 1; *Langdeau* v. *Hanes*, 21 Wall. 521; *Wright* v. *Roseberry*, 121 U. S. 488.

This suit can be maintained in this court under the original jurisdiction clause of the Constitution. *United States* v. *Texas*, 143 U. S. 621; *United States* v. *Michigan*, 190 U. S. 379. The only difference is that the State is plaintiff and the United States defendant.

The Constitution of the United States is the Constitution of all the States speaking in a united sense, and this court, as the Supreme Court of the United States, is also, in the same sense, the Supreme Court for all the United States, having original jurisdiction in all cases of Federal cognizance "in which a State shall be a party." The language of the Constitution in this respect is broad and unqualified. Hence, the door does not here open to the United States against the

State and close against the State when the United States is sought to be made defendant. *Minnesota* v. *Hitchcock*, 185 U. S. 373.

If the element of express consent by the United States to be thus sued is essential, such consent has been given to individuals to thus sue the United States in all cases at law, in equity, or admiralty, not sounding in tort, by the act of March 3, 1887 (24 Stats., p. 505).

Under these statutes and the Constitution of the United States, the Government has not only impliedly but expressly given its consent to be sued in a case where a State is a party, in the Supreme Court of the United States. Suits may be instituted in the territorial district court against the Government under these statutes, although such territorial courts are not named in the act, under § 1910, Rev. Stat., which provides that each of the district courts in the Territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. *United States* v. *Forman*, 5 Oklahoma, 237; *Johnson* v. *United States*, 6 Utah, 403.

The Attorney General, The Solicitor General and *Mr. Assistant Attorney General Russell* for defendants:

The suit is not one of which this court has original jurisdiction. A State is not a party within the meaning of the Constitution, Article III, section 2.

The State of Kansas has no substantial interest in the subject matter, and is but nominally the complainant, the real party in interest being the railway company.

Legal title passed to the railway company, if to anyone, at the date of the grant, or at least upon the construction of the road. *Rice* v. *Railroad Company*, 1 Black, 358, 381.

A conveyance to trustees for certain purposes or uses carries the legal estate to the beneficiaries, unless duties imposed upon the trustees require the estate to be vested in

them. *Webster* v. *Cooper*, 14 How. 488, 499; *Long* v. *Long*, 62 Maryland, 65; Perry on Trusts, §§ 351, 352, 520, 521. This is the rule in Kansas. General Statutes of Kansas (1905), sec. 8624; *Bayer* v. *Cockerill*, 3 Kansas, 282, 292.

When an estate is given to trustees for a certain purpose, or until the happening of a certain event, the intermediate estate of the trustees terminates upon the accomplishment of the purpose or occurrence of the event. *Felgner* v. *Hooper*, 80 Maryland, 262; Perry on Trusts, section 351.

If "the purpose of aiding the railroad company to construct and operate a railroad," or the State's share therein, has been accomplished, then the trust has terminated and legal title is in the company; if it has not, then there is no cause for complaint.

But in this case the State was not even a trustee. It was no more than perhaps a repository in which the title might remain pending the performance of the condition of the grant, or a conduit through which the title might thereupon pass.

The granting act provides that patents shall issue, not to the State, but to the railroad company. Under such circumstances title vests in the company and not in the State. *Sioux City &c., Railroad* v. *United States*, 159 U. S. 349, 363, and cases cited; *Knepper* v. *Sands*, 194 U. S. 476, 481.

Patent not essential to transfer of legal title. It is simply evidence that conditions of grant have been complied with. *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241. Title passes by the grant upon performance of its conditions, and being evidenced by patent, it passes to grantee to whom patent is to issue. By a proper construction of the granting act (sections 1 and 9), lands in Indian Territory were not granted to the State of Kansas. If granted at all, the grant as to them was to the railroad company direct.

In formal communications and protests by the railroad company to the Dawes Commission, the town-site commission, the Indian Agent, and the Secretary of the Interior, the tracts in question have been claimed by the company invariably

heretofore as its own, without reference to any interest of the State therein. Of the counsel for the State two at least belong to the legal department of the railway company. Apparently the proceeding is under the control of the railway company and the name of the State is used simply for the purpose of prosecuting the claim of the company to the lands in question, the expense of the action being borne by the railroad. Under these circumstances the interest of the State is not sufficient to give this court original jurisdiction. *New Hampshire* v. *Louisiana*, 108 U. S. 76.

This is not a suit by a State exclusively against citizens of another State. Some of the parties defendant are citizens of the Indian Territory. A suit by a citizen of a Territory cannot be maintained under the Constitutional provision that jurisdiction of courts of United States shall extend "to controversies between citizens of different States." *Corporation of New Orleans* v. *Winter*, 1 Wheat. 92; *Downes* v. *Bidwell*, 182 U. S. 244, 250.

Jurisdictional qualities must exist as to all parties in order to confer jurisdiction. *Great Southern Hotel Company* v. *Jones*, 177 U. S. 449.

The United States, the real party in interest as defendant, has not consented to be sued, and cannot be sued without its consent, even by a State.

The contention that, since a State without its consent may be sued by the United States, *United States* v. *Texas*, 143 U. S. 621, it follows that the United States without its consent may be sued by a State, is obviously unsound. The question has been squarely decided. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 384; *Oregon* v. *Hitchcock*, 202 U. S. 60; *United States* v. *Lee*, 106 U. S. 196, 207.

It does not appear that all lands in controversy have been allotted, and the courts will not interfere with the Government in the disposal of land so long as the title in any sense remains in the United States. *Bockfinger* v. *Foster*, 190 U. S. 116; *Oregon* v. *Hitchcock*, *supra*.

It might be suggested, in passing, that in any event the grant was expressly limited to *public land*—that is, land which is subject to disposition under general laws, *Newhall* v. *Sanger*, 92 U. S. 761, and these lands in Indian Territory have never become such.

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

On April 30, 1906, the State of Kansas applied for leave to file a bill of complaint against the United States and others, to which the United States objected on the ground of want of jurisdiction. May 21 leave was granted, without prejudice, and the bill was accordingly filed. As such an application by a State is usually granted as of course, we thought it wiser to allow the bill to be filed, but reserving to the United States the right to object to the jurisdiction thereafter, and hence the words, "without prejudice," were inserted in the order. October 9 leave was granted to the United States to file a demurrer, and in lieu of this a motion to dismiss was substituted, which was submitted November 12 on printed briefs on both sides.

The bill was filed by the Attorney General of Kansas, on behalf of the State, as trustee for the Missouri, Kansas and Texas Railway Company, of certain lands in the Indian Territory, alleged to have been granted to the State for the benefit of the railway company.

It is stated by counsel for complainant, as appearing from the bill, that in 1866 "there were three Kansas railroad companies running through the State to the Indian Territory line. The first was the Union Pacific Railway Company, Southern Branch, since the Missouri, Kansas and Texas Railway Company, extending from Fort Riley, now Junction City, Kansas, in a southeasterly direction, down the valley of the Neosho River, to the southern line of the State of Kansas, near Chetopa, Kansas; the second was the Leavenworth, Lawrence and

Fort Gibson Railway Company, since conveyed to the Atchison, Topeka and Santa Fé Railroad Company, extending from Leavenworth, through Lawrence, to the northern line of the Indian Territory, near Coffeyville, Montgomery County, Kansas, in the direction of Galveston Bay, in Texas; and the third was the Kansas and Neosho Valley Railway Company, since the Kansas City, Fort Scott and Memphis, and now a part of the St. Louis and San Francisco Railroad Company, extending from a point of connection with the Union Pacific Railroad at or near the mouth of the Kansas River; thence southeasterly, through the eastern tier of counties, to the northern line of the Indian Territory, at or near Baxter Springs, in Cherokee County, Kansas."

On July 25, 1866, an act of Congress was passed entitled "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red River." 14 Stat. 236, c. 241. On the next day, July 26, an act was passed, using the same language, except as to the routes, entitled "An Act granting lands to the State of Kansas to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph Company, from Fort Riley, Kansas, to Fort Smith, Arkansas," 14 Stat. 289, c. 270, which provided as follows:

"That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; . . ."

"SEC. 3. . . . And the lands hereby granted shall inure to the benefit of said company, as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; . . ."

"SEC. 8. *And be it further enacted*, That said Pacific Railroad Company, southern branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops, machine-shops, switches, side-tracks, turn-tables, and water-stations.

"SEC. 9. *And be it further enacted*, That the same grant[s] of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States."

The bill averred that the road was constructed through the Indian Territory, and set forth at length Indian treaties and Congressional legislation with reference to that Territory, under which it was alleged that the Creek Indian Nation had ceased to occupy or claim the lands in question as a tribe or nation, and that some of the lands had been allotted in severalty to individual members of the Creek Nation; and that thereby

said lands passed to the State under the provisions of the grant mentioned. It was prayed that a decree be entered adjudging the State to be the owner, as trustee for the railway company, of all odd-numbered sections of land to the extent of the grant along the line of the road through the Creek Nation, in the Indian Territory, and that the allottees be directed to surrender the possession to the State as trustee and be enjoined from disposing of said lands, or "in the event that from any equitable considerations the court shall entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy," and that the United States be adjudged to pay to the State as trustee the sum of such values, estimated at more than $10,000,000.

In our opinion it appears upon the face of the bill that the State of Kansas is only nominally a party, and that the real party in interest is the railroad company. Section 3 provided that patents should be issued not to the State but to the company direct, which made the State nothing but a mere conduit for the passage of title. And this is so even if it were ruled that the State of Kansas was made trustee under section 9, because it would only be trustee of the bare legal title. In very many cases "in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself," it has been held that the title vested absolutely in the railroad company. *Sioux City &c. Railroad Co.* v. *United States*, 159 U. S. 349, 363.

Title passed by the grant on the performance of its conditions and to the grantees to whom the patents were to be issued, and here section 3 provided that patents should issue not to the State but to the railroad company direct.

And if the lands in the Indian Territory could be held in any view to have been granted *in præsenti*, such grant was certainly not to the State of Kansas.

The road, in aid of which the grant was made to the State, extended no farther than the southern boundary thereof, and the patents were to be issued to the company. True, as declared in section 1, the road was to be constructed "with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas," and that extension was authorized by section 8, but the lands referred to in section 9 were not lands in the State of Kansas, nor was that State mentioned in the section. It seems clear that those lands were not intended to be granted to that State for the construction of a road beyond its boundaries.

Moreover, the bill sets forth many communications and protests by the railroad company to the Dawes Commission, the townsite commission, the Indian agent and the Secretary of the Interior, in all of which the tracts in controversy were claimed by the railroad company as its own without reference to any interest of the State of Kansas therein.

In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction can not be maintained.

Again, the United States is the real party in interest as defendant and has not consented to be sued, which it can not be without its consent. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Oregon* v. *Hitchcock*, 202 U. S. 60; *United States* v. *Lee*, 106 U. S. 196, 207.

"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."

In the present case the parties defendant other than the United States and its officers are Creek Indian allottees and

persons claiming under them, and if their allotments should be taken from them, which is part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, while the bill prays in the alternative that "in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values."

It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

In *United States* v. *Texas*, 143 U. S. 621, 646, it was held that the exercise by this court of original jurisdiction "in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States." That case was quoted from with approval in *Minnesota* v. *Hitchcock*, *supra*, where Mr. Justice Brewer, delivering the opinion, pointed out that the judicial power of the United States extends to cases in which the United States is a party plaintiff as well as to cases in which it is a party defendant, for "while the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy."

We are not dealing here with the merits of the controversy raised by the bill, but solely with the question of the original

jurisdiction of this court. And as the United States has not consented to be sued, it results that on this ground also the bill must be dismissed.

And it is so ordered.

MR. JUSTICE MOODY took no part in the disposition of this case.

UNITED STATES *v.* HITE.

APPEAL FROM THE COURT OF CLAIMS.

No. 276. Submitted December 18, 1906.—Decided February 25, 1907.

Under the act of March 3, 1889, 30 Stat. 1228, the two months' pay to which an officer of the Navy is entitled, who was detached from his vessel and ordered home to be honorably discharged after creditable service during the war with Spain, is to be computed at the rate of pay he was receiving for sea service when detached, and not at the rate of his pay for shore service when he was actually discharged.
41 C. Cl., 256, affirmed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Van Orsdel and *Mr. John Q. Thompson,* Special Attorney, for appellant:

During the interval of time between December 17, when claimant was detached from the battle ship *Massachusetts,* and December 22, when he was discharged from the service, a period of five days, he was not performing sea service, but was on leave or waiting-orders pay, and therefore was entitled to compensation during such time at the rate of $1,000 a year.

The language of the statute is "shall be paid two months' extra pay," evidently meaning the same pay he would have received if he had remained in the same service two months longer, and if the claimant had remained in the same service

two months longer he would have received and been paid compensation at the rate of $1,000 per year, which was leave or waiting-orders pay. And this is the construction given to a like statute in the cases of *United States* v. *North* and *United States* v. *Emory*, 112 U. S. 510.

The statute granting Hite two months' extra pay was approved March 3, 1899, about two months and a half after he was discharged from the service and nearly ten months after claimant's appointment. The provision for extra pay was therefore a gratuity granted by Congress and for which the Government was in no way liable under its contract with the claimant. It therefore does not seem equitable that he should receive the gratuity of two months' extra pay based upon his sea pay while rendering service beyond the limits of the United States.

Mr. Edward S. McCalmont, for appellee, submitted.

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

This was a petition for the recovery of $116.66. The case having been heard by the Court of Claims, that court, upon the evidence, filed the following findings of fact and conclusion of law:

"*Findings of Fact.*

"I. The claimant, John M. Hite, was appointed assistant engineer in the United States Navy, with the relative rank of ensign, for temporary service during the late war with Spain, on May 14, 1898; he reported for duty on board the U. S. S. 'Massachusetts,' in obedience to orders of the Navy Department, on June 1, 1898, and served creditably as such officer on said ship until December 17, 1898, at which date he was detached and ordered to his home, and on December 22, 1898, was honorably discharged from the naval service.

"The order referred to is in the words following:

"'Navy Department,
"'Washington, D. C., Dec. 12, 1898.

"'Sir: You are hereby detached from duty on board the U. S. S. "Massachusetts," and will proceed to your home.

"'Immediately upon your arrival report your local address in full to the Bureau of Navigation, Navy Department, Washington, D. C. See article 224, U. S. Navy Regulations, 1896.

"'Report also the date of your detachment, and inform the Department of the status of your accounts, and whether you are indebted to the Government by reason of advances drawn by you.

"'Respectfully,

"'JOHN D. LONG, *Secretary.*

"'Assistant Engineer John M. Hite, U. S. N.,
"'U. S. S. Massachusetts.'

"II. The U. S. S. 'Massachusetts' was in commission and cruised beyond the limits of the United States (in Cuban waters) during the time of the claimant's service on board.

"III. In settlement of claimant's claim for extra pay authorized by the act of March 3, 1899, he was allowed by the accounting officers of the Treasury Department two months' pay at the rate of pay of an assistant engineer in the Navy on waiting orders only, to wit, $166.66.

"If entitled to two months' pay upon the basis of sea service the difference is $116.66.

"*Conclusion of Law.*

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment in the sum of one hundred and sixteen dollars and sixty-six cents ($116.66)."

The case is reported in 41 Ct. Cl. 256.

The act of March 3, 1899 (30 Stat. 1228, c. 427), among other things, provides:

"The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay."

Appellee's counsel say that the issue is correctly stated by counsel for the United States as follows:

"The claimant contends that the two months' extra pay provided for in the foregoing statute should be at the rate of pay he received while *doing sea service*, to wit, $1,700 per year.

"The contention of the Government is that under the rulings of this court in the cases of North and Emory (112 U. S. R. p. 510) the claimant has been paid all that was due him, inasmuch as he was paid two months' extra pay provided for in the statute at the rate of pay he was receiving *at the time of his discharge*, to wit, at the rate of $1,000 per annum."

Appellee was appointed an officer in the Navy, May 14, 1898, by authority of the act of Congress of May 4, of that year (30 Stat. 369, c. 234), which provided:

"Whenever, within the next twelve months, an exigency may exist which, in the judgment of the President, renders their services necessary, he is hereby authorized to appoint from civil life and commission such officers of the line and staff, not above the rank or relative rank of commander, and warrant officers including warrant machinists, and such officers of the Marine Corps not above the rank of captain, to be appointed from the non-commissioned officers of the corps and from civil life, as may be requisite: *Provided*, That such officers shall serve only during the continuance of the exigency under which their services are required in the existing war."

The war with Spain began April 21, 1898, and the treaty

of Paris was signed December 10, 1898. Appellee served until December 17, 1898, at which time he was detached from the vessel on which he was serving and ordered home, where, on December 22, he was honorably discharged from the naval service. It seems to have been thought reasonable that the Government should pay the expenses of the journey home and for the time in getting there.

The act of March 3, 1899, provided for extra pay for active service. Hite was detached because it became the Department's duty to discharge him under the proviso of the act of 1898, and the detachment was manifestly preliminary to his discharge. The order detaching him did not prescribe that on arrival home he was to hold himself "on waiting orders" or for further assignment to duty. On the other hand, it required him to inform the Department of the status of his accounts, obviously in order that they might be settled on his leaving the service.

The two months' extra pay is given, as Chief Justice Peelle, delivering the opinion of the Court of Claims, says, "because of creditable service beyond the limits of the United States during the war with Spain, and therefore upon discharge such officers become entitled to the same pay they were receiving while so serving beyond the limits of the United States." "To hold, because the claimant was ordered to his home where he was discharged five days later instead of being discharged on the day he was detached, that therefore he is entitled only to the lesser pay would be a construction too narrow to harmonize with the purpose of Congress as disclosed by the act." Notwithstanding the considered dissenting opinion in the court below, we agree with the conclusion that his engagement having ended and he having been discharged, the two months' extra pay should have been given him upon the basis of the pay he was receiving when detached.

The contention of the Government is that this case is governed by the ruling in *United States* v. *North*, 112 U. S. 510. In that case it was held that officers of the Navy and of the

regular Army, who were employed in the prosecution of the war with Mexico, were entitled to the three months' extra pay provided for by the act of Congress of July 19, 1848, c. 104, § 5, 9 Stat. 248, and the act of February 19, 1879, c. 90, 20 Stat. 316.

The act of 1848 provided: "That the officers, etc., engaged, etc., in the war with Mexico, and who served out the term of their engagement, or have been or may be honorably discharged, . . . shall be entitled to receive three months' extra pay."

North was an officer in the Navy of the United States from May 29, 1829, to January 14, 1861, when he resigned. He served in the war with Mexico, as lieutenant, on board the frigate Potomac, from February 10, 1846, until July, 1847, when his vessel sailed for the United States. And Chief Justice Waite said:

"Those of the regular Army or Navy who were 'engaged in the military service of the United States in the war with Mexico' may be said to 'have served out the term of their engagement,' or to have been 'honorably discharged,' within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of that service. Being in the Army and Navy, their 'engagement' was to serve wherever they were ordered for duty. Their engagement to serve in the war with Mexico ended when they were taken away from that service by proper authority.

"The pay they were to receive was evidently that which they were receiving at the end of their engagement, or when they were honorably discharged. The language is, 'shall be entitled to receive three months' extra pay,' evidently meaning the same pay they would have received if they had remained in the same service three months longer. It follows that, as North was serving at sea when he was ordered away, he was entitled to three months' sea pay, . . ."

In the present case, appellee was taken away from the ser-

vice when he was detached from his vessel, as he was appointed to serve "only during the continuance of the exigency under which their services were required in the existing war," and was entitled, in the circumstances of the case, to extra pay on the basis of that which he was receiving when detached, as we have said above.

Emory's case was also considered by the court in the same opinion and the same conclusion reached, and reference was there made to that case as reported in 19 Ct. Cl. 254.

The judgment of the Court of Claims was right, and it is

Affirmed.

MR. JUSTICE MOODY took no part in the disposition of this case.

UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* UNITED STATES FOR THE BENEFIT OF KENYON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 173. Argued January 18, 1907.—Decided February 25, 1907.

Under the act of August 13, 1894, 28 Stat. 278, as construed in the light of the act passed the same day, 28 Stat. 282, and of the act amending the latter passed January 24, 1905, 33 Stat. 811, in suits brought in the name of the United States for the benefit of materialmen and laborers on bonds given in pursuance of the act, the United States is a real litigant, and not a mere nominal party, and the Circuit Court of the United States has jurisdiction of such suits without regard to the value of the matter in dispute.

BY an act of Congress approved August 13, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," it was provided: "That hereafter any person or persons entering into

a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: *Provided*, That such action and its prosecutions shall involve the United States in no expense. Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant." 28 Stat. 278, c. 280.

On the same day, August 13, 1904, Congress passed an act providing that whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond or undertaking specified, is by the laws of the United States required or permitted to be given with one or more sureties, it should be lawful to accept such instrument from a corporation having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings. The act provided that

any surety company doing business under the provisions of that act "may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond, or undertaking was made or guaranteed, or in the district in which the principal office of such company is located." 28 Stat. § 5, c. 282, p. 279.

Proceeding under the above acts the United States, in 1899, made a written contract with one Churchyard to furnish labor, materials, tools and appliances for the construction of a public building, taking from him the required bond with the United States Fidelity and Guaranty Company, a corporation, as surety.

The present action, brought in the Circuit Court on that bond, was by the United States, "suing herein for the benefit and on behalf of James S. Kenyon," who furnished a contractor for use in the construction of the proposed Government building, materials of the value of $66.05, for which the latter neglected and refused to pay. Damages to the amount of $500 were claimed in the declaration.

The defendant, the United States Fidelity and Guaranty Company, pleaded that it did not owe the sum demanded. The plaintiff introduced testimony, but the defendant introduced none and it appearing upon the face of the declaration that the value of the matter in dispute was less than $2,000, he moved that the action be dismissed for want of jurisdiction in the Circuit Court. That motion was denied, and judgment for $206.47 was entered against the Fidelity and Guaranty Company for the use and benefit of Kenyon. *United States* v. *Churchyard,* 132 Fed. Rep. 82.

Mr. Seeber Edwards, with whom *Mr. George S. Cooper* and *Mr. James E. Smith* were on the brief, for plaintiff in error:

The amount involved in this case being less than $2,000 the jurisdiction of the Circuit Court must fail unless the act

creating the right confers jurisdiction or unless this is a controversy in which the United States is plaintiff, all other Federal jurisdictional requirements being wanting.

The act of August 13, 1894, c. 280, does not confer jurisdiction of this case upon the Circuit Court. Jurisdiction of a case of this kind cannot be conferred by implication. In the absence of an express provision to that effect, jurisdiction must fail unless it is given by some other statutory provision. *Livingston* v. *Van Ingen*, Fed. Cas. No. 8,420; *Bank of U. S.* v. *Deveaux*, 5 Cranch, 61; *Harrison* v. *Hadley*, Fed. Cas. No. 6,137; *Turner* v. *Bank of N. America*, 4 Dall. 8; *United States* v. *Hudson*, 7 Cranch, 32; *McIntire* v. *Wood*, 7 Cranch, 506; *Sheldon* v. *Still*, 8 How. 441.

This is not a controversy in which the United States is plaintiff within the contemplation of the statute which confers on the Circuit Court jurisdiction irrespectively of the amount involved. *Anniston Pipe Co.* v. *National Surety Co.*, 92 Fed. Rep. 549; *Guaranty Co.* v. *Brick Co.*, 191 U. S. 416.

The rule has been to regard the real rather than the merely nominal parties in determining questions of jurisdiction. *Brown* v. *Strode*, 5 Cranch, 303; *McNutt* v. *Bland*, 2 How. 9; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Huff* v. *Hutchinson*, 14 How. 586; *Walden* v. *Skinner*, 101 U. S. 577; *Wade* v. *Wortman*, 29 Fed. Rep. 754; *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Maryland* v. *Baldwin*, 112 U. S. 490, and other cases.

The identical question of jurisdiction has already been decided in accordance with the contention of the plaintiff in error in three exactly similar cases. *United States* v. *Henderlong*, 102 Fed. Rep. 2; *United States* v. *Sheridan*, 119 Fed. Rep. 236; *United States ex rel. Maxwell* v. *Barrett*, 135 Fed. Rep. 189.

Mr. Edward D. Bassett for defendant in error:

The United States is a real, not a nominal, party to the action on the contractor's bond. It was the intention of Congress when this act was passed to aid the United States in

prosecuting public works, for by the terms of the act a materialman was in no danger of losing his money; hence would furnish materials and labor promptly. There was a general scheme providing for the improvement and advancement of public work, as is shown by similar legislation passed the same day. 28 Stat. 278, 279.

It must have been the intent of Congress that the action provided for in the act should be brought in the courts of the United States. Chap. 280 of the act of August 13, 1894, expressly makes the United States the legal plaintiff. In suits at law the legal interest alone is regarded in testing the jurisdiction of the United States courts. *Colson* v. *Lewis*, 2 Wheat. 377; *Irvine* v. *Lowry*, 14 Peters, 293; *Dodge* v. *Tulley*, 144 U. S. 451. The provisions allowing suits to be brought on certified copies of contract bonds and for security for costs, etc., should be applicable only to courts subject to congressional legislation.

The rights of the materialman arising by virtue of an act of Congress can only be enforced in the courts of the United States. *Martin* v. *Hunter*, 1 Wheat. 330; *Ellis* v. *Norton*, 16 Fed. Rep. 4; *United States* v. *Lathrop*, 17 Johns. 3; *New Orleans &c.* v. *Mississippi*, 102 U. S. 135; *Bock* v. *Perkins*, 139 U. S. 621.

The United States might at any time wish to intervene in suits of this kind, as in fact it did intervene in the case of *American Surety Co.* v. *Lawrenceville Cement Co.*, 96 Fed. Rep. 25, which it could do only in the courts of the United States. In that case the United States would sue in one court and the materialman would be obliged to sue in a state court; thus proper adjustment of the equities could not be accomplished.

The United States has a real, not merely a nominal, interest in the bond, and the United States, having obtained the benefit of material furnished and prompt service, permits parties to be subrogated to its rights. *American Surety Co.* v. *Lawrenceville Cement Co.*, 96 Fed. Rep. 25; *United States*

v. *National Surety Co.*, 34 C. C. A. 529; *United States* v. *American Surety Co.*, 200 U. S. 197.

Jurisdiction of the United States courts has been sustained in analogous cases where the United States permits parties where bonds are taken in the name of the United States to bring suit upon them. *Adler* v. *Newcombe*, 2 Dill. 45; *United States* v. *Davidson*, 1 Biss. 433; *Bock* v. *Perkins*, 139 U. S. 628; *Howard* v. *United States &c.*, 184 U. S. 676, 681, following *Bock* v. *Perkins*.

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

This case is here upon a certificate as to the original jurisdiction of the Circuit Court of the United States of this action.

A Circuit Court of the United States, as provided in the Judiciary Act of 1887–88, may take original cognizance of any suit, at common law or in equity, arising under the laws of the United States, if the value of the matter in dispute exceeds two thousand dollars, exclusive of interest and costs. 25 Stat. 433, c. 866. But if, within the meaning of that act, the United States is the plaintiff in the action, then jurisdiction exists in a Circuit Court without regard to such value. *United States* v. *Sayward*, 160 U. S. 493; *United States* v. *Shaw*, 39 Fed. Rep. 433; *United States* v. *Kentucky River Mills*, 45 Fed. Rep. 273; *United States* v. *Reid*, 90 Fed. Rep. 522.

The contention of the Fidelity Company is that the Government, in this case, is to be deemed a nominal party only, its name being used as plaintiff simply under the authority of the above act of 1894, c. 280. In support of this position our attention is called to the following among other cases: *Browne* v. *Strode*, 5 Cranch, 303; *McNutt* v. *Bland*, 2 How. 9, 14; *Maryland* v. *Baldwin*, 112 U. S. 490; *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445.

Browne v. *Strode* was a suit in the Circuit Court for the District of Virginia in which the persons named in the declara-

tion as plaintiffs were justices of the peace, all citizens of Virginia. The suit was on a bond given by an executor in conformity with a Virginia statute, and was for the recovery of a debt due from the testator in his lifetime to an alien, a British subject. The defendant was a citizen of Virginia. This court held that the Circuit Court had jurisdiction, notwithstanding the justices and the defendant were all citizens of the same State. This was, we assume, upon the ground that the justices were nominal parties only, while the beneficial party was an alien, and the defendant a citizen of the State in which the suit was brought.

McNutt v. *Bland* was a suit upon a bond given by a sheriff and running to the governor of the State, conditioned for the faithful performance of the duties of his office. The statute authorized suit to be brought and prosecuted from time to time at the cost of any party injured until the whole amount of the penalty was recovered. The suit was brought in the name of the governor for the use of certain parties who were citizens of New York. The court held that the sheriff and his sureties, citizens of Mississippi, could be sued by the parties in interest in their own name, and that no sound reason could be perceived "for denying the right of prosecuting the same cause of action against the Sheriff and his sureties in the bond, by and in the name of the Governor, who is a purely naked trustee for the party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the Sheriff; the Governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a Circuit Court of the United States, in any other mode of proceeding than on the Sheriff's bond."

Maryland v. *Baldwin*, 112 U. S. 490, 491, was an action in a state court on an administrator's bond in the name of the

State for the benefit of one Markley, a citizen of New Jersey, the obligors in the bond being citizens of Maryland. The action was removed to the Circuit Court of the United States. After referring to the cases of *Browne* v. *Strode* and *McNutt* v. *Bland*, the court said: "The justices of the peace in the one case and the governor in the other were mere conduits through whom the law afforded a remedy to persons aggrieved, who alone constituted the complaining parties. So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Markley was alone named as plaintiff; and the action was properly removed to that court."

Stewart v. *Balt. & Ohio R. R. Co.* was an action against a railroad company by an administrator to recover damages for the benefit of a widow whose husband's death was alleged to have been caused by the negligence of the defendant company. In the course of the discussion of the controlling questions in that case the court observed in passing that "for purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party," and that even in an action of tort "the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought."

This case differs from those just cited and stands, we think, on exceptional grounds. The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies promptly and with certainty. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the Government would exert its power directly for their protection. It

may well have thought that the Government was under some obligation to guard the interests of those whose labor and materials would go into a public building. Hence, the statute required that, in addition to a penal bond in the usual form, one should be taken that would contain the specific, special obligation directly to the United States that the contractor or contractors "shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work." The Government is a real party here because the declaration opens, "The United States, suing herein for the benefit of and on behalf of James Kenyon . . . comes and complains," and alleges that the "defendants became and are indebted to the United States for the benefit of the said James S. Kenyon." In a large sense the suit has for its main object to enforce that provision in the bond that requires prompt payments by the contractor to materialmen and laborers. The bond is not simply one to secure the faithful performance by the contractor of the duties he owes directly to the Government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was therefore enforcible by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is therefore a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the Government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion, in view of the peculiar language of the act of 1894 for the protection as well of the United States as of all persons furnishing materials and labor

for the construction of public works, that it is not an unreasonable construction of the words in the Judiciary Act of 1887-88, "or in which controversy the United States are plaintiffs or petitioners," to hold that the United States is a real and not a mere nominal plaintiff in the present action, and therefore that the Circuit Court had jurisdiction.

This interpretation of the statute finds some support in the above act of 1894, c. 282, passed the same day as the act, c. 280, for the protection of materialmen and laborers, and which provides that suits against a fidelity or guaranty corporation, accepted as surety in any recognizance, stipulation, bond or undertaking given to the United States, may be sued in any court of the United States having jurisdiction of suits upon such instrument. There is in that act no express limitation as to the amount involved in suits of that character in either of the acts passed in 1894. Taking the two acts together, there is reason to say that Congress intended to bring all suits, embraced by either act, when brought in the name of the United States, within the original cognizance of the Circuit Courts of the United States, without regard to the amount in dispute. And this view as to the intention of Congress is strengthened by an examination of the act of February 24, 1905, 33 Stat. 811, c. 778, which amends the above statute of 1904, c. 280. After providing that persons supplying labor and materials for the construction of a public work shall have the right to intervene in any suit brought by the United States against the contractor, that act declares that if no such suit is brought by the United States within six months after completion of the contract then the person supplying labor or material to the contractor "shall have a right of action and shall be and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, *irrespective of the amount in controversy in such suit,* and not elsewhere, for his or their use and benefit, against said contractor and his sure-

ties, and to prosecute the same to final judgment and execution."

It is true that this statute can have no direct application here, because the present action was instituted long prior to its passage and after the trial court had decided the question of the jurisdiction of the Circuit Court. As the act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the Circuit Court was invoked in this action. Nevertheless, that act throws some light on the meaning of the act of 1894, c. 280, for the protection of materialmen and laborers, and tends to sustain the view based on the latter act, namely, that in suits brought in the name of the Government for their benefit the United States is a real litigant, not a mere nominal party, and that of such suits, the Government being plaintiff therein, and having the legal right, the Circuit Court may take original cognizance without regard to the value of the matter in dispute. There are cases which take the opposite view, but the better view we think is the one expressed herein.

The judgment is

Affirmed.

MR. JUSTICE BREWER dissents.

WESTERN TURF ASSOCIATION *v.* GREENBERG.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 189. Submitted January 29, 1907.—Decided February 25, 1907.

Where defendant corporation in the court below questions the constitutionality of a state statute as an abridgment of its rights and immunities and as depriving it of its property without due process of law in violation of the Fourteenth Amendment, and the judgment sustains the validity of the statute, this court has jurisdiction to review the judgment on writ of error under § 709, Rev. Stat.

A corporation is not deemed a citizen within the clause of the Constitution of the United States protecting the privileges and immunities of citizens of the United States from being abridged or impaired by the law of a State; and the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is that of natural, not artificial, persons.

A State may in the exercise of its police power regulate the admission of persons to places of amusement, and, upon terms of equal and exact justice, provide that persons holding tickets thereto shall be admitted if not under the influence of liquor, boisterous, or of lewd character, and such a statute does not deprive the owners of such places of their property without due process of law; so held as to California statute.

148 California, 126, affirmed.

THE facts are stated in the opinion.

Mr. William S. Goodfellow, for plaintiff in error, submitted:

The reason for excluding the defendant in error from the grounds was that he insisted upon publishing a newspaper called a racing chart or form chart, whereas the association had sold the exclusive privilege so to do to other persons. The association had the right to make such a contract, perhaps for the protection of the public, and for the reputation of its own grounds; as also for the profits to be directly derived from the contract.

Apart from this special statute, a ticket of admission to a place of amusement is, and always has been, merely a license. The authorities to this effect were cited in the former case, and the Supreme Court of California held in conformity with them. But if this statute be valid it is no longer possible for two persons to contract for the issuance of a license to a place of amusement. This statute also makes it a *penal offense*, 140 California, 364, for a person who has made a civil contract to violate it. It is understood that every person has that right, of course holding himself responsible in damages.

The plaintiff in error is a private corporation, conducting a private business, upon its own private premises. There is no suggestion that it was in anywise exercising a public use, or that it had ever received aid or special privileges from the

State, or even a license to transact business. *District of Columbia* v. *Saville*, 1 McArthur, 581; *S. C.*, 29 Am. Rep. 616; *Sharpe* v. *Whiteside*, 19 Fed. Rep. 156; *Gibbs* v. *Tally*, 133 California, 373; *State* v. *Associated Press*, 60 S. W. Rep. 191; *Leep* v. *St. Louis*, 25 S. W. Rep. 575.

Mr. William G. Burke, for defendant in error, submitted:

The statute attacked in this case is applicable only to places of public amusement or entertainment and was within the power of the legislature to enact. *Munn* v. *Illinois*, 94 U. S. 113; *Grannan* v. *Westchester Racing Assn.*, 16 App. Div. 8; *S. C.*, 44 N. Y. Supp. 790; *Baylies* v. *Curry*, 128 Illinois, 287; *People* v. *King*, 110 N. Y. 418.

The constitutionality of the statute under consideration has been twice upheld by the Supreme Court of California. *Greenberg* v. *Western Turf Assn.*, 82 Pac. Rep. 684.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff in error is a corporation of California, and the lessee, in possession, of a race-course kept as a place of public entertainment and amusement, and to which it was accustomed to issue tickets of admission. The defendant Greenberg purchased one of such tickets, and was admitted to the race-course. After being admitted he was ejected from the premises against his will by police officers, acting, it was alleged in the complaint, by the direction of the plaintiff. The defendant denied responsibility for the acts of those officers. It was sued by Greenberg in one of the courts of California, and there was a verdict and judgment against the Association for the sum of one thousand dollars. The case was taken to the Supreme Court of the State and the judgment was affirmed. 148 California, 126.

At the trial a question was raised as to the applicability to this case of a statute of California relating to the admission of persons holding tickets of admission to places of public

entertainment and amusement. That statute is as follows: "It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement. Sec. 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this act, is entitled to recover from the proprietors, lessees or their agents, or from any person, association, corporation, or the directors thereof, his actual damage and $100 in addition thereto."

1. The record sufficiently shows that in the Supreme Court of the State the defendant questioned the validity of the statute in question under the Fourteenth Amendment, in that it "seeks to abridge the privileges and immunities of citizens of the United States, and to deprive them of liberty and property without due process of law, and to deny to them, being within its jurisdiction, the equal protection of the laws." By the judgment below the validity of the statute was sustained, the court holding that it was a legitimate exertion of the police power of the State. The contention that this court is without jurisdiction to review that judgment is, therefore, overruled.

2. The Supreme Court of the State in a previous decision between the same parties—*Greenberg* v. *Western Turf Association*, 140 California, 357, 360—held the statute to be constitutional as a valid regulation imposed by the State in its exercise of police power. That decision, we assume, from the opinion of the court, had reference only to the constitution of California. But this court can only pass upon the validity of

the statute with reference to the Constitution of the United States. We perceive no reason for holding it to be invalid under that instrument. The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations or associations conducting places of public amusement or entertainment. Of still less merit is the suggestion that the statute abridges the rights and privileges of citizens; for a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a State.

The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for, the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. *Northwestern Life Insurance Co.* v. *Riggs*, 203 U. S. 243. Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative. Decisions of this court, familiar to all, and which need not be cited, recognize the possession, by each State, of powers never surrendered to the General Government; which powers the State, except as restrained by its own constitution or the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well-being, comfort and good order of the people. The enactments of a State, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the Supreme Law of the land. In view of these settled principles, the defendant is not justified in invoking the Constitution of the United States. The statute is only a regulation of places of public entertainment and amusement upon terms of equal and exact justice to every one holding a ticket of ad-

mission, and who is not at the time under the influence of liquor, or boisterous in conduct, or of lewd and immoral character. In short, as applied to the plaintiff in error, it is only a regulation compelling it to perform its own contract as evidenced by tickets of admission issued and sold to parties wishing to attend its race-course. Such a regulation, in itself just, is likewise promotive of peace and good order among those who attend places of public entertainment or amusement. It is neither an arbitrary exertion of the State's inherent or governmental power, nor a violation of any right secured by the Constitution of the United States. The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the Constitution of the United States cannot, for a moment, be admitted. The case requires nothing further to be said. The judgment is

Affirmed.

UNION BRIDGE COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 431. Argued December 5, 6, 1906.—Decided February 25, 1907.

Commerce comprehends navigation; and to free navigation from unreasonable obstructions by compelling the removal of bridges which are such obstructions is a legitimate exercise by Congress of its power to regulate commerce.

Congress when enacting that navigation be freed from unreasonable obstructions arising from bridges which are of insufficient height or width of span, or are otherwise defective, may, without violating the constitutional prohibition against delegation of legislative or judicial power, impose upon an executive officer the duty of ascertaining what particular cases come within the prescribed rule.

Requiring alterations to secure navigation against unreasonable obstructions is not taking private property for public use within the meaning of the Constitution; the cost of such alterations are incidental to the exercise of an undoubted function of the United States, exerting through Congress, its power to regulate commerce between the States.

Although a bridge erected over a navigable water of the United States under the authority of a state charter may have been lawful when erected and not an obstruction to commerce as then carried on, the owners erected it with knowledge of the paramount authority of Congress over navigation and subject to the power of Congress to exercise its authority to protect navigation by forbidding maintenance when it became an obstruction thereto.

The silence or inaction of Congress when individuals, acting under state authority, place unreasonable obstructions in waterways of the United States, does not cast upon the Government any obligation not to exercise its constitutional power to regulate commerce without compensating such parties.

The provisions in § 18 of the River and Harbor Act of 1899, 30 Stat. 1121, 1153, providing for the removal or alteration of bridges which are unreasonable obstructions to navigation, after the Secretary of War has, pursuant to the procedure prescribed in the act, ascertained that they are such obstructions, are not unconstitutional either as a delegation of legislative or judicial power to an executive officer or as taking of property for public use without compensation.

143 Fed. Rep. 377, affirmed.

THIS is a proceeding in the nature of a criminal information in the District Court of the United States for the Western District of Pennsylvania against the Union Bridge Company, a corporation of Pennsylvania, owning and controlling a bridge across the Allegheny River near where it joins the Monongahela River to form the Ohio River—the Allegheny River being a navigable waterway of the United States, having its source in New York and being navigable in both New York and Pennsylvania.

Stating the matter generally, the Secretary of War found the bridge to be an unreasonable obstruction to the free navigation of the Allegheny River, and required the Bridge Company to make certain changes or alterations in order that navigation be rendered reasonably free, easy and unobstructed. These alterations, it was charged, the company wilfully failed

and refused to make. Hence the present information against it. There was a verdict of guilty, followed by a motion in arrest of judgment, which motion being overruled, the company was sentenced to pay a fine of $5,000. To review that order this writ of error is prosecuted.

The information was based on section 18 of the River and Harbor Act of March 3d, 1899, which provides: "That whenever the Secretary of War shall have reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes, recommended by Chief of Engineers, that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars; and every month such persons, cor-

poration, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided,* That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants." 30 Stat. 1121, 1153, c. 425.

Legislation similar in its general character can be found in River and Harbor Acts passed at previous sessions of Congress. Act of 1884, 23 Stat. 123, 148, c. 229; Act of April 11th, 1888, 25 Stat. 400, 424, 425, c. 860, §§ 9, 10; and act of September 19th, 1890, 26 Stat. 426, 453, c. 907, §§ 4, 5. Finally, we have the act of March 23d, 1906, 34 Stat. 84, c. 1130, §§ 4, 5, which covers the same ground as the act of 1899 under which the present information was filed.

It appears that the Bridge Company was incorporated by an act of the Pennsylvania legislature, approved March 13th, 1873, with authority to construct a bridge over the Allegheny River, in the City of Allegheny. That act contains this proviso: "That the erection of said bridge shall not obstruct the navigation of said river, so as to endanger the passage of rafts, steamboats, or other water crafts; and the piers shall not be so placed as to interfere with tow-boats proceeding out with their tows made up, and shall be constructed in such manner as to meet the requisitions of the law in regard to the obstructions of navigation."

The bridge was constructed in 1874 and 1875, and has been in use since 1875.

In 1902 a petition was sent to the Secretary of War by persons, corporations and companies in and about Pittsburg, which contained, among other things, these statements: "There can be no doubt whatever that this bridge is an unreasonable obstruction to the free navigation of the Ohio, Monongahela and Allegheny Rivers on account of insufficient

height and the filling in of the river or rivers over which it passes in order to provide approaches for it. We respectfully request that you will investigate this matter, having full confidence that after making such investigation you will find it to be your duty to take action against its owners, the Union Bridge Company, under the provisions of Section 18, of the River and Harbor Act, approved March 3, A. D. 1899. . . . It was built of such a low height above the water as to cause the almost complete obstruction of all the packet and towboat trade passing from the Allegheny River into the Ohio and Monongahela rivers, and from these rivers into the Allegheny. In building it the width of the river was very materially narrowed as already stated by the fills made for the approaches. The river commerce of Pittsburg, as you are aware, is of very great magnitude and importance and is rapidly increasing in volume. For the last calendar year it amounted to 10,916,489 tons, being about equal to that of the harbor of New York. The extension of the manufacturing industries of Pittsburg up the Allegheny River is making it of much greater importance than heretofore that the navigation to and from that river should not be obstructed. The present time is peculiarly appropriate for action by you. The Union Bridge is an old wooden structure and will soon need, in fact it already needs, extensive repairs to make it safe for public use. Therefore, as the bridge in question deprives the community of a reasonable use of the Allegheny River in connection with the river business of this great harbor, we appeal to you to exercise the powers committed to you to abate or to at least mitigate this great public nuisance as you shall find yourself justified by the law and the facts of the case."

The matter was referred by the Secretary of War to the proper officers of the Engineer Corps of the Army for examination and report. Such examination was had upon notice to the Bridge Company, and under date of December 8th, 1902, Captain Sibert, captain of engineers, who conducted the examination, reported and recommended to the Chief of En-

gineers that the company be given notice to make certain alterations in its bridge.

On December 16th, 1902, the Chief of Engineers transmitted that report to the Secretary of War, saying: "As required by the law and the instructions of the War Department, a public hearing has been held, after due advertisement, and all interested parties have been afforded an opportunity to present their views. Attention is respectfully invited to the accompanying report on the subject, dated the 8th instant, by Captain Sibert, and to its accompanying papers. In this report Captain Sibert fully discusses all phases of the question and shows that, without reference to the use of the Allegheny River for through navigation, the bridge in question is an unreasonable obstruction, and practically a bar to the use of that portion of Pittsburg Harbor situated on the river. He states that none of the boats engaged in interstate commerce from Pittsburg, south and west, can reach, at low water, a single manufacturing plant or wharf in the cities of Pittsburg and Allegheny on the Allegheny River. He submits a photograph to show that the portion of Pittsburg Harbor in the Monongahela River is crowded with shipping while that portion in the Allegheny has none, all due to the existence of the Union Bridge. It is also shown by the evidence that the lower portion of the Allegheny River would be of great importance as a harbor of refuge when ice is running out of the Monongahela River, if it were not obstructed by the Union Bridge. He reaches the conclusion, based on the facts developed at the hearing, that in order to give the shipping at Pittsburg increased harbor room and to enable it to connect with wharves and manufacturing plants in that part of the harbor located on the Allegheny River, the Union Bridge should be so raised as to provide a channel-span with a clear height of 70 feet, the same as exists under the bridge known as the 'Point Bridge' on the Monongahela River, and the same that will exist under the Wabash Railroad bridge just being built immediately above the Point Bridge. It appears that this

bridge was built in 1873–4 by the Union Bridge Company, incorporated under authority of an act of the Pennsylvania legislature of March 13, 1873, and that it has been the subject of complaint on the part of the navigation interests practically ever since its completion. Numerous investigations have been made by different engineer officers, who have held public hearings on the subject, and who have concurred in expressing the opinion that the bridge was an unreasonable obstruction to navigation, and that it should be raised so as to give a headroom equal at least to that of the aforesaid Point Bridge at the mouth of the Monongahela River. The Union Bridge is situated at the mouth of the Allegheny River, and there seems to be no room for doubt that the alteration of the bridge is essential to the reasonable use for navigation and commercial purposes of that portion of the river forming a part of Pittsburg Harbor. Captain Sibert recommends that the bridge in question be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburg shore to give a clear headroom over the Davis Island Pool of not less than 70 feet; and the first span from the same shore to give a headroom of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island Pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed. The period of 18 months is considered by him ample time within which to make these alterations. I concur in his views and recommend that notice be served on the bridge company, requiring the alterations to be made and completed as specified by him."

Under date of twentieth of January, 1903, Mr. Root, then Secretary of War, issued a formal notice to the Bridge Company stating that he had good reason to believe that its bridge was an unreasonable obstruction to free navigation. The

notice informed the company of the alterations of its bridge recommended by the Chief of Engineers as necessary, and concluded: "And whereas, eighteen months from the date of service of this notice is a reasonable time in which to alter the said bridge as described above; Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, Elihu Root, Secretary of War, do hereby notify the said Union Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before the expiration of eighteen months from the date of service hereof."

As the request of the Bridge Company, the time fixed by Secretary Root for altering, changing and elevating the bridge was extended by his successor, Secretary Taft, to December 1st, 1904. By order of the latter officer the time was extended to January 1st, 1905.

Subsequently, a rehearing was asked for by the Bridge Company, but the rehearing was refused and Secretary Taft made the following order: "The Union Bridge is an unreasonable obstruction to commerce of the Allegheny River. If the bridge were not there, the winter refuge which the stretch of the Allegheny River up to the next bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for navigation and commerce on the Ohio River and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice breaks at different times in the early spring. The mouth of the one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union Bridge at the mouth of the Allegheny was erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized

to inhibit the construction of bridges which were likely to obstruct navigation, but it appears that an army engineer, Colonel Merrill, in charge of the District, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the Government. These are the facts that I find independently of any previous adjudication; but added to this, is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question I should have ruled as Mr. Root ruled, and *a fortiori*, because the orders of this Department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers and the Union Bridge will be notified accordingly."

In the opinion of the District Court, delivered on a motion in arrest of judgment, it was said: "The obstruction here involved consists of a bridge over the Allegheny River just above its junction with the Monongahela at Pittsburg. The Allegheny River rises in Pennsylvania, flows north into New York State and thence back into Pennsylvania. The latter State, by act of March 21, 1798, enacted the Allegheny, from the New York State line to its mouth, a navigable stream, and the State of New York, by act of March 31, 1807, did likewise in its counties of Genesee and Allegheny. The Allegheny is the principal branch of the Ohio, its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the National Government of local interstate water ways and the harbor of Pittsburg. The Government has built or has now in process of construction

a system of locks and dams on the Allegheny which will slackwater the stream for twenty-seven miles from its mouth. The Davis Island Dam, situate five miles below Pittsburg on the Ohio River, raises the water in the Allegheny and Monongahela at their junction six feet above their normal depths and backs its water to the first dams of the Allegheny and Monongahela slackwater systems respectively. These waters form the harbor of Pittsburg, the importance of which harbor will be appreciated from the fact that the tonnage in water transportation passing from it the past year exceeded that of the Suez Canal for the same period. From its size, interstate relation and its being a part of this really great harbor, it will be seen that the Allegheny answers the requirement of a navigable stream, *The Montello*, 11 Wall. 411, and is also one over which the National Government has assumed jurisdiction. The Union Bridge is a pier-supported, wooden structure; it crosses from Pittsburg to Allegheny City; and is the first bridge on the Allegheny."

Mr. D. T. Watson and *Mr. Johns McCleave*, with whom *Mr. John S. Wendt* and *Mr. W. B. Rodgers* were on the brief, for plaintiff in error:

The Union Bridge located in Pennsylvania and spanning the Allegheny River from Pittsburg to Allegheny City, erected in 1874, prior to any legislation by Congress, and under an act of Pennsylvania, approved August 17, 1873, p. 86, and ever since maintained and used as a public traffic bridge, collecting tolls for use of the same, was when the present proceedings were instituted by the Secretary of War and when he made his order of January 20, 1906, for the alteration of said bridge, a lawful structure and the private property of the Union Bridge Company. *People* v. *Renssalaer R. R. Co.*, 15 Wend. 113; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 2; *Lake Shore Company* v. *Ohio*, 165 U. S. 365; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 325.

As to what legislation of Congress is necessary to evince a determination of Congress to exercise its jurisdiction over any given river, see *Gilman* v. *Philadelphia*, 3 Wall. 727; *The Wheeling Bridge Case*, 13 How. 630; *Lake Shore Co.* v. *Ohio*, 165 U. S. 365.

As Congress had not legislated and assumed jurisdiction of the Allegheny River prior to 1875, the absence of such legislation was really affirmative action by Congress that the State might freely legislate on the subject of the erection of bridges across the streams within its borders. *Mobile* v. *Kimball*, 102 U. S. 697.

The Government offered no evidence to show that the bridge was not constructed in accordance with its charter, or as constructed was, as a fact, an unreasonable obstruction to navigation, and the fact that the State of Pennsylvania, which granted the charter, had for over thirty years acquiesced in the construction of the bridge and in the bridge as constructed, and had made no objection whatever to it, is conclusive in the Federal court that the bridge was lawfully constructed. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 2.

The Union Bridge when erected in 1874 was a lawful structure. It was directly authorized by the State of Pennsylvania and approved of by that State acquiescing in its construction for over thirty years. It was indirectly, but affirmatively authorized by the United States Government because that Government by its inaction as to the Allegheny River authorized affirmative action by the State of Pennsylvania in the erection of bridges over that river.

The state or the Federal Government, no more than the individual can foresee the future and tell how in the future years the bridge will affect navigation under it. Both governments act as the individual does under the circumstances surrounding him or it, and if either the state or the Federal Government authorizes the erection of the bridge in a certain way, or approves by acquiescence of a bridge in a certain way the bridge becomes a lawful structure. It is always a ques-

tion of discretion in the State or the United States, and especially if both approved the bridge as a lawful structure. This has been ruled by this court in a number of cases. *Wheeling Bridge Case,* 13 How. 518; *S. C.,* 18 How. 421; *Bridge Co.* v. *United States,* 105 U. S. 470.

As the bridge was then erected under state authority with the consent of the United States Government, it became and was the private property of the Union Bridge Company, and not even the United States Government claiming its sovereign right under the commerce clause could take that bridge for public use, without due compensation, or deprive the Union Bridge Company of it without due process of law. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

The right of the State and the city was sustained in the Supreme Court of Illinois as a state question. *West Chicago Street Ry. Co.* v. *People,* 214 Illinois, 9; *C., B. & Q. Ry. Co.* v. *People,* 212 Illinois, 103.

The present case comes under another class of cases, and among them are the following. *United States* v. *Lynah,* 188 U. S. 445; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Transportation Co.* v. *Chicago,* 99 U. S. 635; *Scranton* v. *Wheeler,* 179 U. S. 146; *Yates* v. *Milwaukee,* 10 Wall. 497.

The power of Congress to regulate commerce is restricted by the provision of the Federal Constitution that private property shall not be taken for public use without just compensation, nor deprive one of property without due process of law. No power is given to any Department of the United States Government to destroy private property without giving the owner an opportunity to be heard on the question as to whether it is or is not a nuisance or subject to such destruction. Admitting for the sake of argument that Congress might decree by an explicit and express act, any bridge over any river a nuisance and an unlawful obstruction, it is submitted that before Congress could carry into effect that judgment the owner of the property has a right to be heard on the question whether as a fact it is a nuisance and interferes with navi-

gation. Unless as a fact it is such a nuisance and interference, even Congress cannot destroy it and remove it without compensation. *Sinking Fund Cases*, 99 U. S. 718; *Murray* v. *Land & Improvement Co.*, 18 How. 272.

The question whether the Union Bridge is an unreasonable obstruction to navigation which makes it a nuisance, is a judicial one which entitles the Bridge Company to a hearing on the merits before it can be deprived of its life. *Commonwealth* v. *New Bedford Bridge Co.*, 2 Gray, 339; *Commonwealth* v. *Pittsburg & Connellsville R. Co.*, 58 Pa. St. 26; *Mayor* v. *Connellsville & S. P. R. Co.*, 4 Am. Law Register (N. S.), 750; *Fisher* v. *McGirr*, 1 Gray, 36; *Colon* v. *Lisk*, 153 N. Y. 188.

Section 18, of the act of March 3, 1899, under which these proceedings were had, does not provide for "due process of law." That term means a course of legal proceedings according to those rules and proceedings which have been established by our jurisprudence for the protection and enforcement of public rights. *Kennard* v. *Louisiana*, 92 U. S. 480; *Pennoyer* v. *Neff*, 95 U. S. 714; *Hager* v. *Reclamation District*, 111 U. S. 701; *Ex parte Wall*, 107 U. S. 265; *United States* v. *Lee*, 106 U. S. 196; *Kelly* v. *City of Pittsburg*, 104 U. S. 78; *Hovey* v. *Elliott*, 167 U. S. 409.

Mr. Milton D. Purdy, Assistant to the Attorney General, for defendant in error:

Administrative process which has been regarded as necessary by the Government and sanctioned by long usage, is as much due process of law as any other. *Wulzen* v. *San Francisco*, 101 California, 15; *Attorney General* v. *Jochin*, 99 Michigan, 358; *Eames* v. *Savage*, 77 Maine, 212; *Holmes* v. *Seeley*, 19 Wend. 507; *Ex parte Milligan*, 4 Wall. 2.

Due process of law does not necessarily require that a judicial hearing shall be accorded before any preliminary action can be taken by the administrative officers of the Government which may result in a temporary deprivation of certain rights of a citizen. If the law contemplates that the citizen whose

rights are affected by certain administrative acts and processes shall finally be accorded an opportunity to have those rights passed upon in a judicial proceeding, then and in such a case due process of law has not been denied within the meaning of the Constitution. *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272.

While it is manifest that a law cannot withdraw from judicial determination a controversy with respect to private rights which from its nature is the subject of a suit at common law, or in equity, or in admiralty, it is likewise clear that in respect to matters involving public rights as distinguished from private rights the legislature may provide that so far as the determination of facts is concerned that the action of the administrative officers may be made final and conclusive. *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673; *United States* v. *Knox*, 102 U. S. 422; *Bushnell* v. *Leland*, 164 U. S. 684; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Public Clearing House* v. *Coyne*, 194 U. S. 497.

This law does not operate to take private property for public use within the meaning of the Fifth Amendment to the Federal Constitution. *New Orleans Gas Light Co.* v. *Drainage Commissioners*, 197 U. S. 453; *C., B. & Q. Ry. Co.* v. *Drainage Comm'rs*, 200 U. S. 561; *West Chicago R. R.* v. *Chicago*, 201 U. S. 506.

Section 18, under which the plaintiff in error was convicted, does not delegate to the Secretary of War legislative or judicial powers. *Buttfield* v. *Stranahan*, 192 U. S. 470; *Field* v. *Clark*, 143 U. S. 649.

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

The first principal question raised by the defendant is whether the 18th section of the River and Harbor Act of March 3d, 1899, is in violation of the Constitution of the United States as delegating legislative and judicial powers

to the head of an Executive Department of the Government. This question, the Government contends, has been determined in its favor by the principles heretofore announced by this court, and need not be discussed as if now presented for the first time. In its judicial as well as legal aspects the question is of such importance as to justify a full reference to prior decisions.

The earliest case is that of *The Brig Aurora*, 7 Cranch, 382, which involved the question whether Congress could make the revival of a law (which had ceased to be in force) depend upon the existence of certain facts to be ascertained by the President and set forth in a proclamation by him. The court said: "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act, declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation without limitation upon the occurrence of any subsequent combination of events." Referring to this language, we said in the subsequent case of *Field* v. *Clark*, 143 U. S. 649, 683: "This certainly is a decision that it was competent for Congress to make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified that they did not violate the neutral commerce of the United States. The same principle would apply in the case of the suspension of an act upon a contingency to be ascertained by the President and made known by his Proclamation."

In *Wayman* v. *Southard*, 10 Wheat. 1, 43, 45, 46, Chief Justice Marshall delivering the unanimous judgment of the court, said that although Congress could not delegate to the courts or to any other tribunals powers strictly and exclusively legislative, and although the line had not been exactly drawn that separates the important subjects which must be entirely

regulated by the legislature itself from those of less interest "in which a general provision may be made, and powers given to those who are to act under such general provisions to fill up the details," yet "Congress may certainly delegate to others powers which the legislature may rightly exercise itself," and "the maker of the law may commit something to the discretion of the other departments."

In *Field* v. *Clark*, just cited, 143 U. S. 649, 680, 683, 691, 692, the question arose as to the constitutionality of that section of the McKinley Tariff Act of 1890 which provided for the imposition, in a named contingency (to be determined by the President and manifested by his proclamation), of duties upon sugar, molasses and other specified articles, which the act had placed in the free list. By that section it was declared that "with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exportation from such designated country as follows, namely." Here follows in the act provisions indicating the particular duties to be collected, after the President's proclamation, upon sugars, molasses, coffee, tea, hides, etc. It was contended in the *Field case* that the

above section, so far as it authorized the President to suspend by proclamation the provisions of the act relating to the free introduction of sugar, molasses, coffee, etc., was unconstitutional, as delegating to him both legislative and treaty-making powers. In its consideration of this question the court, after referring to the case of the *Brig Aurora*, above cited, examined the numerous precedents in legislation showing to what extent the suspension of certain provisions and the going into operation of other provisions of an act of Congress had been made to depend entirely upon the finding or ascertainment by the President of certain facts, to be made known by his proclamation. The acts of Congress which underwent examination by the court are noted in the margin.[1] The result of that examination of legislative precedents was thus stated: "The authority given to the President by the act of June 4, 1794, to lay an embargo on all ships and vessels in the ports of the United States, 'whenever, in his opinion, the public safety shall so require,' and under regulations, to be continued or revoked, 'whenever he shall think proper;' by the act of February 9, 1799, to remit and discontinue, for the time being, the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, 'if he shall deem it expedient and consistent with the interest of the United States,' and 'to revoke such order, whenever, in his opinion, the interest of the United States shall require;' by the act of December 19, 1806, to suspend, for a named time, the operation of the non-importation act of the same year, 'if in his judgment the public interest should require it;' by the act of May 1, 1810, to revive a former act, as to Great Britain or France, if either country had not by a

[1] Act of June 13th, 1798, c. 53, 1 Stat. 565, 566; of February 9th, 1799, c. 2, 1 Stat. 613, of April 18th, 1806, c. 29, 2 Stat. 379; of December 19th, 1806, c. 1, 2 Stat. 411; of March 3d, 1815, c. 77, 3 Stat. 224; of March 3d, 1817, c. 39, 3 Stat. 361; of January 7th, 1824, c. 4, 4 Stat. 3; of May 24th, 1828, c. 111, 4 Stat. 308; of May 31st, 1830, c. 219, 4 Stat. 425; of August 5, 1854, c. 269, 10 Stat. 587; 11 Stat. 790; of March 6th, 1866, c. 12, 14 Stat. 3; 26 Stat. 616, c. 1244; of Act June 26th, 1884, c. 121, 23 Stat. 57.

named day so revoked or modified its edicts as not 'to violate the neutral commerce of the United States;' by the acts of March 3, 1815, and May 31, 1830, to declare the repeal, as to any foreign nation, of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares and merchandise imported into the United States, when he should be 'satisfied' that the discriminating duties of such foreign nations, 'so far as they operate to the disadvantage of the United States,' had been abolished; by the act of March 6, 1866, to declare the provisions of the act forbidding the importation into this country of neat cattle and the hides of neat cattle, to be inoperative, 'whenever in his judgment' their importation 'may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States;' must be regarded as unwarranted by the Constitution, if the contention of the appellants, in respect to the third section of the act of October 1, 1890, be sustained."

Touching the general question the court said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension

lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea. and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed." Again: "'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law,

which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' *Cincinnati, Wilmington &c. Railroad* v. *Commissioners*, 1 Ohio St. 77. In *Moers* v. *City of Reading*, 21 Pa. St. 188, 202, the language of the court was : 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in *Locke's Appeal*, 72 Pa. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction the court said was this: 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The court is of the opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President."

The latest case bearing on the general question is *Buttfield* v. *Stranahan*, 192 U. S. 470, 486. That case involved the constitutionality of the act of Congress of March 2, 1897, 29 Stat. 604, c. 358, relating to the "importations of impure and unwholesome tea." The act provided for the appointment by

the Secretary of the Treasury of a board of seven tea experts, who should prepare and submit to him standard samples of that article. One section of the act provided: "That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof." In that case it was contended that the act was unconstitutional, as making the right to import tea depend upon the arbitrary action of the Secretary of the Treasury and a board appointed by him; as excluding from import wholesome, genuine and unadulterated tea; and, as discriminating unequally in the admission of the different kinds of teas for import, as well as in the right to sell and purchase that article. The act conferred, it was objected, upon the Secretary and the board the uncontrolled power of fixing standards of purity, quality and fitness for consumption, and thus to prescribe arbitrarily what teas may be imported and dealt in. The question of constitutional law so raised was thus disposed of by the court: "The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality.

This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark*, 143 U. S. 649, where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an Executive Department powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts. It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 190. As appropriate to the object

to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through Executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that Executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant

contends received our approval the conclusion could not be avoided that Executive officers, in all the Departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the National Government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon Executive Departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

To this may be added the consideration that Congress, by the act of 1899, did not invest the Secretary of War with any power in these matters that could reasonably be characterized as arbitrary. He cannot act in reference to any bridge alleged to be an unreasonable obstruction to free navigation without first giving the parties an opportunity to be heard. He cannot require any bridge of that character to be altered, even for the purpose of rendering navigation through or under it reasonably free, easy and unobstructed, without giving previous notice to the persons or corporations owning or controlling the bridge, specifying the changes recommended by the Chief of Engineers, and allowing a reasonable time in which to make them. If, at the end of such time, the required alterations have not been made, then the Secretary is required to bring the matter to the attention of the United States District Attorney in order that criminal proceedings may be instituted to enforce the act of Congress. In the present case all the provisions of the statute were complied with. The parties concerned were duly notified and were fully heard. Nor is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence in finding

that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted.

We are of opinion that the act in question is not unconstitutional as conferring upon the Secretary of War powers of such nature that they could not be delegated to him by Congress.

The next principal contention of the Bridge Company is that the act of 1899 is unconstitutional, in that it makes no provision, and the United States has not offered, to compensate it for the sum that will necessarily be expended in order to make the alterations or changes required by the order of the Secretary of War. In other words, the defendant insists, that what the United States requires to be done in respect of defendant's bridge is a taking of private property for public use, which the Government is forbidden by the Constitution to do without making just compensation to, or without making provision to justly compensate, the owner. Stating the question in another way, the contention is, in effect, that even if the United States did not expressly assent to the construction of this bridge as it is, and even if the bridge has become an unreasonable obstruction to the free navigation of the waterway in question, the exertion of the power of the United States to regulate commerce among the States is subject to the fundamental condition that it cannot require the defendant, whose bridge was lawfully constructed, to make any alterations however necessary to secure free navigation, without paying or securing to it compensation for the reasonable cost of such alterations.

The propositions are combatted by the Government, which contends that the alterations or changes required to secure navigation against an unreasonable obstruction is not a *taking* of private property for public use within the meaning of the Constitution, and that the cost of such alterations or changes are to be deemed incidental only to the exercise of an undoubted function of the United States, when exerting, through Congress, its power to regulate commerce among the States,

and therefore navigation upon the waterways on and over which such commerce is conducted.

It would seem clear that this issue has likewise been determined by the principles announced in the previous cases of this court. Let us see whether such be the fact.

A leading case upon this subject is *Gibson* v. *United States*, 166 U. S. 269, 271 *et seq.* Congress, by the River and Harbor Acts of 1884 and 1886, 23 Stat. 133, 147, 24 Stat. 316, 327, authorized and directed the improvement of the Ohio River, and made appropriations to effect that object. Under the authority of the Secretary of War, and the Engineer Corps of the Army, a dike was constructed in that river for the purpose of concentrating the water-flow in the main channel of the river, near Neville Island. The dike began at a certain point on the island. Its construction substantially destroyed the landing on and in front of a farm, owned by Mrs. Gibson, on that island—preventing, during most of the year, free egress and ingress from and to such farm to the main or navigable channel of the river. At the time of the construction of the dike that farm was in a high state of cultivation, well improved with a dwelling house, barn and outbuildings. It had a frontage of a thousand feet on the main navigable channel, and the owner had a landing there which was used in the shipping of products from and supplies to her farm, and was the only one from which such products and supplies could be shipped. Before the construction of the dike the farm, by reason of the use to which it was put, was worth six hundred dollars per acre. The obstruction caused by the dike reduced its value to one hundred and fifty or two hundred dollars per acre, resulting in damages to the owner in excess of three thousand dollars. Suit was brought against the United States in the Court of Claims to recover such damages. That court found as a conclusion of law that the owner was not entitled to recover.

The Chief Justice of this court, delivering its unanimous judgment, said: "All navigable waters are under the con-

trol of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. *South Carolina* v. *Georgia*, 93 U. S. 4; *Shively* v. *Bowlby*, 152 U. S. 1; *Eldridge* v. *Trezevant*, 160 U. S. 452." After referring to several adjudged cases the court proceeded: "The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power. The applicable principle is expounded in *Transportation Co.* v. *Chicago*, 99 U. S. 635. In that case, plaintiff being an owner of land situated at the intersection of La Salle street, in Chicago, with the Chicago River, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in his use thereof by the building of a tunnel under the Chicago River by authority of the state legislature, in accomplishing which work it was necessary to tear up La Salle Street, which precluded plaintiff from access to his property for a considerable time; also to build a coffer dam in the Chicago River, which excluded his vessels from access to his docks; and such an injury was held to be *damnum absque injuria*. The court said, again speaking through Mr. Justice Strong: 'But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any

right of action. This is supported by an immense weight of authority. . . . Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes. In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject."

The *Gibson case* was referred to with approval in *Scranton* v. *Wheeler*, 179 U. S. 141, 153, 162. The latter case involved the question whether the owner of land on the St. Mary's River in Michigan was entitled, under the Constitution of the United States, to be compensated for the injury or damage done him, as a riparian owner, by certain work done in that river under the authority of the United States. The controlling question was whether the prohibition in the Constitution of the United States of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction of a pier resting on submerged lands in front of his upland, and which pier was erected by the United States for the purpose only of improving the navigation of such river. After observing that when that which is done amounts, within the meaning of the Constitution, to a taking of private property for public use, and that Congress may not, in the exercise of its power to regulate commerce, override the provision for just compensation when private property is so taken, the court entered

upon a review of some of the adjudged cases. Among other things it said: "All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guarantees prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the Government does not transcend the limits established by the supreme law of the land. Is the broad power with which Congress is invested burdened with the condition that a riparian owner whose land borders upon a navigable water of the United States shall be compensated for his right of access to navigability whenever such right ceases to be of value in consequence of the improvement of navigation by means of piers resting upon submerged lands away from the shore line? We think not." "The primary use," the court said, "of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman* v. *Benson*, 8 Michigan, 18, 22, the Supreme Court of Michigan, speaking

by Justice Campbell, declared the right of navigation to be one to which all others were subservient. . . . But the contention is that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We cannot assent to this view. If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates case*, 'in due subjection to the rights of the public'—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the pier in question, the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce." The court further said: "In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from

an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the vast commerce passing and to pass over them. Consequently the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability. . . . We are of opinion that the court below correctly held that the plaintiff had no such right of property in the submerged lands on which the pier in question rests as entitles him, under the Constitution, to be compensated for any loss of access from his upland to navigability resulting from the erection and maintenance of such pier by the United States in order to improve and which manifestly did improve the navigation of a public navigable water."

In *New Orleans Gas Light Co.* v. *Drainage Comm.*, 197 U. S. 453, 461, 462, it appeared that, under contract with the City of New Orleans, and at its own expense, the Gas Light Company had lawfully laid its pipes at certain places in the public ways and streets of that city. Subsequently, the Drainage Commission of New Orleans adopted a plan for the drainage of the city, which made it necessary to change the location in some places of the mains and pipes theretofore laid by the Gas Light Company. That company contended that to require such changes was a taking of its property for public use for which it was entitled, under the Constitution, to compensation. That view was rejected by this court. We said: "The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made. . . . The need of occupation of the

soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage, and every reason of public policy requires that grants of rights in such sub-surface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. *National Water Works Co.* v. *City of Kansas*, 28 Fep. Rep. 921, in which the opinion was delivered by Mr. Justice Brewer, then Circuit Judge; *Gas Light & Coke Co.* v. *Columbus*, 50 Ohio St. 65; *Jamaica Pond Aqueduct Co.* v. *Brookline*, 121 Massachusetts, 5; *In re Deering*, 93 N. Y. 361; *Chicago, Burlington &c. R. R. Co.* v. *Chicago*, 166 U. S. 226, 254. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

In *C., B. & Q. R. R. Co.* v. *Drainage Com'rs*, 200 U. S. 561,

582, 593–595, the above cases were cited with approval, and the principles announced in them were applied against a railway company owning a bridge that had been lawfully constructed by it over a non-navigable creek running through certain swamp or slough lands which the Drainage Commissioners were required by statute to drain in order to make them tillable and fit for cultivation. The Commissioners in executing the work of draining found it necessary that the creek over which the railway bridge was constructed should be deepened and enlarged, and a greater opening made under the bridge for the passage of the increased amount of water caused by the deepening and enlarging of the bed of the creek. The railway company was required, at its own cost, to construct such a bridge over the creek as would meet the necessities of the situation as it was or would be under the drainage plan of the Commissioners. The company refused to obey the order. The contention of the railway company was that as the bridge was lawfully constructed under its general corporate powers, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then and subsequently flowed, the foundation of the bridge could not be removed and its use of the bridge disturbed, unless compensation be first made or secured to the company in such amount as would be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the Commissioners would make necessary. The company insisted that to require it to meet these expenses out of its own funds would be within the meaning of the Constitution a *taking* of its property for public use without compensation, and, therefore, without due process of law. The court, after a review of authorities, said: "The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the Government,

Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, 659; *Sweet* v. *Rechel*, 159 U. S. 380, 399, 402; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445. If the means employed have no real substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber*, 136 U. S. 313, 320. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no *taking* of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case." The opinion concluded: "Without further discussion we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the Drainage Commissioners, under the authority of the State; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws."

The latest adjudication by this court was in *West Chicago*

Street Railroad v. *Chicago*, 201 U. S. 506, 524. In that case the principal question related to the duty of a street railroad company, which had lawfully constructed a tunnel under the Chicago River, to obey an ordinance of the city, requiring the company, at its own cost and expense, to lower its tunnel, so as to provide for a certain depth under it, which had been ascertained by competent Federal and local authority to be necessary for the increased demands of navigation. This court held upon the adjudged cases that the rights of the company, as the owner of the fee of the land, on either side of the river or in its bed, were subject to the paramount right of navigation over the waters of the river. It said: "If, then, the right of the railroad company to have and maintain a tunnel under the Chicago river is subject to the paramount public right of navigation; if its right to maintain a tunnel in the river is a qualified one, because subject to the specific condition in the act of 1874 that no tunnel should interrupt navigation; if the present tunnel is an obstruction to navigation, as upon this record we must take it to be; and if the city, as representing the State and public, may rightfully insist that such obstruction shall not longer remain in the way of free navigation; it necessarily follows that the railway company is under a duty to comply with the demand made upon it to remove, at its own expense, the obstruction which itself has created and maintains. If the obstruction cannot be removed except by lowering the tunnel to the required depth and (if a tunnel is to be maintained) providing one that will not interrupt navigation, then the cost attendant upon such work must be met by the company. The city asks nothing more than that the railroad company shall do what is necessary to free navigation from an obstruction for which it is responsible, and (if it intends not to abandon its right to maintain a tunnel at or near Van Buren street) that it shall itself provide a new tunnel with the necessary depth of water above it." Again: "In the case before us the public demands nothing to be done by the railroad company except to remove the obstruction which itself placed and

maintains in the river under the condition that navigation should not at any time be thereby interrupted. The removal of such obstruction is all that is needed to protect navigation. So that whatever cost attends the removal of the obstruction must be borne by the railroad company. The condition under which the company placed its tunnel in the river being met by the company, the public has no further demands upon it. This cannot be deemed a taking of private property for public use or a denial of the equal protection of laws within the meaning of the Constitution, but is only the result of the lawful exercise of a governmental power for the common good. This appears from the authorities cited in *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Com'rs, supra,* just cited. The state court has well said that to maintain the navigable character of the stream in a lawful way is not, within the meaning of the law, the taking of private property or any property right of the owner of the soil under the river, such ownership being subject to the right of free and unobstructed navigation. *People* v. *West Chicago Street R. R. Co.,* 203 Illinois, 551, 557. What the city asks, and all that it asks, is that the railroad company be required, in the exercise of its rights and in the use of its property, to respect the public needs as declared by competent authority, upon reasonable grounds, to exist. This is not an arbitrary or unreasonable demand. It does not, in any legal sense, take or appropriate the company's property for the public benefit, but only insists that the company shall not use its property so as to interrupt navigation."

Do the principles announced in the above cases require us to hold, in the present case, that the making of the alterations of its bridge specified in the order of the Secretary of War will be a taking of the property of the Bridge Company for public use? We think not. Unless there be a taking, within the meaning of the Constitution, no obligation arises upon the United States to make compensation for the cost to be incurred in making such alterations. The damage that will accrue to the Bridge Company, as the result of compliance

with the Secretary's order, must, in such case, be deemed incidental to the exercise by the Government of its power to regulate commerce among the States, which includes, as we have seen, the power to secure free navigation upon the waterways of the United States against unreasonable obstructions. There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the Government that it cannot exert its full power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be

made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the Bridge Company contends would seriously impair the exercise of the beneficent power of the Government to secure the free and unobstructed navigation of the waterways of the United States. We cannot give our assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made.

Independent of the grounds upon which we thus place our decision, it is appropriate to observe that the conclusion reached finds support in the charter of the Bridge Company and in the law of Pennsylvania as declared by its highest court. The charter of the company, as we have seen, expressly warned the company that its bridge must not obstruct navigation—that is, in legal effect, navigation as it then was, or might be, at any subsequent time. In *Dugan* v. *Bridge Company*, 27 Pa. St. 303, 309, 311, we have the case of a bridge company on which was conferred the franchise to erect and maintain a toll-bridge across Monongahela River, coupled, however, with the condition that such bridge should not be erected "in such manner as to injure, stop, or interrupt the navigation of such river by boats, rafts or other vessels." The Supreme Court of Pennsylvania interpreted these words as meaning that "the bridge was to be so built as not to injure, stop or interrupt the navigation, either then or now, whether in its infancy or full growth." The same general question arose in *C., B. & Q. Railway Co.* v. *Drainage Comm'rs*, above cited. This court held that the adjudged cases "negative the

suggestion of the railway company that the adequacy of its bridge and the opening under it for passing the water of the creek at the time the bridge was constructed determine its obligations to the public at all subsequent periods. In *Cooke* v. *Boston & Lowell R. R.*, 133 Massachusetts, 185, 188, it appeared that a railroad company had statutory authority to cross a certain highway with its road. The statute provided that if the railroad crossed any highway it should be so constructed as not to impede or obstruct the safe and convenient use of the highway. And one of the contentions of the company was that the statute limited its duty and obligation to provide for the wants of travelers at the time it exercised the privilege granted to it. The court said: 'The legislature intended to provide against any obstruction of the safe and convenient use of the highway for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway.' In *Lake Erie & Western R. R. Co.* v. *Cluggish*, 143 Indiana, 347, the court said (quoting from *Lake Erie & Western R. R. Co.* v. *Smith*, 61 Fed. Rep. 885), 'The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public.' So, in *State of Indiana* v. *Lake Erie & Western R. R. Co.*, 83 Fed. Rep. 284, 287, which was the case of an overhead crossing lawfully constructed on one of the streets of a city, the court said: 'If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway.'"

Some stress was laid in argument upon the fact that compliance with the order of the Secretary of War will compel the Bridge Company to make a very large expenditure in money. But that consideration cannot affect the decision of the questions of constitutional law involved. It is one to be addressed to the legislative branch of the Government. It is for Congress to determine whether, under the circumstances of a particular case, justice requires that compensation be made to a person or corporation incidentally suffering from the exercise by the National Government of its constitutional powers.

These are all the matters which require notice at our hands; and perceiving no error of law on the record, the judgment must be affirmed.

It is so ordered.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissent.

MR. JUSTICE MOODY did not participate in the consideration or decision of the case.

GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY *v.* TEXAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 2. Argued October 11, 1906.—Decided February 25, 1907.

Where the facts are settled in the state court by special findings, those findings are conclusive upon this court.

An interstate shipment—in this case of car-load lots—on reaching the point specified in the original contract of transportation ceases to be an interstate shipment, and its further transportation to another point within the same State, on the order of the consignee, is controlled by the law of the State and not by the Interstate Commerce Act.

97 Texas, 274, affirmed.

In the District Court of Tarrant County, Texas, on July 28, 1902, the State of Texas recovered a judgment against the Gulf, Colorado and Santa Fé Railway Company for one hundred dollars as a penalty for extortion in a charge for the transportation of a carload of corn from Texarkana, Texas, to Goldthwaite, Texas. This judgment was sustained by both the Court of Civil Appeals, 32 Tex. Civ. App. 1, and the Supreme Court of the State. 97 Texas, 274. Thereupon the railway company brought the case here on a writ of error.

The case was tried in the District Court without a jury. Findings of fact were made, which were sustained by the appellate courts. From them it appears that on January 13, 1902, the Texas and Pacific Railway Company, which owns and operates a railroad from Texarkana, Texas, to Fort Worth, Texas, executed a bill of lading by which it acknowledged the receipt from the Samuel Hardin Grain Company at Texarkana, Texas, of one car of sacked corn consigned to shippers, with orders to deliver to Saylor & Burnett, at Goldthwaite, Texas. This car of corn was transported by the Texas and Pacific Railway Company to Fort Worth, there delivered to the defendant railway company and by it transported to Goldthwaite, where it arrived on the seventeenth day of January, 1902. When it reached Goldthwaite, Saylor & Burnett, who were acting for the Samuel Hardin Grain Company, tendered the charges prescribed by the state railroad commission, which the agent declined to accept, and demanded and collected a larger sum. The following findings state the important facts upon which the controversy turns:

"8. On December 23d, 1901, the Samuel Hardin Grain Company, at Kansas City, Mo., offered to sell Saylor & Burnett, at Goldthwaite, Texas, No. 2 mixed corn at 86½ cents per bushel for delivery on railway track at Goldthwaite, and this offer was accepted for two carloads of corn. This offer and acceptance was by telegraphic communication between the parties at their respective places of business. The Hardin Grain Company did not at that time have the corn, but on December 24th,

1901, to fill the order it contracted with the Harroun Commission Company of Kansas City for the purchase—two 66,000-pound cars of No. 2 mixed corn at 75½ cents per bushel, to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to and did fill the order of the Hardin Grain Company. These cars had originated in Hudson, South Dakota. The receiving carrier at Hudson was the Chicago, Milwaukee and St. Paul Railway Company, who issued bills of lading limiting its liability to losses occurring on its road, with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to 'Forrester Bros., Texarkana, Texas,' and shipment made in cars of C. M. & St. P. Ry. Co., care of Kansas City Southern Ry. at Kansas City, Missouri, with the privilege to stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17th, 1901, was there unloaded, sacked and transferred to the Kansas City Southern Railway Co., who, on December 31st, 1901, issued bills of lading reciting that the corn was loaded in cars No. 3845 P. G. and No. 4189 P. G., that same was received of Forrester Bros. and consigned as follows: 'Shipper's order, notify Harroun Commission Company, Texarkana, Texas,' and reciting further that freight 14 cents per hundred pounds was prepaid, and one of these cars, to wit, car 'No. 3845 P. G.' is the car in controversy in this suit.

"9. The Harroun Commission Company paid no freight on the corn from Hudson, South Dakota, to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

"10. The freight on the corn from Hudson to Texarkana was as follows: 18 cents per 100 pounds from Hudson to Kansas City and 14 cents from Kansas City to Texarkana, all of which was paid by the vendors of Harroun Commission Company. The minimum interstate rate from Hudson, South Dakota, to

Goldthwaite, Texas, was 46 cents per 100 pounds, which would have been apportioned as follows: 18 cents from Hudson to Kansas City, and 28 cents from Kansas City to Goldthwaite, Texas. The G., C. & S. F. Ry. Co., the T. & P. Ry. Co. and the Kansas City Southern Ry. Co., together with other connecting lines from Kansas City, Missouri, to Goldthwaite, Texas, had established a joint tariff of 35 cents per 100 pounds on shipments from Kansas City to Goldthwaite via Texarkana and originating in Kansas City, had agreed on a division of that rate between them and had filed tariffs establishing such rate with the Interstate Commerce Commission, and by such steps had brought itself within the provisions of the interstate commerce laws.

"11. The Hardin Grain Company's officers kept themselves informed of interstate commission freight rates and of the state commission rates, and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they bought the corn for delivery to them at Kansas City and had it shipped from Kansas City to Goldthwaite.

"12. At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin, the manager of the former company, intended that the corn to be thereby acquired should go to Saylor & Burnett and should be shipped to Goldthwaite, from Texarkana, as soon as practicable, and on December 26th, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come.

"13. On December 31st, 1901, the date of shipment from Kansas City to Texarkana, Harroun Commission Company informed the Hardin Grain Company that the corn to fill the

latter's order had been loaded to start to Texarkana, and requested instruction as to how the corn should be shipped from Texarkana for the guidance of F. L. Atkins, their agent at that place, who would attend to such reshipping for the Hardin Grain Company, as per former understanding. Thereupon and in compliance with such request blank bills of lading were made out by the Hardin Grain Company in Kansas City and furnished to the Harroun Commission Company, to be forwarded to F. L. Atkins. These bills of lading were to be executed by the Texas and Pacific Railway Company, and F. L. Atkins, as agent for the Hardin Grain Company, and were for shipment of the corn to Goldthwaite, Texas, consigned to 'Shipper's order, notify, etc.,' giving the numbers and initials of cars, which information had been furnished by the Harroun Commission Company, and on January 14, 1902, the reshipment having been made as per instructions, the bills of lading duly executed by the Texas and Pacific Ry. Co. were by Harroun delivered to Hardin Grain Company, who thereupon paid the Harroun Commission Company $1,779.64, the purchase price previously agreed upon for the corn, and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that company of the intended final destination and disposition of the corn.

"14. Neither Hardin Grain Company nor Harroun Commission Company had any store or warehouse at Texarkana, but under the agreement between the two companies (Hardin and Harroun) one F. L. Atkins, who was the agent of the Harroun Commission Company, and stationed at Texarkana, reshipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite, Texas, over the Texas & Pacific Ry. Co. and the G., C. & S. F. Ry. Co., by bill of lading reciting its receipt from Hardin Grain Company, and consigned to 'Shipper's order, notify Saylor & Burnett, Goldthwaite, Texas,' and was transferred under original seals and without breaking packages, to the Texas & Pacific Ry. Co., after having remained in Texarkana five days, the only

thing done by F. L. Atkins was to surrender the Kansas City Southern bill of lading, have the cars set over on the T. & P. Ry., and take a bill of lading from the latter company. The corn reached Texarkana January 7th, 1902, and was shipped out from Texarkana January 13th, 1902; the defendant was not a party to the bill of lading executed at Texarkana.

"15. On December 31st, 1901, Hardin Grain Company mailed to Saylor & Burnett an invoice of the corn in the form of an account stating the car No.'s and initial, the amount of corn and price to be paid by Saylor & Burnett."

Mr. Gardiner Lathrop, with whom *Mr. Aldis B. Browne* and *Mr. J. W. Terry,* were on the brief, for plaintiff in error:

Transportation of freight from a point in one State to a point in another is of itself interstate commerce without reference to any question of intended sale of freight. Such a shipment does not become intrastate commerce when it reaches the state line, but continues interstate commerce until delivery at the final place of destination in the State. *Rhodes* v. *Iowa,* 170 U. S., 412. The intention of the parties who control the shipment determines the place of final destination in the State. The mere fact that a sale is made of the freight while in transit to the place of final destination does not change its character from interstate to state commerce. *Kelley* v. *Rhodes,* 188 U. S. 1; *United States* v. *Freight Assn.,* 166 U. S. 290; *McCall* v. *California,* 136 U. S. 108; *Norfolk & Western Ry. Co.* v. *Pennsylvania,* 136 U. S. 114; *Wabash Ry.* v. *Illinois,* 118 U. S. 570, 573, 574; *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617.

If railroad companies by manipulation or form may not make that a state or territory shipment which otherwise would be an interstate commerce transaction, for the same reason it necessarily follows that those who determine the destination of the freight cannot deprive it of its quality of interstate commerce by the form which they may elect to give to the transaction. *Cutting* v. *Fla. Ry. & Nav. Co.,*

46 Fed. Rep. 641; *The Daniel Ball,* 10 Wall. 557; *Ex parte Kœhler,* 30 Fed. Rep. 867; *Houston Direct Navigation Co.* v. *Insurance Co.,* 89 Texas, 1; *State* v. *Southern Kansas Ry. Co.,* 49 S. W. Rep. 252; *M., K. & T. Ry.* v. *Fielder,* 46 S. W. Rep. 633; *G., C. & S. F. Ry. Co.* v. *Ft. Grain Co.,* 72 S. W. Rep. 419.

The power to tax does not alone determine whether the transaction is one of interstate commerce. The decisions of the courts have been more liberal in sustaining authority of the State to tax than in cases where the attempted regulation of the State applies directly to interstate shipments such as in this case regulating the amount of the charge to be made by the carrier.

Mr. Robert Vance Davidson, Attorney General of the State of Texas, for defendant in error:

The Supreme Court of Texas did not err in its conclusion of law in finding that the shipment in controversy from Texarkana, Texas, to Goldthwaite, Texas, was not an interstate shipment, but originated and terminated in the State of Texas. Interstate Commerce Act, § 1; *Interstate Com. Comm.* v. *Brimson,* 154 U. S. 457; *Railroad Co.* v. *Interstate Com. Comm.,* 162 U. S. 191; *New York* v. *Knight,* 192 U. S. 21; *Brown* v. *Houston,* 114 U. S. 622; *Diamond Match Co.* v. *Ontonogon,* 188 U. S. 82, 92; *Coe* v. *Erroll,* 116 U. S. 517; *Railroad Co.* v. *Osborne,* 10 U. S. App. 430; *Bridge Co.* v. *Railway Co.,* 37 Fed. Rep. 613; *Ft. W. & D. C. Ry. Co.* v. *Whitehead,* 6 Texas Civ. App. 595.

Transportation from a point in one State to a point in another State constitutes interstate commerce; but when the commodity transported has reached the termination of its journey and has been delivered to the consignee, it ceases to be a subject of interstate commerce and the subsequent shipment from the point at which it has been delivered to another point in the State, is an intrastate shipment. *Coe* v. *Erroll,* 116 U. S. 517; *Ft. W. & D. C. Ry. Co.* v. *Whitehead,* 6 Texas C. C. A. 595; *C., N. O. & T. P. R. R. Co.* v. *Interstate Com. Comm.,* 162 U. S. 184; *S. C.,* Civ. App., 56 Fed. Rep. 925; *C. & N. W. Railway Co.* v.

Osborne, 52 Fed. Rep. 912; *Interstate Com. Comm.* v. *B. Z. & C. Ry. Co.*, 77 Fed. Rep. 942; *Interstate Com. Comm.* v. *Detroit, etc., Ry. Co.*, 167 Fed. Rep. 642; *United States* v. *Interstate Com. Comm.*, 81 Fed. Rep. 783; *G., C. & S. F. Ry. Co.* v. *M. S. S. Co.*, 86 Fed. Rep. 407; *M. & I. R. R. Co.* v. *G. & S. S. R. R. Co.*, 1 Interstate Com. Comm. Rep. 30.

When the corn arrived at Texarkana and was delivered to the consignee it became a part of the property situated within the State of Texas and subject to the laws of that State. 17 Am. & Eng. Enc. of Law, 2d ed. 71; *Robbins* v. *Shelby Co.*, 120 U. S. 497.

When commodities have been transported from a point without the limits of a State to a point within the State, to which, under the contract of shipment, they were to be transported, and the contract of shipment complied with, and ended, such commodities have ceased to be articles of interstate commerce, and are thereafter in all respects subject to the laws of the State in which they may be, and this although the shipper may have intended from the beginning that they were to be immediately taken to some place within the State other than that to which the carrier had contracted to convey them. The motives of an importer or shipper can not be looked to for the purpose of causing commodities to continue subjects of interstate commerce, which would have ceased to be such but for such motives.

The Texas & Pacific Railway Co., the carrier which transported the corn from Texarkana to Fort Worth, and the plaintiff in error, which transported it from Fort Worth to Goldthwaite, were not shown by the evidence to have had any agreement with other carriers to transport said corn, by through bill of lading or in any other manner, and upon the receipt of said corn at Texarkana, Texas, by the Texas & Pacific, it had the right to demand and receive its Texas state rate to Fort Worth, and the plaintiff in error its Texas state rate from Fort Worth to Goldthwaite, and neither of said railroads had the right to charge more or any other rate, or voluntarily convert a local shipment into an interstate shipment, especially

when such interstate shipment from Hudson, South Dakota, to Texarkana, Texas, had terminated at Texarkana, and the corn had been there delivered; and it is immaterial what might have been the motives or intentions of any of the parties to the transaction in the shipment of the corn to Texarkana. *Interstate Com. Comm.* v. *C., N. O. Ry. Co.*, 66 Fed. Rep. 925; *C., N. O. Ry. Co.* v. *Interstate Com. Comm.*, 162 U. S. 192; *So. Pacific Ry. Co.* v. *Interstate Com. Comm.*, 200 U. S. 553; *Texas &c. R. R. Co.* v. *Interstate Com. Comm.*, 43 Fed. Rep. 37; *L. & N. R. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483; *United States* v. *Knight Co.*, 156 U. S. 13; *Railway Co.* v. *Osborne*, 52 Fed. Rep. 912.

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

The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment. If so the regulations of the state railroad commission do not control, and the court erred in enforcing the penalty. If, however, it was a purely local shipment, the judgment below was right and should be sustained.

The facts are settled by the special findings, those findings being conclusive upon this court. *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Thayer* v. *Spratt*, 189 U. S. 346; *Adams* v. *Church*, 193 U. S. 510; *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220.

The corn was carried from Texarkana, Texas, to Goldthwaite, Texas, upon a bill of lading which upon its face showed only a local transportation. It is, however, contended by the railway company that this local transportation was a continuation of a shipment from Hudson, South Dakota, to Texarkana, Texas; that the place from which the corn started was Hudson, South Dakota, and the place at which the transportation ended was Goldthwaite, Texas; that such transportation was interstate commerce, and that its interstate character was not

affected by the various changes of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite.

It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from Hudson to Texarkana. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana—that is, an interstate shipment. The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin company changed or offered to change the contract of shipment, or the place of delivery. The Hardin company accepted the contract of shipment theretofore made and purchased the corn to be delivered at Texarkana—that is, on the completion of the existing contract. When the Hardin company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas and Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn

was delivered to the Hardin company at Texarkana. Whatever may have been the thought or purpose of the Hardin company in respect to the further disposition of the corn, was a matter immaterial so far as the completed transportation was concerned.

In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the State within which that carriage was to be made.

The question may be looked at from another point of view. Supposing a carload of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car, can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended after the goods had reached Texarkana to forward them to some other place outside the State? To state the question in other words, if the only contract of shipment was for local transportation, would the state law in respect to the mode of transportation be set one side by a Federal law in respect to interstate transportation on the ground that the shipper intended after the one contract of shipment had been completed to forward the goods to some place outside the State? *Coe* v. *Errol*, 116 U. S. 517–527.

Again, it appeared that this corn remained five days in Texarkana. The Hardin company was under no obligation to

ship it further. It could in any other way it saw fit have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin company. Then, and not till then, did the Hardin company have full title to and control of the corn, and that was after the first contract of transportation had been completed.

It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits and the carrier ought to be able to depend upon the contract which it has made and must conform to the liability imposed by that contract.

We see no error in the proceedings and the judgment of the Supreme Court of Texas is

Affirmed.

WALLACE *v.* ADAMS.

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

No. 260. Argued December 21, 1906.—Decided February 25, 1907.

The power of Congress over citizenship in Indian tribes is plenary; it may adopt any reasonable method to ascertain who are citizens, and if one method is unsatisfactory it can try another; nor is its power exhausted because the first plan is by inquiry in a territorial court. The functions of a territorial court in such a case are those of a commission rather than of a court.

The act of July 1, 1902, 32 Stat. 641, creating the Choctaw and Chickasaw Citizenship Court and giving it power to examine, and in case of error found, to annul judgments of courts of Indian Territory determining citizenship in the Choctaw and Chickasaw Nations, was a valid exercise of power.

Congress has power to provide for the bringing of a suit in regard to citizenship in Indian tribes in a court of equity in which every class to be affected shall be represented and that those not actually made parties but who belong to the classes represented shall be bound by the decree.

Citizens are bound to take notice of the legislation of Congress.

143 Fed. Rep. 716, affirmed.

THE facts are stated in the opinion.

Mr. A. C. Cruce and *Mr. Jackson H. Ralston*, with whom *Mr. W. I. Cruce*, *Mr. W. R. Bleakmore*, *Mr. Frederick L. Siddons* and *Mr. William E. Richardson* were on the brief, for plaintiffs in error:

The citizenship court was not a court but a commission; it was but an arm of the administrative branch of the government and could not exercise judicial functions and therefore could not vacate a decree entered by the regularly established courts. The Circuit Court of Appeals having decided that the United States courts in the Indian Territory, and the Supreme Court, in determining questions of Indian citizenship were, themselves, not acting as courts, but prac-

tically as commissions, it must follow that the citizenship court, in exercising the jurisdiction conferred upon it, was likewise performing legislative and not judicial functions.

The citizenship court was not capable of exercising such judicial functions as to authorize it to vacate the decree of the United States court in the Indian Territory admitting Hill to citizenship. *Ex parte Joins*, 191 U. S. 93.

If the citizenship court was a judicial body, its decree, setting aside the decrees admitting parties to citizenship, is insufficient to accomplish that purpose as to any other than the ten defendants in that case. Before Hill could be affected by the decree of the citizenship court, he should have been made a party thereto. That court had no right or authority to assume that he was situated similarly to the other defendants. *Harwood* v. *C. & O. R. R. Co.*, 17 Wall. 78.

The questions submitted to the determination of the citizenship court by the act of July 1, 1902, which established that court, were in issue in and determined by, the various cases which came to this Court from the United States courts in the Indian Territory admitting parties to citizenship in the Choctaw and Chickasaw Nations. See *Stephens* v. *Cherokee Nation*, 174 U. S. 445, in which this Court decided that the act of June 10, 1896, was constitutional and that the cases should have been tried *de novo* in the territorial courts. If, after the lapse of four years, Congress had the right to create an inferior tribunal and authorize it to retry these same questions, there is no reason why it may not, at the end of another four years, establish another tribunal to undo the work of the citizenship court, and the litigation might be extended *ad infinitum*.

The act providing for the creation of the citizenship court was class legislation, and therefore unconstitutional. The act of 1890 put the Constitution in force in the Indian Territory, and, since that time, the various members of the Indian tribes have been as much entitled to its protection as citizens of the United States.

The defendant in his application for citizenship, complied literally with the rules adopted by the United States government and its agents, and that government, as well as the Choctaw and Chickasaw tribes, is estopped to claim that the proceedings admitting him to citizenship were irregular. *People* v. *Stephens*, 71 N. Y. 527; *Lindsay* v. *Haws*, 2 Black (U. S.), 554; *State* v. *Milk*, 11 Fed. Rep. 389; *State* v. *Flint*, 89 Michigan, 481; *Sanders* v. *Hart*, 57 Texas, 8; *State* v. *Dint*, 18 Missouri, 313; *Alexander* v. *State*, 56 Georgia, 478.

The Constitution intended that the Judiciary should be independent of Congress, and it would be a dangerous innovation if this court should hold that its final judgments and decrees are subject to the legislative will, in all cases appealed from what are called legislative courts, or where the controversy is about matters which are originally cognizable by Congress.

Congress may relinquish or surrender its plenary power over political questions, and this power once surrendered may never be resumed. *Ex parte Heff*, 197 U. S. 488; *United States* v. *Arredondo*, 6 Pet. 691; *Astiazaran* v. *Santa Rita L. & M. Co.*, 148 U. S. 80; *Den* v. *Hoboken Land & Imp't Co.*, 18 How. 272.

Mr. George A. Mansfield, with whom *Mr. J. F. McMurray* and *Mr. Melven Cornish* were on the brief, for the Choctaw and Chickasaw Nations (by special leave of court). No counsel appeared for the defendant in error.

That part of the act of Congress approved July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court and governing its jurisdiction is constitutional and valid and the decrees of that court, rendered thereunder are regular and should be enforced.

The United States court in Indian Territory was without jurisdiction to entertain a suit in ejectment on behalf of an Indian allottee for possession of his allotment, on account of that provision contained in the act of July 1, 1902, specifi-

cally directing the Indian Agent by summary order, to put allottee Indians in possession of their allotments, and providing that his action to that end should not be interfered with by the writ of process of any court.

It was the duty of the trial judge to have made the Choctaw and Chickasaw Nations parties to the suit under the provisions of section 12 of the act of Congress approved June 28, 1898, 30 Stat. 495, and because of the failure of the trial judge to act as required by this law, the case should not have been permitted to proceed to final determination.

The establishment by Congress of the citizenship court was necessary and desirable; necessary to do justice to the Nations and desirable from the standpoint of the government, as permitting the administration of the estate of its wards and enabling it to bring to a final and correct conclusion all matters entrusted to its care as guardian. It was a necessary and proper exercise of the power of Congress to save the Nations from fraud and wrong. *McCullough* v. *Maryland*, 4 Wheat. 316, 344; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *United States* v. *Kagama*, 118 U. S. 375.

The manner of its exercise is a matter of legislative discretion and cannot be controlled by the courts. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 308; *Lone Wolf* v. *Hitchcock*, 187 U. S. 565.

In the creation of the citizenship court Congress has not exceeded its powers and the legislation is valid and constitutional, and the proceedings of the citizenship court thereunder are regular and they should be enforced. If there should be, however, a doubt as to its validity, that would not be sufficient to justify this court in declaring it unconstitutional. The doubt would be resolved in favor of its constitutionality. Cooley's Const. Lim., 6th ed. 216, and authorities cited.

Mr. Justice Brewer delivered the opinion of the court.

This was an action commenced in September, 1904, by

Mrs. Ella Adams, for herself and her minor children, defendants in error, in the United States court for the Southern District of the Indian Territory, to recover possession of a tract of land in that Territory. Defendants answered, and upon trial judgment was rendered in favor of plaintiffs. This judgment was sustained by the United States Court of Appeals of the Indian Territory, and on further appeal reaffirmed by the United States Circuit Court of Appeals for the Eighth Circuit. 143 Fed. Rep. 716.

The case arises out of the legislation of Congress designed to secure the disintegration of the tribal organization of the Five Civilized Tribes in the Indian Territory, and the distribution of the property of those tribes among the individual Indians. A full résumé of this legislation and the general litigation following it is to be found in *Stephens* v. *The Cherokee Nation*, 174 U. S. 445, and a full statement of the facts in this case is to be found in the opinion of the United States Circuit Court of Appeals. An entire restatement of these matters is, therefore, unnecessary.

There is but a single matter to be determined. As counsel for plaintiffs in error say:

"The assignment of errors presents but one question. If the decree of the Choctaw-Chickasaw Citizenship Court, in the test case known as the *Riddle case*, vacated the decree that defendant, Hill, had, theretofore, procured in the United States court for the Southern District of the Indian Territory, wherein he was adjudged to be a member of the Choctaw tribe of Indians, this case should be affirmed. If it did not, it should be reversed."

To properly appreciate and rightly answer this single question some things in the history of the legislation and litigation and also some of the facts in this case must be noticed.

In order to divide the lands of these Indian nations an enumeration of the individuals entitled thereto became necessary. By the act of March 3, 1893, 27 Stat. 645, c. 209, § 16, the commission to the Five Civilized Tribes, generally known

as the Dawes Commission, was empowered to negotiate and extinguish the tribal title to the lands and to make an allotment thereof to the members of the tribe in severalty. By that of June 10, 1896, 29 Stat. 339, 340, c. 398, the commission was authorized to hear the application and determine the right of each applicant for citizenship in either of these tribes. The act also granted an appeal to the proper United States District Court in the Indian Territory to any party aggrieved by the ruling of the commission, and declared that the judgment of that court should be final. It required the commission to make a complete roll of the citizens of each of the tribes, to be "hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes." Hill, who is the principal defendant, applied to be enrolled as a citizen of the Choctaw Nation, and his application was finally sustained by the court, and he was, on March 8, 1898, adjudged to be a member of the Choctaw tribe by blood and entitled to be enrolled as such. The land in controversy was selected and taken possession of by him in reliance upon this adjudication of citizenship. On July 1, 1898, Congress passed an act (30 Stat. 591, c. 545), granting to the tribes an appeal to the Supreme Court from the judgments of the United States courts of the Indian Territory in citizenship cases. Under the authority of this act many of these cases were appealed to this court, which affirmed the judgments. *Stephens* v. *Cherokee Nation, supra.* On March 21, 1902, an agreement was made between the United States and the Choctaw and Chickasaw Nations, which was confirmed by act of Congress July 1, 1902, 32 Stat. 641. This agreement and act were substantially that a court known as the Choctaw and Chickasaw Citizenship Court should be created, and that court should have power in a suit in equity brought by either or both of these tribes against any ten persons who had been admitted to citizenship or enrollment by the terms of the judgments of the several United States courts in the Indian Territory, as representa-

tives of all persons similarly situated, to determine whether the judgments of those courts should be annulled on account of certain alleged irregularities. The agreement and act also provided that in case the citizenship courts should decide that those judgments should be annulled, the papers in any action in those courts, wherein such a judgment had been rendered, should, upon seasonable application of either party, be transferred to the citizenship court, which should proceed to a hearing and determination of the question of citizenship. Under this agreement and act the court was established and a test suit brought, in which a decree was entered to the effect that the judgments of the United States courts in the Indian Territory, whereby persons were admitted to citizenship in the Choctaw and Chickasaw Nations under the act of June 10, 1896, were annulled and vacated. Hill was not named a party in that test suit, nor did he thereafter apply for a transfer of his case to the Citizenship Court. The above statement of facts is sufficiently full for an understanding of the single question presented for determination.

That single question may be divided into two. First, was the decree in the Indian Territory court declaring Hill a citizen a finality, beyond the power of Congress to in any manner disturb? This was answered in the *Stephens case, supra.* In that case we held that Congress could authorize a review of the judgments of the United States courts of the Indian Territory in citizenship cases, and this although, by the terms of prior legislation, those judgments had become final. While sustaining the act authorizing such review and providing for appeals to this court we construed it as limiting the appeals to the question of the constitutionality or validity of the legislation, and not as bringing before us the facts in the instances of all applications for citizenship. In the opinion (page 477) we said:

"The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain and de-

structive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language expresses a contrary intention in unequivocal terms the mere fact that the legislation is retroactive does not necessarily render it void.

"And while it is undoubtedly true that legislatures can not set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. *Calder* v. *Bull*, 3 Dall. 386; *Sampeyreac* v. *United States*, 7 Pet. 222; *Freeborn* v. *Smith*, 2 Wall. 160; *Garrison* v. *New York*, 21 Wall. 196; *Freeland* v. *Williams*, 131 U. S. 405; *Essex Public Board* v. *Skinkle*, 140 U. S. 334.

"The United States court in Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery, devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort can not be questioned unless in violation of some prohibition of that instrument.

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court

beyond the power of reëxamination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

This decision established that no such vested right was created by the proceedings of the Dawes Commission or the judgments of the courts of the Indian Territory on appeal from the findings of the commission as prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory it could try another. The fact that the first provision was by an inquiry in a territorial court did not exhaust the power of Congress or preclude further investigation. The functions of the territorial courts in this respect were but little more than those of a commission. While the act of July 1, 1898, provided for an appeal to this court, and appeals were taken in many cases, yet our inquiry stopped with the question of the constitutionality of the legislation. In other words, we entertained and decided the purely judicial question of the validity of the means Congress had adopted for determining the matter of citizenship. We did not attempt to pass upon the question of citizenship in any particular case nor determine whether the applicant was or was not entitled to be enrolled as a citizen. It is unnecessary to consider what would have been the effect of a judgment of this court, a court provided for in the Constitution, on the question of the right of a litigant to citizenship. The distinction between this court and the courts established by act of Congress in virtue of its power to ordain and establish inferior courts is shown in *Gordon* v. *United States*, 117 U. S. 697, in which we held that while Congress could give to the Court of Claims jurisdiction to inquire and report upon claims against the Government, it could not authorize an appeal from such report to this court unless our decision was made a final judgment, not subject to Congressional review. In the opinion Mr. Chief Justice Taney said (pp. 699, 702):

"Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the executive departments. In this respect the authority of the Court of Claims is like to that of an auditor or comptroller, with this difference only, that in the latter case the appropriation is made in advance, upon estimates furnished by the different executive departments, of their probable expenses during the ensuing year; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made. In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards. But in principle there is no difference between these two special jurisdictions created by acts of Congress for special purposes, and neither of them possess judicial power in the sense in which these words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments can not alter its character nor enlarge its power. . . . Congress can not extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the duty of hearing and determining an appeal from a commissioner or auditor, or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect."

This decree was followed by legislation which in a general way provided that the rulings of this court on appeals from the judgments of the Court of Claims should be in effect judgments. While that case is not entirely parallel to this, yet the line of thought pursued in the opinion is suggestive.

We do not feel called upon to enlarge upon it. It is enough now to hold that Congress in giving to the Indian Territory courts jurisdiction of appeals from the action of the Dawes Commission did not place the decisions of these courts beyond the reach of further investigation. Hence the act of Congress of July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court, and giving to it power to examine the judgments of the Indian Territory courts and determine whether they should not be annulled on account of irregularities was a valid exercise of power.

The other question is one of procedure and not of power. It is objected that the defendant Hill was not made a party to the proceeding instituted in the citizenship court, but there were a multitude, according to the report of the Dawes Commission, probably one thousand, in whose favor judgments of citizenship had been entered in the Indian Territory courts, and the act provided that ten should be selected as representatives of the class. It further authorized any individual, in case of an adverse judgment by the citizenship court, to transfer his case from the territorial to that court. Now, it is undoubtedly within the power of a court of equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or a common right—a class too large to be all conveniently brought into court —and make the decree effective not merely upon those individuals, but also upon the class represented by them. *Mandeville* v. *Riggs*, 2 Pet. 482; *Smith* v. *Swormstedt*, 16 How. 288; *Bacon* v. *Robertson*, 18 How. 480, 489; *United States* v. *Old Settlers*, 148 U. S. 427, 480. It was by way of extra precaution and in order to more effectually secure the rights of the individuals other than those named as parties defendant in that suit that Congress provided that any one might transfer his individual case from the territorial court to the citizenship court, and there have the merits of his claim decided. Hill, as every other citizen, was bound to take notice of the legislation of Congress, and it is not to be doubted that he as

well as others similarly situated were cognizant of the proceedings that were being had in pursuance of such legislation. He made no application to transfer his case, but chose to abide by the outcome of the case against the ten representatives of his class. The answers to these subordinate questions fully dispose of the main question. Without further discussion, we refer to the exhaustive opinion of Circuit Judge Sanborn, in delivering the judgment of the Court of Appeals, with which, in the main, we fully concur.

We find no error in the record, and the judgment of the Court of Appeals is

Affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* ABILENE COTTON OIL COMPANY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 78. Argued November 2, 1906.—Decided February 25, 1907.

Where defendant in the state court contends that, consistently with the Interstate Commerce Act, the state court has no power to grant the relief, and such contention is essentially involved and expressly, and, in order to support the judgment, necessarily, decided adversely to the defendant, a Federal question exists and this court can review the judgment on writ of error under § 709, Rev. Stat.

Where the state court determined a case involving railroad rates on the hypothesis conceded by counsel on both sides that the rate was one of a lawful schedule duly filed and published in accordance with the Interstate Commerce Act, the contention that the rate was not so filed and published and, therefore, was not a legal rate is not open in this court.

While repeals by implication are not favored and a statute will not be construed as abrogating an existing common-law remedy, it will be so construed if such preëxisting right is so repugnant to it as to deprive it of its efficacy and render its provisions nugatory.

The Interstate Commerce Act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discriminations and undue preference, and to that end placed upon carriers

the duty of publishing schedules of reasonable and uniform rates; and, consistently with the provisions of that law, a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce Commission.

85 S. W. Rep. 1052, reversed.

THE facts are stated in the opinion.

Mr. David D. Duncan, with whom *Mr. John F. Dillon, Mr. Winslow S. Pierce* and *Mr. Thomas J. Freeman* were on the brief, for plaintiff in error:

If an act of Congress gives a right to a party aggrieved without specifying a remedy, it might be enforced in a state court; but, if a right is conferred by statute and a specific remedy provided, or a new power and means of execution granted, the right can be enforced only in the mode provided in the act.

A party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by a procedure either before the Commission or by suit in a Federal court, cannot bring suit before a state court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or Federal court; otherwise, the party would have a third alternative or mode of redress not contemplated by the act. He is restricted to one of two remedies.

Where a right arises under the laws of the United States, Congress may, if it sees fit, give to the Federal courts exclusive jurisdiction.

When a right is given by statute, and a specific remedy provided, or new power, and also the means of execution, the power can be executed, and the right vindicated, in no other way than that prescribed by the act.

The Interstate Commerce Act providing that remedies thereunder must be sought in the Federal courts or before

the Interstate Commerce Commission, but not in both, by necessary implication excludes the idea of jurisdiction in any other tribunals. The act confers the right and provides the remedy and means of enforcement. Interstate Commerce Act, February 4, 1887, and Amendment 1, Supp., Rev. Stat., p. 529, especially §§ 8, 9; *Frank T. Copp* v. *L. & N. R. R. Co.*, 43 Louisiana, 511, 514; *G., C. & S. F.* v. *Moore*, 83 S. W. Rep. 362; *Van Patten* v. *Chicago, M. & St. P.*, 74 Fed. Rep. 981; *Ex parte McNeil*, 13 Wall. 236; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Swift* v. *Philadelphia R. R. Co.*, 58 Fed. Rep. 858; *Claflin* v. *Houseman*, 93 U. S. 130 (see p. 137); *The Moses Taylor*, 4 Wall. 411, 425, 431; Story on the Const., §§ 436–447.

The only lawful rate that can be charged and collected by a common carrier upon an interstate shipment is the legally filed, published and posted rate under the act to regulate commerce, and no cause of action for damages or otherwise will lie against a carrier for collecting its duly-published, filed and posted rates. If this rate be unreasonable, the only remedies the shipper has are those provided in § 9 of the Interstate Commerce Act. By the terms of that act, it is illegal for either a corporation or person to give or receive any rebate, concession, etc., and declaring same to be unlawful, and the person or corporation so doing to be guilty of a misdemeanor. By §§ 6, 10 of the original act, and by the Elkins amendment of February 19, 1903, it is provided that it shall be a misdemeanor and unlawful, punishable by a fine, for any person, persons or corporations to grant, give or solicit, accept or receive, any rebate or concession in respect to the transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof. *Texas & Pacific Ry. Co.* v. *Mugg & Dryden*, 202 U. S. 242; *Hefley* v. *Railway Co.*, 158 U. S. 98; *Southern Ry.* v. *Harrison*, 119 Alabama, 539; *M., K. & T. Ry. Co.* v. *Trinity Lumber Co.*, 1 Tex. Civ. App.

553; *Texas & Pacific Ry. Co.* v. *Clark*, 4 Tex. Civ. App. 611; *M., K. & T. Ry. Co.* v. *Stoner*, 5 Tex. Civ. App. 50; *Dillingham* v. *Fischel*, 1 Tex. Civ. App. 546; *S. A. & A. P. Ry. Co.* v. *Clements*, 20 Tex. Civ. App. 498; Act of Congress of February 4, 1887, 1 Supp. U. S. Stats. 529, and amendments thereto, especially §§ 6, 10.

Mr. Hannis Taylor for defendant in error:

The highest court of a State may administer the common law according to its own understanding and interpretation, without liability to a review in the Federal Supreme Court, unless some right, title, immunity or privilege, the creation of the Federal power, has been asserted or denied. *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 477, and cases there cited.

This common law right, as thus administered, was not taken away by the Interstate Commerce Act (approved February 4, 1887) either directly or by necessary implication. Statutes in derogation of the common law are to be strictly construed and are not presumed to make any alteration in the common law further or otherwise than the clear import of the statutory language necessarily requires. 26 Am. & Eng. Ency. of Law, (2d ed.) 662, and authorities cited, including *Brown* v. *Barry*, 3 Dall. 365; *Wilson* v. *Lenox*, 1 Cranch, 211; *McCool* v. *Smith*, 1 Black, 459; *Shaw* v. *Railroad Co.*, 101 U. S. 557. Affirmative words without negative words do not annul the common law. Unless the intent of a statute is manifest, the constructive repeal of the common law, by implication, cannot be inferred. *Jennings* v. *Commonwealth*, 17 Pick. 82; *State* v. *Norton*, 23 N. J. L. 39. When a statute merely provides a new remedy for a preëxisting right, the new remedy is merely cumulative. 26 Am. & Eng. Ency. of Law, (2d ed. 614, 671, and cases cited.

The interpretation clause of the Interstate Commerce Act specially provides that "nothing in this act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition

to such remedies." A statutory declaration contained in the body of an act, declaring the meaning thereof as well as the intent of the legislature in enacting it, is mandatory and controlling on the courts. *Farmers Bank* v. *Hale*, 59 N. Y. 53; *Commonwealth* v. *Curry*, 4 Pa. Super. Ct. 356; *Snyder* v. *Compton*, 87 Texas, 374; *Rossmiller* v. *State*, 114 Wisconsin, 169.

No right, title, privilege or immunity under a Federal statute specially pleaded and set up in the state court was denied by that court. *Kizer* v. *Texarkana & Ft. Smith Ry. Co.*, 179 U. S. 199. Even if the state court could not try questions involving the construction of the Interstate Commerce Act, yet this suit being brought on the common law liability of plaintiff in error, jurisdiction to hear and determine the facts pleaded by defendant in error could not be defeated by facts outside of the allegations unless a plea had been interposed to the jurisdiction; such plea showing want of jurisdiction in the trial court, and further showing a court with jurisdiction.

Mr. Justice White delivered the opinion of the court.

The oil company, the defendant in error, sued to recover $1,951.83. It was alleged that on shipments of carloads of cotton seed made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that State, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that as the rate complained of was the one fixed in the rate

sheets which the company had established, filed, published and posted, as required by that act, the state court was without jurisdiction to entertain the cause, and even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission.

The trial court made findings of fact. Those relating to the subject of the establishing, filing and publishing by the railway company of rate sheets containing the rate which was complained of were as follows:

"7th. That the Western Classification Committee, agent and representative of numerous railways and of defendant, filed with the Interstate Commerce Commission what is known as the Western Classification, giving classifications of different articles or items of merchandise, and in same cotton seed is classed as 'A;' that this was the joint act of a number of roads, and the defendant adopted said joint classification; that on May 30, 1901, the Southwestern Freight Committee, agent of a number of roads and agent of defendant, filed with the said commission a supplement for numerous roads in connection with defendant, whereby the rate on cotton seed from all points in Louisiana east of Alexandria was fixed at 67 cents per 100 pounds to all points in Texas from all points in Louisiana east of Alexandria and west of Alexandria.

"8th. That said classification and said rate schedule was adopted by defendant and was filed by said S. W. Freight Committee with said Interstate Commerce Commission in behalf of defendant.

"9th. That copies of said schedule and said tariffs and classifications were kept in the office of said defendant at said points of shipment and at said Abilene, that is, in the freight office and depots, for the inspection of the public, as admitted by plaintiff, which admission is found in the statement of facts.

"10th. That other than said schedule and classification nothing has been filed with the Interstate Commerce Com-

mission by or in behalf of defendant in the way of classifications, schedules or rates on cotton seed from points on its road in Louisiana to points on its road in Texas."

From the facts found the court stated the following as its conclusions:

"1st. The facts so found show that this was an interstate shipment.

"2d. The facts so found show that the defendant complied with the interstate commerce law, and said rates and classifications were thereby properly established and in force, except that the rate charged on cotton seed in carload lots was unreasonable and excessive.

"3d. I find that the rate charged by the defendant was that established under the interstate commerce law."

As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those subjects, it may be assumed, were considered to have been eliminated in the course of the trial.

There was judgment for the railway company. When the controversy came to be disposed of by the Court of Civil Appeals, to which the cause was taken, that court deemed there was only one question presented for decision; that is, whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission. In opening its opinion the court said (85 S. W. Rep. 1052):

"Adopting the construction of the pleadings evidently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a violation of an alleged common law right, in that appellee demanded and coercively collected from appellant freight charges in excess of a reasonable compensation, for the trans-

portation of a number of carloads of cotton seed from the town of Cotton Port and other designated towns in the State of Louisiana to the city of Abilene in the State of Texas."

After referring to the findings as to the unreasonableness of the charge exacted, and after pointing out that the railway company had not, by a cross assignment, challenged the correctness of the findings of the trial court as to the unreasonableness of the rate, it was said:

"So that we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact, and therefore now have squarely before us the questions whether in a state court a shipper in cases of interstate carriage can, by the principles of the common law, be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the Interstate Commerce Act?"

Proceeding in an elaborate opinion to dispose of the question thus stated to be the only one for consideration, the conclusion was reached that jurisdiction to grant relief existed, and that to do so was not repugnant to the act to regulate commerce. Applying these conclusions to the findings of fact, the relief prayed was allowed. The court said:

"We therefore adopt the trial court's findings of fact, and, applying thereto the principles of law we have deduced, reverse the judgment, and here render judgment in appellant's favor for the said sum of $1,951.83, excessive freights charged, with interest. . . ."

The assigned errors are addressed exclusively to the operation of the act to regulate commerce upon the jurisdiction of the court below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. Before we take up the consideration of that subject, however, two questions must be disposed of: First, it is insisted that this court is without jurisdiction, because no

Federal question is presented. We think it suffices to say that it obviously results from the statements previously made that a question of that character was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the court below and is also essentially involved in the cause as it is before us. Second, it is urged that the effect of the act to regulate commerce upon the right of the oil company to recover need not be passed upon, since, even if error on that subject was committed below, a review of the decision in that regard is unnecessary, because if the correct legal inference be drawn from the facts found by the trial court, which were adopted by the appellate court, it will result that the railway company had not established a legal schedule of rates in compliance with the act to regulate commerce, and therefore the jurisdiction of the court and its right to afford relief was not at all affected by the provisions of the act. We do not presently stop to consider whether the consequences as to jurisdiction and right to recover which are asserted would result if the premise was well founded, because we think the premise is either shown by the findings to be unfounded or it is not open for contention on the record. The premise rests upon two propositions of fact: *a*. That the findings of the trial court show that the rate sheet filed was joint and therefore did not necessarily relate to a shipment entirely over the road of the railway company. This contention, we think, is shown by the findings to be without merit, since those findings clearly point out that the rate sheet was filed by an agent of the defendant railroad, was by it adopted, and constituted the only rate sheet embracing the traffic in question. *b*. Although it is conceded that the evidence showed that the schedule of rates was established and filed with the Interstate Commerce Commission and was kept at the stations of the railway company for public inspection, and that the oil company had knowledge of the fact, it is insisted that the facts found do not justify the conclusion that there was a compliance with the requirements of the act to regulate com-

merce as to the posting of the established schedule. We think this contention is not open on this record. As we have seen, the trial court expressly concluded that the railway company had complied with the act to regulate commerce in the matter of filing, etc., its schedule of rates, and the appellate court opened its opinion by the statement that the course of the trial and the briefs of counsel confined the issue for determination to the question of the effect of the act to regulate commerce upon the rights of the parties, manifestly upon the assumption that the correctness of the conclusion of the trial court as to compliance with the act was conceded by both parties. In other words, as the court below in deciding the case expressly declared that the course of the argument and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such. *Non constat,* that if the Court of Civil Appeals, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule and affirmatively found facts inevitably compelling the conclusion that the act to regulate commerce had been fully complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. Because we thus find the question not open for consideration we must not be considered as conceding the correctness of the conclusion attempted to be drawn from the supposed failure to post.

We are thus brought to the underlying proposition in the case, viz., the effect of the act to regulate commerce upon the claim asserted by the oil company. As presented below and pressed at bar, the question takes a seemingly two-fold aspect, the jurisdiction of the court below as affected by the act to regulate commerce and the right to the relief sought consist-

ently with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent. Comm., 599, and note *a;* 2 Smith Lead. Cas., pt. 1, 8th ed., Hare & Wallace notes, p. 457.

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we

concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preëxisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both hence mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

Let us, without going into detail, give an outline of the general scope of that act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act

to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the District Attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions "shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ." Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission. By the ninth section of the act it was provided as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery

of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

And by section 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies were saved.

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447, 455; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S. 263, 275. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479.

When the general scope of the act is enlightened by the

considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is

wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that

the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal courts and

in the construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing directly with the question here presented, yet necessarily concern the same.

1. In *Swift* v. *Philadelphia &c. Ry. Co.*, 64 Fed. Rep. 59, it was held that in an action at law to recover damages for the exaction of an alleged unreasonable freight charge, the rate established in conformity with the act to regulate commerce must be treated by the courts as binding upon the shipper, until regularly corrected in the mode provided by the statute. And in *Kinnavey* v. *Terminal R. R. Association*, 81 Fed. Rep. 802, in an able opinion, the question was carefully considered and the same doctrine was announced and applied. When it is considered that the act to regulate commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view any case except the one now under consideration, holding that a court could, compatibly with the terms of that act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the act had generally been treated in practical execution as incompatible with the existence of such power or right.

And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and to the making of orders directing carriers to desist from future violation of the act; that is to say, in necessary legal effect correcting established schedules.

2. The cases of *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648, and *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 190 U. S. 273, involved the enforcement against carriers

of orders of the Commission. After deciding that the orders of the Commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the question of the reasonableness *per se* of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the Commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule.

In *Gulf, Colorado &c. Ry.* v. *Hefley*, 158 U. S. 98, the facts were these: A rate had been fixed by a carrier in a bill of lading for an interstate shipment, which rate was less than that established under the provisions of the act to regulate commerce. On arrival of the goods at destination the carrier refused to deliver on tender of payment of the bill of lading rate, and demanded payment of and collected the higher established schedule rate. For so doing the carrier was proceeded against under a statute of the State of Texas, imposing a penalty upon a carrier for charging more than the rate fixed in a bill of lading. A judgment of the state court, enforcing the penalty, was reversed, upon the ground that the state statute, as applied, was repugnant to the act to regulate commerce, the court saying (p. 102):

"The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us. If, in disregard of the joint tariff estab-

lished by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield."

In *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242, the facts were as follows: On an interstate shipment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment. On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rate. And a recovery of the excess collected over the quoted rate was allowed by a court of the State of Texas. Reversing the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be in effect enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce.

In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made if adopted would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is

there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands.

But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz.: " . . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other ap-

propriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it. Even, however, if in any case we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that by judicial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by section 1 of the act approved February 19, 1903, commonly known as the Elkins act, which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish "the tariffs or rates and charges," as required by the act to regulate commerce and the acts amendatory thereof, "or strictly to observe such tariffs until changed according to law," was made a misdemeanor, and it was also made a misdemeanor to offer, grant,

give, solicit, accept or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of section 1 it was provided as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act."

And, by section 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a Circuit Court of the United States to enforce an observance of the published tariffs.

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce.

The judgment below is, therefore, reversed, and the case remanded for further proceedings not inconsistent with this opinion.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* CISCO OIL MILL.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 79. Submitted November 2, 1906.—Decided February 25, 1907.

Texas & Pacific Railway v. *Abilene Cotton Oil Co., ante*, p. 426, followed as to abrogation by passage of Interstate Commerce Act of common-law remedy for recovery of unreasonable freight charges on interstate shipment where rates charged were those duly fixed by the carrier according to the act and which had not been found unreasonable by Interstate Commerce Commission.

A tariff of rates of which schedules have been filed by a carrier with the Interstate Commerce Commission and also with its freight agents is in force and operative although the copies thereof may not have been posted in the carrier's depots as required by the act.

Such posting is not a condition precedent to the establishment of the rates but a provision for affording facilities to the public for ascertaining the rates actually in force.

THE facts are stated in the opinion.

Mr. John F. Dillon, Mr. Winslow S. Pierce, Mr. David D. Duncan and *Mr. Thomas J. Freeman*, for plaintiff in error.[1]

Mr. John J. Butts, for defendant in error.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

This writ of error is prosecuted to obtain the reversal of a judgment for $641.69, with interest, entered in favor of the Cisco Oil Mill by the Court of Civil Appeals of Texas upon the reversal of a judgment of a district state court in favor of the Texas and Pacific Railway Company. The action was

[1] See abstracts of arguments in No. 78, involving similar questions and argued by same counsel.

brought by the oil company to recover of the railway company the principal sum just stated, because of alleged overcharges by the railway company, paid by the oil company under protest at the time of the delivery of four cars of cotton seed, shipped in the month of September, 1901, from towns in Louisiana east of Alexandria, in that State, to Cisco, Texas. The appellate court, after excluding as surplusage averments in the petition "evidently designed to bring the case within the provisions of the Interstate Commerce Act," was of opinion and decided the case upon the hypothesis that the petition stated a valid cause of action at common law for the recovery of the sums coercively collected upon the delivery of the merchandise, in excess of a reasonable rate, and adopted the finding of the trial court as to the amount of the unreasonable exaction.

In its opinion the Court of Civil Appeals expressly declared that the trial court had rendered judgment in favor of the railway company because the rate demanded and collected of the oil company "was in accord with appellee's rate sheets and freight schedule which had been filed with the Interstate Commerce Commission and promulgated as provided by the act of Congress." Deciding, however, that the case before it presented "substantially the same questions upon substantially the same state of facts" which had been passed on in the case of *Abilene Cotton Oil Co.* v. *Texas & Pacific Railway Company*, the court, for the reason given by it in that case, reversed the trial court and rendered judgment in favor of the Cisco Oil Mill.

The considerations which made necessary our decision, just announced, reversing the judgment of the Court of Civil Appeals in the *Abilene case*, equally apply in the instant case and compel like action. And this result follows despite the contention that a right of action existed, because it is assumed no schedule rate was in existence when the shipments were made. This was based on the claim that it was not affirmatively found below that the schedule of rates applicable to the

shipments in question had been posted as required by section 6 of the act to regulate commerce, noted in margin.[1]

The assumption, it is insisted, is authorized because, it is asserted, the conclusion that the schedule of rates became legally operative was not justified by the finding that such schedule had been filed with the Interstate Commerce Commission and copies thereof furnished to the freight officers of the railroad company at Cisco and other points. The contention is without merit. The filing of the schedule with the commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary. The requirement that schedules should be "posted in two public and conspicuous places in every depot," etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the public for ascertaining the rates *actually in force*. To hold that the clause had the far-reaching effect

[1] First paragraph of section 6 of the Act to Regulate Commerce, as amended March 2, 1889 (25 Stat. L. 855):

"That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

claimed would be to say that it was the intention of Congress that the negligent posting by an employé of but one instead of two copies of the schedule, or the neglect to post either, would operate to cancel the previously established schedule, a conclusion impossible of acceptance. While section 6 forbade an increase or reduction of rates, etc., "which have been established and published as aforesaid," otherwise than as provided in the section, we think the publication referred to was that which caused the rates to become operative; and this deduction is fortified by the terms of section 10 of the act making it a criminal offense for a common carrier or its agent or a shipper or his employé improperly "to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier."

Whether by the failure to post an established schedule a carrier became subject to penalties provided in the act to regulate commerce, or whether if damage had been occasioned to a shipper by such omission, a right to recover on that ground alone would have obtained, we are not called upon in this case to decide.

The judgment below is reversed and the case remanded for further proceedings not inconsistent with this opinion.

AMERICAN RAILROAD COMPANY OF PORTO RICO *v.* CASTRO.

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

No. 151. Argued January 14, 1907.—Decided February 25, 1907.

The mere assertion of a Federal right and its denial do not justify this court in assuming jurisdiction where it indubitably appears that the Federal right is frivolous and without color of merit, and this rule applies to cases brought to this court under the act of April 12, 1900, 31 Stat. 85, from the District Court of the United States for Porto Rico.

Under § 34 of the act of April 12, 1900, 31 Stat. 85, regular terms of the United States District Court are to be held at Ponce and San Juan at the time fixed by the act and the same character of terms at Mayaguez at times specially designated by the court. The terms held at Mayaguez are not special terms at which jury cases cannot be tried as distinguished from regular terms, and § 670, Rev. Stat., does not apply to such terms of that court.

JULIO P. CASTRO, defendant in error, was plaintiff in the court below, and the defendant in error, the American Railroad Company, a New York corporation doing business in Porto Rico, was defendant. The action was commenced by the filing of a complaint in the office of the clerk of the court at *Mayaguez*, Porto Rico. Damages in the sum of fifteen thousand dollars were prayed, because of the alleged negligent killing of the daughter of the plaintiff by a train of the company, whilst she, with other persons, were attempting to pass, in a vehicle, over the railroad of the defendant, at a point where it intersected a public highway leading from the town of San German to the town of Mayaguez.

A demurrer to the complaint was filed, and also the following plea to the jurisdiction of the court:

"Defendant, in the above-entitled action, comes now, by its attorney, F. H. Dexter, and objects to the jurisdiction

of this court to try this cause under the terms and provisions of section 670 of the Revised Statutes of the United States, for the reason that all terms of this court held in the city of Mayaguez, under and by the terms and provisions of the act of March 12, 1900, creating a civil government in Porto Rico, and particularly the present term at which the above cause is set for trial, is a special term of this court, and, therefore, this court is without jurisdiction to try the issues in this cause by a jury.

"Wherefore, defendant prays for an order either dismissing this cause or transferring the same for trial at a regular term of this court to be held at either San Juan or Ponce."

After the entry of an order overruling the demurrer and the plea to jurisdiction, an answer was filed and the case was tried by a jury. A verdict was rendered in favor of the plaintiff for the sum of sixteen hundred dollars. The objection to jurisdiction was renewed in a motion to arrest the judgment, and after the overruling thereof a bill of exceptions was settled by the trial judge, containing exceptions taken during the trial to the admission and rejection of evidence and to instructions given and refused. The case was then brought to this court.

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

Mr. Frederic L. Cornwell, for defendant in error, submitted.

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

By the act of April 12, 1900 (31 Stat. L. 85, chap. 191), the general rule governing the right of this court to review by writs of error or appeal final decisions of the District Court of the United States for Porto Rico was made as to amount

to conform to that obtaining as to the Territories of the United States, viz., five thousand dollars. As this case does not involve the requisite jurisdictional amount, it follows that the right of review does not exist unless the case is within the provision of the statute conferring jurisdiction to review in this court "in all cases where . . . an act of Congress is brought in question and the right claimed therein is denied."

It has been settled that where, in the course of litigation pending in the court just referred to, a party asserts a right under an act of Congress, the act "is brought in question," and when the right so claimed is denied the case can be brought here. *Serralles* v. *Esbri*, 200 U. S. 103; *Rodriguez* v. *United States*, 198 U. S. 156; *Crowley* v. *United States*, 194 U. S. 461.

It is undoubted that the plea to the jurisdiction filed and insisted upon below asserted on the record a right under an act of Congress, which right was denied. But in harmony with the rule which governs where a right under the Constitution, etc., of the United States is asserted in a case which is brought to this court from a state court and in accord with the same rule which also governs cases originally brought in a court of the United States (*New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, and cases cited; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561), we are of opinion that the mere assertion of a Federal right and its denial do not justify our assuming jurisdiction where it indubitably appears that the Federal right asserted is frivolous, that is, without color of merit. We think the case at bar is of this character.

As appears in the Revised Statutes it has been the uniform practice of Congress to fix both the time and place for holding sessions of the District and Circuit Courts of the United States, which, for convenience of expression, have been styled the regular terms of court. Rev. Stat. secs. 572, 658. Upon the district judge has also been conferred the power of designating the time and place of holding special terms of the Dis-

trict Court, in which any business might be transacted which might be disposed of at a regular term. Rev. Stat. sec. 581. The asserted application to the District Court of Porto Rico of the provision as to special terms of the Circuit Courts is that upon which was rested the claim of statutory right to exemption from a trial of the cause by a jury at Mayaguez, which was denied by the court below, and forms the basis for the contention that this court must exercise jurisdiction to pass upon the assigned errors. The section reads as follows:

"SEC. 670. At any special term of a Circuit Court in any district in Indiana, Kentucky, Missouri, North Carolina, Virginia and Wisconsin any business may be transacted which might be transacted at any regular term of such court. At any special term of a Circuit Court in any other district it shall be competent for the court to entertain jurisdiction of and to hear and decide all cases in equity, cases in error or on appeal, issues of law, motions in arrest of judgment, motions for a new trial and all other motions, and to award executions and other final process, and to do and transact all other business and direct all other proceedings in all causes pending in the Circuit Court, except trying any cause by a jury, in the same way and with the same effect as the same might be done at any regular session of said court."

The application of this section, it is contended, results from the concluding words of the following portion of section 34 of the act of April 12, 1900:

"The District Court of the United States for Porto Rico . . . shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court."

Rev. Stat. sec. 670 is to be interpreted in the light of section 669, reading as follows:

"SEC. 669. In the districts not mentioned in the five preceding sections [California, Oregon, Nevada, Kentucky, In-

diana, Tennessee, North Carolina, Virginia and Wisconsin being the districts mentioned] the presiding judge of any circuit court may appoint special sessions thereof, to be held at the places where the regular sessions are held."

Keeping in mind that the substantially uniform rule stated in Rev. Stat. secs. 664 to 669 requires the holding of special terms of a Circuit Court at the place where the regular sessions are authorized to be held, it follows that a special term of a Circuit Court of the United States, as the expression is employed in Rev. Stat. sec. 670, is a session ordered for the disposal of business, supplementary to a regular term, and to be held at the place fixed by Congress for holding such regular term. When the plain result of the legislation just referred to is noted it is apparent that there is no color whatever for the pretension that Rev. Stat. sec. 670 had any possible application to the term at which this case was tried. That term was held under authority conferred by that portion of section 34 of the act of April 12, 1900, where, referring to the District Court of Porto Rico, it was provided:

"Regular terms of said court shall be held in San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and special terms may be held at Mayaguez at such other times as said judge may deem expedient."

On the face of this provision it is apparent that it was the intention of Congress to authorize the holding of sessions of the court at Mayaguez at times to be *specially* designated by the district judge. It can not be said that the word special in the act was intended to affix to the terms authorized by Congress to be held at Mayaguez the character of special terms, as contradistinguished from regular terms, within the purview of Rev. Stat. sec. 670, without reducing the statute to an absurdity, for unless the act authorized the holding of regular terms at Mayaguez it would be impossible to conceive of the holding of special terms at that place in the sense of Rev. Stat. sec. 670. What the provision in question plainly

meant was that regular terms should be held at Ponce and San Juan at the times fixed by Congress in the statute and that the same character of term might be held at Mayaguez at a time to be specially designated by the district judge.

Dismissed for want of jurisdiction.

McKAY [1] *v.* KALYTON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 181. Argued January 25, 1907.—Decided February 25, 1907.

Although the Federal right was first claimed in the state court in the petition for rehearing, if the question was raised, was necessarily involved, and was considered and decided adversely by the state court, this court has jurisdiction under § 709, Rev. Stat.

The United States has retained such control over the allotments to Indians that, except as provided by acts of Congress, controversies involving the determination of title to, and right to possession of, Indian allotments while the same are held in trust by the United States are not primarily cognizable by any court, state or Federal.

The act of August 15, 1894, 28 Stat. 286, delegating to Federal courts the power to determine questions involving the rights of Indians to allotments did not confer upon state courts authority to pass upon any questions over which they did not have jurisdiction prior to the passage of such act, either as to title to the allotment, or the mere possession thereof which is of necessity dependent upon the title.

THIS suit was commenced in the Circuit Court of Umatilla County, Oregon, by the filing of a complaint in the name of Agnes Kaylton, suing by her mother, Louise Kaylton, as guardian *ad litem*. Mary Kaylton and six other persons were made defendants, one such (Charles Wilkins) being sued as the acting United States Indian agent at the Umatilla reservation.

It was alleged in substance as follows: By virtue of an act of Congress approved March 3, 1885, and the amendments

[1] Substituted for Kalyton.

thereto, a tract of land in the Umatilla Indian reservation was duly allotted on April 21, 1891, to one Joe Kaylton, a member of the Cayuse tribe residing on said reservation. It was alleged that in or about the year 1893 Joe Kaylton, the allottee, in accordance with the customs of the Cayuse tribe, married Louise ————, an Indian woman of that tribe, and the plaintiff, Agnes Kaylton, was issue of the marriage. In 1898 Joe Kaylton died intestate, leaving the plaintiff as his sole heir, and, under the laws of Oregon and the provisions of the act of Congress referred to, she became entitled to the land allotted to her father and to the possession and enjoyment thereof. It was charged that Mary Kaylton and four of the defendants, all insolvent, claiming to be heirs of the deceased, had taken and held possession of the land in question, which had a rental value of $274.75 per annum. It was alleged that one of the defendants named Glasscock claimed to have some interest in the land and was confederating with the other defendants, who were wrongfully alleging themselves to be the heirs of Joe Kaylton, with the object of depriving plaintiff of the use of the land and the enjoyment of the rents and profits thereof. Averring that under the rules and regulations of the Department of the Interior, in order that plaintiff might obtain the use and enjoyment of the land, it was requisite that her status as legal heir of the deceased should be adjudged by a court of competent jurisdiction, the court was asked to so decree and to perpetually restrain the defendants from interfering with her possession and use of the land. General relief was also prayed.

An answer was filed on behalf of the defendant Mary Kalyton. It was therein denied in substance that there had been a marriage between Joe and Louise Kalyton, and that the plaintiff was their child, and, averring that Joe Kalyton was a resident and citizen of Oregon and had died intestate, unmarried and without any lineal descendant. It was alleged that the defendant, as the sister of Joe Kalyton, was his sole heir, and as such was the owner of and entitled to the posses-

sion of the lands in controversy and to its enjoyment. A decree was prayed quieting her alleged title.

The other of the defendants, who were alleged to be confederating with Mary Kalyton, filed a disclaimer of any interest in the lands in controversy. The cause was heard by the court. Deciding that if Joe Kalyton and Louise Kalyton had been married according to the custom of the Indians of the Cayuse tribe, such marriage would have been void, and that there had been no marriage between the parties, because none had been solemnized in accordance with the laws of the State of Oregon, the plaintiff was held to be an illegitimate child of the deceased, and to have no right, title or interest in or to the lands in question, and a decree was entered in favor of the defendant Mary Kalyton.

The cause was appealed to the Supreme Court of the State of Oregon. That court, having found that Joe and Louise Kalyton were married according to the custom and usage of the Indian tribe, to which they belonged, and that the plaintiff was the issue of such marriage, held, in view of the legislation of Congress, "that the plaintiff herein was born in lawful wedlock and is the sole heir of Joe Kalyton, deceased, and, as such, entitled to the possession of the real property of which he died seized." The decree of the trial court was, therefore, reversed, and a decree was entered in favor of the appellant in accordance with the opinion. A motion for a rehearing was made and overruled. This motion was based upon the contention that the court had erred in taking jurisdiction of the cause, for the reason that it involved the title and right to possession of public land held in trust by the United States for the benefit of Indians, and hence the United States was a necessary party defendant and not subject to the jurisdiction of a state court. We say the petition for a rehearing was based upon the grounds just stated, although the petition is not in the record, because it is manifest that such was the case from the opinion which the court delivered in refusing the rehearing. 45 Oregon, 116. In that opinion

the question whether the matter was one of exclusive Federal cognizance was elaborately considered, and it was decided that it was not, because a decree as to the right of possession would not interfere with the title or trust interest of the United States. And the court declared that for the purposes of determining its jurisdiction it was wholly irrelevant to consider whether it would have the power to enforce its decree for the possession of the allotted land against the officer of the United States in charge of the Indian reservation in case that official should decline to give effect to the decree for possession.

The case was then brought to this court.

Mr. Samuel Herrick, with whom *Mr. T. G. Hailey* and *Mr. R. J. Slater* were on the brief, for plaintiff in error:

The legal title to the lands involved in this suit is in the United States as trustees for twenty-five years for the allottee, or, in case of death, his heirs. Act of March 3, 1885, 23 Stat. 340. The only authority for such suit as this is the act of Congress of August 15, 1894, 28 Stat. 305, which confers jurisdiction therefor upon the United States Circuit Courts, and such jurisdiction is exclusive. Act Aug. 15, 1894, 28 Stat. 305; *Patawa* v. *United States,* 132 Fed. Rep. 894; *Parr* v. *United States,* 132 Fed. Rep. 1004; *Smith* v. *United States,* 142 Fed. Rep. 226; *Wisconsin Ry. Co.* v. *Price County,* 133 U. S. 496-504.

Prior to the passage of the act of August 15, 1894, *supra,* the authority to determine the rights of claimants to allotments upon the Umatilla Indian Reservation was vested in the Secretary of the Interior. Act March 3, 1885, 23 Stat. 340; *Mosgrove* v. *Harper,* 33 Oregon, 252.

Indians born within the territorial limits of the United States to whom allotments have been made, are citizens of the United States, and of the State or Territory where they may reside, and subject to and entitled to the benefits of all the laws, civil and criminal, of such State or Territory. Act Feb. 8,

1887, § 6, 24 Stat. 288; *Boyd* v. *Thayer*, 143 U. S. 135 162; *In re Heff*, 197 U. S. 488, 509; *State* v. *Denoyer*, 6 N. Dak. 286; *State* v. *Norris*, 37 Nebraska, 299; *In re Now-Ge-Zhuck*, 69 Kansas, 410.

Such Indian allottees are subject to the laws of the State in which they may reside governing their marriage relations. *Moore* v. *Wa-Me-Go*, 83 Pac. Rep. 400.

Mr. William Frye White, with whom *Mr. John B. Cotton* was on the brief, for defendant in error:

This court has no jurisdiction to review this cause on writ of error because no title, right or immunity specially set up or claimed under any Federal statute, has been denied. *Corkran Oil &c. Co.* v. *Arnaudet*, 199 U. S. 182.

If the court below erred as specified in the first assignment of error, in holding that the marriage of Joe Kalyton and Louise was a legal marriage under the act of February 28, 1891, it was an immaterial error and one which cannot in the nature of things be prejudicial to the party against whom the decision was rendered, and that, therefore, if the relief granted is correct according to law, this court will not reverse the decision below. *Erwin* v. *Lowry*, 7 How. 172.

The provisions of the act of February 8, 1887, and § 5 of the amendatory act of February 28, 1891, apply to lands allotted under the act of March 3, 1885, and that, therefore, the court below having found that Joe Kalyton and Louise, Indians residing upon the Umatilla Reservation, were married according to the customs and habits of such Indians, and having found that the plaintiff was the offspring of such marriage, it committed no error in holding and decreeing that the plaintiff should have the possession of the land of which her father as an allottee, died seized.

The Supreme Court of Oregon had jurisdiction of the subject-matter and the act of August 15, 1894, did not oust the jurisdiction of the state court and place it exclusively in the Circuit Court of the United States for the District of Oregon, but the

jurisdiction as between these courts is concurrent. *Jackson* v. *Jackson*, 17 Oregon, 110; *Hindman* v. *Rizor*, 21 Oregon, 112; *Allen* v. *Dunlap*, 24 Oregon, 229; *Bishop* v. *Baisley*, 28 Oregon, 119; *Pacific Live Stock Co.* v. *Gentry*, 38 Oregon, 275; *Browning* v. *Lewis*, 39 Oregon, 11; *Moore* v. *Halliday*, 43 Oregon, 243; *Selkirk* v. *Stephens*, 72 Minnesota, 335; *Swartzel* v. *Rogers*, 3 Kansas, 374; *Wiley* v. *Keokeuk*, 6 Kansas, 94; *Ingrahm* v. *Ward*, 56 Kansas, 550; *Whirlwind* v. *Von der Ahe*, 67 Mo. App. 628; *Felix* v. *Patrick* (C. C.), 36 Fed. Rep. 457; *Y-ta-tah-wa* v. *Rebock* (C. C.), 105 Fed. Rep. 257; *Felix* v. *Patrick*, 145 U. S. 317; *Bem-way-bin-ness* v. *Eshelby*, 91 N. W. Rep. 291; 16 Am. & Eng. Ency. Law, 216; *Stacey* v. *LaBelle*, 99 Wisconsin, 520; *Mo. Pac. Ry. Co.* v. *Cullers*, 31 Texas, 382; 22 Cyc., 149; *Wright* v. *Marsh*, 2 Greene (Iowa), 94; *Telford* v. *Barney*, 1 Greene (Iowa), 575; *Bem-way-bin-ness* v. *Eshelby*, 87 Minnesota, 108; *Bird* v. *Winyer*, 24 Washington, 269.

The Supreme Court of the State of Oregon having jurisdiction of the subject matter, the United States is not a necessary party defendant. *Hy-Tu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401.

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

It is contended that we are without jurisdiction because no title, right or immunity was specially set up or claimed under any Federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the state court. True it is that the immunity which was asserted was first claimed in a petition for rehearing, but as the question was raised, was necessarily involved and was considered and decided adversely by the state court, there is jurisdiction. *Leigh* v. *Green*, 193 U. S. 790.

At the threshold lies the question raised and decided below relative to the jurisdiction of the state court over the controversy.

Allotments of land in severalty to Indians residing upon the Umatilla reservation, in Oregon, were authorized by the act of Congress of March 3, 1885, ch. 319, 23 Stat. 340, which contained the following provision:

"The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided."

The allotment to Joe Kalyton was made on April 21, 1891. Before that allotment, Congress on February 8, 1887, ch. 119, 24 Stat. 388, passed what is known as the General Allotment Act. By that act, as said in *United States* v. *Rickert*, 188 U. S. 432, 435, provision was made for the allotment of lands in severalty to Indians on the various reservations, and for extending the protection of the laws of the United States and the Territories over the Indians. To that end the President was authorized, whenever, in his opinion, a reservation or any part thereof was advantageous for agricultural and grazing purposes, to cause it, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in the reservation in severalty to any Indian located thereon, in certain quantities specified in the statute, the allotments to be made by special agents appointed for that purpose, and by the

agents in charge of the special reservations on which the allotments were made. In one of the provisos of the first section of the act it was declared—

"That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act."

A provision of like nature to that heretofore excerpted from the act of March 3, 1885, was embodied in section 5 of the general allotment act of 1887, reading as follows (24 Stat. 389):

"SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided."

The supervisory power possessed by the United States over allotted lands while the title remains in the United States was pointed out in the opinion in *United States* v. *Rickert, supra*, a case which came to this court upon questions certified from a Circuit Court of Appeals. The suit was instituted under the direction of the Attorney General of the United States for the purpose of restraining the collection of taxes alleged to be due the county of Roberts, South Dakota, in respect of certain permanent improvements on, and personal property used in the cultivation of, lands in that county occupied by members of the Sisseton band of Sioux Indians in the State of South Dakota. The lands referred to had been allotted under the provisions of an agreement made in 1889, ratified by an act of Congress in 1891, and more particularly under section 5 of the act of February 8, 1887, heretofore referred to. Discussing the interest which the Indians primarily acquired in the allotted land, it was concluded that "the United States retained the legal title, giving the Indian allottee a paper or writing improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. . . . These lands were held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them, or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees." And the court approvingly quoted the following passage from an opinion of the Attorney General, delivered in 1888, advising that allotments of lands provided for in an act of Congress were exempt from state or territorial taxation, "that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority."

It was decided, in view of the object to be accomplished

by allotting Indian lands in severalty, that it was not within the power of a State to tax either the permanent improvements made on allotted lands or the personal property consisting of cattle, horses and other property of like character which might be furnished to Indians for use upon such land. And, answering a question as to whether the United States had such an interest in the controversy or in its subjects as entitled it to maintain the suit, the court declared (p. 444) that no argument to establish that proposition was necessary. Nor are the principles which were thus announced as to the nature and character of an allotment of Indian lands and the interest of the United States therein as trustee before the expiration of the period for their final disposition in any way affected by the decision In the *Matter of Heff*, 197 U. S. 488, dealing with the subjection of allottee Indians in their personal conduct to the police regulations of the State of which they had become citizens.

The present suit was commenced in 1899. At that time there was in force an act approved August 15, 1894, ch. 290, 28 Stat. 286, in which it was provided, *inter alia*, as follows (p. 305):

"That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States."

And it was provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

Considering the act of 1894 in *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 413, the court said:

"Under this statute there is no provision rendering it necessary in a private litigation between two claimants for an allotment to make the United States a party. The statute itself provides that the judgment or decree of the court, upon being properly certified to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary. This provision assumes that an action may be maintained without the Government being made a party, and provides for the filing of a certificate of the judgment and its effect; and the Government thereby, in substance and effect, consents to be bound by the judgment, and to issue a patent in accordance therewith."

The *Rickert case* settled that, as the necessary result of the legislation of Congress, the United States retained such control over allotments as was essential to cause the allotted land to enure during the period in which the land was to be held in trust "for the sole use and benefit of the allottees." As observed in the *Smith case*, 194 U. S. 408, prior to the passage of the act of 1894, "the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior." This being settled, it follows that prior to the act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, either state or Federal. It results, therefore, that the act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the state courts the authority to pass upon Federal questions over which, prior to the act of 1894, no court had any authority. The purpose of the act of 1894 to continue the exclusive Federal control over the subject is manifested by the provision of that act, which commands that a judgment or decree rendered

in any such controversy shall be certified by the court to the Secretary of the Interior. By this provision, as pointed out in the *Smith case, supra,* the United States consented to submit its interest in the trust estate and the future control of its conduct concerning the same to the result of the decree of the courts of the United States, a power which such courts could alone exercise by virtue of the consent given by the act. The subsequent legislation of Congress, instead of exhibiting a departure from this policy, confirms it. By the amendments to the act of 1894, approved February 6, 1901, ch. 217, 31 Stat. 750, it is expressly required that in suits authorized to be brought in the Circuit Courts of the United States respecting allotments of Indian lands, "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject.

The suggestion made in argument that the controversy here presented involved the mere possession and not the title to the allotted land is without merit, since the right of possession asserted of necessity is dependent upon the existence of an equitable title in the claimant under the legislation of Congress to the ownership of the allotted lands. Indeed, that such was the case plainly appears from the excerpt which we have made from the concluding portion of the opinion of the Supreme Court of Oregon.

Because from the considerations previously stated we are constrained to the conclusion that the court below was without jurisdiction to entertain the controversy, we must not be considered as intimating an opinion that we deem that the principles applied by the court in disposing of the merits of the case were erroneous.

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

The CHIEF JUSTICE, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissent.

SERRA *v.* MORTIGA.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 202. Submitted February 1, 1907.—Decided February 25, 1907.

The guarantees extended by Congress to the Philippine Islands are to be interpreted as meaning what the like provisions meant when Congress made them applicable to those islands.

While a complaint on a charge of adultery under the Penal Code of the Philippine Islands may be fatally defective for lack of essential averments as to place and knowledge on the part of the man that the woman was married, objections of that nature must be taken at the trial, and if not taken, and the omitted averments are supplied by competent proof, it is not error for the Supreme Court of the Philippine Islands to refuse to sustain such objections on appeal.

While the Supreme Court of the Philippine Islands hears an appeal as a trial *de novo* and has power to reëxamine the law and the facts it does so entirely on the record.

THE facts are stated in the opinion.

Mr. Aldis B. Browne, Mr. Alexander Britton and *Mr. Maurice Kelly*, for plaintiffs in error, submitted:

The complaint herein fails to state the essential elements of the crime of adultery, and is hence fatally defective. In entering judgment of conviction thereon, the court below violated the fundamental guarantees of the Constitution and of the Philippine Bill of Rights. *United States* v. *Cook*, 17 Wall. 168; *United States* v. *Cruikshank*, 92 U. S. 542, 557; *Evans* v. *United States*, 153 U. S. 584; *Cochran* v. *United States*,

157 U. S. 286; *Pettibone* v. *United States*, 148 U. S. 196; *United States* v. *Slenker*, 32 Fed. Rep. 691.

The complaint herein fails to state any place where the alleged acts of adultery were committed, or to show that they were committed anywhere within the jurisdiction of the court, and is hence fatally defective. The court below in entering judgment of conviction thereon violated the fundamental constitutional guarantees of the Philippine Bill of Rights. *United States* v. *Betiong*, 2 Phillip. 126; *United States* v. *Wood*, 2 Wheeler Cr. Cas. 325; *S. C.*, 28 Fed. Cas. No. 16,757; *United States* v. *Anderson*, 17 Blatchf. 238; *United States* v. *Wilson*, Baldw. 78; *S. C.*, 28 Fed. Cas. No. 16,730, pp. 699, 717; *United States* v. *Burr*, Fed. Cas. No. 14,693; *United States* v. *Jackalow*, 1 Black, 484; *Ledbetter* v. *United States*, 170 U. S. 606; *United States* v. *Burns*, 54 Fed. Rep. 351; *Knight* v. *State*, 54 Ohio St. 365; *Thayer* v. *Commonwealth*, 12 Met. 9; *Commonwealth* v. *Barnard*, 6 Gray, 488; *State* v. *Bacon*, 7 Vermont, 219.

The substantial defects in the complaint were not waived by defendants' plea, nor aided by judgment. Objection may be raised at any stage of the proceedings and by appeal or writ of error. 1 Bishop on Criminal Procedure, 4th ed., § 98*a*; *The Hoppet* v. *United States*, 7 Cranch, 389; *Markham* v. *United States*, 160 U. S. 319; *United States* v. *Morrisey*, 32 Fed. Rep. 147; *United States* v. *Hess*, 124 U. S. 483; *Kepner* v. *United States*, 195 U. S. 100; *Trono* v. *United States*, 199 U. S. 521; *United States* v. *Cajayon*, 2 Off. Gaz. 157.

No counsel appeared for defendant in error.

Mr. Justice White delivered the opinion of the court.

Articles 433 and 434, found in chapter 1 of title IX of the Penal Code of the Philippine Islands, define and punish the crime of adultery. The articles referred to are in the margin.[1]

[1] Art. 433. Adultery shall be punished with the penalty of prisión correccional in its medium and maximum degrees.

It is conceded at bar that, under the Philippine law, the offense of adultery, as defined by the articles in question, is classed as a private offense, and must be prosecuted, not on information by the public prosecutor, but by complaint on behalf of an injured party. In the Court of First Instance of Albay, Eighth Judicial District, Philippine Islands, Adriano Mortiga, the defendant in error, as the husband of Maria Obleno, filed a complaint charging her with adultery committed with Vicente Serra, the other plaintiff in error, who was also charged. The complaint is in the margin.[1]

Adultery is committed by a married woman who lies with a man not her husband, and by him who lies with her *knowing that she is married*, although the marriage be afterwards declared void.

ART. 434. No penalty shall be imposed for the crime of adultery except upon the complaint of the aggrieved husband.

The latter can enter a complaint against both guilty parties, if alive, and never, if he has consented to the adultery or pardoned either of the culprits.

[1] The United States of America,

Philippine Islands, Eighth Judicial District:

In the Court of First Instance of Albay.

The United States and Macario Mercades, in Behalf of Adriano Mortiga,

v.

Vicente Serra and Maria Obleno.

The undersigned, a practicing attorney, in behalf of Adriano Mortiga, the husband of Maria Obleno, accuses Vincente Serra and the said Maria Obleno of the crime of adultery, committed as follows:

That on or about the year 1899, and up to the present time, the accused, being both married, maliciously, criminally and illegally lived as husband and wife, and continued living together up to the present time, openly and notoriously, from which illegal cohabitation two children are the issue, named Elias and José Isabelo, without the consent of the prosecuting witness, and contrary to the statute in such cases made and provided.

(Signed) MACARIO MERCADES,
Attorney at Law.

(Signed) ADRIANO MORTIGA.

ALBAY, February 24, 1904.

Sworn and subscribed to before me this 24th day of February, 1904.

(Signed) F. SAMSON, *Clerk.*

Witnesses: ADRIANO MORTIGA.
BERNARDO MORTIGA.
EULALIO MORTIGA.
PLACIDO SOLANO.
CASIMIRA MARIAS.

The defendants were arraigned, pleaded not guilty, were tried by the court without a jury and were convicted. The court stated its reasons in a written opinion, analyzing the testimony and pointing out that all the essential ingredients of the crime of adultery, as defined by the articles of the penal code already referred to, were shown to have been committed. The accused were sentenced to pay one-half of the costs and to imprisonment for two years, four months and one day. The record does not disclose that any objection was taken to the sufficiency of the complaint before the trial. Indeed, it does not appear that by objection in any form, directly or indirectly, was any question raised in the trial court concerning the sufficiency of the complaint. An appeal was taken to the Supreme Court of the Philippine Islands. In that court error was assigned on the ground, first, that "the complaint is null and void because it lacks the essential requisite provided by law;" and second and third, because it did not appear from the proof that guilt had been established beyond a reasonable doubt. The conviction was affirmed. The assignment of error, which was based on the contention that the conviction was erroneous because the complaint did not sufficiently state the essential ingredients of the offense charged, was thus disposed of by the court in its opinion: "The objections to the complaint, based upon an insufficient statement of the facts constituting the offense, cannot be considered here, because they were not presented in the court below. *United States* v. *Sarabia*, 3 Off. Gaz. No. 29."

The assignments, based on the insufficiency of the proof to show guilt beyond a reasonable doubt, were disposed of by an analysis of the evidence which the court deemed led to the conclusion that all the statutory elements of the crime were proven beyond a reasonable doubt. An application for a rehearing, styled an exception, was made, in which it was insisted that it was the duty of the court to consider the assignment based on the insufficiency of the complaint, since not to do so would be a denial of due process of law. The rehear-

ing was refused, and the sentence imposed below was increased to three years, six months and twenty-nine days, on the ground that this was the minimum punishment provided for the offense.

The errors assigned on this writ of error and the propositions urged at bar to support them are confined to the assertion that the refusal of the court below to consider the assignment of error concerning the insufficiency of the complaint amounted to a conviction of the accused without informing them of the nature and character of the offense with which they were charged, and was besides equivalent to a conviction without due process of law. It is settled that by virtue of the bill of rights enacted by Congress for the Philippine Islands, 32 Stat. 691, 692, that guarantees equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment, the twice in jeopardy clause of the Fifth Amendment, and the substantial guarantees of the Sixth Amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands. *Kepner* v. *United States*, 195 U. S. 100.

For the purpose, therefore, of passing on the errors assigned we must test the correctness of the action of the court below by substantially the same criteria which we would apply to a case arising in the United States and controlled by the bill of rights expressed in the amendments to the Constitution of the United States. Turning to the text of the articles of the Philippine penal code upon which the prosecution was based, it will be seen that an essential ingredient of the crime of adultery, as therein defined, is knowledge on the part of the man charged of the fact that the woman with whom the adultery was committed was a married woman. Turning to the complaint upon which the prosecution was begun, it will be at once seen that it was deficient, because it did not specify the place where the

crime was committed, nor does it expressly state that Vicente Serra, the accused man, knew that Maria Obleno, the woman accused, was at the time of the guilty cohabitation a married woman. It results that there were deficiencies in the complaint which, if raised in any form in the trial court before judgment, would have required the trial court to hold that the complaint was inadequate. But the question for decision is not whether the complaint, which was thus deficient, could have been sustained, in view of the Constitutional guarantees, if a challenge as to its sufficiency had been presented in any form to the trial court before final judgment, but whether, when no such challenge was made in the trial court before judgment, a denial of the guarantees of the statutory bill of rights arose from the action of the appellate court in refusing to entertain an objection to the sufficiency of the complaint because no such ground was urged in the trial court. Thus reducing the case to the real issue enables us to put out of view a number of decisions of this court referred to in the margin,[1] as well as many decided cases of state courts referred to in the brief of counsel, because they are irrelevant, since all the former and, if not all, certainly all of the latter, concern the soundness of objections made in the trial court, by the accused, to the sufficiency of indictments or informations.

In *Ex parte Parks*, 93 U. S. 18, the case was this: The petitioner Parks applied to this court for a writ of *habeas corpus*. He had been convicted and sentenced for the crime of forgery in a District Court of the United States. The ground relied upon for release was that the indictment stated no offense. The writ was discharged. Speaking through Mr. Justice Bradley, it was said:

"But the question whether it was not a crime within the statute was one which the District Court was competent to decide. It was before the court and within its jurisdiction.

[1] *United States* v. *Cook*, 17 Wall. 168, 174; *United States* v. *Carll*, 105 U. S. 611; *Dunbar* v. *United States*, 156 U. S. 185; *Cochran & Sayres* v. *United States*, 157 U. S. 286; *Markham* v. *United States*, 160 U. S. 319.

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"Whether an act charged in an indictment is or is not a crime by the law which the court administers [in this case the statute law of the United States], is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy, after final judgment, unless a writ of error lies to some superior court, and no such writ lies in this case."

In *United States* v. *Ball*, 163 U. S. 662, an attempt was made to prosecute for the second time one Millard H. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others, who had been convicted and who had been jointly prosecuted with Ball. Reversing the court below, the plea of *autrefois acquit*, relied on by Ball, was held good. It was pointed out that the acquittal of Ball upon the defective indictment was not void, and, therefore, the acquittal on such an indictment was a bar. This case was approvingly cited in *Kepner* v. *United States*, 195 U. S. 100, 129. It being then settled that the conviction on a defective indictment is not void, but presents a mere question of error to be reviewed according to law, the proposition to be decided is this: Did the court below err in holding that it would not consider whether the trial court erred because it had not decided the complaint to be bad, when no question concerning its sufficiency was either directly or indirectly made in that court? Thus to understand the proposition is to refute it. For it cannot be that the court below was wrong in refusing to consider whether the trial court erred in a matter which that court was not called upon to consider and did not decide. Undoubtedly, if a judgment of acquittal had resulted it would have barred a further prosecution, despite the defective indictment. *Kepner* v. *United States*, *supra*.

But it is said the peculiar powers of the Supreme Court in

the Philippine Islands take this case out of the general rule, since in that court on appeal a trial *de novo* is had even in a criminal case. But as pointed out in the *Kepner case*, whilst that court on appeal has power to reëxamine the law and facts, it does so on the record and does not retry in the fullest sense. Indeed, when the power of the court below to review the facts is considered that power, instead of sustaining, refutes the proposition relied on. Thus the proposition is that the court should have reversed the conviction because of the contention as to the insufficiency of the complaint, when no such question had been raised before final judgment in the trial court, and when, as a necessary consequence of the facts found by the court, the testimony offered at the trial without objection or question in any form established every essential ingredient of the crime. In other words, the contention is that reversal should have been ordered for an error not committed and when the existence of injury was impossible to be conceived, in view of the opinion which the court formed on the facts in the exercise of the authority vested in it on that subject.

Affirmed.

MR. JUSTICE HARLAN dissents.

IGLEHART *v.* IGLEHART.

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

No. 158. Argued January 15, 16, 1907.—Decided February 25, 1907.

In a general code such as that of the District of Columbia a later section does not nullify an earlier one as being the later expression of legislative will; the whole code should, if possible, he harmonized and to that end the letter of a particular section may be disregarded in order to accomplish the plain intent of the legislature.

Section 669 of the Code of the District of Columbia making it lawful for cemetery associations incorporated under the laws of the District to hold grants in trust without time limitations is not nullified by § 1023 limiting trusts to one life in being and twenty-one years thereafter.

In pursuance of the general comity existing between States a trust permitted by the laws of the District of Columbia in favor of cemetery associations incorporated under the laws of the District will be sustained in favor of a cemetery association of a State which has power under the laws of that State to hold property under similar conditions.

26 App. D. C. affirmed.

THIS is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District construing a will. 26 App. D. C. 209. The bill was filed by the executor of the will of Annie E. I. Andrews, who was a resident of the District at the time of her death, and whose will was there duly admitted to probate March 28, 1904. The Supreme Court held that all disputed provisions of the will were valid and entered a decree to that effect, which was affirmed by the Court of Appeals, on an appeal taken by these appellants separately from the other parties defendant, by leave of the Supreme Court of the District. All necessary persons were made parties to the suit. The deceased left an estate of about $10,000, of which $3,000 consisted of real estate in the city of Washington.

The disputed portions of the will are clauses one, ten and twelve, and they are set forth in the margin.[1]

[1] First, I give, devise and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a

J. Howard Iglehart, the executor, is the son of a deceased brother of the testatrix (mentioned in the first clause of the will), and the two appellants are, respectively, her brother and sister.

The executor, in his bill, alleged his readiness to distribute the estate as directed by the will, but he said that some of the heirs at law disputed the validity of some of its provisions, and hence his appeal to the court for a construction of those clauses.

The grounds of the dispute are stated to be that the trusts created in the first and twelfth clauses of the will are void, as in violation of the statute of the District of Columbia prohibiting perpetuities and restraints upon alienation. Sec. 1023, Code D. C. The devise of the real estate is alleged to be void on that ground, as is also the residuary bequest to the cemetery company, while the direction to erect a monu-

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house and lot, known and designated as house No. 88 M. street, northwest, in the city of Washington, District of Columbia, to be held by them in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them; provided, they shall keep the said property in repair and pay the taxes thereon. At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold, and the proceeds of such sale shall be invested in United States securities, the interest or income from such said investment to be used by the Greenwood Cemetery Company, aforesaid, as trustees, for the purpose of keeping the Andrews cemetery lot in perpetual good order and condition.

Tenth, It is my will, and I order and direct that five thousand dollars be raised out of my estate to be expended in erecting a suitable monument at the grave of my dearly beloved husband E. L. Andrews, in Greenwood cemetery, Brooklyn, New York.

Twelfth, It is my will, and I order and direct that all the rest and residue of my estate, real, personal, and mixed, wheresoever it may be found, and of whatsoever it may consist, shall be converted into cash, and said cash invested in United States securities, the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, in addition to and together with the trust fund hereinbefore mentioned in clause one of this my last will, for the purposes and to the benefit of beautifying and keeping the aforesaid Andrews' cemetery-lot in perpetual good order and condition.

ment, as provided in section ten of the will, it is alleged, must fall with the destruction of the trust, as it is part of the general scheme of the will, and is inseparable from the trust provisions. The executor submitted the questions to the court and did not appeal from the original decree nor from the decree of affirmance by the Court of Appeals, and he now asks that this court should make proper provision for his protection and that of the estate, in regard to the costs involved by the contention between the defendant and the appellants.

Mr. Andrew Wilson and *Mr. Noel W. Barksdale* for appellants:

As the will creates a future estate, suspending the power of absolute alienation of property beyond life or lives in being and twenty-one years, it is in restraint of alienation and a perpetuity, and, therefore, void in its creation. *Piper* v. *Moulton*, 72 Maine, 155; *McIlvain* v. *Hockaday* (Texas), 81 S. W. Rep. 54; *Corle's Estate*, 61 N. J. Eq. 409; *Sherman* v. *Baker*, 20 R. I. 446; *Kelly* v. *Nichols*, 17 R. I. 306; *Hartson* v. *Elden*, 50 N. J. Eq. 522; *Read* v. *Williams*, 125 N. Y. 560; *Coit* v. *Comstock*, 51 Connecticut, 352; *Fite* v. *Beasley*, 80 Tennessee, 328; *Detwiller* v. *Hartman*, 37 N. J. Eq. 347; *Church Extension* v. *Smith*, 56 Maryland, 362.

The validity of the bequest and devise is to be determined by the laws of the District of Columbia.

The validity of a devise, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of a bequest, as against the next of kin, upon the law of the State in which the testator had his domicile. *Jones* v. *Habersham*, 107 U. S. 174–179; *Vidal* v. *Girard*, 2 How. 127; *Wheeler* v. *Smith*, 9 How. 55; *McDonough* v. *Murdoch*, 15 How. 367; *Fontain* v. *Ravenel*, 17 How. 369; *Perin* v. *Carey*, 24 How. 465; *Lorings* v. *Marsh*, 6 Wall. 337; *United States* v. *Fox*, 94 U. S. 315; *Kain* v. *Gibboney*, 101 U. S. 362; *Russell* v. *Allen*, 107 U. S. 163.

Even though there is equitable conversion from realty to personalty, yet the bequests will nevertheless fall within the prohibition of the statute. *Cruikshank* v. *Home*, 113 N. Y. 337; *In re Walkerly*, 108 California, 627; *Underwood* v. *Curtis*, 127 N. Y. 537; *Penfield* v. *Tower*, 1 N. Dak. 216; *Fifield* v. *Van Wyck*, 94 Virginia, 557; *Harrington* v. *Pier*, 105 Wisconsin, 485; *Read* v. *Williams*, 125 N. Y. 560.

The doctrine of comity has no application, because to recognize the foreign cemetery company would violate the settled policy of the District of Columbia distinctly marked by Congressional legislation.

The courts seem to be of one accord that comity will not be extended when to do so would violate the public policy as indicated by statute. Comity gives way where the established policy of the legislature indicates to its courts a different rule. *Walworth* v. *Harris*, 129 U. S. 364. Comity does not permit the exercise of a power by a corporation when the policy of the State, distinctly marked by legislative enactment or constitutional provision, forbids it. *McDonough* v. *Murdoch*, 15 How. 113; *Paul* v. *Virginia*, 8 Wall. 168, 181. Courts out of comity will enforce the law of another State, when by such enforcement they will not violate their own laws or inflict an injury on some one of their citizens, as these courtesies are extended when they are not prevented by some positive law of the State. *Franzen* v. *Zimmer*, 35 N. Y. Supp. 612. Mere comity can never compel courts to give effect to laws of another State which directly conflict with the laws of their own State and are contrary to its known public policy. Wharton on Conflict of Laws, § 598.

A state statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply to domestic corporations only. *United States* v. *Fox*, 94 U. S. 315; *Vanderpoel* v. *Gorman*, 140 N. Y. 563; *White* v. *Howard*, 46 N. Y. 144; *Matter of Balleis*, 144 N. Y. 132; *Whitcomb* v. *Robbins*, 69 Vermont, 477; *Falls* v. *Savings Ass'n*, 97 Alabama, 417; *Holbert* v. *St. Louis R. R. Co.*,

45 Iowa, 23; *South Yuba* v. *Rosa*, 80 California, 333; *Rumbaugh* v. *Improvement Co.*, 106 N. Car. 461.

Section 669 of the Code, being inconsistent with Section 1023 and irreconcilable, the former is absolutely void.

The two sections cannot be harmonized, and the authorities on statutory construction say that where there is an irreconcilable conflict in different sections of a code or of parts of the same act, that the last in order of arrangement must prevail. Sutherland's Statutory Construction, § 268; 26 Am. & Eng. Ency. of Law, § 619; *Hand* v. *Stapleton*, 135 Alabama, 156, 162.

The will embodied one entire scheme composed of two interdependent parts: (*a*) The erection of a monument; (*b*) its care and preservation. If the latter is invalid, the former must fall with it.

The rule is that if some of the trusts embodied in a will are valid and some invalid, if they are so taken together as to constitute an entire scheme so that the presumed wishes of the testator would be defeated if one portion was retained and the other portions rejected, then all the trust must be construed together, and all must be held illegal and fall. *Tilden* v. *Green*, 130 N. Y. 29–50; *Lawrence* v. *Smith*, 163 Illinois, 149, 165; *In re Walkerly*, 108 California, 627, 644; *Matter of Will of Butterfield*, 133 N. Y. 473, 476; *Holmes* v. *Mead*, 52 N. Y. 332, 345; *Knox* v. *Jones*, 47 N. Y. 389, 398.

Mr. Walter V. R. Berry and *Mr. Hugh B. Rowland*, with whom *Mr. Benjamin S. Minor* and *Mr. Charles H. Stanley* were on the brief, for appellee:

Under the statutes in force in the District of Columbia and in the State of New York, and under the general doctrine of comity obtaining among the States, clauses one and twelve of the will are valid. D. C. Code, Chap. XVIII, sub-chap. VI, sec. 669; Chap. 156, Laws 1839, N. Y.; *Christian Union* v. *Yount*, 101 U. S. 352; *McDonough's Exrs.* v. *Murdoch*, 15 How. 367.

The Greenwood Cemetery takes the interest in the real

estate as personal property, and takes a vested interest as legatee, under the doctrine of equitable conversion. *Cropley* v. *Cooper*, 19 Wall. 167; *Peter* v. *Beverly*, 10 Pet. 532; *Craig* v. *Leslie*, 3 Wheat. 563; *Given* v. *Hilton*, 95 U. S. 591; *Holcomb* v. *Wright*, 5 App. D. C. 76.

Where the testator directs a fund to be transmitted to another jurisdiction and there applied to a trust, the courts of the testator's domicile will uphold the bequest when the trust is lawful in the jurisdiction where it is to be performed, even though it could not be enforced in the jurisdiction of testator's domicile. *Mount* v. *Tuttle*, 2 Lawyers' Rep. Ann. (N. S.) 409, 410, 430, 433.

A general code is one system of law and sections dealing with the same subject are construed as one statute. *Groff* v. *Miller*, 20 App. D. C. 353, 357; *Petri* v. *Com. Bank*, 142 U. S. 644; *Bernier* v. *Bernier*, 147 U. S. 242.

The will is clear as to the intention to create a trust fund. The bequest of the interest or produce of a fund without limitation as to the extent of its duration is a bequest of the fund itself. *Garrett* v. *Rex*, 6 Watts, 14; *Appeal of Pa. Co. for Ins. on Lives*, 83 Pa. 312; *Collier* v. *Collier*, 3 Ohio St. 369; *Millard's Appeal*, 87 Pa. 457; *Craft* v. *Snook*, 13 N. J. Eq. 121; *Gulick* v. *Gulick's Ex'r.*, 27 N. J. Eq. 498; *Snyder* v. *Baker*, 5 Mackey, 443; Roper on Legacies, vol. 2, p. 1476.

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

The first inquiry is in regard to the law existing in the District of Columbia upon the subject of trusts of this nature. There are two sections of the Code of the District of Columbia (sections 669 and 1023) which are involved in the question before us. Section 669 (sub-chapter 6, relating to "Cemetery Associations," of chapter 18, relating to "Corporations") provides in substance that it shall be lawful for cemetery associations incorporated under the laws of the District to

take and hold any grant, etc., upon trust, to apply the income thereof under the direction of the association for the embellishment, preservation, renewal or repair of any cemetery lot or any tomb or monument or other structure thereon, according to the terms of such grant, and the Supreme Court of the District is given the power and jurisdiction to compel the due performance of such trusts, or any of them, upon a bill filed by the proprietor of any lot in such cemetery for that purpose. Section 1023 (sub-chapter 1 of chapter 24, relating to "Estates") provides that except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation, which suspends the absolute power of alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter. The provisions of the section are (at the end of the sub-chapter) made applicable to personal property generally, except where from the nature of the property they are inapplicable.

The appellants assert that section 669 is nullified by section 1023. They urge that the last section, being the last expression of the legislative will, and being inconsistent with section 669, the last section must prevail. This, although section 669 makes special provision in regard to trusts of this nature and permits their creation, yet because the latter section does not in terms make exception of the trusts provided for in the earlier section, these trusts, it is urged, are thereby prohibited.

This is not a case for the application of that doctrine, which is in any event very seldom applicable. The true rule is to harmonize the whole code, if possible, and to that end the letter of any particular section may sometimes be disregarded in order to accomplish the plain intention of the legislature.

Effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. *Petri* v. *Commercial National Bank,* 142 U. S. 644, 650; *Bernier* v. *Bernier,* 147 U. S. 242, 246; *Groff* v. *Miller,* 20 App. D. C. 353, 357. These two sections can be easily harmonized, and the undoubted intention of the legislature be thus carried out, by considering the latter section as applying to cases other than those specially provided for in section 669. That section must be regarded as in full force.

Assuming, however, that the section is not affected by section 1023, it is then contended by the appellants that section 669 does not apply to this case, and that the trusts are not valid as a gift or devise to a charitable use within the exception mentioned in section 1023. It may be assumed for the purposes of this case that the gifts contained in the first and twelfth clauses of the will do not constitute a valid trust for a charitable use, *Jones* v. *Habersham,* 107 U. S. 174, 183, and that those clauses would be illegal if dependent upon the exception mentioned in that section. But the earlier section is referred to for the purpose of ascertaining the policy of Congress within the District upon the general subject of trusts for the perpetual maintenance of cemetery lots, and of monuments and other structures erected thereon.

That policy, as indicated in the section, permits in the District exactly what is provided for in this will, namely, a trust to a cemetery (incorporated) association for the maintenance of a lot and a monument in perpetual good order and condition.

The law in New York in regard to Greenwood Cemetery permits the same kind of a trust. Section 6 of Chapter 156 of the laws of New York for 1839, passed April 11, 1839. The law of the District of Columbia, where the testatrix died and where the property was situated, and the law of the State of New York, where the moneys are to be applied by a corporation created by the laws of that State, concur in per-

mitting such trusts as are created in this will, and under those circumstances such a trust will be permitted by the courts of the District to be carried out in the State of New York, although the testatrix was domiciled in the District at the time of her death, and the funds to be applied to such trust arise from property owned by her in the District at that time.

This is in pursuance of the general comity existing between the States of the Union, and under that the cemetery association can take and hold the property for the purposes mentioned in the will, which are permitted both by the law of the District of Columbia and the law of the State of New York.

But it is contended that the law of the District prohibits the creation of such trusts and refuses to permit them to be carried out within that District, and that there is no rule of comity which obtains in such case by which these trusts might be held valid when affecting property within the District owned by a testator residing therein at the time of his death, even though the party to carry out the terms is a foreign corporation and the trusts are to be carried out in another State. This claim is made upon the assertion that section 669 of the code, even if in force at all, refers only to domestic associations, and that foreign corporations not being within the exception, receive no power from that section and cannot take or hold property situated in the District upon these trusts.

It may be that section 669 referred only to domestic corporations, when the power was therein granted them to take such gifts upon the trusts mentioned, and carry them out in the District. The section is cited, as has been already mentioned, for the purpose of determining the general policy of Congress in relation to this class of trusts, and whether, under the law, trusts similar to those under discussion are permitted in the District. If so, then the result follows from the rule of comity already stated, that a trust of that nature, permitted in the District, will not be interfered with when it is to be operative in a foreign State whose laws also permit it. The

statute is not relied upon as a direct grant to a foreign corporation of the right to carry out a trust in a foreign State regarding property situated in the District and owned at the time of his death by a resident therein. If the statute granted such a right, of course there would be no question of its validity, nor would there be any in regard to comity.

Trusts of the same kind, although to be carried out in a foreign State by a foreign corporation in regard to property within the District, cannot be said to violate any policy or statute of the District, so long as the statute permits therein, grants on similar trusts, although to its own corporations. The prohibition of section 1023 would not extend to such a trust so provided for.

Ever since the case of *Bank of Augusta* v. *Earle*, 13 Pet. 517, this doctrine of comity between States in relation to corporations has been steadily maintained, and it has been recognized by this court in many instances. See specially *Cowell* v. *Springs Co.*, 100 U. S. 55; *Christian Union* v. *Yount*, 101 U. S. 352. These cases cover, as we think, the principle involved herein.

In the opinion delivered in the Court of Appeals it was well said that "it cannot be successfully contended that something which the District of Columbia permits to its own corporations is so far against its public policy that it will not permit persons domiciled within its territory to devise their property to be used for the same purpose by a foreign corporation authorized by its own charter to receive and administer such bequests." In our opinion the first and twelfth clauses of the will are valid.

The objection to the tenth clause is based upon the assumption that the first and twelfth clauses are invalid, and that the tenth clause is so interwoven with the first and twelfth clauses that if they are pronounced void, the whole scheme of the will falls, and the tenth clause goes down with it. Holding the first and twelfth clauses valid, the contention in regard to the tenth clause also fails.

The appellees also urge that by reason of the direction contained in the will to sell the real estate it thereby became constructively converted into personalty at the time of the testatrix's death, and that, regarding it as personalty, the trusts created are still less open to any objection set up by the appellants. Although the provisions of the sub-chapter containing section 1023 apply to personal property generally, as well as to real estate, except where from the nature of the property they are inapplicable, yet when it is seen that even in regard to real estate granted to a domestic corporation for the purposes mentioned in this will, a perpetuity may be created, it seems to be still plainer, if possible, that it would not be against the policy of the District, as evidenced by the statute, to affirm the legality of a trust of this kind in relation to personal property which is to be sold and the proceeds taken to another State by a foreign corporation for the purpose of administration in that State. In any aspect in which we can view the case, we think the disputed provisions of the will are valid.

In regard to costs, the courts below have charged the appellants with costs, and we think the same rule should obtain here. The executor may apply to the Supreme Court for such allowance out of the fund as it may think is, under all the circumstances, proper.

Judgment affirmed.

McGUIRE *v.* GERSTLEY.

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

No. 168. Argued January 17, 18, 1907.—Decided February 25, 1907.

A bond to secure sales made on a credit for a specified period means that the purchasers shall not be called on for payment until after the expiration of that period, and if the declaration shows that such period has actually elapsed since the sales sued for were made, it is sufficient although it may not allege that the sales were made on the specified terms.

Pleas in defense to a suit on such a bond alleging damages for failure to sell on the terms and for prices agreed must be distinct and set forth the details. In order to found a cause of action on the shortcomings of another they must be so plainly set up as to show that they were the proximate and natural cause of actual damages sustained.

Where a bond given to secure payment for goods sold to the principals on a specified credit is complete on its face it is a clear and separate contract between the sellers and the signers of the bond, and the liability of the sureties is not, in the absence of any separate agreement in writing, affected by any future alterations of the prices of merchandise sold provided the specified credit is allowed; and parol evidence to show the existence of any other agreement as to prices between the principals of the bond is not admissible.

A plea alleging damages for breaking up a partnership is insufficient in the absence of an allegation as to duration of the partnership as no action lies for terminating, or inducing the termination of, a partnership at will.

23 App. D. C., 193 affirmed.

THE defendants in error, who were the plaintiffs below, and are hereafter so called, brought an action in the Supreme Court of the District of Columbia on December 10, 1904, against the plaintiffs in error and others, hereafter called the defendants, on a bond, and obtained a judgment, which was entered February 24, 1905, for $5,000 and interest thereon from that date. On appeal the Court of Appeals of the District affirmed the judgment, 26 App. D. C. 193, and the defendants (the two McGuires) brought the case here by writ of error.

The declaration in the action alleged the execution of a bond by all of the defendants in the action dated the eleventh day of September, 1903, which bound the defendants in the

sum of $5,000, to be paid to the plaintiffs, subject to the condition therein stated. The recital in the bond was that Monaghan and J. Charles McGuire were desirous of purchasing merchandise from plaintiffs, "now and from time to time hereafter, which the said John F. Monaghan and J. Charles McGuire have bound and hereby bind themselves to pay for in four months after the date of each respective purchase," and the condition was as follows:

"That if the said John F. Monaghan and J. Charles McGuire shall strictly and faithfully pay or cause to be paid to said Rosskam, Gerstley & Company for merchandise now and hereafter so purchased, the moneys due and to become due thereon when and as the same shall become due and payable, then this obligation shall be null and void, otherwise it shall remain in full force and virtue."

The defendants John F. Monaghan and J. Charles McGuire were principals, and the other defendants, William McGuire and John W. Clark, were sureties. Clark sued out a separate writ of error, which is hereafter disposed of. It was further alleged in the declaration that on the days set forth in the particulars of demand annexed, and which formed part of the declaration, the defendants Monaghan and J. Charles McGuire purchased from the plaintiffs merchandise aggregating the sum of $14,497.16; that they had paid on account thereof, at various times, as shown in said particulars of demand above mentioned, the sum of $9,100.48, leaving a balance overdue and unpaid amounting to $5,396.68, which it was averred the defendants had not paid or caused to be paid to the plaintiffs, and that the whole balance was still due to the plaintiffs, to their damage of $5,000, with interest, besides costs.

The statement annexed to the declaration showed merchandise sold to the defendants by the plaintiffs, commencing September 24, 1903, through almost every month from that time up to and including July 27, 1904, and amounting to the total sum stated in the declaration. The credit side of the

demand also showed payments by the defendants from and including October 27, 1903, up to and including November 11, 1904, and amounting to the sum stated in the declaration and leaving a balance due as stated therein.

Judgment by confession was obtained against the defendant Monaghan for $5,000, with interest and costs. The defendants J. Charles McGuire, one of the principals in the bond, and William McGuire, one of the sureties therein, filed two joint pleas to the declaration, and the defendant William McGuire subsequently filed three separate pleas, and still later three additional pleas.

The plaintiffs first demurred to the joint pleas of the defendants J. Charles McGuire and William McGuire and to the three separate pleas of the defendant William McGuire. They thereafter filed a demurrer to the three additional pleas of defendant William McGuire which had subsequently been filed. Both demurrers were sustained, and, the defendants refusing to amend their pleas, final judgment was entered against them.

The first (so numbered in the record) joint plea of defendants J. Charles McGuire and William McGuire alleged the indebtedness of the plaintiffs to the defendants John F. Monaghan and J. Charles McGuire in the sum of $10,000, because that on the twenty-fifth of August, 1903, the plaintiffs entered into an agreement with Monaghan and J. Charles McGuire (the two principals in the bond), by which the plaintiffs agreed that if the principals would form a copartnership for carrying on in the District of Columbia a wholesale liquor dealer's business, and deal in spirituous liquors to be furnished by the plaintiffs, and would also furnish to plaintiffs a bond in the sum of $5,000, with the defendants Clark and William McGuire as sureties, conditioned for the payment to the plaintiffs of the amount of the indebtedness to be incurred by Monaghan and McGuire in the purchase by them from the plaintiffs, from time to time, of such merchandise, that then, in consideration thereof, the plaintiffs would sell and furnish to

Monaghan and McGuire, whenever requested by them, from time to time, at and for certain prices then specified and agreed upon by the parties to that agreement, the merchandise required in said business and so to be requested, and would allow to them for the goods so requested and required a continuous credit of $10,000, and that they should sell such merchandise to their customers in said business upon such terms as to time and otherwise as they should find and believe to be the best terms obtainable, having in view the establishment and maintenance in said District of a demand for the plaintiffs' goods, and that the said Monaghan and McGuire would not be required to pay for the goods so sold to their customers until they could make collections therefor from their said customers. It was then further understood by and between all the parties to the said agreement, and as part thereof, that said Monaghan and McGuire would enter upon said business without means or capital to sustain the same other than the continuous credit aforesaid, and that, in order to perform their part of said agreement, they would be required to make sales of said merchandise to their customers on credit to be paid for by said customers in periods varying according to circumstances, as stated. The plea then set up that on the date first mentioned (August 25, 1903) the said Monaghan and McGuire formed a copartnership for the purpose stated, and thereafter furnished to the plaintiffs a bond (the one in suit) prepared by the plaintiffs and which the plaintiffs accepted, and the defendants then entered upon and fully established the business mentioned and in all respects performed their said agreement, so far as they were permitted by the plaintiffs to perform the same. That they had obtained a large number of customers, to wit, from 70 to 80, at great labor and expense, to whom they sold on the terms mentioned goods purchased by them from the plaintiffs, and that from the twenty-fourth day of September, 1903, to the tenth day of December, 1903, the plaintiffs furnished to Monaghan and McGuire, from time to time under said

agreement, merchandise amounting in the aggregate to $10,617.55, which they in turn sold to their customers, excepting only a portion of said merchandise which they returned to and which was accepted by the plaintiffs. That the plaintiffs on the tenth day of December, 1903, wrongfully and with the intent to destroy the business so established and to sell goods directly to said customers drew on said Monaghan and McGuire for the sum of $1,500 on their said account and sent through various banks the draft to them, and on the eleventh of December, 1903, the plaintiffs wrongfully refused to furnish merchandise to the above-named defendants at the price stated, but demanded a large increase over those prices, and on the thirteenth day of January, 1904, wrongfully refused to furnish more goods under said agreement or further to perform said agreement, and forced the said Monaghan and McGuire to abandon their said business, which they had established at great expense, to wit, an expense of not less than $10,000 and in which their profits were very great; whereby the plaintiffs wrongfully destroyed the credit and business of said Monaghan and McGuire and violated the agreement of August 25, 1903, and the said Monaghan and McGuire were and each of them was thereby injured and damaged in the sum of $10,000, for which sum the said J. Charles McGuire claims judgment against the plaintiffs; and the defendants aver that they are willing that the same may be set off against the plaintiffs' demand.

The second joint plea of the same defendants (so numbered in the record) set up in substance the same agreement as the first, except that agreement was alleged to have been made September 11, 1903, and the bond was conditioned for the payment by the principals for all merchandise to be furnished by the plaintiffs on four months' credit. The plea also omitted the agreement that the principals (Monaghan and McGuire) would not be required to pay the plaintiffs until they (the principals in the bond) could make collections from their customers. The plea also alleged that the plaintiffs, shortly

after the execution of the bond in suit, wrongfully refused to sell to the principals therein merchandise on credit to the amount of $10,000 at and for the prices stated in the agreement, and wholly neglected and refused to perform the agreement between them and the principals in the bond, whereby Monaghan and McGuire were forced to abandon their said business and lose all the money and time expended by them in and about the same, and amounting to not less than $10,000, and were and each of them was injured and damaged in the sum of $10,000, for which sum the said J. Charles McGuire claimed judgment against the plaintiffs, and the defendants were willing that the same should be set off against the claim of plaintiffs.

Thereafter the defendant William McGuire filed three separate pleas. The first separate plea (numbered 1 in the record) alleged an indebtedness of the plaintiffs to William McGuire in the sum of $5,000, for that, on the eleventh day of September, 1903, and in consideration of plaintiffs agreeing to sell merchandise to Monaghan and McGuire at and for certain prices named in the agreement, and to give them a continuous credit of $10,000 for merchandise sold to them by plaintiffs, the defendants did agree to and did sign the bond mentioned in the declaration, but the plaintiffs wrongfully refused to perform the agreement or to sell to Monaghan and McGuire merchandise at the prices named in the agreement or to allow them the continuous credit mentioned therein, whereby they were prevented from paying for the merchandise purchased and mentioned in the declaration, and the defendant thereby incurred great liability and was injured and damaged in the sum of $5,000, and claimed judgment therefor, and was willing that the same might be set off against the demand of plaintiffs.

The second separate plea (numbered 2 in the record) set forth the same agreement and bond and consideration therefor that is mentioned in the first separate plea, and added that the plaintiffs, on December 11, 1903, and, again, on the twenty-third day of March, 1904, without the knowledge or consent

of the defendant, entered into other agreements with Monaghan and McGuire to sell to them, at different prices and terms of sale, the merchandise purchased from plaintiffs by them, and that since December 11, 1903, the plaintiffs have refused to sell merchandise to Monaghan and McGuire at the prices named in the agreement, though requested to do so, whereby the defendant was discharged from his liability.

The third separate plea (numbered 3 in the record) alleged that the merchandise mentioned in the declaration as having been sold was purchased by the defendants Monaghan and McGuire under an agreement not under seal entered into before and since the eleventh day of September, 1903, between them and the plaintiffs, and not according to the terms of the bond mentioned in the declaration, wherefore the defendant prayed judgment if he ought to be charged with the said debt by virtue of said bond.

Subsequently the same defendant filed three additional pleas. By the first additional plea (which is numbered 4 in the record) he alleges that prior to signing the bond plaintiffs agreed with the principals therein to sell the merchandise referred to in the bond at and for certain prices specified in a letter dated August 25, 1903, sent by the plaintiffs to the principals in the bond. The plaintiffs represented to the defendant that the agreement was applicable to all merchandise to be purchased under the bond, and plaintiffs thereby intended to induce defendant to sign the bond, which he did in reliance upon that statement. Thereafter the principals purchased from the plaintiffs merchandise amounting to $14,477.16 and no more, and the sum of $10,617.55 was for merchandise purchased at the prices agreed upon, and the balance, $3,859.61, was for merchandise purchased at greatly enhanced prices, made under an agreement entered into on or about the eleventh day of December, 1903, without the knowledge or consent of defendant; that the principals paid plaintiffs on account of said sum of $10,617.55 the sum of $9,100.48, leaving due to the plaintiffs under the bond $1,517.07 and no more.

By the second additional plea (numbered 5 in the record) the defendant set up substantially the same agreement as to signing the bond and the consideration therefor, and then made the additional averment that the agreement was that the plaintiffs would not at any time exceed the sum of $10,000 in their sales to the principals, but the plaintiffs failed to perform the conditions, or any of them, and refused to sell at the agreed prices, and also permitted the indebtedness of the principals to continue from December 10, 1903, to January 21, 1904, to be greatly in excess of $10,000, by all of which defendant was discharged.

By the third additional plea (numbered 6 in the record) the defendant alleged the partnership agreement between the principals in the bond, but did not allege that there had been any time ever agreed upon for the continuance of such partnership, and further alleged that during the year 1903 the principals in the bond had established a good business, and the bond was executed and delivered to the plaintiff for the purpose of establishing and maintaining the credit of the principals with the plaintiffs; but that, on or about January 12, 1904, the plaintiffs, for the purpose of securing the customers which the principals in the bond had obtained for themselves, and for the purpose of selling directly to those customers, wrongfully induced Monaghan to withdraw from the partnership and enter the employ of plaintiffs, which Monaghan did, and that thereby the business of the principals was wholly destroyed, and by reason thereof they were unable to pay for the merchandise referred to in the bond and declaration, all of which was without the knowledge or consent of the defendant, by reason whereof defendant was discharged from all liability under the bond.

Mr. Lorenzo A. Bailey for plaintiff in error:

The agreement mentioned in the first and second joint pleas and the first separate plea of the surety is pleaded according to its legal effect, which is proper and sufficient.

1 Chit., Pl. 334. The breaches are set out with sufficient certainty.

The damages claimed are such as may be presumed to result from the breach. Such damages are matter of evidence and need not be alleged and are scarcely ever stated but in a general manner. *Barruso* v. *Madan*, 2 Johns. Rep. 149; 1 Chit., Pl. 371. Profits of such a business may be considered in damages. 1 Sedgw., Dam., § 182.

In this District, before the Code, the right of a surety to set off a debt due his principal in an action against the principal and surety and the right of one member of a partnership to set off a debt due the entire partnership was recognized. *United States* v. *West*, 8 App. D. C. 59. The Code D. C. § 1568, provides that "in an action against principal and sureties an indebtedness of the plaintiff to the principal may be set off as if he were the sole defendant." Sec. 1563 of the Code fully justifies the pleas of set-off. By § 1565, Code D. C., each claim of set-off may be considered as an action against the plaintiff.

The second separate plea of the surety McGuire sets up an agreement, preceding the bond, fixing the prices and terms; that this agreement was the consideration for giving the bond; that the prices and terms were changed by subsequent agreements made without his consent or knowledge. The consideration was thereby destroyed and the surety discharged. This may be established by parol evidence. *Marchman* v. *Robertson*, 77 Georgia, 40; *Hickock* v. *Farmers' &c. Bank*, 35 Vermont, 476; *Campbell* v. *Gates*, 17 Indiana, 126; *Moroney* v. *Coombes*, 88 S. W. Rep. 430; *Dicken* v. *Morgan*, 54 Iowa, 684; 1 Brandt, Sur. 454; 5 Cyc. 742, 744, 818.

The fifth separate plea of the surety alleges delivery upon conditions therein set forth, which were "known to and accepted by the plaintiffs," but which have never been performed. This operated as a discharge. *Campbell* v. *Gates*, 17 Indiana, 126; *Hickock* v. *Farmers' &c. Bank*, 35 Vermont, 476.

The Court of Appeals held that the bond, not being by any

of its terms dependent upon the agreements mentioned in these pleas, the relation between them must depend for its establishment upon parol evidence and that such evidence was inadmissible.

There is nothing in the pleas to justify the finding, or an inference that the surety was without written evidence to sustain the pleas. But parol evidence is admissible to show matter discharging a surety. Cases *supra*.

The Court of Appeals held that the sixth separate plea of the surety was either a plea of set-off or else of recoupment, and as such, bad in substance; but it is not such in form or in effect. It is based upon the proposition that such misconduct on the part of the obligees in a bond, wilfully and maliciously preventing the performance of the condition of the bond and tantamount to fraud, will discharge a surety. *Trustees* v. *Miller*, 3 Ohio 261.

Mr. Eugene A. Jones, with whom *Mr. Simon Wolf* and *Mr. Myer Cohen* were on the brief, for defendants in error:

Damages recoverable under a contract must be the natural and proximate result of the breach of the contract or such as are in contemplation of the parties at the time the contract is made. Sedgwick, Dam., 8th ed., § 146.

The prices and terms upon which the merchandise was to have been sold, are not set forth and the pleas are vague and indefinite in all their allegations. A plea of set-off must disclose a state of facts such as would entitle the party pleading to an action if he were suing as plaintiff, and must contain the substance, at least, of a declaration. *Crawford* v. *Simonton*, 7 Port. (Ala.) 110; Waterman, Set-off, §§ 646, 648; *Garrett* v. *Love*, 89 N. Car. 205; 19 Ency. Pl. & Pr. 754.

A plea of set-off, containing facts which would entitle the defendant to nominal damages only, is insufficient; it will not even affect the matter of costs. *Hitchcock* v. *Trumbull*, 44 Minnesota, 475.

Where a promise is made to two or more jointly all the

promisees must join as plaintiffs in an action for the breach thereof. 15 Am. & Eng. Ency. Pl. & Pr., 528.

A cause of action in favor of a surety alone cannot be set off in a suit against principal and surety. *Corbett* v. *Hughes*, 75 Iowa, 281; 25 Am. & Eng. Ency., 2d ed., 540.

The violation of a collateral agreement, such as that set up in the fifth separate plea of William McGuire does not operate as a discharge of surety. A bond cannot be delivered to the obligee, in escrow, or upon a condition not expressed in the instrument itself. *Newman* v. *Baker*, 10 App. D. C. 187.

The sixth separate plea of William McGuire has been treated by counsel and the court below as a plea of set-off, and as a plea of recoupment; it is in form, neither, and is insufficient in substance to meet the requirements of either.

No action lies for terminating a partnership at will. *Karrick* v. *Hannaman*, 168 U. S. 328.

A defense by way of recoupment must arise out of the same contract or suit on which the plaintiff relies to make his case. *Van Buren* v. *Diggs*, 11 How. 461.

An alteration or modification of an independent or subsidiary agreement cannot affect the surety's liability. *Domestic Sewing Machine Co.* v. *Webster*, 47 Iowa, 357; *Amicable Mut. Ins. Co.* v. *Sedgewick*, 110 Massachusetts, 163; *Stutz* v. *Stranger*, 60 Ohio St. 384; *U. S. Glass Co.* v. *Matthews*, 61 U. S. App. 542.

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

The declaration in this case is attacked by the defendants under the rule that the court will go back to the first substantial defect appearing in the pleadings before the filing of the demurrer. The criticism made by the defendants upon the declaration is that it does not sufficiently show a violation of the terms of the bond. The defendants say the bond limits the liability of the sureties to pay for such mer-

chandise only as was sold on a four months' credit, and that the declaration does not show that the terms of the sale of the merchandise were those which were set forth in the bond. The declaration shows a failure to pay for certain merchandise alleged to have been sold to the defendants, amounting to a stated sum on the dates set forth in the particulars of demand, which demand was annexed to and forms a part of the declaration. This demand showed that the last item of sale was made July 27 prior to December 11, 1904. The condition of the bond meant that the defendants should not be called upon to pay until after the expiration of four months from the date of each of the respective purchases. The defendants had, as the pleadings show, paid for all the merchandise purchased, except the balance therein stated, and four months had in fact elapsed since the last sale. The defendants have, therefore, obtained four months after the purchase before they were called upon to pay. We think the declaration was sufficient.

We are also of opinion that the two joint pleas of J. Charles McGuire and William McGuire, and the first separate plea of the latter, which it is contended set up offsets to the plaintiffs' claim, did not allege facts with sufficient distinctness to constitute a defense to the action. Neither of these pleas is sufficiently distinct to constitute a good pleading. What the special agreement was that is alleged to have been made between the principals in the bond and the plaintiffs, in consideration of which the bond was signed by the surety, is not stated with any degree of particularity. It simply states that the agreement in this respect was that the merchandise should be sold to the principals in the bond at and for certain prices specified in the agreement, but the pleas do not set them forth, nor do they state for how long a time such agreement was to remain in existence, nor how the defendants suffered damage to the extent named in the pleas, or to any extent. It is impossible for a court to see how these damages would necessarily or probably flow from a violation of said

agreement, or that they could form a basis for any legal demand flowing from not longer fulfilling the terms of the alleged contract. The damages alleged in the pleas are most remote, vague and shadowy in their nature, such as could not have been contemplated by any party to the alleged agreement, as the probable result of its violation. While rules of pleading have become more liberal in modern days, yet in order to found a cause of action on the alleged shortcomings of another, they must at least be so far plainly set up as to show actual damage and the wrongful act of the other party as the proximate and natural cause. The particulars of the alleged resulting damages should be so far set forth that the court may be able to see therefrom that such alleged damages are neither obscure, vague or shadowy, but might and probably would naturally result from the acts complained of. Within such limitations, which have always existed, the three pleas are insufficient.

The next succeeding plea is marked in the record the second separate plea of the defendant William McGuire. The court below treated this plea, together with the third separate plea of the defendant, and his fifth (in truth, the second) additional plea, as together resting upon common ground. We think they may be properly so regarded. It is seen from the whole record that the principals in the bond sued on were expecting to have business transactions with the plaintiffs, by purchasing from them liquors, which they expected to sell to others at profit, but the plaintiffs did not care to sell the goods to these principals without some security for payment of the goods sold when cash payment was not exacted. The bond in suit was thereupon agreed to be given as security for the payment of the merchandise to be sold by the plaintiffs to the principals, and which the principals were bound to pay for in four months after the date of each respective purchase. This is a clear and separate contract between the plaintiffs and the signers of the bond, and there is nothing in the declaration or bond which shows the existence of any

other agreement than that mentioned therein, or that an alteration in the prices of the goods sold to the principals by the plaintiffs could, or would, have any effect upon the liability of the sureties. The bond being complete in itself on its face, it cannot be seen that any future alteration of the prices for the sale of the merchandise, arrived at between the plaintiffs and the principals in the bond, would be material to or alter the liability of the sureties for the payment of the merchandise sold and delivered at the prices agreed upon, after four months from the date of purchase. There is no allegation in these pleas that any separate agreement was in writing, and the bond itself does not show the existence of any other agreement or the sale of the property upon any other conditions than those mentioned in the bond itself. Under such circumstances evidence by parol going to show any other agreement between the principals of the bond and the plaintiffs would not be admissible. *Seitz* v. *Brewers' &c. Co.*, 141 U. S. 510; *Domestic Sewing Machine Co.* v. *Webster*, 47 Iowa, 357. In holding these pleas insufficient we think the court below was right.

This leaves the fourth (the first additional) and the sixth (the third additional) pleas. The fourth plea alleges that the merchandise referred to in the bond was to be sold at and for certain prices specified in a letter dated August 25, 1903, and sent by plaintiffs to Monaghan and McGuire. What those prices were is not stated in the plea, while the representations alleged in the plea to have been made, that the agreement was applicable to all merchandise to be purchased under the bond, would require parol evidence, as there is no pretense that these representations were made in writing or that the letter referred to them in any way. The same consideration existing in regard to the pleas last mentioned would operate here and render the plea insufficient.

The third additional plea (marked 6 in the record) attempts to set up a cause of action against the plaintiffs because, as alleged, they induced the defendant Monaghan to dissolve

the partnership between him and McGuire and to enter the plaintiff's employ, for the purpose, on plaintiff's part, of increasing the plaintiff's profits and with intent to wrongfully destroy the business of the defendants Monaghan and McGuire. As the court below well says, there is in this plea no allegation as to how long the partnership was to continue, and no action would lie for terminating or inducing the termination of a partnership at will. *Karrick* v. *Hannaman*, 168 U. S. 328, 333. We do not see how any legal damage to the sureties under such circumstances can be said to be the proximate, natural or probable result of such action on the part of the plaintiffs. After the dissolution of the partnership of course no sales could thereafter be made, and in relation to sales already made with credit according to the terms of the bond, it is impossible to see how it could be said that the ruin of the business of the principals of the bond, and hence the damage to the sureties could be regarded as the probable consequence of the act of the plaintiffs in procuring Monaghan to dissolve the partnership and enter their employ. Whether treated as an offset or recoupment, or simply as an independent cause of action, the plea does not set up facts sufficient to constitute a valid set-off, recoupment or cause of action.

The judgment of the Court of Appeals was right and is

Affirmed.

CLARK *v.* GERSTLEY.

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

No. 169. Argued January 17, 18, 1907.—Decided February 25, 1907.

McGuire v. *Gerstley*, *ante*, p. 489, followed and *held* also:

The liability of sureties on the bond in this case given to secure payment for goods sold on a specified credit was not affected by failure of the sellers to notify the sureties of non-payment at the expiration of the credit, or by their giving an extension of credit, there being no definite term of such extension.

26 App. D. C. 205, affirmed.

THE facts are stated in the opinion.

Mr. Lorenzo A. Bailey for plaintiff in error.

Mr. Eugene A. Jones, with whom *Mr. Simon Wolf* and *Mr. Myer Cohen* were on the brief, for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The defendants in error, plaintiffs below, obtained judgment against the plaintiff in error for $5,000 and interest in April, 1905, in the Supreme Court of the District of Columbia, which judgment was affirmed by the Court of Appeals, 26 App. D. C. 205, and the plaintiff in error has brought the case here for review.

It is the same action as the foregoing case, just decided, but the plaintiff in error, who was one of the sureties in the bond, separately filed special pleas to the declaration, which were separately demurred to, and the Supreme Court sustained the demurrer. On appeal to the Court of Appeals the demurrer was not disposed of at the same time as the demurrers to the other pleas in the case, but was postponed to a subsequent time, April 7, 1905. On that date the de-

murrer was sustained and the judgment previously entered affirmed against this plaintiff in error, who then brought the case here on a separate writ of error.

The special pleas filed by the plaintiff in error were seven in number, the first six being the same as filed by the other plaintiffs in error in the case. The seventh set up the failure of the plaintiffs to give notice to the sureties that the principals in the bond had not paid for the goods at the expiration of the term of credit allowed them, and also that the time had been extended by the plaintiffs in which the principals in the bond might pay for the goods sold to them. No definite term of extension was stated. What has already been said in regard to the other six pleas in the case determines the decision in regard to the same pleas hereinabove set forth. In regard to the seventh plea the plaintiff in error says in his brief in this court that he makes no point concerning the same.

Judgment affirmed.

ARTHUR *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 176. Argued January 24, 1907.—Decided February 25, 1907.

Cau v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, followed as to binding effect of agreements in bills of lading exempting carrier from fire loss and claimed to have been forced on the shipper under duress and without consideration.

Where a railway company has no other place for delivery of cotton than the stores and platform of a compress company, where all cotton transported by it is compressed at its expense and by its order, its acceptance of, and exchange of its own bills of lading for, receipts of the compress company passes to it the constructive possession and absolute control of the cotton represented thereby, and constitutes a complete delivery to it thereof; nor can the railway company thereafter divest itself of responsibility for due care by leaving the cotton in the hands of the compress company as that company becomes its agent.

On the evidence in this case the question of whether the custodians of the cotton were guilty of negligence should have been submitted to the jury.

139 Fed. Rep. 127, reversed.

THE plaintiffs in error, who were plaintiffs below, filed their complaint against the railway company in the Circuit Court of the United States for the Western District of Arkansas, Texarkana Division. The case arose under the laws of the United States, as the defendant was incorporated under an act of Congress, passed March 3, 1871, which act was amended by one passed May 2, 1872, among other things changing the name of the corporation to that under which it was sued in this case. Upon the trial the court directed a verdict for the defendant, which was affirmed by the Circuit Court of Appeals, 139 Fed. Rep. 127, and the plaintiffs have come here by writ of error.

The action was to recover damages against the defendant for loss by fire of 50 bales of cotton, which were burned at Texarkana, Texas, September 19, 1900, and which the plaintiffs allege had been duly delivered to the defendant at that place, under a through bill of lading for transportation to Utica, New York. In the third clause of the conditions stated in the bill of lading was a provision "That neither the Texas and Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire." In the fifth clause of the bill of lading it was provided that "each carrier over whose road the cotton is to be carried hereunder shall have the privilege, at its own cost, to compress the same for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression."

Although the cotton was destroyed by fire, plaintiffs alleged that they were not concluded by the fire clause, which they allege was void "because (1) said bill of lading was executed by said plaintiffs under duress; (2) said provision is unreason-

able; and (3) was without a consideration." The freight rates charged in the bill were the regular rates for the shipment of cotton over all lines of railway between Texarkana and Utica, New York, and no option was given to said plaintiffs, as they allege in their complaint, to receive any other form of bill of lading than that exempting the defendant from liability for loss of the cotton by fire, and plaintiffs allege they did not assent thereto.

It was also alleged that the place where the cotton was stored after its delivery to the railway company by the plaintiffs was not a safe place, being on the platform of the Union Compress Company; that the platform was not enclosed, and that there was no proper provision made to prevent the destruction of the cotton by fire, and that the cotton was at such place exposed to the sparks of passing engines, and that the employés of the Union Compress Company, which was the agent of the defendant, neglected to care for the cotton, which caught fire from sparks from a passing engine and was destroyed, September 19, 1900, whereby defendants became liable to the plaintiffs in the sum of $2,605, the value of the cotton. The defendant, by answer, put in issue all the allegations as to negligence by its own servants or by the servants or agents of the compress company, and also denied that the plaintiffs had ever delivered the cotton to the railway company; and alleged that at the time it was destroyed it was in the possession and control of the compress company, which was not its agent and over which it had no control.

Upon the trial evidence was given tending to prove the following facts: The plaintiffs, with offices at Texarkana, were extensive buyers of cotton, which they purchased in the surrounding country and had it transported to that place as a place of concentration, where it might be classified and subsequently transported to the East and other parts of the country by the railroads.

The Union Compress Company was an independent corporation, doing business at Texarkana, as a compresser of cotton,

which it compressed for the various railroads having tracks at that place. The compress company had a platform on its own land, of about 400×600 feet, upon which cotton was delivered from wagons and from railroad cars, and the receipt of the cotton was acknowledged by the compress company. From this platform cotton was loaded on the respective cars of the different railroads, the tracks of which surrounded the platform on three of its sides. This platform was within the State of Texas. Substantially all the cotton received at Texarkana was received at this platform. The local platform of the defendant company was not calculated to receive cotton for shipment by the company, on account of its small size, and the defendant's agent testified that he would not know what to do with cotton if offered at this platform, except to send it to the platform of the compress company. When cotton was placed on the platform of the compress company it did not then compress it, but it remained there until further orders were given, as herein stated. After delivery on the platform, and after the shipper had procured the written acknowledgment of the receipt of the cotton by the compress company, the practice was for the shipper, when he was ready to have it shipped, to go to the railway company, and upon the surrender of the receipts of the compress company to the agent of the railway company the shipper would receive from such agent a bill of lading for the cotton, which acknowledged its receipt by the company and the place and person it was consigned to, and the shipper had nothing further to do in regard to the cotton. He issued no orders for compressing it, and was not allowed to route it by any particular route. He would identify the cotton covered by the bill and give the destination point of the cotton and the name of the consignee, and there his right ended. The railroad company, when it received from the shipper the compress company's receipt, and gave its bill of lading to the shipper, took the receipts to the compress company and gave them up, and directed the company to

compress the cotton and obtain insurance upon it covering the responsibility of the railroad company, and load it into cars to be designated by the railroad company's agent. It was a general understanding between the railroad company and the compress company that when the former delivered the cotton receipts to the compress company it was to compress the cotton, obtain the insurance and give the policies to the agent of the railway company, and ship the cotton on the cars pointed out by the railway company's agent. There is no evidence that the compress company ever compressed cotton at the orders of the shipper, or charged him for the storage of the cotton on the platform. The compressing was in fact done by the compress company for the railway company, for its convenience, by its direction and at its cost. While the cotton was being compressed the compress company was not under the control of the railway company in matters relating to the mode and manner of compressing, nor were the employés of the compress company under any control by the railway company, but the compress company followed the orders of the railway company when to compress and where to load the cotton after compressing.

This customary way of doing business was followed with regard to the cotton in question. It was received on the platform of the compress company from plaintiffs, and receipts given for it to them. These receipts were taken on September 17, 1900, to the agent of the railway company, who thereupon signed and delivered a bill of lading to plaintiffs, acknowledging the receipt of the cotton to be transported to Utica, New York, at named rates. The agent of the railway company then took these receipts which plaintiffs had handed to him, and delivered them to the compress company and gave written instructions, signed by such agent, to the compress company on a form customarily used, and which ran thus: "I have this day issued on your compress receipts bill of lading to W. A. Arthur & Company for 50 bales of cotton, (marks, number of bales, and total weight given.) Do-

mestic. Compress and ship the above cotton," as stated in directions. The compress company, when its own receipts were delivered to it by the railway company's agent, in accordance with its general custom, caused this cotton to be insured for the benefit of the defendant company and in the name of that company, and delivered the policies to the agent of the railway company, who forwarded them to division headquarters at Dallas, Texas. The compress company paid for the insurance under the direction of the railway company.

It was while the cotton was still on the platform and not yet compressed that it was burned.

The order adopted by the Texas State Railroad Commission, which was put in evidence, reads as follows:

"Thirteenth. When cotton is tendered to railroad companies upon compress platform, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company."

The rule of the defendant was also put in evidence, and reads as follows:

"Rule Eleven. When cotton is tendered this company upon a compress platform which is situated on the track of this company agent shall take charge of and receipt for such cotton in the same manner and on the same terms as he would receive and receipt for the cotton if tendered him at this company's depot platform or other places assigned by it for such transactions; provided, however, that the shipper or the compress company shall, in such cases, assume the additional risk of insurance involved by such act of this company."

Mr. William H. Arnold, with whom *Mr. James K. Jones* and *Mr. James K. Jones, Junior,* were on the brief, for plaintiffs in error:

The cotton had been delivered and accepted, and the liability of the defendant as a common carrier existed at the time of the fire.

Upon the delivery and acceptance of goods the carrier's liability is the same as when the goods are in transit.

The delivery of goods for shipment to an agent of the carrier duly authorized to receive them, or who is clothed with apparent authority and has been accustomed to receive goods for carriage, is sufficient to bind the carrier. Goods must be tendered at a time and place where the carrier is accustomed to receive freight. A deposit of the goods may amount to a delivery when there is proof of a constant and habitual practice and usage on the part of the carrier to receive goods for transportation when they are deposited for it in a certain place; proof of such practice is sufficient to show a public offer by the carrier to receive in that way, and to constitute an agreement between it and the shipper by which goods when so deposited will be considered having been delivered to it without further formality. 5 Am. & Eng. Ency. of Law, 2d ed., 181; *Pratt* v. *Grand Trunk Ry. Co.*, 95 U. S. 336.

The duty of loading freight of any kind upon cars, rests primarily upon the carrier. It is not necessary to constitute a delivery to a carrier that the goods be loaded upon the cars. 5 Am. & Eng. Ency. of Law, 2d ed., 189; *Bulkley* v. *Naunkeag Steam Cotton Co.*, 24 How. 386; *Fitchburg Ry. Co.* v. *Hanna*, 6 Gray (Mass.), 541.

A limitation against liability is not operative where the loss occurred by reason of negligence. *Railroad Co.* v. *Lockwood*, 17 Wall. 383; *Bank of Ky.* v. *Adams Express Co.*, 93 U. S. 174; *Inman* v. *Railway Co.*, 129 U. S. 128.

The defendant was negligent in detaining and storing the cotton with the compress company on its platforms, a place

known to the defendants to be unsafe, the cotton was kept unprotected against fire.

The compress company was the agent of the defendant, charged with the protection of the cotton, for whose negligence the defendant was liable, and it negligently left the cotton exposed, and failed to take the ordinary precautions to guard or watch it, and did not use the means in its power to prevent its loss. The compress company provided no protection against fire, and defendant knowing this, is liable for the loss of plaintiff's cotton.

Whether these acts on the part of the compress company and its employés constituted negligence which contributed to the loss of the cotton should have been left to the jury, since the compress company was the agent of the railway company in custody of the cotton. The authorities clearly sustain the proposition that the railway company is liable for the negligence of the compress company and its employés. *Bank of Ky.* v. *Adams Express Co.*, 93 U. S. 174; *Block* v. *Merchants' Dispatch T. Co.* (Tenn.), 6 S. W. Rep. 881; *Boscowitz* v. *Express Co.*, 93 Illinois, 523; *Christenson* v. *Express Co.*, 15 Minnesota, 270 (Gil. 208); *Transportation Co.* v. *Oil Co.*, 63 Pa. St. 14.

The fire exemption in bill of lading was void for duress.

The evidence leaves it clear that no option was given or afforded plaintiffs for the shipment of their cotton except on the terms prescribed by the bill of lading. Here was a plain coercion on the part of the defendant requiring the plaintiffs to accept this form of bill of lading or none at all.

The fire clause in bill of lading if valid was not in force while cotton was detained for compression.

One who has by contract assumed certain liabilities cannot free himself therefrom by the employment of an independent contractor, and this principle has been held to be applicable when the contract is merely one implied by law. 16 Am. & Eng. Ency. of Law, 204; *Montgomery Gas Light Co.* v. *Montgomery R. Co.*, 86 Alabama, 373; *Atlanta &c. R. Co.* v.

Kimberly, 87 Georgia, 161; *Waller* v. *Lasher,* 37 Ill. App. 609; *Edwards* v. *N. Y. &c. Ry. Co.,* 98 N. Y. 245.

Mr. David D. Duncan, with whom *Mr. John F. Dillon* was on the brief, for defendant in error:

The stipulations in the bill of lading that defendant should not be liable for the loss or destruction of the cotton by fire, nor for loss or damage thereto by causes beyond its control, or not occurring on its own line, and that in having the same compressed it should not be responsible for deviation or unavoidable delays, are all valid and binding.

As to validity of the fire clause in identically the same kind of a bill of lading, and for the same fire see *Cau* v. *T. & P. Ry.,* 113 Fed. Rep. 91; *S. C.,* 194 U. S. 427.

While the shipper might insist on the railway company receiving and transporting his property under his common law liability, he could only compel it to transport to the end of its line. He would have no right to demand a bill of lading beyond the line of the initial carrier. *Railway* v. *Sharp,* 40 S. W. Rep. 71; *Ry.* v. *Hurst,* 67 Arkansas, 407; *Exp. Co.* v. *Welcome,* 29 S. W. Rep. 34.

The compress company was not the agent of the railway company.

The compress company acted independently of the railway company, and selected and provided its own platform and appliances for storing cotton, its own process for pressing the same, and its own appliances for extinguishing fire, and the railway company had no authority or right to make any change, or in any way or manner whatever direct or control the compress company or its servants in the manner of doing the work, or of providing appliances or places for the work.

There was no actual delivery to the defendant. It had no control over the cotton, and no right to handle it, and had nothing else to do with it, until it was loaded on the cars.

The compress company was a contractor for whose negligence defendant in error cannot be held responsible.

The compression of the cotton was a collateral and independent undertaking of the Union Compress Company, and the injury did not result from the acts called for or rendered necessary by the contract.

Defendant in error did not contract or agree with plaintiff in error to put the cotton in proper condition for transportation, but only reserved the right to do so, without rendering it liable for deviation or unavoidable delays. *Bank* v. *Express Company*, 93 U. S. 174, distinguished.

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

The plaintiffs, in order to avoid the obstacle in the agreement in the third clause of the bill of lading, providing that defendant was not to be liable for damages to the cotton by fire, contend, as set up in the complaint, that the clause in the bill of lading was received under duress, and that it was unreasonable and without consideration. These contentions have been answered and overruled, upon much the same evidence, in the case of *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, and need not be further discussed.

With the fire clause in force, it became necessary for the plaintiffs, in maintaining their action, to show that defendant had received the cotton, and that it was destroyed through the negligence of the defendant or its agents, as the exemption would not apply to a case of damage occurring through such negligence. *Bank of Kentucky* v. *Adams Express Company*, 93 U. S. 174. We are of opinion, after carefully reading the record, that there was evidence enough to be submitted to the jury upon the question of negligence in the care of the cotton while on the platform.

This leaves the questions whether there was a delivery of the cotton to the railway company, and whether the compress

company, at the time of the fire, was the agent of the railway company as to that cotton.

Upon the evidence in this case, was there a delivery? The evidence showed that the cotton was not delivered on the platform by the plaintiffs for the purpose of being compressed for them by the compress company. The order to compress was subsequently given by the railway company. That company had no other place for the delivery of the cotton to it than at this platform, but, as there were three companies with tracks at the platform, with either one of which the shipper might contract for the transportation of the cotton, it cannot be held that there was at the time of the delivery of the cotton at the platform a delivery to the defendant, especially as the compress company itself acknowledged the receipt of the cotton. But when these receipts were handed by the plaintiffs to the defendant's agent, who took them and issued a bill of lading to the plaintiffs, the constructive possession and the entire control of the cotton passed to the defendant. It could then, if so minded, have taken the cotton and loaded it on cars and taken it away without having had it compressed. It was, however, compressed by its own order, given in writing to the compress company, and for its own convenience and at its own cost, and the insurance was obtained by its direction by the compress company, in the name of the defendant and for its benefit, and such policies were delivered to the defendant and sent by its agent to Dallas. Most probably the cost of compression and insurance was paid by the plaintiffs in the rate paid by them for the transportation of the cotton, as that cost was one of the factors which may be supposed to have entered into the rate of freight charged by the defendant; but the total sum paid for transportation by plaintiffs left the matter with defendant to compress and insure if it saw fit, which it probably would think fit to do in all cases as an ordinary business precaution. The fact that in getting the cotton compressed the railway chose to have it done by an independent con-

tractor, over whose acts it had no control while the cotton was being compressed, and the fact that it would order the compress company after compressing to load the cotton on cars selected by defendant's agent, did not in any way affect the fact that the cotton had been received by the railway company, and that it was thereafter subject to its full control. The defendant could not divest itself of the responsibility of due care by leaving the cotton to be compressed and loaded by the compress company. The latter company was, while so acting, the agent of the defendant, chosen by it, and, as such, the defendant was responsible for any lack of proper care of the cotton by the compress company. *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. *supra.*

It is urged that the case cited does not cover the facts herein, because in the reported case the attempt was to secure the immunity of the defendant express company from the consequences of the negligence of the railroad in doing the very thing that the express company had agreed to do, viz., transport the money; while in the case before us the negligence of the compress company (assuming there was such) was not in transporting the cotton, which the railway company had agreed to do, but in caring for it while awaiting compression. We see no difference, in fact, which would lead to a different result.

The compression was done for the convenience of the railroad company, after the company had received the cotton and before the actual transportation had commenced. In order to enable it the more conveniently to do the work of transportation it cannot divest itself of its obligation to exercise due care while the cotton is in the control of the compress company, although the latter is an independent contractor and not under the immediate control of the railway company while doing the work of compression in its behalf. There would be no justice in such holding, and we are clear it would violate the general rule that the carrier, after the freight has been received by it, must be regarded as liable,

at least, for the negligence of its own servants, and also for that of the servants of an independent contractor, employed by it to do work upon the freight for its own convenience and at its own cost.

In *California Insurance Co.* v. *Union Compress Co.*, 133 U. S. 387, the question was simply as to the liability of the insurance company on a policy of insurance against fire, issued by it to the Union Compress Company upon cotton in the possession of the compress company for compression, and which belonged to divers other parties. The policy insured the cotton for the plaintiff while "in bales, their own or held by them in trust or on commission." The defense was that as the compress company did not own the cotton and the beneficiaries under the policy were its owners, that no interest of any carrier was covered by the policy. The court held that the railway companies were beneficiaries under the policy, because they had an insurable interest in the cotton, and to that extent were its owners, and that it was held in trust for them by the plaintiff. The railway companies had issued bills of lading upon the surrender of the receipts of the compress company. It was held that where the original depositors of the cotton had surrendered to the railway companies the receipts which they had taken from the compress company, that those companies became substituted in the relation to the compress company, which before had been held by the depositors of the cotton; that the railway companies thus became the beneficiaries of the trust so far as the compress company was concerned, because they thus became the persons to whom that company owed the duty of bailment, and the persons entitled to demand possession of the property from the plaintiff. The policy also contained a provision that it should be void if there were any change in the possession of the insured property, and the defendants insisted that there was such a change, caused by the signing of the bill of lading by the railway companies in return for the receipts given by the compress company upon the de-

posit of the cotton with the latter company, although no actual change had taken place and the cotton still remained in the custody of the compress company. It was, however, held that the railway companies, in acquiring the receipts of the compress company and issuing bills of lading for the cotton, took only constructive possession of it, and the plaintiff retained actual physical possession of it and did not lose any element of possession necessary to give it the right to effect the insurance for its own benefit and as bailee or agent for the protection of the railway companies, although the railway companies' was the right to ultimate possession, which passed to them by the original deposit of the cotton receipts given by the plaintiff.

The question of whether there had been a change of possession within the meaning of that expression as used in the insurance policy, is entirely different from that of whether immediate control of the cotton passed to the railway company by virtue of the delivery of the bill of lading in this case, so as to render the company liable for any neglect by it or its agent in regard to the subsequent care of the cotton. In the case at bar, not only was there a constructive possession by the railway company, but that company assumed full control of the cotton, and gave directions to the compress company what to do with it.

In *St. Louis &c. Railway Company* v. *Commercial Union Insurance Co.*, 139 U. S. 223, the question was also in regard to insurance, the insurance company endeavoring to collect from the defendant what it had paid to the owners of the cotton. In that case the cotton which had been destroyed by fire was in the possession of the compress company, and the railway company had never given any bill of lading for it. The insurance companies had issued policies upon and delivered them to the owners of the cotton, and when the cotton had been destroyed by fire the companies paid the losses and claimed that the railway company was liable under the contract which the company had made with the compress

company to receive the cotton and transport it over its railroad across the Arkansas River to the press of the compress company in Argenta, a distance of a mile and a half. The insurance companies insisted that by the failure of the railway company, under its contract with the compress company, to transport this cotton as fast as it came in, the amount of the cotton became so great as to constitute a public nuisance, as it was piled up in the compress company's warehouse and overflowed into the adjoining streets. This court held that, as there had been no bills of lading issued by the railway company for the cotton which had been destroyed, the failure of the railway company to furnish sufficient transportation for the cotton to the compress company, while it may have been a breach of the contract between the railway company and the compress company, yet such breach created no liability in contract or tort to the owners or insurers of the cotton or to any other person. The court, at page 237, said: "This cotton, certainly, was in the exclusive possession and control of the compress company. The railway company had not assumed the liability of a common carrier, or even of a warehouseman, with regard to it; had given no bills of lading for it; had no custody or control of it and no possession of it, actual or constructive, and had no hand in placing or keeping it there."

In speaking of the issuing of bills of lading by the railway company for certain other cotton and what effect it had upon the rights of the parties, in the case then under consideration, the court said, page 238:

"There is nothing else in the case, which has any tendency to show that the railway company had or exercised any control or custody of the cotton, or of the place where it was kept by the compress company, before it was put upon the cars by that company. The railway company evidently neither considered itself, nor was considered by the compress company, as having assumed any responsibility for the care or custody of the cotton, until it had been insured in its behalf and loaded

upon its cars. The evidence warranted, if it did not require, the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or legal custody of the cotton until it was so loaded."

Such is not the case here.

In *Missouri Pacific Railway* v. *McFadden*, 154 U. S. 155, the case was decided upon the facts therein stated, which were that it was understood both by the carrier and the shipper that the cotton was not to be delivered at the time the bills of lading were issued, the cotton at that time being in the hands of the compress company, which compress company was the agent of the shipper, it being the intention of the parties at the time the bills of lading were issued that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed. These allegations were made in the answer of the company, which was excepted to and their truth was therefore admitted. The trial court had, nevertheless, held the company liable for the loss of the cotton. This court said (page 160): "The case presents the simple question of whether a carrier is liable on a bill of lading for property which at the time of the signing of the bill remains in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated." The court held that under such circumstances there was no liability on the part of the common carrier, because it had never had the cotton delivered to it, the issuing of the bill of lading being subject to the intention of the parties, and the cotton remaining in the hands of the compress company as agent of the shipper.

The facts in the case at bar are totally different.

Stress was laid in the argument before us upon the fact that under the thirteenth rule of the Texas Railroad Commission the defendant was bound to sign the bill of lading when the receipts of the compress company were presented

to the railway company, and that, therefore, the defendant cannot be held to have become liable by virtue of the delivery of the bill of lading in question upon such a purely arbitrary order. It is also urged that the eleventh rule of the defendant, which is set up in the foregoing statement and which is to the same effect as the order of the railroad commission, was adopted simply pursuant to that order, and, therefore, no liability attaches from the bill of lading issued under the circumstances of this case. We think the argument is not sound. The rule of the Texas commission applies to a case when the cotton is tendered to the railway company, although at the time it is upon the compress company's platform. Now if the railway company did not regard the presentation of these receipts as in fact a tender to the railway company of the cotton in question, or if it were not a valid tender of the cotton, it could have refused to sign the bill of lading. The same may be said of rule eleven of the company itself. The company evidently regarded the cotton as tendered them, and issued the bill in acknowledgment of the fact of such tender.

We think the evidence in this case made out a delivery to and acceptance by the railway company of the cotton in question, and that the compress company had the actual custody of the cotton as the agent of the railway company, and the question of whether the persons in whose custody it was, at the time of the fire, were guilty of negligence was a question which should have been submitted to the jury.

The judgment of the Circuit Court of Appeals and that of the Circuit Court should be reversed and the case remanded to the Circuit Court with directions to set aside the verdict and to grant a new trial.

Reversed.

EAU CLAIRE NATIONAL BANK *v.* JACKMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 163. Argued January 16, 17, 1907.—Decided February 25, 1907.

Where the bankrupt, within four months of the petition, mortgages his property to a creditor having knowledge of his insolvency and thereafter conveys it to a third party subject to the mortgages and the creditor forecloses and as a result of the transaction obtains a greater percentage on his claim than other creditors of the same class, the transaction amounts to a voidable preference and the trustee can recover from the creditor the value of the property so transferred.

A trustee in bankruptcy can maintain a suit to recover the value of a voidable preference without first electing to avoid such preference by notice to the creditor receiving the preference and demand for its return.

A demand is not necessary where it is to be presumed that it would have been unavailing.

The right of the trustee in bankruptcy to recover property obtained in fraud of the bankruptcy act is not varied by how the property would be administered and distributed between the different classes of creditors; all creditors, whether general or preferred, are represented by the trustee.

Where there is a voidable preference the creditor receiving it cannot, in a suit of the trustee in the state court to recover the value thereof, litigate the validity of other claims against the bankrupt and whether other creditors have received, and not been required to surrender, preferences.

125 Wisconsin, 465, affirmed.

THIS action was brought by defendant in error, hereafter called the trustee, in the Circuit Court of Eau Claire County, State of Wisconsin, against the plaintiff in error, hereafter called the bank, under section 60*b* of the bankrupt act of 1898, to recover the value of property which, it is alleged, was transferred by the bankrupt to the bank, for the purpose of giving the latter a preference over other creditors. Judgment was recovered by the trustee, which, on appeal, was affirmed by the Supreme Court of the State. 125 Wisconsin, 465. Thereupon this writ of error was sued out.

The complaint of the trustee alleges that on the seventh of June, 1902, John H. Young duly filed his petition in bank-

ruptcy in the United States District Court for the Western District of Wisconsin, pursuant to the act of Congress, and was on said day duly declared a bankrupt. Subsequently defendant in error was duly elected and appointed by the creditors of the bankrupt as trustee in bankruptcy, and duly qualified as such trustee.

The plaintiff in error is and was at all the times mentioned in the complaint a national bank. Young, during the four months immediately preceding the filing of his petition, was the owner and in possession of certain lumber, shingles, and lath, located at Cadott, Chippewa County, Wisconsin, and certain logs in or near the Yellow river and Chippewa river in Chippewa County, which were reasonably worth the sum of thirty-five thousand dollars. The value of all other property owned by him did not exceed the sum of $500.

On the tenth of February, 1892, Young was wholly insolvent, and owed debts which largely exceeded the value of his property, which fact was well known to him and the bank. The aggregate amount of his indebtedness exceeded the sum of $40,000, and the value of his property was substantially $35,000. He was indebted to the bank in the sum of $27,000 for moneys borrowed from time to time for a period of about two years previous to that time. On said day Young executed to the bank a chattel mortgage on 2,100,000 feet of saw logs, to secure the sum of $15,900, then owing from him to the bank, and also executed a chattel mortgage, transferring 1,000,000 feet of lumber, about 600,000 shingles and about 200,000 lath, to secure the sum of $11,100, owing by him to the bank. This indebtedness existed long prior to said mortgages, and the property transferred constituted substantially all of the property then owned by Young not exempt from execution, which facts were well known by him and the bank. The effect of the foreclosure of the mortgages would be to enable the bank to obtain a much larger percentage of its debt than would the other creditors of Young in the same class as the bank. The mortgages were given by Young and taken

by the bank for the sole purpose of hindering and delaying the other creditors, and were executed and received for that purpose, and the bank at the time of their execution had reasonable cause to believe that they were given with the intention to give it a preference over other creditors.

The Waters-Clark Lumber Company is a corporation of the State of Minnesota, and D. S. Clark is the president thereof and also a director in the bank, and W. K. Coffin is the cashier of the latter. On or about the tenth of March, 1902, Coffin, acting for the bank, requested Young to transfer to the lumber company, for the benefit of the bank, all of the property embraced in the mortgages, together with certain other property. Pursuant to such request Young did, on or about the tenth of March, 1902, transfer, by absolute bills of sale, to the lumber company all of the property described in the mortgages, and other saw logs owned by him. The property transferred was reasonably worth the sum of $35,000. Immediately on the execution of the bills of sale the lumber company, acting pursuant to the directions by and in behalf of the bank, took possession of the property transferred, and thereafter sold the same and applied the proceeds to the payment of the indebtedness secured by the mortgages. At the time the bills of sale were made the lumber company and the bank thought the property transferred constituted all of the available assets of Young, and that the result of such transfer and the appropriation of the proceeds thereof would result in the other creditors of Young losing all of his indebtedness to them. The lumber company, acting as vendee of said property, was in reality acting as trustee for the bank, and made such pretended purchase with the understanding and agreement with the bank and Young that it would account to the bank for the proceeds of the property transferred to the amount of his indebtedness, and that any sums realized in excess of his indebtedness should be paid to Young. The bills of sale were not executed in compliance with the statues of the State. Except as to the agreement

to pay said indebtedness, no consideration was paid by the lumber company for the property, and at the time of the transfer of the property nothing was paid to Young therefor. By reason of said transactions the bank within four months appropriated to the payment of its claims substantially all of the property of Young, which at said time was and has been ever since worth $35,000. There is no other property in the possession of the trustee, belonging to Young, out of which his other creditors can be paid.

The bank demurred to the complaint on the following grounds: The court had no jurisdiction of the subject of the action; the trustee had no legal capacity to sue, in that the complaint did not allege that authority or permission was given him to bring suit; defect of parties, in that Young and the lumber company were not made parties; and that the complaint did not state a cause of action. The demurrer was overruled, and the bank, availing itself of the permission granted, filed an answer, in which it admitted its corporate character and that of the lumber company, and the execution of the mortgages and the bills of sale, and that the instruments were not executed in the manner provided by the statutes of the State. It denied all the other allegations of the complaint, and alleged that a portion of the proceeds of the sale of the property was paid to the bank to discharge valid and existing liens which it held against the property. And it alleged that the mortgages were given for a good and valuable consideration, and that neither of them nor the payments to the bank were made or received for the purpose of giving the bank a preference over other creditors of Young, "contrary to the provisions of the bankruptcy laws," and "that, prior to the commencement of this action, the plaintiff commenced an action in this court against said Waters-Clark Lumber Company to recover from said Waters-Clark Lumber Company the purchase price of logs and other material sold by said Young to said Waters-Clark Lumber Company, and thereby elected to treat and consider said contract between

said Young and said Waters-Clark Lumber Company as legal and valid, and elected to look to and hold the said Waters-Clark Lumber Company, instead of this defendant, as liable to said trustee for all sums of money which the said plaintiff may be entitled to recover on account of the transactions mentioned in plaintiff's complaint."

Questions were submitted to the jury covering the issues in the case, except the value of the property, which, by stipulation of parties, was reserved for the court. The jury in response to the questions found that at all the days mentioned in the complaint the property transferred at a fair valuation was insufficient to pay Young's debts; that the lumber company, acting for the bank and pursuant to the arrangement between it and the bank, took the legal title to the lumber and logs for the benefit of the bank under an agreement with it and Young to account to the bank for a portion of the proceeds; that it was the intention of Young, by the execution of the mortgages and the transfer of the property, to give the bank a preference, and that the bank and officers and agents had reasonable cause to believe that Young intended to give it such preference and to enable it to obtain a greater percentage of its indebtedness than any other of his creditors of the same class would be able to obtain.

The court found that the lumber which was included in the bank's mortgage was worth $3,452.85, and that a note for that sum and value was given by the lumber company to Young and by him transferred to the bank; that the Cadott logs, included in the mortgage and sold by Young to the lumber company, were worth $10,077.84; that the up-river logs not included in the mortgage, but sold to the lumber company by Young, were worth $11,055.84, and that a note which was given as the net proceeds of the sale of both quantities of logs over and above certain labor liens was worth $2,508.14. This note was given by the lumber company to Young and transferred by him to the bank. The trustee contended in the trial court that he was entitled to recover

for the entire value of the logs and lumber, and that no credit should be allowed the bank for the sums paid by it to discharge certain liens on the property for labor claims and unpaid purchase money. The court rejected the contentions and gave judgment for the trustee in the sum of $6,254.99. In this sum was included the value of the notes.

The assignments of error are that the Supreme Court erred in the following particulars: (1) In determining that the complaint stated a cause of action. (2) In determining that the bank was liable for the value of the logs and lumber to the extent of the chattel mortgage interest of the bank therein. (3) In determining that the bank was liable for having received a preference contrary to sections 60*a* and 60*b* of the bankrupt act of July 1, 1898, as "a portion of its chattel mortgage interest in said logs, the sum of $1,335.62 as the proceeds of the sale of the portion of said logs known as the 'up-river logs,' on which logs said defendant never held any chattel mortgage and which logs were never transferred to said defendant." (4) In determining that the bank was liable for the value and moneys it received as a preference, although the trustee had not elected to avoid such preference by bringing suit to recover the same and had not elected to avoid such preference in any manner. (5) And in holding that in determining a question of preference it was immaterial under the bankrupt act whether the bank and the other creditors were of the same class, and in refusing to reverse the judgment because of the error of the Circuit Court in charging the jury that all of the creditors were of the same class. (6) In its construction of the bankrupt act in the following particulars: (*a*) In holding that a transfer made within four months of the bankruptcy proceedings, which enabled a creditor to obtain any portion of his debt, constituted a preference. (*b*) That, although the effect of the transfer in question did not operate to give the bank a greater percentage of its debt than other creditors of the same class, such transfer constituted a preference. (*c*) In determining,

by such rules of construction of the bankrupt act, that the evidence was sufficient to establish that the bank had reasonable cause to believe that a preference was intended. (7), (8), (9) In holding that the bank was liable for the full value of the preference received in an amount in excess of what was necessary to pay all the other creditors of the bankrupt, and claims of fictitious creditors and claims of creditors who had themselves received preference, and in not limiting the recovery to such sum as would be sufficient to pay the claims of creditors whose claims were provable. (10), (11) In affirming the judgment against the bank and not rendering judgment for it.

Mr. James Wickham, with whom *Mr. Burr W. Jones* and *Mr. Frank R. Farr* were on the brief, for plaintiff in error:

The questions raised by the specification of errors are all Federal questions, involving the construction of the Federal bankrupt act. Most of the questions are shown by the opinion of the state Supreme Court to have been there raised and to have been decided adversely to the plaintiff in error, and the other questions not expressly mentioned in the opinion are shown by the certificate of the Chief Justice of the state Supreme Court to have been specially set up and raised and decided adversely to the plaintiff in error. Substantially all of the questions that were involved in the bank's appeal to the state Supreme Court are the same questions that are now involved on this writ of error.

In such a case this court has jurisdiction on a writ of error issued to review the judgment of a state court. *Factors & Traders Insurance Co.* v. *Murphy,* 111 U. S. 738; *Traer* v. *Clews,* 115 U. S. 528; *Dimock* v. *Revere Copper Co.,* 117 U. S. 559; *Palmer* v. *Hussey,* 119 U. S. 96; *Winchester* v. *Heiskell,* 119 U. S. 450; *Williams* v. *Heard,* 140 U. S. 529; *Dushane* v. *Beall,* 161 U. S. 513; *McCormick* v. *Market National Bank,* 165 U. S. 538; *Farmers & Merchants Ins. Co.* v. *Dobney,* 189 U. S. 301; *Crawford* v. *Burke,* 195 U. S. 176; *Kaufman* v.

Tredway, 195 U. S. 271; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91.

The trustee has not elected to avoid, or brought suit to recover, any preference that the bank may have received, and the judgment rendered therefor cannot be sustained.

A transaction resulting in a voidable preference does not violate any law. The transaction is lawful when made subject to a possibility of being defeated by subsequent events. It continues to be lawful unless it is followed by an adjudication in bankruptcy within the statutory period. It continues to be lawful after that time unless the trustee elects to avoid it. A preference is never void, but only voidable, and no one but the trustee can elect to avoid it. *Dyer* v. *Kratzenstein*, 92 N. Y. S. 1012; *Lewis* v. *First National Bank*, 78 Pac. Rep. 990.

A creditor by merely receiving the voidable preference does not violate any legal or moral right. *Swarts* v. *Fourth National Bank*, 117 Fed. Rep. 1, 11; *Swarts* v. *Frank*, 82 S. W. Rep. 60.

A creditor receiving a preference not voidable is given the right of election by section 57*g* either to return what he received and file his claim with the other creditors, or else keep what he has received and not file his claim. *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438.

Where the facts are in dispute as to whether or not a certain transaction constitutes a preference, the creditor receiving the alleged preference is by the bankrupt act necessarily called upon to determine for himself whether he will return what he has received and file his claim with other creditors, or whether he shall litigate that question and attempt to hold what he has received, in which event, in most cases, as in the case at bar, the year allowed by § 57*n* in which to file claims would expire without his claim being filed.

The bankrupt act contemplates that the trustee shall exercise his election as to whether or not he shall avoid a preference, and it also contemplates that the creditor receiving

such alleged preference must exercise an election as to what course he shall take. Until the trustee exercises his election, no cause of action accrues. The creditor is not called upon to elect what course he shall take until the trustee has acted. It therefore follows that the trustee should exercise his election and make his demand before commencing suit.

A complaint in such a case is insufficient where it fails to allege such demand and refusal. *Shuman* v. *Fleckenstein*, Fed. Cas. No., 12,826; *Brooks* v. *McCracken*, Fed. Cas. No., 1932; *Lyon* v. *Clark*, 88 N. W. Rep. (Mich.) 1046; *Wright* v. *Skinner*, 136 Fed. Rep. 694; *Capital National Bank* v. *Wilkerson*, 72 N. E. Rep. (Ind.) 247.

No fraud in the transactions was either proven or found by the court or jury. Except in cases of fraud, and except as to the right to recover a preference, the trustees take the property of the bankrupt in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in the hands of the bankrupt. *Thompson* v. *Fairbanks*, 196 U. S. 516, 526; *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344, 352, and cases there cited; Bankrupt Act, § 60*b*.

A payment to a creditor who is entitled to priority by reason of having a claim for wages, or by reason of his having some claim placing him in a different class from other creditors, does not constitute a preference. If other creditors are in a subsequent class they are not injured by the transfer, and therefore the enforcement of the transfer does not enable the creditor receiving it to recover a greater percentage of his debt than he is entitled to. Loveland on Bankruptcy, 2d ed. 587; Collier on Bankruptcy, 4th ed. 422; *In re Henry C. King Co.*, 113 Fed. Rep. 110; *Doyle* v. *Milwaukee National Bank*, 116 Fed. Rep. 295; *Easton* v. *Garrison*, 82 S. W. Rep. (Tex.) 800.

Mr. C. T. Bundy, with whom *Mr. R. P. Wilcox* was on the brief, for defendant in error:

It was immaterial how the preference was given. If through

the mortgages, bills of sale, agreement or otherwise, the plaintiff in error was paid either directly by Young, or by Waters-Clark Lumber Company, who purchased his property, at any time within the prohibited period, and it received such payment with guilty knowledge, it is liable for the amount it received. *Sterns* v. *Trust Co.*, 112 Fed. Rep. 501; *Western Tie Co.* v. *Brown*, 129 Fed. Rep. 728; *Schwartz* v. *Bank*, 117 Fed. Rep. 1; *Woolen Co.* v. *Powell*, 72 S. W. Rep. 723.

Courts have been frequently called upon to pass upon devices and schemes like the one at bar, intended to cover illegal preferences, and uniformly hold that any scheme resulting in one creditor receiving, directly or indirectly, any part of his debt, in excess of the amount other creditors of the same class would receive by an equal distribution, is void. *In re Stein*, 22 Fed. Cas. 1232; *Fleming* v. *Andrews*, 3 Fed. Rep. 632; *In re Beerman*, 112 Fed. Rep. 664; *Bardes* v. *Bank*, 98 N. W. Rep. 284; *Hackney* v. *Bank*, 98 N. W. Rep. 412; *Hackney* v. *Hargrave*, 98 N. W. Rep. 626; *In re Belding*, 116 Fed. Rep. 1016.

The whole question, however, as to whether or not the officers of the bank had reasonable cause to believe that Young intended by the sale to give it a preference, or reasonable cause to believe that it was getting a preference, is purely a question of fact for the jury and the jury have found, on ample evidence, against plaintiff in error. *Crittenden* v. *Barton*, 69 N. Y. Supp. 559; *Giddings* v. *Dodd*, 10 Fed. Rep. 338; *In re Forsyth*, 9 Fed. Cas. 465; *In re McDonough*, 16 Fed. Cas. 68; *In re Eggert*, 102 Fed. Rep. 735; *In re Graham*, 110 Fed. Rep. 135; *Hackney* v. *Clark Co.*, 94 N. W. Rep. 822; *Bardes* v. *Bank*, 98 N. W. Rep. 28.

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

A motion is made to dismiss on the ground that the record

presents nothing but questions of fact. It is contended that neither in the pleadings of the bank nor in any way was any right, privilege or immunity under a Federal statute specifically set up or claimed in the state courts. The only questions presented by the pleadings, it is urged, were, did the bankrupt give the bank a preference, and did the bank accept it with reasonable grounds to believe that a preference was intended? The Supreme Court, however, considered the pleadings to have broader meaning, and answered some of the contentions of the bank by the construction it gave to the bankrupt act. The case, therefore, comes within the ruling in *Nutt* v. *Knut*, 200 U. S. 12. It was there said: "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States, may be fairly held within the meaning of § 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary." See also *Rector* v. *City Deposit Bank*, 200 U. S. 405.

On the merits of the case we start with the facts established against the bank, that the property of Young, at the time he executed the chattel mortgages and when he executed the deed to the lumber company, at a fair valuation was insufficient to pay his debts, and that by the execution of those instruments and the transfer of his property effected thereby, he intended to give the bank a preference over his other creditors, and that the bank had reasonable cause to believe that he intended thereby to give it a preference, and to enable it to obtain a greater percentage of its debt than any other creditor of Young of the same class. These, then, are the prominent facts, and seemingly justified the judgment. Against this result what does the bank urge? It urges, first, that there is included in the judgment the sum of $1,335.62, the net proceeds of the sale of certain logs, called the "up-river logs," which, it is contended, were not covered by either of

the mortgages, and that the Supreme Court, in its opinion, apparently supposed that those logs were covered by the mortgages, and erred in giving judgment therefor. This is a misunderstanding of the opinion. While the court did not explicitly distinguish between the mortgages and the deed to the lumber company, we think it is clear that the court regarded the deed, and what was to be done under it, as the consummation of the "legal wrong," to use the language of the court, which went back to the time of the mortgages. In other words, that the up-river logs as well as the other property were conveyed to the lumber company for the purpose of giving a preference to the bank.

The bank also attempts to urge against this conclusion the different views expressed by the trial court and the Supreme Court upon the finding of the jury as to the relation which the lumber company stood to the bank. The jury found, in answer to questions 4 and 5, that the lumber company, acting for the bank, took the legal title for the benefit of the latter under an agreement with Young and the bank to account to it for a portion of the proceeds. The trial court said that this was not a finding "that the lumber company was the agent of the bank." The Supreme Court thought that the jury "pretty clearly decided" that the bank was a principal and the lumber company "a mere agent" in the matter. It is true the Supreme Court immediately added: "However, the evidence seems to clearly establish that the lumber company purchased the property from Young in the regular course of business, without any understanding with the defendant, other than that its interest in the property as mortgagee and claimant under numerous statutory labor liens should be recognized, and the equivalent thereof in money delivered to it out of the proceeds." And this was deemed sufficient to accomplish the preference which Young intended to give the bank. The court passed over as not important the distinction between the notes given by the lumber company to Young as the purchase price of the lumber.

These minor matters out of the way, we come to the more important contentions of the bank. These contentions are expressed in the form of questions, the first of which is: "Can a trustee in bankruptcy, under the provisions of the bankruptcy act, lawfully maintain a suit to recover the value of a voidable preference without first electing to avoid such preference by notice to the creditor receiving such preference, and by demand for its return?"

It is urged by the bank that he cannot, and to sustain this contention, that a preference is not void but voidable. And voidable solely at the election of the trustee, who must indicate a purpose to do so. The argument is that a preference being voidable, the creditor receiving it is not in default until he fails to or refuses to surrender it on demand. Prior to that time his possession is rightful and lawful, and he is not guilty of any wrong, tort or conversion. And the demand, it is further urged, must be made before suit, for, it seems also to be contended, that the creditor must be given an opportunity to exercise the election given him by subdivision *g* of § 57 of the bankrupt act to surrender the preference and prove his claim. We say, "seems to be contended," because we are not clear that counsel for the bank claims that the rights of a creditor under § 57*g* depend upon the action of the trustee. Counsel say:

"The bankrupt act, therefore, contemplates that the trustee shall exercise his election as to whether or not he shall avoid a preference, and it also contemplates that the creditor receiving such alleged preference must exercise an election as to what course he shall take. Until the trustee exercises his election, no cause of action accrues. The creditor is not called upon to elect what course he shall take until the trustee has acted. It therefore follows that the trustee should exercise his election and make his demand before commencing suit."

And this, it is argued, is more than a mere question of state practice, and involves the question whether the property consisting of the alleged preference is any part of the trust

estate. If it be intended by this to assert that the action of the creditor under § 57*g* is to wait upon or depends upon the action of the trustee under § 60, we do not assent, and nothing can be deduced, therefore, from the supposed relation of those sections as to the necessity of a demand before suit. We do not see how such a demand can even be an element in the consideration of the creditor, whether he will surrender the preference and prove his debt. The right of surrender exists as well after suit as before suit. *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356.

Independently of such considerations, whether the election by a trustee to avoid a preference should be exercised by a demand before suit or can be exercised by the suit itself might be difficult to determine if it were necessary on the record. 1 Chitty on Plead. 176, and cases cited; *Shuman* v. *Fleckenstein*, Fed. Cases, No. 12,826; *Brooks* v. *McCracken*, Fed. Cases, No. 1932; *Wright* v. *Skinner*, 136 Fed. Rep. 694; *Goldberg et al.* v. *Harlan*, 67 N. E. Rep. 707. But we do not think it is open to the bank to urge the first. The bank, it is true, demurred to the complaint and urged as a ground of demurrer the absence of an allegation of a demand. But the bank did not stand on the demurrer. It answered, and not only traversed the allegations of the plaintiff, but set up an independent defense, and showed that a demand would have been unavailing, and a demand is not necessary where it is to be presumed that it would have been unavailing. *Davenport* v. *Ladd*, 38 Minnesota, 545; *Bogle* v. *Jordan*, 39 Kansas, 31. Besides, it appears that a demand was made before suit. In determining from what date interest should be given the trial court said: "There is evidence of a demand, but I think only a short time elapsed until action was commenced, so that it will make little difference whether interest is computed from the time of the demand or the commencement of the action."

The trial court instructed the jury substantially, in the words of subdivision *a* of section 60 of the bankrupt act, as

to when a debtor should be deemed to have given a preference, and, in explanation of the intention of the debtor, said "to intend to prefer would be to make a transfer for the purpose of enabling the bank to obtain a greater percentage of its debt than any other debtors of the same class." And, defining this class of creditors, said further, "so far as creditors' rights are involved in this action, they are all of the same class, by which is meant they would receive the same percentage of their claims. Claims for taxes or wages within certain times so as to be preferred would be of a different class. But claims of general creditors, like those approved in the Young bankruptcy proceedings, are all of the same class." The bank excepted, and assigned as error the charge that all of the creditors were of the same class. Disposing of the assignment the Supreme Court said: "Whether that is right or wrong does not seem to in any way concern the case. The action, as we have indicated is simply one in trover to recover the value of property which, as is alleged, was, in fraud of the bankrupt act, wrongfully converted by defendant to its own use. Whether there was one or more classes of creditors, and in what manner the property sought to be recovered would, if the suit were successful, be administered, did not vary in the slightest degree the legal rights of the plaintiff. If the property was obtained by the defendant in fraud of the bankrupt act, plaintiff was entitled to recover the same, and this is the only question involved."

The bank contests this view, and contends that, if accepted, "it would be impossible to ascertain whether or not the preference had been received without first determining the question of whether the enforcement of the transfer would enable the bank to recover a greater percentage of its debt than other creditors of the same class." But there is a question of fact to be considered. It was a question of fact what claims were proved against the estate. At the trial the learned judge who presided described them in his instructions as claims of general creditors. In his memorandum opinion

he said that from his minutes and the statements of the evidence in the briefs of counsel he was inclined to believe that the point was not well taken, and that the evidence did not show that the effect of the enforcement of the transfer would be to enable the bank to obtain a greater percentage of its debt than other creditors of the same class. The bank, in its brief in this court, says, "certain other claims were filed and allowed in the bankruptcy proceedings as preferred claims. These were probably claims for wages after the time of the transfers in question." In the list of claims referred to some only are marked preferred. But, granting that they all were, they were represented by the trustee.

The other questions propounded by the bank are based on the sixth assignment of error. We will not examine the arguments of counsel for the bank in detail. Their fundamental contention is that the transfers to the bank were not invalid as a preference if their enforcement would not operate to give the bank a greater percentage of its debt than other creditors of the same class would receive. And such, it is further contended, was not the result, and it is intimated that claims of possible and fictitious creditors were in effect considered. But this contention encounters the facts found by the jury and the trial court. We have already seen what, in the opinion of the trial court, the evidence established as to the effect of the transfers, and the jury found that Young was insolvent at the time they were made, and that the purpose of their execution was to give the bank a preference and to enable it to obtain a greater percentage of its debt than other creditors of Young of the same class. These findings were not disturbed by the Supreme Court, and we must accept them as stating the facts established by the evidence, although counsel seem to invoke an examination by us of the record against them. Taking them as true, they show a case of preference and grounds to set it aside. The bank also contends, in effect, that in such suit the validity of all other claims against the bankrupt can be litigated and

whether they have received voidable preferences and have not been required to surrender them. The broad effect of the contention repels it as unsound. To yield to it would transfer the administration of a bankrupt's estate from the United States District Court to the state court.

Judgment affirmed.

HAMMOND *v.* WHITTREDGE.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 164. Argued January 17, 1907.—Decided February 25, 1907.

Where the state court expressly decides, adversely to contention of plaintiff in error that a statute of the United States does not preclude others from asserting rights against him, but does preclude him from asserting rights against them, a Federal question exists giving this court jurisdiction to review the judgment under § 709, Rev. Stat.

Where an incorporeal interest of the bankrupt in a contingent remainder passed to the assignee in bankruptcy under a petition filed in 1878, and no notice to the trustees was necessary, the fact that the assignee brought no suit to establish his right to the bankrupt's interest in the fund for more than two years does not bar his claim thereto under § 5057, Rev. Stat.; but under that section all persons who had not brought suits within two years against the assignee to assert their rights to the property are barred. Nor will the assignee be presumed to have abandoned the property simply because he did not sell it; when, as in this case, he brings an action to protect his interest therein.

189 Massachusetts, 45, affirmed.

THE defendant in error Whittredge, who was trustee of certain property held in trust under the will of Solon O. Richardson, who died in 1873, filed this bill for instructions in the Supreme Judicial Court of the State of Massachusetts.

There was bequeathed by said will $35,000, on the following trusts:

"The income to be paid to his three sisters for life, namely,

Mary A. Sweetser, Martha Hutchinson and Louisa Richardson; and 'at the decease of my said sisters, or either of them, my will is that the share belonging to the deceased sister shall revert to her children, to be shared by them each and each alike; if either of my said sisters shall die childless, the income belonging to her I direct shall revert to the said sisters surviving, to be shared equally between them. At the decease of all my three said sisters, I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever.'"

The three life tenants survived the testator. Louisa never had any child; Martha Hutchinson had one child; Mary A. Sweetser had one child, a son, Elbridge L. Sweetser. He and the child of Martha were born in the lifetime of the testator. Mary A. Sweetser survived her sisters, leaving her son and niece surviving her.

This bill was brought February 1, 1901, to determine who was entitled to receive Elbridge L. Sweetser's half of the fund, whether his assignees in bankruptcy, appointed in proceedings instituted by him in 1878, by voluntary petition in bankruptcy in the District Court of the United States for the District of Massachusetts, or the plaintiff in error, who claims under an equitable attachment made in 1881, as hereafter stated, and an assignment made in October, 1885, to secure two debts incurred after Sweetser's bankruptcy. There are other defendants besides the plaintiff in error, but their rights are not before us.

The facts are stipulated, and the most pertinent are the following:

On February 23, 1878, Elbridge L. Sweetser filed a voluntary petition in bankruptcy in the District Court of the United States, District of Massachusetts, and was on that day adjudged a bankrupt. On the sixteenth of March, 1878,

William B. H. Dowse and Horace P. Biddle were appointed the assignees of his estate, and there was duly conveyed to them all the estate which the bankrupt owned or was entitled to on February 23, 1878.

During the year 1878 claims amounting to $13,940.47 were proved against the estate. No other claims have since been proved.

The only assets disclosed by Sweetser in his schedules consisted of a stock of goods subject to mortgage. The proceeds of these goods were consumed in paying the mortgage and certain expenses of the assignees, and the balance, of about $280, was paid to the assignees on account of services.

The Florence Machine Company, in 1881, filed a bill in equity against Elbridge L. Sweetser and Solon O. Richardson, then the sole trustee of Solon O. Richardson, deceased, to reach and apply in payment of five notes held by that company against Sweetser, his equitable interest under the will of said deceased. The suit was brought under the provision of General Statutes of Massachusetts, c. 113, sec. 2, and is called equity suit No. 386. Subpœna was issued November 28, 1881, and served on Sweetser and Richardson, trustee, November 29, 1881. Sweetser filed an answer February 1, 1882, in which, among other things, he denied that he had any such interest under the will as could be reached and applied to the payment of the claim of the company, and also denied the validity of the claim, but did not deny making the notes. On the same date Solon O. Richardson, trustee, also filed an answer, setting up the proceedings in bankruptcy and the appointment of assignees, and suggested that any interest that Sweetser had in the fund passed to them. The suit is still pending, no hearing upon the merits having ever been had.

In 1882 the assignees filed a bill in equity against Sweetser and Solon O. Richardson, then the sole trustee under the will of said Solon O. Richardson, in the United States District Court, alleging an interest in Sweetser in the fund, that it had

accrued before the bankruptcy, but was not set forth in his schedule of property, and that they had no knowledge of such interest until a few days before filing the bill. The bill prayed, among other things, "that the said Elbridge L. Sweetser might be directed to execute and deliver such instruments as would convey to said assignees all of his interest as legatee under the said will, and that the said trustee, Solon O. Richardson, might be enjoined from paying to the said Elbridge L. Sweetser, or any person or persons claiming under him, any part of the said trust fund, or the income thereof, which might accrue and become payable to the said Elbridge L. Sweetser."

On November 15, 1882, the Florence Machine Company, by its attorney, Warren O. Kyle, filed a general replication in suit No. 386.

On December 2, 1882, Sweetser and Solon O. Richardson, trustee, filed general demurrers to the bill. No hearing, however, has ever been had in the case, either upon the demurrers or the merits, and the case is still pending.

On October 24, 1885, Sweetser executed and delivered to the Monitor Oil Stove Company a note for $1,809 and a note to Solon O. Richardson, individually, for the sum of $506.05. As a security for said notes Sweetser gave a written mortgage or assignment, under seal, of all his interest under the will of Solon O. Richardson, deceased, to Richardson and the company. Sweetser's wife signed the notes and mortgage as joint maker. Notice of the mortgage assignment was acknowledged by William Morton, the then trustee under the will. On the same day Sweetser and his wife conveyed to one Sidney P. Brown their interest under the will, subject to the mortgage, and Brown conveyed to Hannah Sweetser. Notice of these conveyances was acknowledged by said trustee William Morton.

On October 24, 1885, the Florence Machine Company brought an action at law in the Superior Court of Suffolk County against Sweetser, in which the then assignees in

bankruptcy were summoned as trustees, to recover the sum of $7,620.13, amount due on eight promissory notes which had been proved in his bankruptcy proceedings, and also to recover upon an account based on ledger entries made by the company in 1881. The assignees in bankruptcy were duly served with process, but did not appear, and were defaulted.

On October 26, 1885, in equity suit No. 386, Solon O. Richardson, trustee, filed a further answer, stating that he had resigned as trustee, and that William Morton had been appointed sole trustee and had accepted the trust.

On June 16, 1891, on motion of W. B. H. Dowse, Warren O. Kyle was joined with him as a party plaintiff in the suit of *Dibble et al.* v. *Sweetser*, in the United States District Court, and Daniel G. Walton, the then trustee under the will, was summoned as a defendant. He accepted service July 30, 1891, and on November 4, 1891, filed a general demurrer to the bill.

On April 19, 1893, the Florence Machine Company was dissolved by an act of the legislature, c. 215 of the Acts of 1893.

On August 13, 1894, the Florence Machine Company filed a motion in equity suit No. 386 that Daniel G. Walton, who had become trustee of the trust under the will of Solon O. Richardson, deceased, and the then assignees in bankruptcy, Dowse and Kyle, might be made parties defendant and summoned to answer the plaintiff's bill. Service was made on Walton August 18, 1894, and accepted by the assignees August 30. In September, 1894, Walton's appearance was entered. On May 15, 1899, Hammond, plaintiff in error, having become assignee of the claim in suit, entered his appearance for the plaintiff, and also entered his appearance *pro se*, and filed a motion setting forth the assignment to him of the claim and asking to be permitted to prosecute the suit in his own name.

May, 1899, the assignees filed an answer, alleging upon information and belief that Sweetser had at the time of the

assignment in bankruptcy a vested interest in the trust fund under the will of Richardson, and that by the operation of the United States bankruptcy act said interest had been transferred to them.

On February 1, 1901, William W. Whittredge, being then the sole succeeding trustee under said will, filed this suit for instructions. On April 22, he was summoned to appear as party defendant in the case of *Dibble et al.* v. *Sweetser et al.*, in the United States District Court. He accepted service and appeared by counsel June 12, 1901. July 1, 1901, Hammond filed a petition in said case to be made a party. In the petition he alleged, among other things, that the assignees were not entitled to Sweetser's interest as against him as assignee of the Florence Machine Company; among other reasons, because such rights as said assignees had, if any, were barred by the statute of limitations. U. S. Rev. Stat. § 5057. Whittredge, trustee, also filed an answer, alleging the pendency of the suit in equity No. 386, brought by the Florence Machine Company, and that his predecessor had been made a party therein; and also alleging that he, Whittredge, had filed this suit for instructions, and also that the right of action of the assignees was barred by the limitations of law.

On February 10, 1904 (the said assignees Dowse and Kyle having disputed the right of said John C. Hammond to be subrogated to the rights of the Florence Machine Company as to the claims proved by said company against the estate in bankruptcy of said Sweetser in 1878, and having petitioned to have said claims expunged), the United States District Court made a decree in favor of said Hammond.

The decree has since been affirmed by the United States Circuit Court of Appeals. *Dowse et al.* v. *Hammond*, 130 Fed. Rep. 103.

The suit in equity in the United States District Court, brought by the assignees of Sweetser in the first bankruptcy, has been continued from time to time at the request of the assignees, who have appeared for that purpose at the callings

of the docket to await the termination of the life interests in the trust fund.

As already stated, no hearing has been had either upon the said demurrers or upon the merits.

That part of the trust fund held by Whittredge, as trustee, which is the subject matter of this suit, consists of property worth about $18,000.

The Supreme Judicial Court decreed that Sweetser's interest in the fund passed to his assignees in bankruptcy. 189 Massachusetts, 45. And it was decreed that Hammond, as assignee of the Florence Machine Company and as assignee of the Monitor Oil Stove Company, had "no rights in said equitable interest either by reason of the provisions of the United States Revised Statutes, § 5057, or otherwise."

Mr. Hollis R. Bailey, for plaintiff in error, submitted:

Under §§ 5044, 5045, 5046, Rev. Stat., the bankrupt Sweetser, in November, 1881, had such title to the asset in question that the Florence Machine Company could, by making an equitable attachment, render it necessary for the assignees to take proper steps to resist the same.

A bankrupt has a good title to his assets as against all the world except his assignees in bankruptcy. Under the later English law a bankrupt may maintain an action against a debtor, unless there is interference on the part of the assignees. *Clark* v. *Calvert*, 3 J. B. Moore, 96, 112; *Herbert* v. *Sayer*, 5 Q. B. 965, 975; *Semple* v. *Railway Co.*, 2 Jurist. 296; *Fyson* v. *Chambers*, 9 M. & W. 460; and as to the law in Massachusetts, see *Gay* v. *Kingsley*, 11 Allen, 348; *Mayhew* v. *Pentecost*, 129 Massachusetts, 332; *Herring* v. *Downing*, 146 Massachusetts, 10. The Federal law is similar. *Amory* v. *Lawrence*, 3 Clifford, 523; *Taylor* v. *Irwin*, 20 Fed. Rep. 615; *Glenny* v. *Langdon*, 98 U. S. 20; *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sessions* v. *Romadka*, 145 U. S. 29, 51.

The attachment made by the Florence Machine Company rendered it necessary for the assignees at their peril to inter-

vene and contest the same within two years under § 5057, Rev. Stat., as to the scope whereof see *Bailey* v. *Glover*, 21 Wall. 342, 346; *Rock* v. *Dennett*, 155 Massachusetts, 500; *Pritchard* v. *Chandler*, 2 Curtis C. C. 488; *Walker* v. *Towner*, 16 N. B. R. 285, 287; *Avery* v. *Cleary*, 132 U. S. 604, all of which hold that it applies to adverse claims made by third parties after the bankruptcy, and that assignees are bound to dispute such claims within two years of the time when they are asserted. *Dushane* v. *Beall*, 161 U. S. 513, did not overrule this rule, *In re Conant*, 5 Blatch. 54, nor can those cases be considered as overruled.

Assuming that the assignees were not bound by § 5057, Rev. Stat., to intervene within two years, they nevertheless were bound to intervene at their peril within a reasonable time. *Squire* v. *Lincoln*, 137 Massachusetts, 399; *Taylor* v. *Irwin*, 20 Fed. Rep. 615.

They did not intervene for over sixteen years and after the expiration of two years it was reasonable for the bankrupt and his subsequent creditors to assume that the assignees had abandoned this asset. The interest of Sweetser under the will appeared of record in the probate court. There was no fraudulent concealment of the asset by the bankrupt. No examination was made of the bankrupt. He was allowed to obtain his discharge. *Sparhawk* v. *Yerkes*, 142 U. S. 1, 14; *Taylor* v. *Irwin*, 20 Fed. Rep. 615, 618.

The assignees' rights were not preserved by the suit of *Dibble* v. *Sweetser*, as the Florence Machine Company was not a party thereto, or, so far as appears, ever heard of it until twenty years later.

Mr. Warren Ozro Kyle, with whom *Mr. Fred Joy* was on the brief, for defendants in error, the assignees in bankruptcy:

Nothing in the record shows lack of diligence by the assignees. The failure to schedule the property and concealment of it from the assignees in bankruptcy for several years was clearly in fraud of the bankrupt law, and cannot constitute such an

immunity as to deserve protection under the judiciary act or any other law of the United States.

A plaintiff bringing a bill in equity under the provisions of the Public Statutes, c. 151 § 2, cl. 11, and the statute of 1884, c. 285, § 1, to reach property of the debtor which cannot be come at to be attached or taken on execution in a suit at law against such debtor, does not thereby acquire a lien on the property which will prevent it passing to an assignee in insolvency. *Trow* v. *Lovett*, 122 Massachusetts, 571; *Squire* v. *Lincoln*, 137 Massachusetts, 399; *Powers* v. *Raymond*, 137 Massachusetts, 483; *Fish* v. *Fiske*, 154 Massachusetts, 302, 304.

Section 5057, Rev. Stat., does not apply to a case like the present. *Dushane* v. *Beall*, 161 U. S. 513.

This is not a suit between an assignee in bankruptcy and a person claiming an adverse interest. The petitioner, who is the trustee under the will, claims no adverse interest and does not plead the statute. *Nash* v. *Nash*, 12 Allen, 345; *Minot* v. *Tappan*, 127 Massachusetts, 333, 338; *In re A. H. English*, 6 Fed. Rep. 276.

All statutes of limitation begin to run from the time the cause of action accrues, and, in this case, could not run until the right to the possession of the Sweetser half of the fund fell to the assignees, on the death of the bankrupt's mother, the last survivor of the testator's three sisters. Perry on Trusts, § 860; *French* v. *Merrill*, 132 Massachusetts, 525, 527, and cases there cited.

As it was necessary to await the termination of the life interests before any one claiming through the remainderman could claim possession of the fund, the assignees in bankruptcy have not been remiss, and the delay, if any, has not operated to the prejudice of anybody, hence there has been no laches. *Haven* v. *Haven*, 181 Massachusetts, 573, 579; *Tucker* v. *Fisk*, 154 Massachusetts, 574, 579, and cases cited; *Ryder* v. *Loomis*, 161 Massachusetts, 161, 163; *Beale* v. *Chase*, 31 Michigan, 532; *New York Bank Note Co.* v. *Hamilton*

Co., 28 N. Y. App. Div. 411; *Ulman* v. *Clark*, 75 Fed. Rep. 868.

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

A motion is made to dismiss, which, we think, should be denied. Plaintiff in error sets up rights under § 5057 Rev. Stat., which were adjudged against him. The court said:

"The defendant Hammond admits that when the testator died Elbridge had either a vested remainder in one-half of the trust fund of $25,000 subject to the life estates created by this item of the will, and subject to the class being opened on the birth of further child or children of the life tenants, or a vested interest in a contingent remainder, and that 'in either case' his interest was 'assignable.'

"His contention, however, is that the assignees are barred by U. S. Rev. Sts. § 5057."

The court decided against the contention, and decided, besides, that "the title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder," and that "the ownership drew after it the possession," which has continued ever since, "and all persons are barred by U. S. Rev. Sts. § 5057, from controverting it." In other words, the court decided that § 5057, did not preclude the assignees from asserting rights against plaintiff in error, but precluded him from asserting rights against them. Defendants in error, however, urge that the court's decision resulted from facts found or admitted and from general principles of law, and "there remained in the case no question as to any title, right, privilege or immunity under a statute of the United States; and that the court expressly declined to choose 'between the opinion in *Dushane* v. *Beale*, 161 U. S. 513, and the decision in *Rock* v. *Dennett*, 155 Massachusetts, 500.' " But rights under a statute of the United States were claimed by plaintiff in error and that statute was referred to by the

Supreme Judicial Court and was an element in its decision. We think also that the decree rendered was final for the purposes of this writ of error. We therefore overrule the motion to dismiss and go to the merits.

On the merits nine errors are assigned, but plaintiff in error asserts that the questions really involved are only four, namely: Had Sweetser such "amount of title" in the trust fund that the Florence Machine Company could make an equitable attachment? Did § 5057, render it necessary for the assignees to intervene and contest the attachment within two years? If not within two years, then within a reasonable time? Was the machine company, in November, 1881, barred by § 5057 from bringing the attachment suit?

Section 5044 of the Revised Statutes required the register in bankruptcy to transfer by instruments under his hand all of the estate of the bankrupt. The assignment related back to the commencement of the proceedings, and operated to vest the title in the assignee. Section 5046, in most comprehensive terms, vested in the assignees all rights in equity and choses in action which the bankrupt had, and 5047, all of his remedies. Section 5057 reads as follows:

"No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee unless brought within two years from the time when the cause of action accrues for or against such assignee."

Under these provisions the contention of plaintiff in error is, that, notwithstanding the bankruptcy and the broad language of the sections referred to, Sweetser had an interest in the trust fund that could be assigned or attached, and in such way a title could be acquired good against all the world except the assignees, and good against the assignees by their inaction within the time prescribed by § 5057, or by their abandonment. Applying this principle plaintiff in error contends that "three years having elapsed without anything

having been done by the assignees in the way of disposing of this equitable asset, the bankrupt, in November, 1881, had such an amount of title that he could have brought a suit against the trustees under the will to obtain his share, assuming that the contingency had then happened upon which the right to a distribution depended." And that Sweetser, having such title, it followed, it is contended, that the Florence Machine Company, a subsequent creditor, could make an equitable attachment and make it incumbent upon the assignees to assert their rights within two years, in accordance with § 5057. The Supreme Judicial Court met this contention by the effect of the local law. The court said:

"The title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder. In this commonwealth notice to the trustees is not necessary to complete the title of an assignee of an interest in the property held in trust by them. *Thayer* v. *Daniels*, 113 Massachusetts, 129, and cases there cited. See also *Putnam* v. *Story*, 132 Massachusetts, 205; *Butterfield* v. *Reed*, 160 Massachusetts, 361. By virtue of the assignment in bankruptcy, the complete ownership in this incorporeal interest in this personal property became vested in the assignees, and the ownership drew after it possession, so far as the interest here in question (an incorporeal interest because an interest in remainder) is capable of possession. This result is not affected by the fact that the assignees were for a time ignorant of the existence of this property of the bankrupt. This ownership and possession in the assignees has continued ever since, and all persons are barred by U. S. Rev. Sts. § 5057, from controverting it. The contention that one in possession of property is barred from exercising the rights, which that ownership confers on the owner, by not having brought an action, is groundless. Under these circumstances we have not found it necessary to choose between the opinion in *Dushane* v. *Beale*, 161 U. S. 513, and the decision in *Rock* v. *Dennett*, 155 Massachusetts, 500."

The cases referred to are antagonistic in their construction of § 5057. In *Rock* v. *Dennett*, it was held that the limitations expressed by that section applied to adverse claims arising after the assignment in respect to property vested in the assignee.

In *Dushane* v. *Beale*, 161 U. S. 513 the court said: "That limitation [Section 5057, Rev. Stat.] is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee to which adverse claims existed while in the hands of the bankrupt and before assignment."

Defendant in error contends for the construction expressed in *Rock* v. *Dennett*, 155 Massachusetts, 500 against that expressed in *Dushane* v. *Beale*, and insists that the latter case does not overrule prior cases upon which *Rock* v. *Dennett* was based. We will not stop to reconcile *Dushane* v. *Beale*, with prior cases. It is a later utterance by this court, and disposes of the contention of plaintiff in error based on § 5057, Rev. Stat.

The Supreme Judicial Court also found adversely to plaintiff in error's contention that the assignees had abandoned the property. The court said: "The only other contention made by the defendant Hammond is equally groundless, to wit, that the assignees abandoned this property. The contention is put on the ground that they did not sell their interest in remainder in this fund. Were that all that appeared the argument would be without merit. But that is not all." And, referring to the suit brought by the assignees in the District Court in 1882, said further: "This bill apparently was brought by the assignees as soon as they learned of the existence of the fund and of the fact that creditors of Elbridge were seeking to reach and apply this interest of Elbridge in satisfaction of the debt due from him to them. The bringing of this bill (which seems to have been a bill in the nature of a bill *quia timet*) disposes of the contention

that it was in fact the intention of the assignees to abandon this property."

We think that the record sustains the conclusion of the court.

These views dispose of all the questions in the case.

Decree affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* SMITH, HUGGINS & COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 198. Argued January 31, 1907.—Decided February 25, 1907.

If a party relies upon a Federal right he must specially set it up. The mere denial of a carrier, sued for damages to merchandise, that it was bound by contracts of the initial carrier, or that it was the connecting and ultimate carrier of the merchandise and bound "by the law" to receive and forward the merchandise, does not, in the absence of any other reference thereto, raise a Federal question under the Interstate Commerce Act which gives this court jurisdiction to review the judgment under § 709, Rev. Stat.

While the certificate of the presiding judge of a state court can make more certain and specific what is too general and indefinite in the record it cannot give jurisdiction to this court under § 709, Rev. Stat., where there is nothing in the record in the way of a Federal question to specialize and make definite and certain.

THIS suit was brought in the Chancery Court for the county of Jefferson, State of Tennessee, by defendant in error against the plaintiff in error and the Southern Railway Company, for damages alleged to have been received by the defendant in error to certain carloads of corn shipped over the Southern Railway Company from certain points in Tennessee to be delivered to defendant in error or its order at Birmingham, Alabama.

The bill alleged that at the time of the shipments the two

railway companies were common carriers of goods and chattels, the Southern Railway being the receiving and initial carrier, and the one with which the contracts were made, and the plaintiff in error being the connecting and ultimate carrier, and as such bound by said contracts and the law relative to common carriers to receive said cars of corn, and to forward and deliver them to destination whereunto consigned in good order and in a reasonable time. It was alleged that one of said companies "breached the said several contracts," whereby the damage complained of accrued.

The companies filed separate answers. That of the Southern Railway Company we need not set out. Plaintiff in error, in its answer, neither admitted nor denied certain of the allegations of the bill, and expressed want of knowledge as to others. Touching the allegation of the bill, that it was a common carrier, it admitted that it was such in certain States and portions of the country where it operated lines of roads, but denied "that it was the connecting and ultimate carrier of the carloads of corn alleged to have been delivered to the Southern Railway Company," denied that it made the contracts or was liable under them, or "that it was bound by law to receive said alleged carloads of corn and forward and deliver them to their ultimate destination in good order and in reasonable time."

The chancellor adjudged that there was no liability on the part of plaintiff in error, and dismissed the bill as to it. He held the Southern Railway Company liable for not delivering the cars, according to its contracts, within a reasonable time, and, after report by a master to whom the cause was referred, decreed that complainant have and recover the sum of $1,015.69. The case was taken to the Court of Chancery Appeals, both by defendant in error and the Southern Railway Company. And that court adjudged that the Court of Chancery erred (1) in adjudging that the Southern Railway Company was liable for any part of the damages to the corn which accrued after its arrival upon the delivery tracks of the company in

Birmingham and after notice to the consignees of its arrival; (2) in adjudging that plaintiff in error was not liable for the damages suffered by the corn after its arrival in Birmingham and while it was in the yards prior to being unloaded. The court said:

"This court is of the opinion that the Southern Railway Company is only liable for such portion of the damages as accrued by reason of the delay in transition of the cars shipped, which is fixed by the concurrent finding of the master and chancellor at forty per cent of the entire damages.

"This court is further of the opinion and decrees that the Louisville and Nashville Railroad Company is liable for sixty per cent of the damages reported by the master, being the per cent of damages which accrued while the corn remained undelivered in the yards at Birmingham."

It was accordingly adjudged and decreed that the complainant recover of the Southern Railway Company $415.84, and of the Louisville and Nashville Railroad Company $609.42, being sixty per cent of the recovery awarded by the chancellor, together with interest from May 8, 1905, making a total of $623.73. The plaintiff in error took an appeal to the Supreme Court of the State. It assigned as error the action of the Court of Chancery Appeals (1) "In refusing to find certain uncontradicted facts when specially requested to so find." The facts were set out. (2) That the court erred in holding the company liable for any portion of the alleged damage "because under the facts of the case it was not a connecting carrier and was not bound to handle these shipments." The other errors assigned we are not concerned with. The decree of the Chancery Court of Appeals was affirmed without an opinion by the Supreme Court. The order of affirmance recites that the cause came "on to be heard upon the transcript of the record from the Chancery Court of Jefferson County, the opinion and findings of fact of the Court of Chancery Appeals and the assignment of errors filed to the decree of said Court of Chancery Appeals by the defendant, Louisville and Nash-

ville Railroad Company, and the reply brief of complainants."

The assignments of error in this court are to the effect that the Supreme Court erred in not giving full force and effect to the Interstate Commerce Act, which, it is contended, governed the shipments, and in not disregarding the statutes and decisions of the State in conflict therewith, and in denying the rights claimed by plaintiff in error under the Interstate Commerce Act. And that the court erred in holding that it was the duty of plaintiff in error to switch over its yards and terminals cars tendered to it by the Southern Railway Company; in holding that it did not have the right to discriminate as to freight arriving on its own lines, or could not prefer its own business; in rendering judgment against it because it would not turn over its private switch yards and terminals to a competing road, and because of its refusal to make a through routing with the Southern Railway Company; in holding that it was its duty to switch cars for other roads within its terminals to the exclusion of its own business, the effect being to cause an obstruction to interstate commerce and an interference with the paramount duties to which it was subjected by the Constitution and laws of the United States.

Other facts will appear in the opinion.

Mr. James B. Wright, with whom *Mr. John H. Frantz* was on the brief, for plaintiff in error:

Complainants' bill in this case charges that the goods were delivered to the Southern Railway Company at various East Tennessee points and consigned to Birmingham, Alabama, which allegations in themselves make the subject matter of this lawsuit a subject of interstate commerce.

The Louisville & Nashville Railroad Company interposed a general denial and that sufficiently raised the Federal question even if it should be held necessary to raise it in the pleadings.

Even though the state court did not in its opinion expressly refer to the Federal Constitution, if the bill of affirmance

necessarily denied Federal rights claimed by the defendant the writ of error will lie. *Roby* v. *Colehour,* 146 U. S. 153; *Green Bay &c. Co.* v. *Patten Paper Co.,* 172 U. S. 58.

This court has jurisdiction in error over a judgment of the state court when it necessarily involves the decision of the question, raised in the appellate court for the first time and noticed in its opinion, whether a statute of the State conflicts with the Constitution of the United States. *Arrowsmith* v. *Harmoning,* 118 U. S. 19; *Chicago L. Co.* v. *Needles,* 113 U. S. 574; *McCullough* v. *Virginia,* 172 U. S. 102; *Chapman* v. *Crane,* 123 U. S. 540; *Green Bay &c. Co.* v. *Patten Paper Co.,* 172 U. S. 58.

The Federal question is involved if the effect of the state decision is to construe the act alleged to violate the Federal Constitution although the state court does not mention the statute. *Houston & T. C. R. R. Co.* v. *Texas,* 177 U. S. 66.

It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion if an adjudication of such question was necessarily involved in the disposition of the case by the state court. *Kaukauna Water Power Co.* v. *Green Bay Canal Co.,* 142 U. S. 254; *Snell* v. *Chicago,* 152 U. S. 191.

If it appears from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it that will be sufficient to give jurisdiction. *Powell* v. *Brunswick County,* 150 U. S. 433; *Armstrong* v. *Athens County,* 16 Pet. 284.

Mr. C. T. Rankin, for defendant in error, submitted:

The findings of the Court of Chancery Appeals are conclusive upon the Supreme Court of Tennessee as to the facts of the case; and that court can not look behind the findings, to the depositions, or any matter of evidence. Acts 1895, Ch. 76, § 11, creating Court of Chancery Appeals (Shannon's Code, §§ 6312, 6327).

Under this statute, the Supreme Court of Tennessee has repeatedly held that the case must be tried by it alone on the findings of the Court of Appeals; and that the decree of the Court of Appeals must be shown by the facts appearing in its findings to be erroneous. *Hale* v. *Hale*, 99 Tennessee, 513; *Carver* v. *Maxwell*, 110 Tennessee, 77; *Woodward* v. *Bird*, 105 Tennessee, 673.

This finding of facts is equally conclusive upon this court. It is well settled that on writ of error to a state court, this court will not review the findings of fact by the state court. *K. & H. Bridge Co.* v. *Illinois*, 175 U. S. 626, 635; *Jenkins* v. *Neff*, 186 U. S. 230, 238.

An examination of the opinion and findings of facts of the Court of Chancery Appeals and its decree, together with the decree of the Supreme Court, which is one of simple affirmance, will show that those courts did not consider or pass upon any Federal question whatever, and that the Interstate Commerce Act invoked has no application.

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

A motion is made to dismiss the writ of error, on the ground that no Federal question was raised in the state courts or decided by them. In opposition to the motion plaintiff in error contends that the allegations of the bill and its denial thereof sufficiently raise a Federal question, and that the courts of the State, in rendering judgment against plaintiff in error, necessarily decided that question. And it is further contended that even if those courts did not pass on the Federal question, their failure or refusal to do so is equivalent to a decision against the Federal rights involved. A number of cases are cited to sustain these propositions. But is the basis of the propositions sound? In other words, was a Federal question raised, or, if raised, ignored? First, as to the pleadings. The bill charges a breach of the contracts of ship-

ment by one or the other of the railway companies who, the bill alleges, were connecting common carriers, and as such bound by the contracts and the law relative to common carriers to receive and forward to destination the goods shipped in good order and in a reasonable time. Plaintiff in error admitted that it was a common carrier in some States, but was not a connecting and ultimate carrier of the corn in question, denied that it was bound by the contracts, and denied that "it was bound by law" to receive the corn and forward and deliver it to its ultimate destination. And this denial, it is insisted, raised a Federal question. We do not think so. The denial was of a legal conclusion resulting from the facts alleged, and added nothing to them. Besides, if a party relies upon a Federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement. For this we need not cite cases.

Was a Federal question decided or ignored? To answer the question a review of the proceedings is necessary. The chancery court held that, as between the complainant and plaintiff in error, there was no liability upon the part of the latter. The rights of the railway companies, between themselves, the court said, need not be determined. The opinion and findings of the Chancery Court of Appeals are very elaborate. They state the issue, the proceedings in and the judgment of the chancery court and recite that—

"Now, it appears that the Louisville and Nashville Railway denies any liability for its refusal to receive corn shipped over the Southern Railway after its arrival at Birmingham and deliver it over its terminal tracks to the American Mill and Elevator Company, to whom the corn had been sold.

"Of course, this denial is predicated upon the idea that it was not a connecting carrier in handling the shipments of corn involved in this case, or that it was under any obligation respecting the same."

Passing on these denials the court said that at the time of the shipments the Southern Railway Company was placing

shipments, as it was requested, upon the spur track of plaintiff in error, and that the latter was accustomed to receive them and remove them to places where they were to be delivered; and this was its custom for years, and until about the time or just before the corn reached Birmingham, "it was a part of its business and a daily occurrence to receive and remove such cars of freight." And this was done for all persons offering them and without discrimination. For this service it received compensation. The court, however, also found that plaintiff in error "placed an embargo upon the receipt or handling of such cars, November 13, 1902, after the complainant had contracted to sell the carloads of corn and after most of them were shipped."

The contention of the Louisville and Nashville Railroad Company, the court stated as follows:

"The contention of the Louisville and Nashville Railroad Company, reduced to its simplest statement, is that it was not bound to receive these cars of corn and place them.

"This insistence on its part rests upon the proposition that, in the matter of handling the cars of other roads in its yards or over its spur tracks, it was not a common carrier, but simply a private carrier, and that this being so, it had the right to refuse to receive and handle these cars, and as a corollary to this proposition, that it had the right to discriminate between freight arriving in Birmingham over its lines and freight arriving over other lines, and could give preference between those that it chose to serve in this business."

The court decided against the contention, and that the company, by reason of its practice in handling freight, "assumed with respect thereto the character of a common carrier, and hence incurred the duties and liabilities of such character." The court added:

"The result is that we are of opinion that the Louisville and Nashville Railway Company was bound, by virtue of its previous course of business, to accept these cars of corn and deliver them to their destination on its terminal or spur

tracks, and that by reason of its failure to do so, it is liable for all damages resulting from its failure, . . ."

There was a petition for an additional finding of fact and a rehearing, which the court said would take in the neighborhood of one hundred pages of typewritten information to set out and answer in the form in which they were presented. Some, however, were granted; some qualified. We give only those which we think are relevant. The fifteenth request was that the court set out in full from the evidence, which was, it was said, uncontradicted, the conditions which caused the embargo to be laid by plaintiff in error against switching. The evidence was set out. The court, answering the request, said:

"The simple fact in connection with this matter is that the Louisville and Nashville Railroad Company declined to receive these cars of corn and deliver them to their destination on their spur or side tracks, because it deemed it to its advantage to use its said tracks for and in its own special business."

The twenty-fifth request was "that the terminals and equipment of the Louisville and Nashville Railroad Company at that time were sufficient under ordinary circumstances and conditions." In granting this request the court remarked:

"The twenty-fifth request is granted, with the statement that in our opinion, based upon the evidence as we construe it, the Louisville and Nashville Railroad Company could have handled this corn and delivered it to its destination much sooner than it did had it not preferred other business, and even with that business, with the energetic appliance of all the means and facilities at its command."

It will be seen from this statement of the case that there is not a word in it which refers to the Interstate Commerce Act or the assertion of any rights under that act. Plaintiff in error accounts for the want of explicit statement on the ground that the action was instituted and tried, until the decision of the chancery court, upon the theory that the Southern Railway Company and plaintiff in error were "connecting car-

riers," and that this theory of the case having been disproved and the appeal dismissed as to plaintiff in error, complainant (defendant in error) shifted its position, and under the broad practice and pleading in the state court was allowed to proceed and procure judgment upon the theory that plaintiff in error had discriminated against defendant in error by preferring its own business, that it had failed to furnish equal facilities for interchange as to this shipment, and that, on account of its previous switching arrangements with the Southern Railway Company, it had no right to refuse to "switch" the cars over its terminals. The record furnishes no justification for this contention. The bill charged the railroad companies as being connecting common carriers, plaintiff in error being the ultimate carrier, and that both were bound by the contracts made, and bound to carry the corn from the points of shipment to destination. Plaintiff in error denied these allegations, as we have seen, and on the issue thus formed proof was taken.

The chancery court found, it is true, in favor of plaintiff in error. The case was taken to the Court of Chancery Appeals, where it was heard, the record recites, "upon the transcript of the record from the Chancery Court of Jefferson County and upon the assignments of error and briefs of counsel." In other words, the Court of Chancery Appeals heard the case as made in the chancery court. What the Chancery Court of Appeals said of the issues and contentions of the parties we have already stated, and we need only repeat that the assignment of error by complainant (defendant in error) in the Chancery Court of Appeals was general, and showed no change in the theory upon which the case was brought and conducted. It was that the chancery court erred in holding that there was no liability on the part of the Louisville and Nashville Railroad Company, and in refusing to hold that it was liable either alone or jointly with the other company. And the court said that the denial of plaintiff in error of liability was "predicated upon the idea that it was not a

connecting carrier in handling the shipments of corn involved in this case, or that it was under no obligations respecting the same." It is true the court also said that plaintiff in error contended "that it had the right to discriminate between freight arriving in Birmingham over its lines and freight arriving over other lines, and could give preference between those that it chose to serve in this business," but this contention, it was also said, was "as a corollary" to the proposition that plaintiff in error was not a common carrier, but simply a private carrier. The court determined against this proposition, and in consequence adjudged plaintiff in error liable. In other words, the judgment of the court was in exact response to the pleading. Nor was there any change on appeal to the Supreme Court. The railroad company's second assignment of error was (and it is the only one with which we can concern ourselves) that it was not "liable for any portion of the alleged damage to these various shipments, because under the facts of this case it was not a connecting carrier and was not bound to handle these shipments. . . ."

There is in the printed record a certificate of the Chief Justice of the Supreme Court of the State, given when the writ of error was applied for, to the effect that the Supreme Court of the State was of opinion "that the statutes and laws of Tennessee were not in conflict with the act of Congress regulating interstate commerce, and that the act of Congress did not control the shipments in controversy." Counsel concedes the rule to be that the certificate of the presiding judge of a state court is insufficient to give us jurisdiction, but insists that it can make more certain and specific what is too general and indefinite in the record. There is no doubt of the rule, but there is nothing in this record to justify its application. There is nothing in the record to specialize. It is less open to conjecture than the certificate. As no Federal question was raised, the motion to dismiss must be granted.

It is so ordered.

UNITED STATES *v.* KEATLEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 482. Submitted January 29, 1907.—Decided February 25, 1907.

Where several persons are indicted under one indictment an order of the court granting separate trials makes separate independent causes and entitles the clerk to separate docket fees under par. 10 of § 828, Rev. Stat. Clerk's fee for recording abstract of judgment allowed on folio basis under par. 8 of § 828, Rev. Stat., in addition to the docket allowed by pars. 10, 11, 12 of that section.

41 C. Cl. 384, affirmed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Van Orsdel and *Mr. Philip M. Ashford*, Special Assistant Attorney, for appellant.

Mr. Frank B. Crosthwaite, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The claimant in the court below, appellee here, was clerk of the United States Circuit Court for the Southern District of West Virginia from July 1 to July 6, 1902, and clerk of that court and the District Court from July 16, 1902, to September 17, 1904. He regularly rendered accounts for such services, which contained, among other things, charges for "separate docket fees in separate trials under one indictment." The charges were disallowed and this suit was brought therefor in the Court of Claims. Judgment was rendered for claimant for the sum of $125.45, certain items being disallowed.

A counterclaim was filed by the United States for the recovery of $57.90, charged for "docketing judgments," alleged to have been erroneously and unlawfully paid to claimant

by the accounting officers of the United States. The counterclaim was disallowed and the United States assigns as error the action of the court in rendering judgment for the claimant as aforesaid and overruling the counterclaim. In passing on the charge for the service the Court of Claims said:

"The defendants' contention as to item 6 is troublesome. It appears that joint indictments were returned against several defendants; that on motion of defendants' counsel separate trials were granted to some of the defendants, whereupon the clerk made separate docket entries in accordance with said motion, docketing said causes as though separate indictments had been returned against the parties granted separate trials.

"Paragraph 10 of section 828 of the Revised Statutes provides:

"'For making dockets and indexes, issuing venire, taxing costs and all other services on the trial or argument of a cause where issue is joined and testimony given, three dollars.'

"By paragraph 11 a fee of $2 is allowed where no testimony is given, and by paragraph 12 a fee of $1 is allowed where the cause is dismissed or discontinued or judgment or decree rendered without issue."

The contention of the appellant turns upon the word "cause." The argument is that the word "cause" is limited by the word "indictment," and if it be returned against a number of persons and they be granted separate trials there is only one "cause." It is conceded that the court may grant separate trials, and it is not disputed that the court did so in the case for which the services sued for were charged and that each was separately designated on the records.

We think the order granting separate trials made separate causes, and therefore each was independent of the other. *State* v. *Rogers*, 6 Baxter (Tenn.), 563; *Noland* v. *State*, 19 Ohio St. 131; *Bryan* v. *Spivey*, 106 N. Car. 95. The services rendered were a proper charge under the statute.

2. The counterclaim was for the recovery of $57.90, charges

made for "docketing judgments," and the lists filed showed amounts from $0.15 to $8.70. The Court of Claims' comment was: "The defendants' counterclaim, predicated upon the alleged illegal allowance for the docketing of judgments, will have to be dismissed. The services here charged for were admittedly performed, by order of the court, and under the *Jones case* (*supra*) allowable."

The case referred to is *United States* v. *Jones*, 134 U. S. 483. In the absence of anything in the record to the contrary, we must assume that the application of that case was made on account of the facts presented to the Court of Claims in this. Counsel for the United States say that the findings of the Court of Claims "on the subject of the counterclaim are not as full and complete as they might be." A belief is expressed, however, that it appears, from the face of the counterclaim, that they are folio fees. At all events, it is insisted, that they are not the charges specified in paragraphs 10, 11 and 12 of section 828 of the Revised Statutes. This the appellee concedes in effect, and urges that the charge was made under and is justified by paragraph 8 of that section, which reads as follows: "For entering any rule, order, continuance, judgment, decree, or recognizance, or drawing any bond or making any *record*, certificate, return, or report, for each folio fifteen cents." The words we have italicized are the words upon which appellee relies combined with the following order of the court:

"The clerk of this court is directed to keep a judgment docket wherein shall be *recorded* abstracts of all judgments rendered in cases wherein the United States is a party. Said judgment docket shall contain:

"The number of the case.

"The date of the indictment.

"The names of the parties.

"The amount of the judgment.

"The amount of costs.

"The date of the judgment.

"When docketed.

"The amount paid.

"The disposition of the funds and any additional matter which the clerk may deem pertinent."

The record required by that rule, appellee contends, is different from the various dockets which are kept in all United States courts in which brief entries of fact are made, and which, it is said, are covered by the docket fee. The contention is consonant with the decision of the Court of Claims, and we do not think it is refuted by the suggestions made by appellant.

Judgment affirmed.

OSBORNE v. CLARK.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 159. Argued January 16, 1907.—Decided February 25, 1907.

The fact that a state statute which was assailed in the state court as invalid under the constitution of the State might have been assailed on similar grounds as also invalid under the Constitution of the United States does not give this court jurisdiction to review under § 709, Rev. Stat., on writ of error where the objections to the decision under the Constitution of the United States were suggested for the first time on taking the writ of error.

THE facts are stated in the opinion.

Mr. James J. Lynch and *Mr. Floyd Estill,* with whom *Mr. Jesse M. Littleton, Mr. Isaac W. Crabtree* and *Mr. Felix D. Lynch* were on the brief, for plaintiffs in error:

The charter granted by the State of Tennessee to the Trustees of Carrick Academy created a contract, and the rights of

plaintiff in error under its charter were impaired by virtue of the act of 1881, authorizing the lease of this property to Winchester Normal College.

The Federal question as to the impairment of the obligation of the contract was sufficiently raised in the pleadings.

True, the Federal Constitution was not mentioned in the bill. But it is manifest that the Federal question was raised, when the bill attacked the act, because it undertook to authorize the trustees to appropriate the corporation's property to the use of another. It was raised by the demurrer, in which it was insisted that the General Assembly of Tennessee had a right to authorize a diversion of this fund. *Columbia Water Power Co.* v. *Columbia Electric &c. Co.*, 172 U. S. 474; *McCullough* v. *Virginia*, 172 U. S. 104; *Yazoo &c. Co.* v. *Adams*, 190 U. S. 1.

The opinions of the court may be looked to in determining whether or not a Federal question was raised and decided. *Murdock* v. *Mayor*, 20 Wall. 590; *San José Land & Water Co.* v. *San José Ranch Co.*, 189 U. S. 177.

In both courts the decisive question considered and determined was whether the act of 1881 impaired the contract clause of the Federal Constitution.

Defendants in error contended that the acts of 1806 really conveyed the property to the State, and by virtue thereof the State became the owner of the fund arising from the sale of this property, and that the academies endowed therewith were state agencies for this reason. Plaintiffs in error insisted that the State was only made a trustee, and that the fund was intended for Carrick Academy, and that the endowment of Carrick Academy with this fund did not make it a public corporation or state agency. The Supreme Court adopted the view of the defendants in error, and construed this act of Congress according to their insistence. This was necessary to the decision of the case, as it was decided. And hence a Federal question arises. *Glascow* v. *Baker*, 128 U. S. 560; *Neilson* v. *Lagow*, 7 How. 771; *Joplin* v. *Chachere*, 192 U. S.

94; *Shiveley* v. *Bowley*, 152 U. S. 1; *Kennedy Mining & Milling Co.* v. *Argonaut Mining Co.*, 189 U. S. 1.

Mr. Charles C. Trabue, with whom *Mr. William L. Granbery* was on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill to set aside a lease made by former trustees of Carrick Academy to the trustees of the Winchester Normal College, in pursuance of an Act of the General Assembly of Tennessee, authorizing the letting of the academy property to said lessees. The bill alleged that the act was contrary to the constitution of the State for various reasons, but said nothing of the Constitution of the United States, and in no way implied a reliance upon any of its terms. An Act of Congress of April 18, 1806, was referred to, but was not alleged to be contravened. The defendants demurred, and the demurrer, after being overruled by the Court of Chancery Appeals, was sustained by the Supreme Court of the State. — Tennessee, —. The case then was brought there by writ of error, and was argued both on the merits and upon a motion to dismiss.

The assignment of errors sets up that the above-mentioned state law impairs the obligation of contracts, contrary to the Constitution of the United States, although it does not show definitely what contract, or how that contained in the charter of Carrick Academy is impaired. It sets up, also, that the act is repugnant to the Act of Congress of April 18, 1806; and it alleges that the plaintiffs in error specially set up and claimed their rights in these respects in the Chancery Court of the State.

To show that the Constitution of the United States was relied upon below, the plaintiffs in error refer to passages in the opinions of the Court of Chancery Appeals and the Supreme Court, in which the *Dartmouth College case*, 4 Wheat. 518, was discussed, as establishing the point. But we are

unable to see that those passages prove the fact. The Court of Chancery Appeals states the violations of the state constitution set up in the bill, summarizes the questions presented by the bill and demurrer, and then addresses itself to answering those questions, suggesting no others, and saying nothing about the Constitution of the United States. After a statement of historical facts, it says that if the act authorizing the lease is constitutional and the subject-matter of the act was under the control of the State, the case is at an end. If Carrick Academy is a public corporation, the State is assumed to have control. If it is a private corporation, the state constitution is assumed to invalidate the statute by one of the clauses set up in the bill. The judge, speaking for himself, would regard the academy as a public corporation, but he yields to the weight of the decision in the *Dartmouth College case*, or at least to the principle of that case, according to which, as he conceives, the academy is a private corporation, and therefore exempt from a diversion from its original charter purposes, such as the act authorizing the lease is assumed to effect. The objections to such a diversion that he is considering are those that he has stated as presented by the bill. The Supreme Court, after stating the nature of the corporation and the relations and course of dealing of the State with it, and citing cases to prove that Carrick Academy is a public agency, refers to the decision below and the citation there of the *Dartmouth College case* only in order to show that that case was misapplied.

But the plaintiffs in error say further that the question of their rights under the Constitution of the United States necessarily was involved in a decision upon the bill, and that that is enough when the validity of a state law is concerned. *Columbia Water Power Co.* v. *Columbia Electric Street Ry., Light & Power Co.*, 172 U. S. 475, 488; *McCullough* v. *Virginia*, 172 U. S. 102, 117. These and similar cases, however, are not to be pressed to the point that, whenever it appears that the state law logically might have been assailed as invalid

under the Constitution of the United States, upon grounds more or less similar to those actually taken, the question is open. If a case is carried through the state courts upon arguments drawn from the state constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. *Crowell* v. *Randell*, 10 Pet. 367, 398; *Simmerman* v. *Nebraska*, 116 U. S. 54; *Hagar* v. *California*, 154 U. S. 639; *Erie Railroad* v. *Purdy*, 185 U. S. 148, 153.

We are the less uneasy at the conclusion to which we are forced, that we do not apprehend that the statute of Tennessee is invalid for the reason now put forward. That reason is that the General Assembly of the State had no authority to authorize the taking of the property of this corporation for the private use of another. This objection might be urged with some force perhaps to the lease that was made. But the statute, which alone could be brought in question here, merely authorized the trustees of Carrick Academy to let the academy property to the trustees of the Winchester Normal College for not more than fifty years, and required the trustees of the college to keep the property in good condition and free from debt or incumbrance, if the lease was made. It said nothing about terms. It left the academy free. There was no taking of property, but at most an authority to change an investment. So far as the act shows on its face, which is all that we have before us, it might have contemplated a lease of the present grounds merely as a means to keeping up the academy with increased resources in a better place elsewhere.

Writ of error dismissed.

MASON CITY AND FORT DODGE RAILROAD COMPANY *v.* BOYNTON.

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

No. 170. Argued January 22, 23, 1907.—Decided February 25, 1907.

In condemnation proceedings the words plaintiff and defendant can only be used in an uncommon and liberal sense, and although a state statute may describe the landowner and the condemning corporation as plaintiff and defendant respectively, and the state court may hold them to be such, this court is not bound by that construction in construing the act of Congress regarding removal of causes and may determine the relation of the parties and who is entitled to remove the suit.

A condemnation proceeding is a suit even though the condemning corporation may be free to decline to take the property after the valuation, it being charged with costs in case it elects not to take.

Under the Iowa statute, in a condemnation proceeding, the landowner is the defendant within the meaning of the act of Congress regarding removal of causes, and may remove the proceeding to the proper United States Circuit Court, notwithstanding the state statute provides that he is the plaintiff in such proceedings.

THIS case comes here on the following certificate:

"The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, Missouri, on the eighth day of December, A. D. 1905, certifies that the record on file in the above entitled cause, which is pending in such court upon a writ of error duly issued to review a judgment rendered in such cause in favor of the defendant in error in the Circuit Court of the United States for the Southern District of Iowa, discloses the following:

"The Code of Iowa, 1897, in a chapter relating to the taking of private property for works of internal improvement, including the construction and repair of railways, contains the following:

"'SEC. 1999. If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises.'

"'SEC. 2009. Either party may appeal from such assessment to the District Court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant.

"'SEC. 2010. An appeal shall not delay the prosecution of work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof. . . .

"'SEC. 2011. On the trial of the appeal no judgment shall be rendered except for costs. The amount of damages shall be ascertained and entered of record, and if no money has

been paid or deposited with the sheriff the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the land owner, a reasonable attorney's fee, to be taxed by the court.

"'SEC. 2012. If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on or using or controlling the premises. The sheriff, upon being furnished with a certified copy of the assessment, may remove said corporation, and all persons acting for or under it, from said premises, unless the amount of the assessment is forthwith paid or deposited with him.

"'SEC. 2013. If the amount awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid the landowners.'

"Section 3497 of the Code of Iowa, 1897, also provides:

"'An action may be brought against any railroad corporation, . . . in any county through which such road or line passes or is operated.'

"The Mason City and Fort Dodge Railroad Company, plaintiff in error, hereinafter called railroad company, was a railroad corporation organized and existing under the laws of the State of Iowa, and as such entitled to avail itself of the provisions of the foregoing statutes of Iowa. C. D. Boynton, defendant in error, hereinafter called the owner, was the owner of certain lots of ground in the Town of Carroll, Carroll County, in the State of Iowa, and was at all times mentioned herein a citizen of the State of Missouri. Prior to February 18, 1902, the railroad company, requiring Boynton's lots as a right of way for the construction of its railroad, filed an application in the office of the sheriff of Carroll County, asking

for the appointment of six freeholders to inspect the lots and assess the damages which the owner would sustain by the appropriation of his lots for the use of the railroad company. On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report, assessing the owner's damages occasioned by the appropriation of his lots by the railroad company at $4,750.00.

"On the same day the railroad company paid the sheriff that amount of money for the use of the owner.

"Afterwards, and within the time fixed by the state statute, the owner appealed from the commissioners' award to the District Court of Carroll County. In due time, the owner filed in the last mentioned court a petition for the removal of the cause into the Circuit Court of the United States for the Western Division of the Southern District of Iowa, on the ground of diversity in citizenship. In his petition and bond to secure such removal the owner referred to and treated himself as the defendant, and referred to and treated the railroad company as the plaintiff, in the case.

"In due course the cause came on for hearing in the Circuit Court, when the parties, by a written stipulation filed with the clerk, waived a jury and agreed to try the case to the court. Both parties introduced evidence and fully submitted themselves to the jurisdiction of the court (if they could do so). The trial resulted in an assessment of the owner's damages at $11,445, and in a judgment against the railroad company for costs, including a fee of $300 for the owner's attorneys. In due time the railroad company regularly sued out a writ of error to the end that the record and proceedings in the Circuit Court might be reviewed by this court. The assignment of errors which accompanied the petition for the writ of error alleged that the Circuit Court erred in ascertaining and fixing the amount of damages to be paid by the railroad company for its appropriation of the owner's lots, in that there was an entire absence of evidence to support the award and finding. At no time during the pendency of the pro-

ceedings in the Circuit Court did the railroad company question the jurisdiction of that court or the right of the owner to remove the cause into that court, but both parties participated in the trial up to a final judgment, and in the proceeding to secure a writ of error, as if there was no question of jurisdiction in the case. Not until the railroad company filed its brief in this court was the jurisdiction of the Circuit Court in any manner challenged. But in its brief, as also in the oral argument made in its behalf, the chief point relied upon by the railroad company to secure a reversal of the finding and judgment of the Circuit Court, is that the owner was the plaintiff in said cause and proceeding, and did not have the right to remove the same into the Circuit Court and that therefore that court could not entertain jurisdiction thereof.

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

"1. Was the land owner a defendant within the meaning of the removal statute, when the suit was removed into the Circuit Court?

"2. If the land owner was not a defendant, within the meaning of the removing statute, could the Circuit Court take cognizance of the suit through a removal by him? Stated in other words, the question is this: Is the provision of the removal statute, to the effect that the removal, on the ground of diverse citizenship, may be 'by the defendant or defendants therein, being non-residents of that State,' restrictive and jurisdictional in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only modal and formal in the sense that non-compliance therewith, or non-conformity thereto, may be waived?

"3. Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State, by way of a so-called appeal from the assessment of the commissioners selected by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court?

"4. If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that court?"

Mr. Thomas D. Healy, with whom *Mr. A. G. Briggs, Mr. John L. Erdall, Mr. M. F. Healy* and *Mr. Robert Healy* were on the brief, for Mason City and Fort Dodge Railroad Company:

The landowner was plaintiff within the meaning of the removal statute, when the suit was removed into the Circuit Court.

The corporation seeking to condemn real estate is in fact the defendant, and occupies a position analogous to that of a defendant in a case brought to recover the value of real estate which has been appropriated. This is the case where there is nothing left to contest but the value of the real estate taken.

When the case was transferred to the District Court by appealing from the award of the commissioners, it took, under the statutes of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. No other question was open to contest in the state District Court. *Turner* v. *Holeran*, 11 Minnesota, 253; *Mississippi Boom Company* v. *Patterson*, 98 U. S. 403; *Meyers* v. *C. & N. W.*, 118 Iowa, 312; §§ 1999, 2009, 2010, 2011 of the Code (1897) of Iowa.

Mr. Benjamin I. Salinger, for Boynton:

Within the meaning of the removal act, this land-owner was not a plaintiff, and no case holds that he is except *Myers* v. *Railway*, 118 Iowa, 312, and *Kirby* v. *Railway*, 106 Fed. Rep. 552.

The non-resident landowner may remove before he appeals to the state court from award made. *Railway* v. *Day*, 54 Fed. Rep. 545; *Traction Co.* v. *Mining Co.*, 196 U. S. 249.

While state laws, and decisions by state courts of last resort, may, as to litigants who remain in the courts of the State, settle, arbitrarily, who is plaintiff, neither a legislature nor such courts may, directly or indirectly, abridge the right to remove to the Federal court in a case of which that court has original, concurrent jurisdiction. *Hess* v. *Reynolds*, 113 U. S. 73; *Myers* v. *Railway*, 118 Iowa, 312, 321; *Terminal Co.* v. *Ry.*, 119 Fed. Rep. 209; *Searle* v. *District*, 124 U. S. 197; *Traction Co.* v. *Mining Co.*, 196 U. S. 249; *Reagan* v. *Loan Co.*, 154 U. S. 391.

What is removable in one State must be so in every other; and a State may not vary the standard of removability by making proceedings which affect the property rights of a non-resident unlike what suits usually are. Cases *supra*.

While the Federal courts will, in such cases as plaintiff in error cites, follow the decisions of the highest state courts, even where the soundness of such decisions is not approved, this rule does not apply to state decisions that directly or

indirectly tend to abridge the jurisdiction of the Federal courts. Cases *supra.*

While it has been settled that certain instances of seeking to increase an award are equivalent to beginning suit to obtain pay for land appropriated, this does not necessarily settle that every non-resident landowner who appeals from a condemnation award is a plaintiff within the meaning of the removal act, and the cases that so defined the beginning of suit did not, and had no occasion to, hold that such owner was such plaintiff.

If it may be claimed that some of the cases so defining the beginning of suit do hold that the appealing landowner was a plaintiff, they do so on the theory that his appeal could not and did not present anything but the question of compensation.

Under the statutes of Iowa such appeal could also present whether conditions existed which, under such statutes warranted condemnation proceedings. *Terminal Co.* v. *Railway Co.*, 19 Fed. Rep. 209.

Under those statutes the condemnation at bar was sufficiently a judicial proceeding to make the one who instituted it, rather than the owner who appealed from the award, the plaintiff. *Traction Co.* v. *Mining Co.*, 196 U. S. 241; *Boom Co.* v. *Patterson*, 98 U. S. 404; *Searle* v. *District*, 124 U. S. 199, 200.

Had the Iowa statutes done less than to make the proceedings on condemnation sufficiently judicial to allow a hearing on whether the right to condemn existed, and confined them to the mere right to have compensation ascertained, there would have been a denial of due process of law. *Traction Co.* v. *Mining Co.*, 196 U. S. 251, 252.

While consent cannot give jurisdiction, if one party assert the facts necessary to jurisdiction and they are not put in issue, and if a court competent to try the question whether jurisdiction exists, decides that it does, it is an adjudication that jurisdiction exists.

While judicial decisions can not create jurisdiction in the tribunal that decides what jurisdiction a court, competent to try the question of fact or law involved, can, by deciding that another court has jurisdiction, preclude inquiry into said jurisdiction unless the decision is directly attacked. *Railway Co.* v. *Daughtry*, 138 U. S. 298; *Cable* v. *Ry.*, 88 Fed. Rep. 803; *Connell* v. *Smiley*, 156 U. S. 335; *Davies* v. *Lathrop*, 13 Fed. Rep. 565; *Railway* v. *Ramsey*, 22 Wall. 322; *Sims* v. *Hundley*, 6 How. 1; *De Sobrey* v. *Nicholson*, 3 Wall. 420; *Goodnow* v. *Burrows*, 74 Iowa, 266; *Kirby* v. *Railway Co.*, 106 Fed. Rep. 552.

While the order of the state court granting a removal will not avail against conflicting action on part of the Federal courts, if such order is neither appealed from nor nullified by the court to which the removal is taken, such order of the state court, as against collateral attack, establishes conclusively that there was jurisdiction to remove. *Telegraph Co.* v. *Griffith* (Ga.), 30 S. E. Rep. 420; Dillon's Rem. of Causes (5th ed.), 174; Black, Dillon Rem. par. 191; *Removal Cases*, 100 U. S. 474; *Stone* v. *South Carolina*, 117 U. S. 430; *Bank* v. *Dodge*, 42 N. J. L. 316; *Walker* v. *O'Neil*, 38 Fed. Rep. 374; *Goodnow* v. *Burrows*, 74 Iowa, 266.

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

In *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U. S. 239, it was decided that proceedings of this character could be removed to the United States Circuit Court. The question to be decided now is only whether the removal in this case can be upset on the ground that it was asked by the wrong party. The railroad company relies upon the words of the Iowa Code, § 2009, quoted above, and upon a decision of the Supreme Court of the State in a case like the present, except that the railroad was a foreign company, in which it was held that the railroad had a right to remove. *Myers* v. *Chicago & Northwestern Ry. Co.*, 118 Iowa, 312, 324. See

also *Kirby* v. *Chicago & Northwestern Ry. Co.*, 106 Fed. Rep. 551. It is said that this court is bound by the construction given to the state law by the state court. Indeed the above § 2009 does not need construction; it enacts, in terms, that the landowner shall be plaintiff. As the right to remove a suit is given only to the defendants therein, being non-residents of the State, it is argued that the state decision ends the case.

But this court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which for the purposes of removal this court might think the proper ones to be applied. In condemnation proceedings the words plaintiff and defendant can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary in order to decide that the present removal was right to say that the state decision was wrong. We leave the latter question where we find it. But we are of opinion that the removal in this case was right for reasons which it will not take long to state.

It is said the proceedings only become a case, within the meaning of the Act of Congress, after the preliminary assessment and the appeal, and that then the landowner is in the position of one demanding pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the landowner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount

first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. Sec. 2010. We see no reason to suppose that the deposit impairs the railroad's right to withdraw, although the Supreme Court of Iowa says, *ubi supra,* that by payment and entry the railroad appropriates the land. See § 2013. Probably, too, the position of the parties under the Act of Congress should be determined upon general considerations without regard to what has happened. Looked at as a whole, the Iowa statutes provide a process by which railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The State is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. *Hudson River Railroad & Terminal Co.* v. *Day,* 54 Fed. Rep. 545.

It is not argued that this is any the less a suit because the railroad is free to decline to take the property. The adjudication fixes the right of the railroad to take the land at the price adjudged, and charges it with costs and attorney's fees taxed by the court, in case it elects not to take. The question is not discussed in *Madisonville Traction Co.* v. *Saint Bernard Mining Co.,* 196 U. S. 239, where, if there had been anything in it, possibly it might have been raised.

As what we have said is sufficient to dispose of the matter of the certificate, we think it unnecessary to consider other arguments, or to answer any question but the first.

The first question is answered, Yes.

ALLEN v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 192. Argued January 29, 30, 1907.—Decided February 25, 1907.

Under § 1986, Rev. Stat., a commissioner of the United States is not entitled to any fees for drawing complaints or jurats thereto charging offenses under ch. 7, Title 70, Rev. Stat., unless the complaints are served; there is no case within the meaning of § 1986 unless there be an arrest and examination. The fee provided by § 1986 covers all services and unless earned the commissioner gets no other and is not entitled to compensation under § 847, Rev. Stat., which as well as §§ 823 and 828 are supplanted in this class of cases by § 1986.

Where the United States commissioner is also supervisor of election he is not entitled to compensation for certifying the complaints from himself in one capacity to himself in another capacity under § 2027, Rev. Stat.

When a commissioner applies on an account for an additional sum for services in which he has already been improperly allowed certain amounts, the United States may counterclaim for the amount already so allowed as an offset against the amount actually due the commissioner notwithstanding the approval of his account by the United States Circuit Court, "subject to revision by the accounting officers of the United States Treasury;" and, under § 1059, Rev. Stat., and § 1, Cl. 2 of the act of March 3, 1887, c. 359, the counterclaim may include payments made after the filing of the commissioner's claim.

26 Ct. Cl. 445, affirmed.

THE facts are stated in the opinion.

Mr. Charles C. Lancaster, with whom *Mr. Herbert E. Smith* was on the brief, for appellant.

Mr. Assistant Attorney General Van Orsdel, with whom *Mr. Philip M. Ashford* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim made by a commissioner of the United States Circuit Court for services rendered between January 29, 1886,

and January 20, 1892, charges for which were disallowed by the officers of the Treasury Department. It is necessary to state only the items and matters now in controversy. Item 1, so far as disallowed by the Court of Claims, is for drawing complaints which charged offences under the Revised Statutes, Title Crimes (70), ch. 7 (Crimes against the Elective Franchise and Civil Rights of Citizens), and upon which warrants never were served "because inquiry developed no offence had been committed." The disallowed portion of item 2 is for drawing jurats to similar complaints of which the same facts were true. Item 11 is for certifying complaints for offences under said ch. 7, the claimant being the chief supervisor of elections, to whom he, as commissioner, certified the complaints. Item 20 is for filing and entering similar complaints, in civil-rights proceedings, where the warrants were returned unexecuted by the marshal. Item 23 is for drawing depositions for complaints in similar proceedings, where "no warrant issued as the result of scrutiny of lists of voters by commissioner and inquiries at residences." These are the disallowed claims brought here by this appeal.

By Rev. Stats. § 1986, district attorneys and others mentioned are to be paid for their services under the provisions for enforcing said ch. 7 "the same fees as are allowed to them for like services in other cases." The sentence then goes on: "and where the proceedings are before a commissioner he shall be entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination." It is established and admitted that this fee is not earned (because there is not a "case" within the meaning of the section), unless there be an arrest and an examination. *Southworth* v. *United States*, 151 U. S. 179, 185; *S. C.*, 161 U. S. 639. And again, it is plain that the fee, when it is earned, covers all services; as sufficiently appears from the contrast to the allowance of the usual fees to others in the earlier part of the same sentence and from the final words of the entitling clause. These two propositions granted, it seems to us not

to need argument to conclude that unless the fee is earned the commissioner gets no other. This section having supplanted the usual provisions of §§ 823, 828, 847, for the cases to which it refers, cannot be held to leave open a resort to § 847 when the conditions attached to the substituted compensation are not fulfilled. This disposes of all items except 11, which stands on a different ground. As to that a few words are enough. By Rev. Stats. § 2027 it was the claimant's duty as commissioner to forward the original complaint, etc., to the chief supervisor for the judicial district. As he was supervisor as well as commissioner this section merely required a change in the character of his custody. No certificate was necessary, and if the complaints were certified it can have been only for the purpose of charging fees. But further, if that duty had been added to the others in connection with cases covered by § 1986, the mere fact that the addition was by a later statute would not break in upon the rule established by § 1986, that the compensation for all the services was entire.

The first item is not for the whole service of drawing the complaints. It admits the receipt of fifteen cents per folio and demands five cents more on the strength of cases decided after the claimant had been paid upon his former account. *United States* v. *Ewing*, 140 U. S. 142; *United States* v. *Barber*, 140 U. S. 164. These cases being decisions under Rev. Stats. § 847, are not in point. But, if that be in any way material, they had the effect of inducing the applicant to open his account. The present is called a new account in argument to be sure. But it is hard to conceive a more distinct opening than the demand of money in addition to sums received at the time as full payment for indivisible items. On the claimant's own view of his rights, there were not two charges for each folio, one for fifteen cents and another for five. He asserted one indivisible right on which he had been paid fifteen cents in full and he now says that that was not enough. The United States, by way of counterclaim to this attempt

to get additional pay, demanded the sums already paid to the claimant contrary to the principle that we have laid down, and the Court of Claims allowed an offset of $3,120, found to have been paid by mistake, against the larger sum that it found due to the claimant. We see no reason to doubt the right of the United States, or the legality of its asserting that right by counterclaim. *Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190; *United States* v. *Burchard,* 125 U. S. 176; *McElrath* v. *United States,* 102 U. S. 426. It is urged that the account was approved by the United States Circuit Court. The account was approved, "subject to revision by the accounting officers of the United States Treasury" only. On the findings on which the case comes before us this qualified approval has no weight. One portion of the counterclaim is for dates later than the filing of the claim. But, in view of the broad language of the statutes ("all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever," Rev. Stats. § 1059, clause "second"; act of March 3, 1887, c. 359, § 1, clause "second"), we are of opinion that it properly was allowed with the rest.

The case was elaborately argued at the bar, and is discussed at length in printed briefs. We have examined all the details of the latter, but do not deem it necessary to add more to the careful consideration that the case received in the Court of Claims.

Judgment affirmed.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY *v.* BABCOCK, TREASURER OF ADAMS COUNTY, NEBRASKA.

UNION PACIFIC RAILROAD COMPANY *v.* FINK, TREASURER OF DOUGLAS COUNTY, NEBRASKA.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Nos. 215, 341. Argued January 21, 22, 1907.—Decided February 25, 1907.

Railroad corporations attacked assessments made by a state assessing board and sought to enjoin the collection of taxes based thereon beyond a sum tendered, claiming that, induced by political clamor and fear, the board had arbitrarily fixed excessive valuations and had included property beyond the jurisdiction of the State, thus depriving the corporations of their property without due process. The bills charged political duress and a consequent scheme of fraud. The board, after declaring that it had taken into consideration the returns furnished by the corporations and their respective stocks, bonds, properties and earnings, fixed the total valuations and average mileage value of property in the State and then fixed a lower value for assessment purposes, which the corporations claimed was arbitrary and excessive. Members of the assessing board were called as witnesses and cross-examined as to the operation of their minds in reaching the valuation. *Held*, that:

The charges of fraud and duress were not sustained.

In an independent proceeding attacking the judgment of an assessing board it is improper to cross-examine the members in an attempt to exhibit confusion in their minds as to the method by which the result was reached.

In a suit of this nature this court will not consider complaints as to results reached by a state board of assessors, except those based on fraud or the clear adoption of a fundamentally wrong principle.

In this suit it does not appear that the present Union Pacific Railroad Company has any United States franchises which were taxed by the State of Nebraska or improperly considered in estimating the assessment for taxation of the company's property in that State.

THE facts are stated in the opinion.

Mr. Charles J. Greene, with whom *Mr. James E. Kelby* and *Mr. Charles F. Manderson* were on the brief, for appellant, Chicago, Burlington & Quincy Railway Company:

The proceeding is void because the Board acted arbitrarily

and in disregard of the express provision of the statute. In ascertaining the total valuation of the complainant's lines of railroad in the State, it failed to give any consideration to the sworn statements, schedules and other information required by the statute and without using any statutory or other recognized rule or method of obtaining such valuation. In fixing and returning the assessed valuation per mile of complainant's lines of railroad in each county, the Board disregarded the express provisions of the statute. Had the Board regarded the statute a difference of opinion would have been impossible, because the discretionary powers vested in it would have been exhausted in the act of fixing the value of the entire property. The average value per mile would have been merely a matter of arithmetic which not even the members of an assessing board could reasonably differ about.

The statutes defining its powers, jurisdiction and duties were conceived and framed upon the idea that the mass of things tangible and intangible which constitute a railroad property are a unit and should be valued as a unit. *State* v. *Savage*, 65 Nebraska, 714; *State* v. *Back*, 100 N. W. Rep. 952.

The action of the Board in computing the total valuation of the property, upon the basis of the ascertained value of a mile, not only reversed the program dictated by the legislature, but it also made impossible the only intellectual process by which consideration could be given to the returns upon which the statute expressly declares the valuation should be based.

The proceedings of the state board operated to tax the complainant's property beyond the jurisdiction of the State, in violation of its rights under the Federal Constitution.

Had the Board, after finding the total value, deducted the value of outside property and applied the balance to the total mileage and apportioned it, the result would have been an average value of less than that which appellants tendered taxes upon.

This is not a mere case of overvaluation, but is an assessment made upon unconstitutional principles. While the

company as a matter of policy, made a tender of taxes based upon a fair valuation, it was not bound to do so, for the Board having acted without jurisdiction, the entire tax based upon the assessment was illegal and void. *Fargo* v. *Hart*, 193 U. S. 502, 503. See also *Norwood* v. *Baker*, 172 U. S. 269; *Ogden* v. *Armstrong*, 168 U. S. 237; *U. P. Ry. Co.* v. *Cheyenne*, 113 U. S. 527; *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, 101 U. S. 153; *Litchfield* v. *County of Webster*, 101 U. S. 781.

Mr. John N. Baldwin and *Mr. Maxwell Evarts*, with whom *Mr. Robert S. Lovett* was on the brief, for appellant, Union Pacific Railway Company:

The state board took into account, considered, and in effect and in fact assessed property of the Union Pacific Railroad Company beyond the jurisdiction of the State and committed many gross errors in its calculations, and thereby imposed an unconstitutional burden on the complainant and on commerce among the States.

The rule to be followed in passing upon the validity of assessments of this character has been announced by this court. *Pittsburg &c. Ry. Co.* v. *Backus*, 154 U. S. 421.

The Board, in making the assessment complained of, did not exercise its free and fair judgment, and fix a fair cash value on the property assessed, but, intimidated, influenced and terrorized by great public clamor and tumult, fixed a value thereon largely in excess of the fair cash value.

The state board, in considering the value of the physical or tangible property of complainant as a factor to aid it in fixing the value of the railroad's property in Nebraska, arbitrarily and fraudulently fixed the value of said tangible property at an amount far above its value as shown by the undisputed evidence before it, this arbitrary action resulting necessarily in great prejudice to complainant.

The members of the Board were incompetent to place a valuation on complainant's property and committed many

gross errors in their calculations and methods of arriving at the assessment in question.

All property in the State of Nebraska other than railroad property was valued for assessment at much less than its real cash value, and all such other property, when compared relatively with railroad property, was undervalued, and a deliberate intent was shown on the part of the state board to impose an unfair burden on complainant and other railroad corporations. Said Board sitting as a Board of Equalization, after the assessment of railroad property, being fully advised of the undervaluation of property other than railroad property, and of the excessive valuation of railroad property as compared to other property, failed and refused to give force and effect to the provision of the constitution of Nebraska requiring uniformity of taxation of all property.

In respect to this matter of overvaluation of the property of the complainant and the systematic and habitual undervaluation of all other property, this case comes directly within the rules laid down in the following cases. *Cummings* v. *Bank*, 101 U. S. 153; *Poindexter* v. *Greenhow*, 114 U. S. 270, 295; *Taylor* v. *Company*, 88 Fed. Rep. 350.

The state board, in fixing the value of complainant's property, estimated the value thereof by a process known as capitalizing the net earnings, and in so doing erroneously included in said net earnings the earnings from interstate commerce and from the transportation of mail, troops and munitions of war of the United States, thereby imposing an unconstitutional burden on this complainant and on interstate commerce.

Taxation is an element of cost in the transportation of traffic, and a State may not, for its own benefit, impose a tax on interstate commerce, thereby not only obstructing the free passage of commerce, but increasing the cost of transportation of said commerce in proportion to the burden thus imposed.

So far as the tax levied for the use of the State is concerned this is not in effect a suit against the State, and this action will

lie. *Osborne* v. *U. S. Bank*, 9 Wheat. 738; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Allen* v. *Railway Co.*, 114 U. S. 311; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 518; *Prout* v. *Starr*, 188 U. S. 537.

Mr. William T. Thompson, Attorney General of the State of Nebraska, and *Mr. Norris Brown*, with whom *Mr. M. F. Stanley* was on the brief, for appellee:

When the State Board of Equalization and Assessment fixed the value of complainant's property in Nebraska, it acted judicially and its judgment cannot be assailed collaterally except for fraud or want of jurisdiction.

Courts of equity are without power to control the discretion vested in said Board by law as to the value of property for taxation purposes. *Lowenthal* v. *People*, 192 Illinois, 222; *Keokuk Bridge Co.* v. *People*, 186 Illinois, 267; *Connecting R. Co.* v. *People*, 119 Illinois, 182; *Ottawa Glass Co.* v. *McCaleb*, 81 Illinois, 562; *Jones* v. *Rushville Nat. Gas. Co.*, 135 Indiana, 595; *Senour* v. *Matchett*, 140 Indiana, 636; 1 High on Injunctions, §§ 485, 486, 490, 493; *Haywood* v. *Buffalo*, 14 N. Y. 534; *Burns* v. *Mayor*, 2 Kansas, 454; *McPike* v. *Pew*, 48 Missouri, 525; *Warden* v. *Supervisors*, 14 Wisconsin, 618; *Clark* v. *Ganz*, 21 Minnesota, 387; *City Council* v. *Sayre*, 65 Alabama, 564; *Stanley* v. *Albany County*, 121 U. S. 535; *Collins* v. *Keokuk*, 118 Iowa, 30; 1 Cooley on Taxation, 3d ed. p. 784; *State Railroad Tax cases*, 92 U. S. 575; *Pittsburg R. Co.* v. *Backus*, 154 U. S. 421; *Maish* v. *Arizona*, 164 U. S. 599; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194; *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1; *Ogden City* v. *Armstrong*, 168 U. S. 224; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *State* v. *Dodge*, 20 Nebraska, 599; *State ex rel Bee Pub. Co.* v. *Savage*, 65 Nebraska, 714; *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 605.

The allegation in the bill of complaint charging fraud against

the State Board of Equalization and Assessment is not sustained by the evidence.

The methods authorized by the Nebraska law and followed by the State Board of Equalization and Assessment are sanctioned by the courts of the country. *State Railroad Tax cases*, 92 U. S. 575; *Pittsburg R. Co.* v. *Backus*, 154 U. S. 421; *K. C., Ft. S. & M. R. Co.* v. *King*, 57 C. C. A. 278; *Traction Company cases*, 114 Fed. Rep. 557; *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U. S. 185.

The evidence shows conclusively that the property of complainants was assessed below its true and full value by the state board.

Equity will not enjoin the collection of taxes on account of the under assessment of other property by taxing officers, unless it appears that such undervaluation is the result of system, design, intention, habit, custom or agreement. *Taylor* v. *Louisville & N. R. Co.*, 88 Fed. Rep. 350; *German Nat. Bank* v. *Kimball*, 103 U. S. 732; *New York* v. *Barker*, 179 U. S. 190; *Exchange Nat. Bank* v. *Miller*, 19 Fed. Rep. 372; *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 605.

The evidence fails to show that the County Assessors and County Boards of Equalization by intention, custom, system, design or agreement undervalued property within their jurisdiction.

The evidence affirmatively shows that all property within their jurisdictions was assessed by the local taxing officers in good faith and at its full value.

The question of undervaluation of other property by the local taxing officers was adjudicated by the State Board of Equalization and Assessment, when, on the complaint of the complainant and in its presence, the State Board of Equalization passed on the valuation of lands, live stock, and other properties subject to the jurisdiction of local taxing officers. Complainant is therefore bound and cannot attack such judgment of said Board collaterally. *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 605; *Hacker* v. *Howe*, 101 N. W. Rep. (Neb.) 255.

Whenever the law vests in a special officer or tribunal the duty and power to ascertain and determine a question of fact, such decision amounts to more than a mere presumption that the fact exists, and such decision cannot be overthrown in a collateral attack by evidence tending to show that the fact was otherwise than was found and determined. *Pittsburg C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 434; *W. U. T. Co.* v. *Taggart*, 163 U. S. 1; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 229; *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 605.

The complainant in this case has not been discriminated against or denied the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States by reason of the action of the State Board of Equalization and Assessment in assessing its property in the State of Nebraska, nor by reason of the action of the local taxing officers and local boards of equalization which assessed property other than railroads within their jurisdiction. *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 605; *King* v. *Mullins*, 171 U. S. 436; *M. & M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 464; *Florida C. & P. R. Co.* v. *Reynolds*, 183 U. S. 476.

Mr. Justice Holmes delivered the opinion of the court.

These are bills to declare void assessments of taxes made by the State Board of Equalization and Assessment for the year 1904, and to enjoin the collection of the same beyond certain sums tendered. The bills allege that the Board, coerced by political clamor and its fears, arbitrarily determined in advance to add about nineteen million dollars to the assessment of railroad property for the previous year, and then pretended to fix the values of the several roads by calculation. They allege that the assessments were fraudulent, and void for want of jurisdiction, and justify these general allegations by more specific statements. One is that other property in the State, especially land, was valued at a lower rate than that of the railroads. Another, of more importance, is to the effect that

the Board adopted a valuation by stock and bonds and then taxed the appellants upon the proportion of the value so reached that their mileage within the State bore to their total mileage, without deducting a large amount of personal property owned outside the State, or specially valuable terminals, etc., east of the Missouri River. The principle of this last objection was sanctioned in *Fargo* v. *Hart*, 193 U. S. 490, under the commerce clause of the Constitution, Art. I, Section 8, but later cases have decided that tangible property permanently outside the jurisdiction is exempted from taxation by the Fourteenth Amendment, *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, and the Fourteenth Amendment alone, somewhat inadequately referred to, is the foundation of these appeals. Demurrers to the bills were overruled, mainly, if not wholly, on the ground of the charges of duress and fraud. Answers then were filed denying the material allegations and after a hearing on evidence the bills were dismissed.

The dominant purport of the bills is to charge political duress, so to speak, and a consequent scheme of fraud, illustrated by the specific wrongs alleged, and in that way to make out that the taxes were void. As the cases come from the Circuit Court, other questions beside that under the Constitution are open, and, therefore, it is proper to state at the outset that the foundation for the bills has failed. The suggestion of political duress is adhered to in one of the printed briefs, but is disposed of by the finding of the trial judge, which there is no sufficient reason to disturb. The charge of fraud, even if adequately alleged, *Missouri* v. *Dockery*, 191 U. S. 165, 170, was very slightly pressed at the argument, and totally fails on the facts. Such charges are easily made and, it is to be feared, often are made without appreciation of the responsibility incurred in making them. Before the decree could be reversed it would be necessary to consider seriously whether the constitutional question on which the appeals are based

was not so pleaded as part of the alleged fraudulent scheme that it ought not to be considered unless that scheme was made out. *Eyre* v. *Potter*, 15 How. 42, 56; *French* v. *Shoemaker*, 14 Wall. 314, 335; *Hickson* v. *Lombard*, L. R. 1 H. L. 324.

When we turn to the evidence there is equal ground for criticism. The members of the Board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the Board were not entitled to the possibly higher immunities of a judge. *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, 433. Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. *Mattox* v. *United States*, 146 U. S. 140. So, as to arbitrators. *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, 457, 462. Similar reasoning was applied to a judge in *Fayerweather* v. *Ritch*, 195 U. S. 276, 306, 307. A multitude of cases will be found collected in 4 Wigmore, Evidence, §§ 2348, 2349. All the often repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law. See *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 610; *Central Pacific R. R. Co.* v. *California*, 162 U. S. 91, 107, 108, 117; *S. C.*, 105 California, 576, 594; *State Railroad Tax cases*, 92 U. S. 575; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus*, 133 Indiana, 513, 542. In *Fargo* v. *Hart*, 193 U. S. 490, 496, 497, there was no serious dispute as to what was the principle adopted.

Again, this Board necessarily kept and evidently was expected by the statutes to keep a record. That was the best evidence, at least, of its decisions and acts. If the roads had

wished an express ruling by the Board upon the deductions which they demanded, they could have asked for it and could have asked to have the action of the Board or its refusal to act noted in the record. It would be time enough to offer other evidence, when such a request had been made and refused. See *Fargo* v. *Hart*, 193 U. S. 490, 498; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus*, 133 Indiana, 513, 542; *Havemeyer* v. *Board of Review*, 202 Illinois, 446. However, as the foregoing objections were not urged, and as the cases were discussed upon all the testimony, we shall proceed to consider them in the same way.

The facts that appear from any source are few. The Board voted first, as a preliminary step toward ascertaining the actual value of all property to be assessed, to make an estimate of the tangible property of the railroads, to be taken as one of the factors in making up the total assessment of the roads. Schedules were prepared, and it is objected that the Board added twenty-five per cent to certain items as furnished by the companies. If this be true, and it is not admitted that any figures were more than tentative, the addition seems to have been made on personal judgment and on a theory that the values given were the values the property was insured for. If mistaken, a mistake does not affect the case. The main point comes on the final assessment, to which we turn at once.

The Board expressed its result in another vote. "Having given full and due consideration to the returns furnished said Board by the several railroad companies, and having taken into consideration the main track, side track, spur tracks, warehouse tracks, roadbed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies, moneys, credits, franchises and all other property of said railroad companies, and having taken into consideration the gross and net earnings of said roads, the total amount

expended in operation and maintenance, the dividends paid, the capital stock of each system or road and the market value thereof and the total amount of secured and unsecured indebtedness [we] do hereby ascertain and fix for the purposes of taxation the full actual value, the average value per mile, and the assessable value per mile of the several roads as follows:" with a list.

The roads supplement the record by evidence that the State Treasurer, a member of the Board, on the objection being made to a paper said to exhibit the stock, bonds and floating debt of the Union Pacific, that the stock and bonds of other companies owned by the Union Pacific had not been deducted, answered, "the Board has decided that it can not make deductions for property outside of the State." This answer was in the presence of the other members of the Board. It is agreed that the paper referred to was prepared for the use of the Board. It shows a column of figures marked "Deductions for locally assessed," and amounting, when added, to 1,152,230. Then, under the head "Earnings," are the figures 398,474,068, from which is subtracted 1,152,230, giving 397,321,838, which is divided by 6,104, giving 65,092 as the quotient. This dividend is said to be shown by the coincidence of figures to have been made up of the market value of the stock of the Union Pacific, its mortgage bonds and other indebtedness, less the property locally assessed in the State, but without the deduction to which we have referred and to which the road alleges that it was entitled. The divisor is the total number of miles of the road. It is true that the valuation ultimately reached was $55,000 a mile instead of $65,092, but this is said to have been an arbitrary reduction, and did not reduce the amount sufficiently, if we were to assume that this paper furnished the basis of the tax.

But no such assumption can be made. The Board considered the paper no doubt, but so they considered a capitalization of what they understood to be the net earnings

in the State, and the value of the tangible property apart from its outside connections. Exactly what weighed in each mind, and even what elements they purported to consider in their debates, is little more than a guess. There is testimony which cannot be neglected that, in this very matter of valuing the road by stocks and bonds, etc., the Board, from another table furnished by the company, valued it at over $540,000,000, and did deduct from that sum the stocks and bonds owned by the road, and valued by the Board at over $140,000,000, prior to the subsequent reduction to $55,000 a mile. It is said that this valuation is absurd and due to misunderstanding of the table. But we have nothing to do with complaints of that nature, or with anything less than fraud, or a clear adoption of a fundamentally wrong principle. The Board, in its formal action properly before us, did vote to request of the Union Pacific, among other things, "an itemized statement of the several bonds and stocks owned by said Company, for which they are legally entitled to receive credit on offset, in estimating the value of said Company for assessment." This recognizes the true principle, almost in terms. Beyond a speculation from figures, and a few statements improperly elicited from one or two members of the Board, there is nothing to contradict the inference from this vote except the above alleged statement of the treasurer, met by his and others' testimony that a proper deduction was made.

Evidently the Board believed that the figures furnished by the roads were too favorable and were intended to keep the taxes as low as they could be kept. Evidently also the members or some of them used their own judgment and their own knowledge, of which they could give no very good account on cross-examination, but which they had a right to use, if honest, however inarticulate the premises. It would seem from the testimony, as might have been expected, that the valuations fixed were a compromise and were believed by some members to be too low, as they seemed to one too high. It is argued to us, on expert testimony, that they are too low.

The result of the evidence manifests the fruitlessness of inquiries, which, as we have said, should not have been gone into at all. We have adverted more particularly to the case of the Union Pacific, but that of the Chicago, Burlington and Quincy Railroad stands on similar and no stronger ground, and what we have said disposes of the main contention of both. If the court below had found the other way it would have been difficult to say that the finding was sustained by competent evidence. There certainly is no sufficient reason for disturbing the finding as it stands.

A point less pressed than the foregoing was that the other property in the State was greatly undervalued and that thus the rule of uniformity prescribed by the constitution of Nebraska had been violated. Upon this matter it is enough to say that no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the Board of Equalization and Assessment, and to refer to *Coulter* v. *Louisville & Nashville Railroad Co.*, 196 U. S. 599.

Again it was said that, inasmuch as the present Union Pacific Company, a Utah corporation, acquired its road by foreclosure of a mortgage from a preceding corporation chartered by the United States, it appeared from admissions in testimony or followed from the Board's taxing the Nebraska portion of the road as a going concern that it was taxing United States franchises, contrary to the decision in *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1. This also, although stated, was not pressed. It does not appear that the present Union Pacific has any United States franchises that were taxed, and, if it has any that were considered in estimating the value of the road, it does not appear that they were considered improperly under the later decisions of this court. *Central Pacific R. R. Co.* v. *California*, 162 U. S. 91; *People* v. *Central Pacific R. R. Co.*, 105 California, 576, 590. See *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185. And the same thing may be said as to the interstate business of the

roads. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; *S. C.*, 166 U. S. 185. The Board had a right to tax all the property in the State and to tax it at its value as an organic portion of a larger whole. *Western Union Telegraph Co.* v. *Gottlieb*, 190 U. S. 412.

Various arguments were addressed to us upon matters of detail which would afford no ground for interference by the court, and which we do not think it necessary to state at length. Among them is the suggestion of arbitrariness at different points, such as the distribution of the total value set upon the Chicago, Burlington and Quincy system, among the different roads making it up. But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge. *State Railroad Tax cases*, 92 U. S. 575; *State* v. *Savage*, 65 Nebraska, 714, 768, 769; *In re Cruger*, 84 N. Y. 619, 621; *San José Gas Co.* v. *January*, 57 California, 614, 616. Within its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end. We are of opinion that whatever grounds for uneasiness may be perceived nothing has been proved so clearly and palpably as it should be proved, on the principle laid down in *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754, in order to warrant these appeals to the extraordinary jurisdiction of the Circuit Court.

Decrees affirmed.

MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA dissent.

DOYLE *v.* LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED.

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

No. 155. Argued January 11, 1907.—Decided February 25, 1907.

An order punishing for contempt made in the progress of the case, when not in the nature of an order in a criminal proceeding is an interlocutory order and to be reviewed only upon appeal from a final decree in the case.

The Circuit Court of Appeals has no jurisdiction upon writ of error sued out by defendants from an order of the Circuit Court adjudging them guilty of contempt in disobeying an order for production of books and papers, and also adjudging that they produce same and pay costs within a specified period or that in default thereof they pay a fine and be committed.

Bessette v. *W. B. Conkey Co.*, 194 U. S. 324, followed and *Matter of Christensen Engineering Co.*, 194 U. S. 458, distinguished.

Questions certified in 134 Fed. Rep. 125, answered.

THE facts, which involve the jurisdiction of the Circuit Court of appeals to review orders in contempt, are stated in the opinion.

Mr. E. Clinton Rhoads, with whom *Mr. John C. Bell* was on the brief, for Doyle:

There is no magic about a contempt case which forbids Appellate Courts to rectify a wrong done by the lower court. The only difficulty has been to find the proper machinery.

When the United States Circuit Courts of Appeal were established, their appellate jurisdiction included criminal cases. As this proceeding in contempt is a criminal proceeding, that court has jurisdiction. *Bessette* v. *Conkey*, 194 U. S. 324; *Christensen case*, 194 U. S. 458; *Alexander case*, 201 U. S. 117.

All cases of contempt are primarily criminal in their nature, and are separable from any litigation to which they are incident.

All cases of disobedience to the orders of a court, which are properly contempts, are criminal cases, and that the term civil contempt is properly applicable to cases which are in substance executions, such as attachments for the payment of money, fines which are merely compensatory in their nature, orders for the payment of alimony, and orders for the payment of sums found to be due in probate courts and in similar cases. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392; *Passmore Williamson case*, 26 Pa. St. 9.

The appellate court has authority to relieve from a void order. *In re Chetwood*, 165 U. S. 443; *Commonwealth* v. *Perkins*, 124 Pa. St. 36.

A writ of error is the proper method of review. *Bullock* v. *West*, 129 Fed. Rep. 105; *Bessette* v. *Conkey*, 194 U. S. 324.

Mr. Thomas Raeburn White for London Guarantee and Accident Company:

The Circuit Courts of Appeals have jurisdiction to review the action of Circuit or District Courts by writ of error or appeal only after final judgment in the court below. Act of March 3, 1891, ch. 526, 26 Stat. L. 828.

A final judgment or decree is one which leaves nothing further to be done in the case except execution of the judgment of the court. *Grant* v. *Phœnix Life Ins. Co.*, 106 U. S. 429; *St. Louis &c. Ry. Co.* v. *Southern Express Co.*, 108 U. S. 24; *Robinson* v. *Belt*, 56 Fed. Rep. 328.

It matters not that the question sought to be reviewed involves an attack upon the jurisdiction of the lower court, an appeal or writ of error cannot be considered until after the final disposition of the case. *McLish* v. *Roff*, 141 U. S. 661.

Contempt proceedings are of two classes, vindicatory and remedial.

In *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 234, this court fully recognized the distinction between civil and criminal cases. *In re Nevitt*, 54 C. C. A., 622; *S. C.*, 117 Fed. Rep. 448.

Vindicatory contempt proceedings are the only ones reviewable on writ of error by the Circuit Courts of Appeals prior to the termination of the main suit. *Bessette* v. *Conkey, Co.*, 194 U. S. 324; *Matter of Christensen Co.*, 194 U. S. 458; *Alexander* v. *United States*, 201 U. S. 117; *Bullock Co.* v. *Westinghouse Co.*, 129 Fed. Rep. 105.

Remedial contempt proceedings are a part of the main suit, and can be reviewed on writ of error or appeal only after final judgment in the court below. *Hayes* v. *Fischer*, 102 U. S. 121; *Bessette* v. *Conkey*, 194 U. S. 324; *Heinze* v. *Butte & Boston Co.*, 194 U. S. 632; *King* v. *Wooten*, 54 Fed. Rep. 612; *In re Nevitt*, 117 Fed. Rep. 448.

Mr. Justice Day delivered the opinion of the court.

This case is here upon certificate from the Circuit Court of Appeals for the Third Circuit. From the facts stated it appears that William J. Doyle and James G. Doak were adjudged guilty of contempt of court in the Circuit Court of the United States for the Eastern District of Pennsylvania. After the bringing of the action, upon the petition of the London Guarantee and Accident Company, Limited, the plaintiff below, the court made the following order:

"And now, June 25th, 1904, the court orders the defendants to produce, within twenty days, in the office of the clerk of said court, their pay sheets, time books, cash books and all other books of original entry which contain information as to the amount of compensation paid to employees of themselves or of their subcontractors or of any other persons contemplated in the contracts upon which suit is brought in this case during the period of said contracts as set forth in the petition filed."

After that order was made the certificate recites:

"Thereafter the plaintiff presented to the court a petition

alleging disobedience by the defendants of the above order and praying that an attachment issue against them for contempt of court. Thereupon the court granted a rule upon the defendants to show cause why an attachment should not issue against them for contempt of court by reason of their violation and disobedience of said order. To this rule the defendants filed an answer under oath, denying intentional non-compliance with said order and stating that they were not able to produce all the books and papers called for, because upon a thorough search the absent ones could not be found and averring their belief that they were accidentally lost or by mistake were destroyed at a time when alterations were made in their office and a removal of its contents to another place occurred. Subsequently, to wit, on January 3d, 1905, upon the hearing of the rule, the court gave and entered judgment that the 'defendants are guilty of contempt in disobeying the order referred to,' and further adjudged as follows:

"If the defendants produce in the office of the clerk of the Circuit Court on or before January 15th, 1905, the ledger of 1902–4, the pay rolls or time sheets from March to May 28, 1903, and the cash book from May 28 to December 1, 1902, or if they produce the cash book alone, they are ordered to pay no more than the costs accruing upon this motion, including the stenographer's charges, on or before January 20, or in default of such payment to suffer imprisonment in the jail of this county for the period of sixty days. If the foregoing books and papers are not produced on or before January 15, the defendants are ordered to pay a fine of two hundred and fifty dollars, and also the cost accruing upon this motion, including the stenographer's charges, on or before January 20, or in default of such payment to suffer imprisonment in the jail of this county for the period of sixty days."

A writ of error was allowed to the Circuit Court of Appeals. Upon the facts stated the following question was certified to this court:

"Has the Circuit Court of Appeals jurisdiction upon the writ of error sued out by the defendants to review the above recited judgment of January 5th, 1905, adjudging that the defendants are guilty of contempt of court in disobeying the above recited order of court of June 25th, 1904, and imposing upon the defendants a fine of $250.00 on the specified conditions and terms?"

Cases involving the right to review orders of the Federal courts in matters of contempt have been so recently before this court that an extended discussion of the principles involved is unnecessary. *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324; *Matter of Christensen Eng. Co.*, 194 U. S. 458; *Alexander* v. *United States*, 201 U. S. 117.

In *Bessette* v. *W. B. Conkey Co., supra*, a question was certified here from the Circuit Court of Appeals of the Seventh Circuit, involving the jurisdiction of that court to review an order in a contempt proceeding finding the petitioner guilty of contempt for violation of an order of the Circuit Court, and imposing a fine. In that case the subject underwent a full examination and the previous cases in this court were cited and reviewed. As a result of those decisions we deem it settled that an order punishing for contempt made in the progress of the case, when not in the nature of an order in a criminal proceeding, is regarded as interlocutory and to be reviewed only upon appeal from a final decree in the case. *Matter of Christensen Eng. Co.*, 194 U. S. 458. In *Bessette* v. *Conkey Co., supra*, it was pointed out that this court had no jurisdiction to review judgments in contempt proceedings criminal in their nature under the power to punish for contempt defined by Congress, 1 Stat. 83, and limited by the act of March 2, 1831. 4 Stat. 497, Rev. Stat. sec. 725.

The right to review a judgment in a contempt proceeding in the Circuit Court of Appeals was derived from the Circuit Court of Appeals act, section 6, of which Mr. Justice Brewer, speaking for the court in the *Bessette case*, said:

"So when, by section 6 of the Court of Appeals act, the

Circuit Courts of Appeals are given jurisdiction to review the 'final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,' and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory ground can it be held that the final decisions in contempt cases in the Circuit or District Courts are not subject to review by the Circuit Courts of Appeals? Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of the opinion that there is a right of review in the Circuit Court of Appeals."

And again, in the same case, it is said:

"As, therefore, the ground upon which a review by this court of a final decision in contempt cases was denied no longer exists, the decisions themselves ceased to have controlling authority, and whether the Circuit Courts of Appeals have authority to review proceedings in contempt in the District and Circuit Courts depends upon the question whether such proceedings are criminal cases."

It therefore appears that the only right of review given to the Circuit Court of Appeals in contempt proceedings is derived from the act giving that court such right in criminal cases. In the course of the discussion in the *Bessette case* it is said that proceedings for contempt may be divided into those which have for their purpose the vindication of the authority and dignity of the court, and those seeking to punish parties guilty of a disregard of such orders as are remedial in their character, and intended to enforce the rights of private parties, to compel obedience to orders and decrees made to enforce their rights and to give them a remedy to which the court deems them entitled. And it is said that the one class is

criminal and punitive in its nature, in which the Government and the public are interested, and the other civil, remedial and coercive in its character, in which those chiefly concerned are individuals whose private rights and remedies are undertaken to be protected and enforced. From the discussion in that case it clearly appears that proceedings which are criminal in their nature and intended for the vindication of public justice, rather than the coercion of the opposite party to do some act for the benefit of another party to the action, are the only ones reviewable in the Circuit Court of Appeals under its power to take jurisdiction of and determine criminal cases.

In that case, and in the cases generally, where the right of review has been recognized, the party prosecuted has been other than one directly interested in the suit and brought into it for the purpose of punishing a known violation of an order in defiance of the authority and power of the court. In such case the proceeding is entirely independent and its prosecution does not delay the conduct of the action between the parties to final decree. True it is that in some cases, as in the *Christensen case*, 194 U. S. 458, the punishment for contempt which has been held reviewable is for a past act of a party in violation of an order made for the benefit of the other party. In that case one-half of the fine imposed went to the United States, and was not intended for the enforcement of an order in favor of a party, but rather for the vindication of the authority of the court, and punishment for an act done in violation of the court's order, and it was held that such judgment was in a criminal proceeding and reviewable in the Circuit Court of Appeals. In the present case, while it is true that the fine imposed is not made payable to the opposite party, compliance with the order relieves from payment, and, in that event, there is no final judgment of either fine or imprisonment.

"It may not be always easy," said the learned justice, speaking for the court in the *Conkey case*, "to classify a particular act as belonging to either one of these two classes

[speaking of vindicatory and remedial proceedings]; it may partake of the character of both. A significant and general determinative feature is that the act is by one party to the suit, in disregard of a specific order made in behalf of the other; yet sometimes disobedience may be of such a character and in such a manner as to indicate a contempt of the court other than a disregard of the rights of the adverse party."

In view of the principles which we deem settled by the adjudications referred to, the question decisive of the present case, therefore, is: Was the judgment rendered in the contempt proceeding criminal in its nature, and having for its object the vindication of the authority of the court, or was it one in the nature of a proceeding to enforce an order seeking the protection of the rights of the party to the suit for whose benefit it was made?

The certificate does not fully indicate the character of the action in which the order was made; yet sufficient appears from which it is to be inferred that the action before the court was one in which it was necessary for the protection of the plaintiff that an inspection of the books and papers of the defendant be had. The defendants were required to produce in the office of the clerk the time books, cash books, etc., containing information as to the amount of compensation paid to the employés of themselves or subcontractors, or to any other persons contemplated in the contracts upon which suit was brought. The court deemed it proper, in view of certain contracts between the parties, that these books and papers be opened for inspection for the benefit of the plaintiff. And, after hearing the parties, it was adjudged that if they produce the books they should be liable only for the costs of the proceedings or in default of payment suffer imprisonment for a period of sixty days. And if the books and papers were not produced on or before January 15 a fine of $250 and costs was imposed or in default of payment thereof imprisonment in the county jail for the period of sixty days. We think it is apparent from a perusal of this order, in the light of the state-

ment of facts under which it was made, that its object and purpose was to obtain information for the benefit of the plaintiff in the suit to which the court found it entitled, and that the punishment of fine and imprisonment, which was in the alternative, was imposed, not for the vindication of the dignity or authority of the court, in the interests of the public, but in order to secure, for the benefit of the plaintiff, a compliance with the order of the court as to the production of the books. The case clearly falls within the class of contempt proceedings which are not criminal in their nature, and are not reviewable before final decree. The proceeding is against a party, the compliance with the order avoids the punishment, and there is nothing in the nature of a criminal suit or judgment imposed for public purposes upon a defendant in a criminal proceeding.

It may be true, as said in argument, that unless the party complies with the order he may be subjected to fine or imprisonment, and if the order cannot be reviewed until after final decree it may come too late to be of any benefit to the party aggrieved. But the power to punish for contempt is inherent in the authority of courts, and is necessary to the administration of justice and part of the inconvenience to which a citizen is subject in a community governed by law regulated by orderly judicial procedure. As has been said, while the party may suffer imprisonment, "he carries the keys of the prison in his own pocket," *In re Nevitt*, 117 Fed. Rep. 448, and by compliance with the order of the court may deliver himself from punishment.

But whatever the hardship, the question now before the court is as to the authority of the Circuit Court of Appeals to review judgments in contempt proceedings. In the Circuit Court of Appeals act, as construed by this court, the jurisdiction of the Circuit Court of Appeals is extended to the right to review judgments entered before final decree in the action out of which the contempt proceedings arose where the order is final and in a proceeding of a criminal nature,

Beyond this, the jurisdiction of the court has not been carried, and, in our opinion, no right of review exists in such a case as is shown in the certificate before us, in advance of a final decree in the case in which the order was made.

It is urged by counsel for plaintiff in error that the only authority of the Circuit Court to make an order for the production of books and papers in a common law action is under section 724 of the Revised Statutes of the United States, providing for the production of papers after issue joined. But the question certified is not as to the lack of authority of the Circuit Court to make the order for want of jurisdiction, a question which might arise upon a *habeas corpus* proceeding, but concerns the right of the Circuit Court of Appeals to review an order made in the Circuit Court, undertaking to punish for contempt for violation of an order made in other than a proceeding of a criminal character. The Circuit Court of Appeals Act of 1891 gives no right to review other than final judgments in the District and Circuit Courts, except in injunction orders, as provided in § 7 of the act. *McLish* v. *Roff*, 141 U. S. 661, 668.

For the reasons stated we think the Circuit Court of Appeals has no jurisdiction to review the judgment set forth in the certificate, and the question certified will be answered in the negative.

Mr. Justice Peckham took no part in the decision of this case.

COMPUTING SCALE COMPANY OF AMERICA *v.* AUTOMATIC SCALE COMPANY.

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

No. 175. Argued January 25, 1907.—Decided February 25, 1907.

While a combination of old elements producing a new and useful result may be patentable, if the combination is merely the assembling of old elements producing no new and useful result, invention is not shown.

Where an inventor seeking a broad claim which is rejected, acquiesces in the rejection and substitutes therefor a narrower claim, he cannot afterwards insist that the claim allowed shall be construed to cover that which was previously rejected; and in this case the contention of the inventor is not sustained that after striking out his broad claim he presented and obtained another claim equally broad and is entitled to relief thereunder.

Complainant's patent for improvements in computing scales is of the narrow character of invention which does not, as a pioneer patent would, entitle the patentee to any considerable range of equivalents; but it must be limited to the means shown by the inventor, and in this case the defendant's construction does not amount to an infringement.

THE facts are stated in the opinion of the court.

Mr. Mellville Church, with whom *Mr. Joseph B. Church* was on the brief, for appellant.

Mr. H. P. Doolittle, with whom *Mr. E. Hilton Jackson* was on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the

District dismissing the bill of the Computing Scale Company of America, appellant, against the Automatic Scale Company, based upon the alleged infringement of letters patent No. 700,919, granted to the complainant as the assignee of the inventor, Austin B. Hayden, said letters bearing date May 27, 1902, for an improvement in computing scales.

The bill contained a prayer for an injunction and accounting. The answer denied the patentability of the alleged invention of the plaintiff, set up the alleged anticipating invention of one Christopher, and denied infringement.

The alleged improvement of Hayden is shown in the accompanying illustrations taken from the patent.

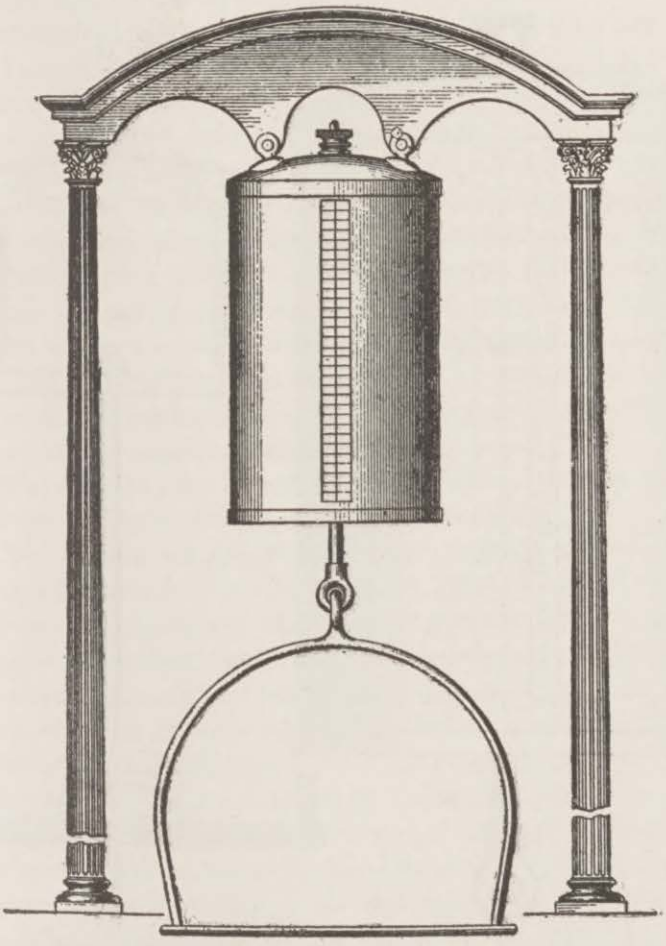
To understand these drawings they are to be viewed in the light of the description of the mechanism given by complainant's expert, which has the approval of the expert of the defendant, and was accepted as correct in the Court of Appeals. This description, somewhat abridged, is as follows:

"The two principal parts of the mechanism are as follows: 1st, a vertically arranged, non-rotating frame which comprises and includes a vertical cylindrical casing which encloses, conceals and protects the major portion of the operating portions of the scale, and upon which are marked the price indications which indicate the price per pound at which the articles weighed are to be sold. As clearly shown in the drawings this external casing or frame is provided with a vertically disposed sight opening through which the coacting mechanism is observable, and along one vertical edge of this sight opening are arranged the numerals indicating the price per pound.

"The second of these principal parts is a second cylinder located within the casing, this cylinder constituting a computing cylinder or chart drum upon which are placed indications indicating the weight in pounds of the article weighed, and also having other indications indicating the price of an article weighed corresponding to the weight and to the price per pound. This chart drum or computing cylinder extends vertically within the external casing and it is arranged to rotate

on a vertical axis within the external casing. This casing is appropriately connected to the spring balancing mechanism and to the scale pan so that when the spring balancing mechan-

Fig. 1.



ism moves up and down on the placing or removing of a load on the scale pan, the chart drum will be rotated in one direction or the other within the external casing or frame.

"As shown in Fig. 2, the weight and value indicating figures are placed in horizontal rows on the external surface or periphery of the rotatable chart drum of the computing cylinder, the weight indications being shown in a horizontal row at the

Fig. 2.

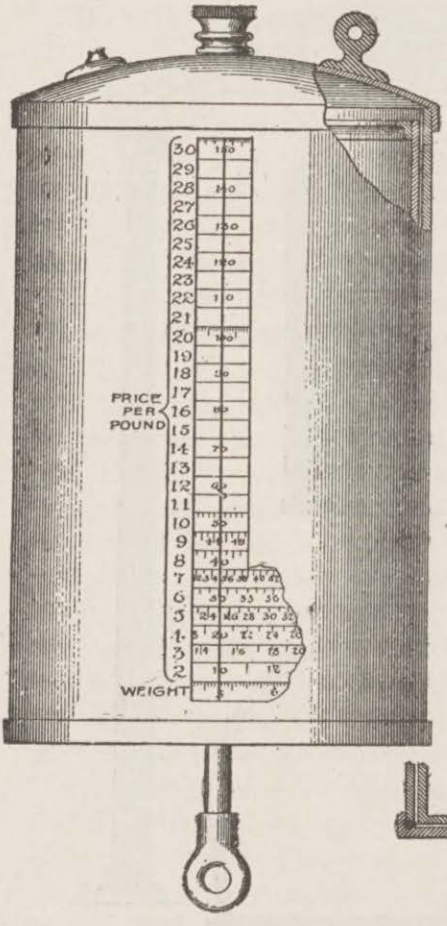
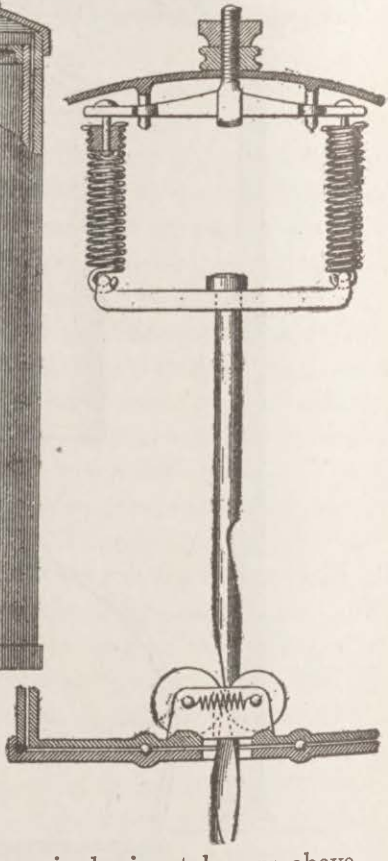


Fig. 3.



bottom, and the price indications in horizontal rows above, there being as many of these horizontal rows of price indicating figures as there are 'price per pound' indicating figures on the fixed external casing. These value indicating figures on

the chart drum are computed at different rates corresponding to the 'price per pound' figures on the external casing. As indicated in Figure 2 of the drawings of the patent, there is supposed to be a weight on the scale pan of five pounds, this weight being indicated on the weight scale, and it will be seen that in such instance the various value indications on the chart drum opposite the 'price per pound' indications on the fixed casing, are in each illustrated instance, five times as great as the corresponding 'price per pound' indications. The drawings illustrate only a portion of the indicating figures on the chart drum, but it will be understood in practice that this drum will be entirely covered on its external surface with figures corresponding to the weights multiplied by the figures indicating 'price per pound' on the non-rotatable external casing. Accordingly whenever the interior chart drum is turned a distance corresponding to the load placed on the scale pan, the value of the load can be read at once opposite the figures on the external casing which correspond to the price per pound of the article weighed.

"The various price indications on the chart drum are visible through the sight opening in the external casing.

"The mechanism whereby the chart drum is rotated a distance corresponding to the weight of the load placed on the scale pan is as follows: The balancing mechanism is a spring balance comprising two springs which are suspended from a suitable portion of the non-rotating frame of the scale. To the lower ends of these springs is attached a cross-bar in the middle of which depends a rod, this cross-bar and rod constituting the runner of the scale. (See Fig. 3.) The scale pan is suspended from the lower end of this rod as illustrated in Figure 1. When a load is placed on the scale pan the vertical runner moves vertically downward distending the spring to an extent proportional to the weight of the load. In order to indicate the weight this vertical movement of the spring-supported runner is converted or translated into a rotary movement of the chart drum by suitable intervening mechan-

ism. This intervening mechanism consists of a spiral groove of high pitch on the vertical rod and two rollers journaled in suitable bearings carried by the rotable chart drum, the bearings of one of these rollers being spring pressed so that the rollers are held in yielding contact with the spiral groove on the rod. Consequently as the rod moves vertically the spiral groove thereof causes the chart drum or computing cylinder to rotate on its vertical axis.

"Accordingly, the mechanism is such that the vertical movement of the runner is translated into rotary movement of the chart drum and the chart drum is rotated to an extent proportional to the vertical movement of the runner."

In his application, Hayden, having set forth a description of his invention, disclaiming any intention to limit his invention by the precise description of the specifications, except as appears from his claims, sets forth eleven (11) claims, which he alleges as new and desires to secure by letters patent.

The claims alleged to be infringed in this case are numbered 1, 2, 6, 7 and 8. Numbers 1 and 2 are practically alike, except that in No. 2 the spring-supported, load-bearing and cylinder-revolving rod is described as non-rotatably suspended. Claims 6, 7 and 8 have some trifling variations, but, in the view we take of this case, they are sufficiently embodied in claim No. 6. We shall, therefore, consider, in arriving at a decision, claims 1 and 6. They are as follows:

"1. In a spring-balance computing-scale, the combination of a suitably-supported vertical non-rotatable casing provided with a price-index, a vertical rotatable computing-cylinder journaled in said casing, provided with cost computations, a spring-supported load-bearing and cylinder-revolving rod suspended from said casing and connecting means between rod and computing-cylinder, whereby, by longitudinal movement of the rod rotary movement is imparted to said cylinder, substantially as and for the purpose set forth.

"6. In a spring-balance, the combination of a non-rotating frame providing an external casing and having means for sup-

porting it from above, weighing-springs secured at their upper ends to rigid parts of said frame, a vertically-movable runner which is suspended from the lower ends of said springs and is provided with depending means to support the load, a chart-drum rotatably mounted within said casing on a vertical axis and having external horizontal rows of value-indicating figures computed at different rates, said casing having a sight-opening through which portions of said value-indicating rows may be seen, and corresponding rate-indicating figures on the outer face of said frame adjacent to the value-indicating rows on the chart drum, and mechanism for translating the vertical movement of the runner into the rotary movements of the chart-drum."

Hayden did not assume to be a pioneer in this field of invention, but he claims to have made an improvement in computing scales of the spring-balance type, and states his object to be specially to increase the computing capacity of scales of that type.

An examination of the record discloses that computing scales have been the subject of prior inventions and were well known at the time of Hayden's application. It is true that the scales disclosed in the prior art were generally those having a horizontal axis, case and cylinder, although it was not new to arrange a scale vertically.

If we are to read the claims as broadly as is contended for and omit for the present vertical construction shown by Hayden, we shall find in the patent of Phinney, No. 106,869, of August 30, 1870, a computing scale having the general elements of a non-rotatable casing, provided with a price-index and rotatable cylinder journaled in the case and having computations thereon, a suspended, spring-supported, load-bearing, and cylinder-revolving rod, and connecting means between the rod and computing cylinder, to impart rotary motion to the inner cylinder. This is perhaps more emphatically true in the invention of Smith, patent No. 545,619, of September 3, 1895.

In the patent of Babcock, No. 421,805, February 18, 1890, a vertical construction is shown. It is true that Babcock's invention was not automatic in its operation, and required the intervention of the operator to complete the required process, but it serves to show that the idea of vertical construction was not new when Hayden entered the field. Taking the state of the art at that time, it is evident that there is little room to claim a broad construction of Hayden's improvement. It is well settled by numerous decisions of this court that while a combination of old elements producing a new and useful result will be patentable, yet where the combination is merely the assembling of old elements producing no new and useful result, invention is not shown. *Specialty Manufacturing Co.* v. *Fenton Metallic Manufacturing Co.*, 174 U. S. 492–498, and previous decisions of this court there cited.

It is true that many valuable inventions seem simple when accomplished, and yet are entitled to protection. The books abound in cases showing inventions involving only small departure from former means, yet making the difference between a defective mechanism and a practical method of accomplishing results. In such cases a decision in favor of invention as distinguished from mere mechanical improvement has not infrequently resulted, in view of the fact that the device has made the difference between an impracticable machine and a useful improvement displacing others theretofore occupying the field. *Krementz* v. *The S. Cottle Co.*, 148 U. S. 556; *Consolidated Brake Shoe Co.* v. *Detroit Steel & Spring Co.*, 47 Fed. Rep. 894; *Star Brass Works* v. *General Electric Co.*, 111 Fed. Rep. 398.

In the present case it nowhere appears in the testimony, nor is it claimed in the specifications of Hayden's patent, that the prior mechanisms of horizontal construction were impracticable or inefficient. There is no suggestion that Hayden's invention has been the last step between an inoperative machine and one practically operative and useful. There is no showing that it has been generally accepted in the trade and displaced

the former machines used for the same purpose. Without resort to the record in the Patent Office, we think it is plain that the invention is but a small advance upon others already in use.

Broadly considered, the elements of Hayden's invention were in the horizontal machines, and the idea of vertical construction was old. Considering this invention in the light of what occurred in the Patent Office in connection with the other considerations already referred to, and the state of the art at the time, we think Hayden's invention can only be sustained to a limited extent.

Before taking up the record as disclosed in the file wrapper and contents we may premise that it is perfectly well settled in this court by frequent decisions that where an inventor, seeking a broad claim which is rejected, in which rejection he acquiesces, substitutes therefor a narrower claim, he cannot be heard to insist that the construction of the claim allowed shall cover that which has been previously rejected. *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.*, 150 U. S. 38–40, and cases there cited.

A late statement of the rule, and one as favorable to the inventor as the previous cases would admit, is found in *Hubbell* v. *United States*, 179 U. S. 77, 80, as follows:

"An examination of the history of the appellant's claim, as disclosed in the file wrapper and contents, shows that, in order to get his patent, he was compelled to accept one with a narrower claim than that contained in his original application; and it is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim, and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. *Leggett* v. *Avery*, 101 U. S. 256; *Shepard* v. *Carrigan*, 116 U. S. 593; *Knapp* v. *Morss*, 150 U. S. 221, 227.

"It is quite true that where the differences between the claim as made and as allowed consist of the mere changes of

expression, having substantially the same meaning, such changes, made to meet the views of the examiners, ought not to be permitted to defeat a meritorious claimant. While not allowed to revive a rejected claim by a broad construction of the claim allowed, yet the patentee is entitled to a fair construction of the terms of his claim as actually granted."

Looking to the record in the Patent Office, we find that claim 1, as originally presented, read as follows:

"1. In a spring-balance computing scale, the combination of a suitably supported vertical non-rotatable casing provided with a price-index, a vertical rotatable computing-cylinder journaled in said casing, provided with cost computations, a spring-supported load-pan supported from said casing, and means connected with said pan and cylinder for rotating the cylinder as the pan is lowered under pressure, substantially as and for the purpose set forth."

The examiner rejected this claim upon the patent of Smith, No. 545,616, price scales, and in view of the patent of Turnbull, No. 378,382, spring scales, saying, "It would not involve invention to arrange upon Turnbull's scales a vertical stationary casing having within it a revolvable computing chart, the axis being connected with the index-carrying shaft P shown in the Turnbull patent."

To this the applicant, through his attorneys, replied:

"The first portion of the examiner's letter is not understood, as there are no modifications referred to in lines 6 to 26 of page 3. A reconsideration of the claims is requested, for the reason that it is believed that the references cited do not anticipate any of the claims. In both of the references cited a rack-bar extending transversely of the centre of rotation of the computing chart serves, by means of engagement with a pinion at the axis of the computing chart, to rotate the latter. This is entirely different from applicant's construction, and it is not seen that the references are pertinent to the issue. Certainly, the references neither singly nor taken together anticipate the structure set forth in the claims, and there can hardly be

any question that the construction which applicant shows is a substantial improvement in the art. It is hoped that all the claims may be allowed."

But the examiner again rejected claims 1, 8 and 9 upon the references of record, and held that it would not involve invention to arrange upon the vertical shaft of Turnbull's scale a computing chart and enclosing case having the characteristics of Smith's scale. To this the attorneys for applicant answered:

"These claims are cancelled, not because considered unallowable, but because it is not desired to prosecute an appeal, in view of the fact that the allowed claims appear to cover the invention as it would be constructed in practice. The cancellation is made, therefore, without prejudice to the claims which remain."

The sixth claim was allowed upon the suggestion of the examiner, as follows:

"In a spring balance, the combination of a non-rotating frame providing an external casing and having means for supporting it from above, weighing springs secured at their upper ends to rigid parts of said frame, a vertically movable runner which is suspended from the lower ends of said springs and is provided with means to support the load, a chart drum rotatably mounted within said casing on a vertical axis and having external horizontal rows of value indicating figures computed at different rates, said casing having a sight opening through which portions of said value indicating rows may be seen, and corresponding rate indicating figures on the outer face of said frame adjacent to the value indicating rows on the chart drum and mechanism for translating the vertical movement of the runner into the rotary movements of the chart drum."

It was afterwards stated by the examiner:

"Upon consideration of claim 6 preparatory to the declaration of interference it is found that the claim does not clearly and patentably distinguish from the scale shown in the patent to Herr, No. 651,801, June 12, 1900, Price Scales, and it is

therefore necessary to reject the claim. It is believed, however, that the claim may be rendered allowable by inserting *depending* before 'means' in line 6," and, accordingly, the word "depending" was inserted in the claim, so as to make it in its present form. How this added anything to the patentability of the mechanism described it is difficult to perceive, in view of the presence of "depending means to support the load" in all scales of this class.

The general rule, as stated, as to the effect of a patentee striking out a broad claim and accepting a narrow one, is conceded by the learned counsel for appellant, but it is contended that if an inventor presents a broad claim and strikes it out and then presents and obtains an equally broad claim, he loses no right by such action, and may justly claim his allowed claim to be a broad one and have relief accordingly. But we think the action of the department in this case cannot be thus eliminated. Claim 1, as presented, had contained the words "a spring-supported load-pan supported from said casing, and means connected with said pan and cylinder for rotating the cylinder as the pan is lowered under pressure," and as allowed there was inserted "a spring-supported load-bearing and cylinder-revolving rod suspended from said casing, and connecting means between rod and computing cylinder, whereby longitudinal movement of the rod rotary movement is imparted to said cylinder, substantially as and for the purpose set forth." This limitation to specific means is certainly a narrowing of the claim.

It was accepted, as the patentee said, "in view of the fact that the allowed claims appear to cover the invention as it would be constructed in practice."

We cannot think it was the intention of the department, after requiring the insertion of "a spring-supported load-bearing and cylinder-revolving rod" and "connecting means between rod and computing cylinder" to secure the rotary movement of the inner cylinder as a means of saving claim 1, to then permit the claim to be granted broadly in allowing other

claims. And we believe it would be a more reasonable construction of the letter of the applicant to say that he recognized that his invention, "as constructed in practice," must have read into it to sustain the claim, the specific means shown for translating the vertical movement of the runner into the rotary movement of the chart-drum, rather than as saving a right to construe a claim broadly as including in one claim what had just been refused in another.

It is to be noted that Hayden, in his specifications, says:

"The spiral rod passing through the lower ends of the casing and serving, by means of its connection with the two cylinders, to rotate the computing cylinder is regarded as the essence of this feature of the invention, however, regardless of the precise details of connection between cylinders and rod."

In view of the action of the Patent Office in this case and the acquiescence of the applicant, considered also in view of the state of the art, in our opinion it is necessary to have this novel element of the invention read into them in order to save the claims of Hayden's patent.

Conceding that this spiral rod and its connections with the cylinder in the manner and for the purposes stated is a novel feature in the combination and entitled to protection, it is of that narrow character of invention which does not entitle the patentee to any considerable range of equivalents, but must be practically limited to the means shown by the inventor. The distinction between pioneer inventions permitting a wide range of equivalents and those inventions of a narrow character, which are limited to the construction shown, has been frequently emphasized in the decisions of this court. *Cimiotti Unhairing Co.* v. *American Fur Refining Co.*, 198 U. S. 399, 406, and cases therein cited.

Thus limiting the invention, we do not think the construction of the defendant amounts to an infringement. Its mechanism, by means of which the downward movement of the load accomplishes the rotary movement of the cylinder, consists

of a bar which has a rod extended upward and carrying a rack which meshes with a pinion on a shaft journaled in bearings on a cross bar of the frame of the machine. On this shaft is a gear meshing with the pinion, secured to an upright shaft journaled in bearings in the frame, and projecting above it so as to receive a light frame composed of cross arms and a circular rim to which the chart drum is secured. The downward movement of the load-supporting hook causes the rack to move in the same direction, rotating the horizontal shaft by means of the pinion, and this movement is communicated by means of the gearing to the upright shaft carrying the chart drum. The cylinder-revolving rod with its connections, which, as we have seen, was made an essential element to accomplish invention in Hayden's device, is not found. The complainant's expert is of opinion that it is shown in the hook at the bottom of defendant's scale for holding the load pan. We cannot agree to this conclusion; the hook is not the cylinder-revolving spiral rod and does not accomplish its function.

The Court of Appeals held the sixth claim void. We are of opinion that it cannot be allowed for the broad claim "mechanism for translating the vertical movement of the runner into the rotary movement of the chart drum," but must be limited to Hayden's suspended rod with its spiral, engaging with the rollers, or similar devices on the cylinder, practically in the manner and for the purposes shown by him. If the claim be thus limited, for the reasons we have already stated, the mechanism of the defendant does not infringe.

We find no error in the decree rendered by the Court of Appeals, and it is

Affirmed.

DUKE, MAYOR OF THE CITY OF GUTHRIE, *v.* TURNER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 178. Argued January 24, 25, 1907.—Decided February 25, 1907.

While the authorities are in conflict as to whether a statute of limitations, without express words to that effect governs a proceeding in mandamus, such a proceeding is not, under the Oklahoma Code, a civil action and, therefore, not within the terms of the three year statute of limitations applicable to contracts created by statute; and in that Territory, if the relator is otherwise entitled to the writ, it should not be denied unless he has so slept upon his rights for such an unreasonable time that the delay has been prejudicial to the defendant or the rights of other interested parties.

THE facts are stated in the opinion.

Mr. A. H. Huston, with whom *Mr. L. E. Payson, Mr. William R. Benham* and *Mr. James Hepburn* were on the brief, for plaintiff in error:

The rule, that in an action upon a municipal warrant, the statute of limitations does not commence to run against such action until there is money in the treasury to pay the same, does not apply to an action in mandamus to compel a tax levy to pay such warrant. *Turner* v. *Guthrie,* 13 Oklahoma, 26; *Barnes* v. *Glide,* 117 California, 1; *Prescott* v. *Gonser,* 34 Iowa, 175.

Even in an ordinary suit for a money judgment on a municipal warrant against the municipality issuing it such action accrues when the moneys are in the treasury to pay it, or when sufficient time has elapsed for the collection of the same, and that the statute of limitations begins to run from the time of such accrual.

In this case, it should be determined as a matter of law, that sufficient time had elapsed to collect the money at the time the first suit in mandamus was brought.

Those cases which hold that the statute of limitations does

not run against an action upon a municipal warrant, until there is money in the treasury with which to pay the same, are all based upon the proposition that the cause of action does not accrue until the money is in the treasury, or sufficient time has elapsed to collect it, but none of them go to the extent of holding that where the cause of action has accrued, and a first action actually been brought, and afterwards dismissed, and a new action commenced after the period designated in the statute had expired, that the statute does not run against such new action. It will be observed of course that the reversal, and subsequent dismissal of the first action in mandamus was not for the reason nor upon the ground that the action had not yet accrued, nor because it was prematurely brought. *Martin* v. *Gray, Receiver,* 5 Oklahoma, 188; *King Iron Bridge Co.* v. *Otoe,* 124 U. S. 459; *Lincoln County* v. *Luning,* 133 U. S. 529.

This action is upon a liability created by statute, and is barred by the three years' limitation statute. *Turner* v. *Guthrie,* 13 Oklahoma, 26; *Ryus* v. *Gruble,* 31 Kansas, 767.

This action not having been commenced within one year from the time the first action was dismissed, it is barred.

All the warrants having a fixed time of payment, an action accrued on each, when payment was not made at the fixed time. *Nash* v. *El Dorado,* 24 Fed. Rep. 252; *Barden* v. *Duluth,* 28 Fed. Rep. 14.

Mr. Frank Dale, with whom *Mr. A. G. C. Bierer* was on the brief, for defendants in error:

In a case of this character, where the only question involved is that of the statute of limitations, this court accepts the construction placed upon such statute by the Supreme Court of the Territory, even if the higher court might be of the opinion that probably the construction given by the courts of the Territory was not such as would be placed upon such statute if the matter were before this court to be determined independently of such construction. It is the

settled rule of this court to follow the construction placed upon local statutes of limitations by the various state and territorial courts. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329–339.

The rule of the Supreme Court of Oklahoma in dealing specifically with the question under consideration in *Commissioners of Greer County* v. *Clark*, 12 Oklahoma, 197, is that a municipality which issues evidence of indebtedness of the character in question cannot invoke the statute of limitations without first pleading and proving that it has provided a fund for the payment of the indebtedness. *Robertson* v. *Blaine County*, 90 Fed. Rep. 63; *Lincoln County* v. *Luning*, 133 U. S. 532. And see as applying this principle to the right of municipal corporations to plead the statute of limitations, *Grayson* v. *Latham*, 84 Alabama, 546; *Apache County* v. *Barth*, 6 Arizona, 13; *Justices* v. *Orr*, 12 Georgia, 137.

Mr. Justice Day delivered the opinion of the court.

The original action was a proceeding in mandamus commenced in the District Court of Logan County, Oklahoma Territory, July 23, 1903, by Turner and Kirkwood against the mayor and councilmen of the city of Guthrie. The petitioners obtained a writ of mandamus in the District Court to compel the city officials, for the payment of certain warrants, to levy a tax upon the property of persons residing in the territory covered by various former "provisional governments," and known as Guthrie proper, East Guthrie, West Guthrie and Capitol Hill, now included in the city of Guthrie.

These warrants were issued in pursuance of a special act of the territorial legislature, approved December 25, 1890. 1 Wil. Rev. Stat. 260, 261. This act was the subject of consideration in this court, its validity was sustained and its history will be found in *Guthrie National Bank* v. *Guthrie*, 173 U. S. 528. The act is set forth in the margin of the report of that case at p. 530. The warrants sued upon are 17 in

number, all bearing the date of July 1, 1893, and maturing in various years, from July 1, 1894, to July 1, 1898, inclusive. These warrants are in the following form:

"Warrant of the City of Guthrie, Oklahoma Territory.

"$554.15. No. 6.

Treasurer of the City of Guthrie:

"One year after date pay to the order of Harper S. Cunningham, receiver National Bank, Guthrie, the sum of five hundred and fifty-four and 15.100 dollars with interest thereon at the rate of six per centum per annum, from June 3, 1891, from any moneys which shall arise from special levy for the payment of city warrants issued under the provisions of chapter No. 14, of the Statutes of Oklahoma, providing for the payment of indebtedness of the provisional governments of the cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, upon the subdivision of Guthrie known as East Guthrie.

"By the order of the City Council, July 1, 1893.

"A. M. McElhinney, *Mayor.*

"Attest: E. G. Milliken, *City Clerk.*"

The Supreme Court of the Territory preceded its opinion with the following statement:

"This is the third time that these warrants have been brought before this court. W. H. Gray, receiver of the National Bank of Guthrie, and successor to Harper S. Cunningham, on the 7th day of September, 1895, commenced a mandamus proceeding, identical with this, in the District Court of Logan County, for the purpose of compelling the then mayor and councilmen of the city of Guthrie to levy a tax to provide a fund for the payment of certain warrants; the district court allowed the writ, but the case was appealed to this court, and on the twelfth day of February, 1897, was reversed. [5 Oklahoma, 188.] After this reversal nothing whatever was done by the holder of these warrants in the way of taking any steps towards collecting them for more than four years

thereafter. But after the decision in the case of the *Guthrie National Bank* v. *The City of Guthrie* was rendered in the Supreme Court of the United States, [173 U. S. 528,] the holders of these warrants who had lain dormant during these years made another move. The old case of *Gray* v. *Martin and Spencer*, after it had been reversed and remanded, had been dropped from the docket, and on the 28th day of June, 1901, Turner and Kirkwood filed their motion as the successors in interest of Gray, to have the case redocketed, and also filed on the same day an application to have the case revived in their names, as the successors in interest of Gray, and on the same day they filed their motion to dismiss said action, which motion was sustained, and the case dismissed. Shortly after the dismissal of the original mandamus case Turner and Kirkwood brought suit against the city of Guthrie upon these same warrants, wherein a judgment against the city for the amount of the warrants was prayed for; they failed in this suit in the District Court and appealed to the Supreme Court, where the judgment of the lower court was affirmed. [13 Oklahoma, 26.]

"On the twenty-third day of July, 1903, after the final decision in this court in the case of *Turner and Kirkwood* v. *The City of Guthrie*, this mandamus proceeding was commenced against the mayor and councilmen, the same being in all respects similar to and identical with the original mandamus proceeding brought by W. H. Gray, receiver, upon the same warrants in 1895. The return and answer to the alternative writ set forth the same defense as was alleged in the return to the proceedings brought by Gray, receiver, and also alleges the bar to the action of the statute of limitations. Trial was had before the court, wherein it was agreed that the allegations set forth in the fourth answer or return of the defendants to the alternative writ are true, and which show the facts substantially as above set forth. Thereupon the court rendered judgment for the plaintiffs below, and allowed a peremptory writ of mandamus against plaintiffs in error,

from which judgment and final order the plaintiffs in error appeal to this court."

The Supreme Court of the Territory affirmed the judgment of the District Court upon the ground that the statute of limitations, which is also the defense made in the case upon which the decision of the appeal to this court turns, did not begin to run in favor of the municipal corporation upon the obligation evidenced by the warrants, until the municipality had provided funds by which payment could be made.

The authorities are much in conflict as to whether a statute of limitations, without express words to that effect, governs a proceeding in mandamus as though it were an ordinary civil action. Some of the cases hold that the statute of limitations applies which would govern an ordinary action to enforce the same right.

Other cases hold that the statute of limitations does not apply as it would to ordinary civil actions, but the relator is only barred from relief where he has slept upon his rights an unreasonable time, particularly when the delay has been prejudicial to the rights of the respondent. The cases *pro* and *con* are collected in a note to section 30*b*, High, Extraordinary Legal Remedies, 3d ed.

The question is not a new one in this court; it was under consideration in *Chapman* v. *The County of Douglas*, 107 U. S. 348. That case was a bill in equity filed September 10, 1877, to compel the county of Douglas to surrender possession of two certain tracts of land to which the county had acquired title through deed made by Chapman, March 5, 1859, or in case the county elected to retain and hold the land that it be compelled to pay the reasonable price and value thereof to the complainant. The land had been conveyed for a "poor farm." The county made a payment on the land and gave its notes, secured by mortgage, payable in one, two, three and four years. Afterwards the Supreme Court of the State decided that by the purchase of lands for such a purpose a county could not be bound to pay the purchase money at any

specified time or to secure it by mortgage upon the land, but was limited to a payment in cash and to the levy of an annual tax to create a fund wherewith to pay the residue. The notes remaining unpaid, the bill was filed in equity for the purpose above stated. In considering the nature of the relief and the applicability of the statute of limitations Mr. Justice Matthews, speaking for the court (p. 355) said:

"And if in such cases a proceeding in mandamus should be considered more appropriate, and, perhaps, the only effective remedy, it also is not embraced in the statute of limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by mandamus must depend, in a great measure, on the character and circumstances of the particular case. *Chinn* v. *Trustees*, 32 Ohio St. 236; Moses on Mandamus, 190. There is no statute of limitations in Nebraska applicable to that proceeding."

It will be observed that the learned justice refers in the citation just given to *Chinn* v. *Trustees*, 32 Ohio St. 236, and Moses on Mandamus, 190. In that treatise the author gives his preference for the English rule, that the party should suffer no unreasonable delay in the opinion and discretion of the court, as more just and equitable than the rule countenanced by some of the American cases.

The case of *Chinn* v. *Trustees*, 32 Ohio St. 236, holds that under the Ohio code there is no strict limitation as to the time wherein a writ of mandamus may be obtained, and the case is directly in point, owing to the similarity of the codes of Ohio and Oklahoma.

The statute of limitations relied upon in the case at bar is the three years' limitation, contained in second paragraph, section 18, Oklahoma Code, 2 Wilson's Rev. Stats. 973, 975, as to statutory liabilities, and section 23, regulating the time

for the beginning of a new action to one year after reversal or failure of a former action. These sections in article 3, "Time of Commencing Civil Actions," are as follows:

"SEC. 18. Civil actions, other than the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years, an action upon any contract, agreement or promise in writing.

"Second. Within three years, an action upon a contract not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

* * * * * * * *

"SEC. 23. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

The limitation to three years, said to be applicable here, is upon an action created by statute other than forfeiture or penalty, but this language is in a section limiting *civil actions* other than for the recovery of real property, and the language used in section 23 has reference to actions of like character.

The proceeding in mandamus is regulated in article 33, Oklahoma Code, 2 Wilson Revised Statutes, 1130. That the proceeding is not regarded as a civil action is shown in section 694, Code, 2 Wilson, 1131, which provides that pleadings are to be construed and may be amended in the same manner "as pleadings in a civil action," and issues joined, tried, and the proceedings had, "in the same manner as in a civil action." The Oklahoma Code (§ 687) also declares that writs of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of the law.

In *Chinn* v. *Trustees*, *ub. sup.*, Judge Scott, delivering the opinion of the Ohio Supreme Court, said:

"The code of civil procedure limits the time within which an action can be brought 'upon a liability created by statute, other than a forfeiture or penalty' to six years. (Sec. 14.) This provision is found in title 2 of the code, the object of which is to define and prescribe 'the time of commencing civil actions.' The civil action of the code is a substitute for all such judicial proceedings as, prior thereto, were known, either as actions at law, or suits in equity. (Sec. 3.) By section 8, the limitations of this title are expressly confined to civil actions. But proceedings in mandamus were never regarded as an action at law, or a suit in equity, and are not therefore a civil action within the meaning of the code. Mandamus is an extraordinary or supplementary remedy, which cannot be resorted to if the party has any adequate, specific remedy. The code provides for and regulates this remedy, but does not recognize it as a civil action."

This language is no less applicable to the Oklahoma code. The proceeding in mandamus is not a civil action, and therefore not within the terms of the statute of limitations.

Following, then, the rule recognized and approved in *Chapman* v. *County of Douglas*, *supra*, the question is, should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested persons?

We perceive nothing in the record to warrant that conclusion. Gray, as receiver of the National Bank of Guthrie and successor of Cunningham, to whom the warrants were payable, on September 7, 1895, began a suit in mandamus in Logan County, Oklahoma. He prevailed in that court. The case was reversed on February 12, 1897, by the Supreme Court of the Territory, 5 Oklahoma, 188, and was remanded and refiled in the District Court, April 7, 1897.

The validity of the act was in controversy in the case of *Guthrie National Bank* v. *Guthrie*, and sustained in this court, April 3, 1899, 173 U. S. 528, reversing the Supreme Court of the Territory.

On the twenty-eighth day of June, 1901, Turner and Kirkwood, as the successors in interest to Gray, having purchased the warrants, as they allege, on January 5, 1901, filed their motion to dismiss the original action, which was sustained. They then (on June 28, 1901) brought suit against the city of Guthrie for judgment upon the warrants against the city, in which they failed in the District Court, and on appeal to the Supreme Court, that court holding that the remedy, if any, was by mandamus. 13 Oklahoma, 26. On the twenty-third day of July, 1903, this mandamus proceeding was begun.

These facts do not disclose any laches in asserting their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that the municipal corporation has been in anywise prejudiced by the delay. In some form legal warfare seems to have been waged for the collection of these warrants by various holders in different courts without beneficial results until the present action.

While we do not put our decision upon the same grounds as the Supreme Court of the Territory, we think its conclusion was right, and its judgment will be

Affirmed.

SMITHERS *v.* SMITH.

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

No. 138. Submitted December 21, 1906.—Decided February 25, 1907.

When the Circuit Court dismisses a case under the provisions of § 1 of the act of March 3, 1875, 18 Stat. 470, as amended by § 1 of the act of August 13, 1888, 25 Stat. 434, because not substantially involving the requisite amount in controversy to confer jurisdiction, the order of the court, in this case without a jury, is subject to review in this court in respect to the rulings of law and findings of fact upon the evidence.

Whatever plaintiff's motive in bringing his suit in the Federal court rather than in the state court may be he has the right to act upon it.

Where a plaintiff in good faith asserts a claim against several defendants that acting together they have taken land from him of over $2,000 in value and inflicted upon him damages of over $2,000, and requisite diverse citizenship exists, the Circuit Court has jurisdiction and the case does not fall within the dismissal provision of § 1 of the act of March 3, 1875, because it appears to the trial judge that each of the defendants claims that the part of plaintiffs' land which he has taken and the damages recoverable against him would amount in value to less than $2,000. A determination by the judge that the defendants did not act jointly is not a determination of a jurisdictional fact but of an essential element of the merits.

THE plaintiff in error, a citizen of New York, brought in the Circuit Court for the Northern District of Texas, a petition to try the title to 1,280 acres of land, against ten defendants, citizens either of Texas, Kentucky or Illinois. Six of the defendants were warrantors of the plaintiff's title, and questions arising as to them are not material here. The petition alleged that upon January 15, 1902, "the defendants Reagan, Smith, Greer and Deven unlawfully entered upon said premises and dispossessed plaintiff thereof, and have since that date unlawfully withheld from the plaintiff the possession thereof, to his damage $2,000.00;" that the plaintiff's title was derived by mesne conveyances from two patents of adjoining lots of land, known respectively as survey 27 and survey 91; that prior to plaintiff's acquisition of title the two surveys were circumscribed by a fence two miles long and one mile wide, making a single tract of land of those dimensions; that the value of the land was $5,000, and that the defendants have destroyed fences and other improvements and thereby damaged the plaintiff in the sum of $2,000; and prayed possession of the land, and damages.

The answer of Reagan alleged that he was the owner of part of the land described in the petition by a title separate and independent from the other defendants; that his land is enclosed by a fence and in his possession; that he disclaims title to the remainder of the land claimed; that the allegation in the petition that he entered upon any other than his own land was untrue, "and made with the intent to confer

upon this court jurisdiction over him;" that the value of the land which he entered, is in possession of and claims, is less than $800, and asked that the suit abate as to him.

Treating the foregoing answer as a plea in abatement, Reagan, without waiving it, further answered, disclaiming as to part of the land claimed in the petition and pleading the general issue as to the remainder.

The answer of Greer was substantially the same, except that the value of the land upon which he entered and was possessed of was alleged to be less than $600. Greer further answered, alleging the pendency in the courts of the State of an action "to try title to recover of S. A. Greer, a defendant in the case at bar, one T. Smith and others, the title and possession of the land described in the petition in the case at bar," and praying that the cause await the determination of the cause in the state court. The answer of Smith contained the same allegations with regard to the pendency of the action in the state court as that of Greer, disclaimed as to part of the land described in the petition and pleaded the general issue as to the remainder. Deven filed no answer.

More than a year after the last of the foregoing pleadings were filed the plaintiff filed what was entitled "First amended original petition." In it Lee, also a resident of Texas, was named as an additional defendant. The amendment seems to be substantially like the original petition, except that it alleged that "the defendants Reagan, Smith, Greer, Lee and Deven together unlawfully entered upon said premises and dispossessed plaintiff thereof," and that "all of said defendants have jointly taken possession of plaintiff's said land;" that the plaintiff has acquired title to land by the statute of limitations, and that the action is one to fix and determine the boundaries, which are uncertain, and that "the entire land is the subject matter of this controversy as between the plaintiff and each and all of said defendants."

Subsequently Lee answered, alleging that he was the owner of part of the land described in plaintiff's petition by a title

separate and independent from that of the other defendants, and with respect to that he pleads the general issue, and disclaims as to the remainder. The answer also alleged that the matter in controversy did not exceed the sum of $2,000, and that "the claim of plaintiff as set forth in his petition as to the value of said land, improvements, rents and damages, exceeding $2,000, has been fraudulently alleged with the intent and purpose to confer jurisdiction upon this honorable court, when in truth and in fact no such jurisdiction existed, because the matter in controversy is of less than $2,000 in value."

Subsequently Smith amended his answer and alleged that he was the owner and in possession of 443 acres of the land described in plaintiff's petition, which was of the value of $1,500, and disclaimed as to the remainder. He also alleged that the valuation placed by the plaintiff on the land, and the plaintiff's allegation that "he and S. A. Greer jointly took possession of said lands," was "fraudulently claimed and alleged for the intent and purpose of conferring jurisdiction upon this honorable court, when in truth and in fact no such jurisdiction existed, because the whole matter in controversy is and was of less value than $2,000." He further alleged that the controversy had been adjudicated in the state court. The pleas to the jurisdiction were, on motion of the defendants, tried by the judge, jury being waived, who found that "the pleas of each of the said defendants Reagan, Lee, Smith and Greer is fully proved and sustained, and that this court has no jurisdiction over the subject matter in dispute," and dismissed the action for want of jurisdiction. A writ of error was allowed "solely upon the question of jurisdiction," the judge certifying that no other question was tried, transmitted the record containing a bill of exceptions to this court.

The bill of exceptions shows that it was agreed that the plaintiff owned the two surveys, 91 and 27, containing 1,280 acres, of a value much exceeding $2,000; that Lee owned section 32, Reagan section 31, Smith section 28, and Greer

section 90, all of which were adjoining sections and surrounded three sides of the plaintiff's land. The dispute concerned the situation of the boundaries. As the defendants claimed the boundaries, they owned 1,014 acres of what the plaintiff claimed to be his land, which when he acquired it was enclosed by a fence in one parcel of 1,280 acres. Of the 1,014 acres taken from the land claimed by plaintiff, Lee claimed 96, Reagan 288, Smith 443 and Greer 187. The evidence which is reported in full in the bill of exceptions shows the following facts: In 1892, before any of the defendants appeared claiming title, the 1,280 acres claimed by the plaintiff were enclosed as one parcel by a substantial fence, and were known as the Pendleton pasture. Subsequently the plaintiff acquired title to the enclosed land. Smith pulled down part and Reagan another part of the Pendleton pasture fence, and Smith and Greer each pastured their cattle throughout the Pendleton pasture.

Mr. David T. Bomar and *Mr. Frank E. Dycus,* for plaintiff in error, submitted:

A joint trespass by the defendants upon the enclosed lands of the plaintiff authorized an action by the plaintiff to join all of the defendants in one suit. *Greer* v. *Mezes*, 24 How. 268, 663; *L. & N. Ry. Co.* v. *Smith* (C. C. A.), 128 Fed. Rep. 5; *McGuire* v. *Pensacola City*, 105 Fed. Rep. 679; 1 Pom. Eq. Jur., §§ 145, 273.

The right to fix and establish the boundaries of the entire 1,280 acres being the object of the suit, as to each and all of the defendants, the value of the entire tract is the matter in dispute. *L. & N. Ry. Co.* v. *Smith*, 128 Fed. Rep. 5; *Munsey* v. *Matfield* (Tex.), 40 S. W. Rep. 346.

A disclaimer by the defendants, or either of them, does not take away the jurisdiction of the court, which is fixed by the claim of the demandant.

Where the Circuit Court dismisses a case for lack of jurisdictional value, the evidence on which that conclusion is

reached must be shown of record to a legal certainty. The lack of jurisdiction must clearly appear. *Barry* v. *Edmunds*, 116 U. S. 553; *Wetmore* v. *Reimer*, 169 U. S. 115; *Waterworks* v. *Ryan*, 181 U. S. 409; *Gage* v. *Pumpelly*, 103 U. S. 164.

The Supreme Court will look into the facts, review the evidence and determine whether it supports the action of the Circuit Court in dismissing the case for lack of jurisdiction. *Wetmore* v. *Reimer*, 169 U. S. 115; *Steglider* v. *McGusten*, 198 U. S. 140.

The jurisdiction of the Circuit Court is fixed by the matter in dispute at the date of the decree rendered in that court. *Knapp* v. *Banks*, 2 How. 74, 184; *Keller* v. *Ashford*, 133 U. S. 670; *Mass. Benefit Ass'n* v. *Miles*, 137 U. S. 689, 835.

It is sufficient to give jurisdiction to the court, that it had jurisdiction at the time the decree was rendered, and it is immaterial how long before that time its jurisdiction had attached. *Washer* v. *Bullitt Co.*, 110 U. S. 558; *Pacific Ry. Co.* v. *Ketcham*, 101 U. S. 289; *First Nat'l Bank* v. *Bedford Tr. Co.*, 80 Fed. Rep. 572.

In the action of trespass to try title in Texas, the plaintiff may, by amendment, set up a new cause of action or a new title acquired by him after the suit was brought. The cause thereupon proceeds as a new suit based on such amendment. *Collins* v. *Ballew*, 72 Texas, 330; *Ballard* v. *Carmichael*, 83 Texas, 359; *Sinsheimer* v. *Kahn*, 24 S. W. Rep. 535; *Schmidt* v. *Huff*, 28 S. W. Rep. 1055.

The disclaimer by the defendants of lands found in their possession did not take away the jurisdiction of the court, provided said lands exceeded in value, with the damages and rents, the sum of $2,000. *Green* v. *Liter*, 8 Cranch, 229; *Galbreath* v. *Howard*, 32 S. W. Rep. 808; *Wooters* v. *Hall*, 67 Texas, 513; *Dykes* v. *Miller*, 24 Texas, 422; *Capt.* v. *Stubbs*, 68 Texas, 225; *Tate* v. *Wyatt*, 77 Texas, 412.

The jurisdiction of the court as between plaintiff and Smith and Greer is not to be determined by the value of the right of the present possession but by the value of the entire 720

acres of the land in controversy now in Smith's possession. *Black* v. *Jackson*, 177 U. S. 335.

Mr. Theodore Mack, *Mr. Sam. J. Hunter* and *Mr. Ray Hunter*, for defendants in error, submitted:

The presumption is that a cause is without the jurisdiction of the Circuit Court unless the contrary affirmatively appears. *Grace* v. *Ins. Co.*, 109 U. S. 278; *People* v. *Fordyce*, 119 U. S. 469; *Turner* v. *Bank*, 4 Dallas, 8; *Livingston* v. *Van Ingen*, 1 Paine, 45; Federal Cases No. 8420; *Nashville & St. L. Ry.* v. *Taylor*, 86 Fed. Rep. 168.

Distinct demands cannot be united in one suit by a plaintiff against several defendants in order to give the court jurisdiction. 1 Desty, 374; *Walter* v. *Northeastern Ry.*, 147 U. S. 370; *Fishback* v. *Western Union*, 161 U. S. 96; *Bank* v. *Cannon*, 164 U. S. 319; *Busy* v. *Smith*, 67 Fed. Rep. 13.

If several persons have a common undivided interest, although separable as between themselves, the amount of their joint interest is the test of the jurisdiction. But this is not true where the claims are in their nature separate. *Holt* v. *Bergevin*, 60 Fed. Rep. 1; *Walter* v. *Northeastern Ry. Co.*, 147 U. S. 370; *Putney* v. *Whitmire*, 66 Fed. Rep. 385.

Where shareholders are individually liable for the debts of a corporation, the claims of creditors against shareholders are several and cannot be joined to make up the required amount. 1 Desty, 375; *Auer* v. *Lombard*, 33 U. S. App. 438; *S. C.*, 72 Fed. Rep. 209.

In an action by the taxpayers to restrain the issue of municipal bonds, the amount of taxes which plaintiff would have to pay, and not the entire issue, would be the test of jurisdictional amount. 1 Desty, 375; *Colvin* v. *Jacksonville*, 158 U. S. 456.

An allegation of the amount of taxes to be collected in different counties cannot be made for the purpose of obtaining the jurisdictional amount of $2,000.00. 1 Desty, 376; *Fishback* v. *Western Union*, 161 U. S. 96; *Bank* v. *Cannon*, 164 U. S. 319.

When one sues for an amount which exceeds $2,000, but at the trial his own evidence shows that he actually claims less than $2,000, the court is without jurisdiction. 1 Desty, 377; *Cabot* v. *McMaster*, 61 Fed. Rep. 129; *United States* v. *Poe*, 61 Fed. Rep. 475; *Horst* v. *Merkely*, 59 Fed. Rep. 502; *Holden* v. *Utah*, 82 Fed. Rep. 209.

The court does not acquire jurisdiction where the amount claimed is not claimed in good faith. *Bank* v. *Bradley*, 36 U. S. App. 519; *S. C.*, 72 Fed. Rep. 67; *Am. Wringer Co.* v. *Ionia*, 76 Fed. Rep. 6.

All doubts as to jurisdiction must be resolved against the court's jurisdiction. *Railway Co.* v. *State Board of Assessors*, 132 Fed. Rep. 629; *McDaniel* v. *Taylor*, 123 Fed. Rep. 338.

When defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance. Tex. Rev. Stat. 5269.

Upon defendants filing disclaimer the court may render judgment for the land disclaimed. *Burk* v. *Mangham*, 37 S. W. Rep. 459.

Matter in dispute is something upon which the court must hear evidence. 18 U. S. Stat. 472, part 3; *Stilwell* v. *Williamston*, 80 Fed. Rep. 69; *Bouman* v. *Ry. Co.*, 115 U. S. 611; *Cabot* v. *McMaster*, 61 Fed. Rep. 129.

As to disclaimer leaving court without jurisdiction, see *Cooper* v. *Preston*, 105 Fed. Rep. 403; *Stemmler* v. *McNeal*, 102 Fed. Rep. 660; *Herring* v. *Swayne*, 84 Texas, 525; *Wooters* v. *Hall*, 67 Texas, 515.

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

The plaintiff in error brought an action in the Circuit Court for the recovery of certain land and damages for the detention thereof, basing jurisdiction upon a diversity of citizenship, which was undisputed. In such case it is essential to the jurisdiction of the Circuit Court that "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of

two thousand dollars." Act of March 3, 1875; c. 137, § 1, 18 Stat. 470. Amended act of August 13, 1888; c. 866, § 1, 25 Stat. 434. The action was dismissed by the authority given by section 5 of the act of March 3, 1875, in which it is provided that "if in any suit commenced in a Circuit Court . . . it shall appear to the said Circuit Court, at any time after such suit has been brought . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to such suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable . . . under this act," the court shall dismiss the suit. The propriety of the dismissal is brought here for review by virtue of section 5 of the act of March 3, 1891, and is the only question for decision.

The plaintiff was the owner in fee simple of a quadrangular lot of land two miles long and one mile wide, containing 1,280 acres, enclosed by a fence, and known as the Pendleton pasture. Its value largely exceeded two thousand dollars. He sought to recover possession of this land and damages from the defendants Reagan, Smith, Greer, Deven and Lee, who, as he claimed, had disseized him of the land, and were unlawfully holding possession. In ascertaining the precise nature of the plaintiff's claim we take into account not only the original petition, but that pleading entitled "First amended original petition," although it is urged that it does not appear that the amendment was allowed by the court. It is not clear that the amendment adds anything, material to the question presented here, to the original petition, but, however that may be, as it is certified to be a part of the record and was answered by one of the defendants, we assume that it was properly allowed, and was not a mere casual intruder among the papers in the case. The plaintiff alleged in substance in the original and more specifically in the amended petition that the defendants had jointly entered upon, taken and held possession of his land, which was of the value of $5,000, and

inflicted damages of $2,000 upon him by the unlawful entry and possession, and sought to recover of all the defendants the whole parcel of land and all the damages claimed. Thus the plaintiff set forth a case within the jurisdiction of the court. Giving to the defendants' answers the broadest possible effect, they each, for the purpose of disputing the jurisdiction of the court, denied that they had jointly entered upon plaintiff's land, and, each disclaiming as to the remainder, alleged that, under a title separate and independent from the other defendants, he had entered upon and held possession of only a certain part of the plaintiff's land, which together with the damages inflicted by the entry and possession was of much less value than $2,000. The answers further alleged that the allegations of the value of the land, the extent of the damages and the joint action of the defendants in entering, taking and holding possession were fraudulently made by the plaintiff with the intent and purpose of conferring jurisdiction upon the court, when in truth no such jurisdiction existed, because the matter in controversy was in reality less than the value of $2,000. Upon the motion of the defendants the judge, without a jury, passed upon the question of jurisdiction, and, after hearing evidence, found that the pleas of the defendants as to the jurisdiction were "fully proved and sustained," and that the court has no jurisdiction over the subject matter in dispute, and dismissed the suit.

The order of the court is subject to review in this court in respect of the rulings of law and findings of fact upon the evidence. *Wetmore* v. *Rymer*, 169 U. S. 115.

The absence of any opinion in the court below, and of any finding of fact except by reference to the several answers of the defendants, which are said to be "fully proved and sustained," and of any more specific recital in the judgment than that the suit was dismissed for want of jurisdiction, renders it somewhat difficult to understand the facts and reasons which led to the dismissal. But upon an examination of the whole record it seems clear that the court found:

(1) That the defendants did not jointly take and hold the plaintiff's land;

(2) That each defendant, acting independently of the others, took and held only a part of plaintiff's land, and that each part thus taken and held by each defendant was of less value than $2,000; and

(3) That the plaintiff in his petition had fraudulently stated the value of his land, the extent of his damages and the joint character of defendant's action in entering and taking possession of his land, and had done this for the purpose of conferring jurisdiction upon the court.

If the last finding of fact was warranted by the evidence there is no need of going further, because such a state of facts would demand a dismissal of the action. Ordinarily the plaintiff's claim with respect to the value of the property taken from him or the amount of damages incurred by him through the defendants' wrongful act measures for jurisdictional purposes the value of the matter in controversy, *Smith* v. *Greenhow*, 109 U. S. 669; *Barry* v. *Edmunds*, 116 U. S. 550; *Scott* v. *Donald*, 165 U. S. 58; *Wiley* v. *Sinkler*, 179 U. S. 58; unless, upon inspection of the plaintiff's declaration, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount. *Lee* v. *Watson*, 1 Wall. 337; *Schacker* v. *Hartford Fire Ins. Co.*, 93 U. S. 241; *Vance* v. *Vandercook Company*, 170 U. S. 468; *North American Company* v. *Morrison*, 178 U. S. 262. The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except where upon the face of his own pleadings it is not legally possible for him to recover the jurisdictional amount, controls even where the declarations show that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount. *Schunk* v. *Moline Co.*, 147 U. S. 500. In the last case the plaintiff's petition prayed judgment on several promissory notes, of which some, amounting to $530, were due, and others, amounting to $1,664, were not due, the jurisdictional amount then,

as now, being $2,000. In holding that the court had jurisdiction of the claim this court, by Mr. Justice Brewer, said:

"Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2,500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the Circuit Court would have jurisdiction? There would be presented a claim to recover the $2,500; and whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court."

Nevertheless, however stringent and far reaching the rule may be that it is the plaintiff's statement of his case which governs in determining the jurisdiction, it does not exclude the power of the court to protect itself against fraud. This was pointed out in *Smith* v. *Greenhow*, 109 U. S. 669, where it was said that, if the court found as a fact that the damages were laid in the declaration colorably and beyond a reasonable expectation of recovery for the purpose of creating jurisdiction, there would be authority for dismissing the case, and, following this statement of the law, it was held that where the judge of the Circuit Court, upon sufficient evidence, found that the damages had been claimed and magnified fraudulently beyond the jurisdictional amount, the action should be dismissed. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540. It follows, therefore, as has been said, that if the third finding of the judge in the court below was warranted, his action in dismissing the case should be affirmed. But after an examination of the evidence we are of the opinion

that nothing in it warranted any such finding. It appeared clearly that the Pendleton pasture, which the plaintiff sought to recover against all the defendants, was of a value much in excess of the jurisdictional amount. There was not a word of evidence reflecting upon the plaintiff's good faith in bringing the action, in joining the defendants, or in framing his petition. He doubtless preferred to try his controversy in the Federal courts, and whatever the motive of his preference may have been, he had the right to act upon it. *Blair* v. *Chicago*, 201 U. S. 400; *Chicago* v. *Mills*, decided February 4, this term, *ante*, p. 321. Therefore the validity of the order of dismissal must be considered, after an elimination of the finding that the plaintiff's claim was fraudulently made.

The plaintiff's claim, which we now assume to have been made in good faith, was that the defendants, acting together, took and held from him land of the value of $5,000, and at the same time inflicted damages upon him of $2,000. Upon any possible theory of law this claim states the plaintiff's side of a controversy, which is unquestionably within the jurisdiction of the Circuit Court. When it is duly put in issue by the defendants' pleadings the record upon its face discloses a controversy between citizens of different States, in which "the matter in dispute exceeds two thousand dollars in value," and, therefore, one which is within the exact words of the act conferring jurisdiction upon that court. It is legally possible for the plaintiff to recover the full amount of all the land and the full amount of the damages claimed. We know of no case that holds that in such a situation the judge of the Circuit Court is authorized to interpose and try a sufficient part of the controversy between the parties to satisfy himself that the plaintiff ought to recover less than the jurisdictional amount, and to conclude, therefore, that the real controversy between the parties is concerning a subject of less than the jurisdictional value, and we think that by sound principle he is forbidden to do so. In exercising the authority to dismiss the action conferred by the act of 1875

the judge may proceed upon motion of the parties or upon his own motion, and, if he chooses, without trial by jury. *Williams* v. *Nottawa*, 104 U. S. 209; *Wetmore* v. *Rymer*, *ub. sup.* Such an authority obviously is not unlimited, and its limits ought to be ascertained and observed, lest under the guise of determining jurisdiction the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury. For it must not be forgotten that where in good faith one has brought into court a cause of action, which, as stated by him, is clearly within its jurisdiction, he has the right to try its merits in the manner provided by the Constitution and law, and can not be compelled to submit to a trial of another kind. This was clearly stated by Mr. Justice Matthews in *Barry* v. *Edmunds*, 116 U. S. at page 565, who said: "In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award." In applying these general principles for the purpose of ascertaining the limits of the authority to dismiss summarily for lack of jurisdiction the circumstance that in this case a jury was waived by the parties is without significance, because if the judge had authority to adopt this summary method he could dispense with the jury, whether the parties agreed to it or not.

The error into which the judge in the court below has fallen is shown by an analysis of his findings. He did not find that the land which the plaintiff claimed to recover was not of a value in excess of $2,000, but that parts of that land, which each defendant claimed that the plaintiff ought only to recover against him, were each of less than the value of $2,000. As the plaintiff alleged and the defendants denied that the defendants jointly took and held his whole lot of land, the judge, on the conceded value of the plaintiff's land, in order to have arrived at the conclusion that the case should be dismissed,

must have found that the defendants had not jointly taken and held the whole of the plaintiff's land. In doing this we think he exceeded his authority under the statute, and in determining the jurisdiction, in effect, decided the controversy between the parties upon the merits. In deciding that the defendants had not acted jointly, as the plaintiff alleged and the defendants denied, he determined not a jurisdictional fact, but an essential element of the merits of the dispute upon which the parties were at issue.

An assumption which underlay the action of the court below in dismissing the case evidently was that if the defendants, as they asserted in their pleadings, had, each, acting by virtue of a separate and independent title, taken and held a part only of the plaintiff's land, each part being less than the jurisdictional amount, although the whole was of more than the jurisdictional amount, there was no controversy within the jurisdiction of the Circuit Court. The correctness of this assumption of law has been argued before us by the parties. We do not deem it necessary to decide that question. There is certainly respectable authority which tends to show that in such a case the plaintiff, being the owner of a single lot of land, may maintain one action against all the defendants and that the measure of jurisdiction is the value of the plaintiff's land, and not the value of the part held by each defendant. The appropriate rule, however, to be applied to the facts of this case can be better determined in a trial on the merits, where instructions on their varied aspects may be given to the jury, subject to the review provided by law.

Because the Circuit Court erred in dismissing the case for want of jurisdiction, its action must be reversed.

The judgment of the court below is therefore reversed and the cause remanded to that court with directions to take such further proceedings therein as the law requires and in conformity with this opinion.

Mr. Justice Brewer dissents.

CUNNINGHAM *v.* SPRINGER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 146. Argued January 10, 1907.—Decided February 25, 1907.

The excepting party should make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appellate court in disturbing the verdict.

Where defendants deny liability for services rendered by plaintiff on the ground that the amount was fixed by contract and paid, and the jury after instructions to find only for plaintiff in case there was no contract and the value of services exceeded the amount paid, find a verdict for defendant, all expert testimony as to the value of plaintiff's services based on the assumption that there was no contract, becomes immaterial; and as, in view of the verdict, adverse rulings in regard to its admission were not prejudicial to the plaintiff, even if error, they become immaterial and do not afford grounds for reversal.

Where plaintiff did not object below to instructions of the judge limiting expert evidence, he cannot claim on appeal that it was admissible for a broader purpose.

While §§ 2992, 3022 of the Statutes of New Mexico provide that all instructions to the jury must be in writing and that the jury may take the instructions with them, this court will not presume in the absence of the record affirmatively disclosing such a fact that the jury did not take with it the written instructions as finally corrected by the court.

A judge is not bound to charge the jury in the exact words proposed to him by counsel, and there is no error if he instructs the jury correctly and in substance covers the relevant rules of law proposed by counsel.

THE plaintiffs brought an action in the District Court in the Territory of New Mexico, in which they sought to recover $75,000 as the reasonable value of the services of the plaintiff Jones, as an attorney at law, rendered to the defendants at their request. For answer the defendants pleaded a general denial and payment. The jury returned a verdict for the defendants. The plaintiffs alleged exceptions to certain rulings of the judge who presided at the trial, which were overruled by the Supreme Court of the Territory, and are here

upon writ of error to that court. The exceptions are stated in the opinion.

Mr. Neill B. Field, for plaintiff in error:

Where there is a dispute as to the terms of an alleged contract, evidence of the value of the subject-matter of the contract is admissible as tending to show whether such a contract was or was not probably entered into. *Barney* v. *Fuller*, 30 N. E. Rep. 1008; *Flagg* v. *Reilly et al.*, 48 N. Y. Supp. 544; *Whitney Co.* v. *Stevenson*, 45 N. Y. Supp. 552; *Walker* v. *Johnson*, 46 N. Y. Supp. 864; *Allison* v. *Horning*, 22 Ohio St. 146; *Swain* v. *Cheney*, 41 N. H. 232; *Roberts* v. *Roberts*, 91 Iowa, 231; *Paddleford et al.* v. *Cook*, 74 Iowa, 433; *Johnson* v. *Harder et al.*, 45 Iowa, 677; *Kidder* v. *Smith*, 34 Vermont, 291; *Bradbury* v. *Dwight*, 44 Massachusetts, 31; *Baxter* v. *Wales*, 12 Massachusetts, 365; *Leland* v. *Stone*, 10 Massachusetts, 459.

The contract price and the value of property or services may be so variant that the mere disparity will raise a presumption of fraud, and while mere inadequacy of price is not ordinarily sufficient to defeat the enforcement of contracts at law if their existence be clearly established, yet a glaring inadequacy of price affords strong presumptive evidence that the contract if oral was never entered into, and if written was obtained by circumvention and fraud. *Hume* v. *United States*, 132 U. S. 414, 415.

Paragraph 13 of the charge of the court was clearly erroneous.

The plaintiffs in error sought to recover as upon a *quantum meruit* the reasonable value of the services of Jones; the defendants in error by their answer allege that they had, prior to the institution of the suit, paid Jones for those services. They did not plead the special five hundred dollar contract, as perhaps in strictness they ought to have done, but they sought to show by evidence in support of their plea of payment, that there was such a contract. Proof of the payment of five hundred dollars, without proof of the special contract relied on, would not maintain the plea of payment. The whole defense

of payment rested upon the existence of the contract testified to by the witness Springer. This instruction, however, put upon plaintiffs in error the burden of proving that there was no such contract.

While as to every other issue than that of payment, the burden of proof was on plaintiff; it was, however, the defendants in error who relied upon the special contract, and evidence of the existence of the special contract would not have been admissible under a general denial. *Register Printing Co.* v. *Willis*, 57 Minnesota, 95; *Lautenschlager* v. *Hunter*, 22 Minnesota, 268.

The attempted modification of paragraph 13 was not in writing, and this error was neither invited nor waived.

The statutes of the Territory require that all instructions shall be in writing. Laws of New Mexico, secs. 2992, 2994, 2995, 2996, 2997, 2998, 3002, 2685. The instruction asked with reference to the preponderance of the evidence should have been given.

This instruction appears to have been peculiarly applicable to this case as it was presented to the jury. *Thorwegan* v. *King*, 111 U. S. 554; *Tryon* v. *Pingree*, 112 Michigan, 338; *Deserant* v. *Cerrillos &c. Co.*, 178 U. S. 409; *Durant Min. Co.* v. *Percy &c. Co.*, 93 Fed. Rep. 166.

Mr. Charles A. Spiess, with whom *Mr. Thomas B. Catron*, *Mr. Aldis B. Browne* and *Mr. Alexander Britton*, were on the brief, for defendants in error:

That a hypothetical question is not required to embrace all of the facts proven or elements which may be considered upon the particular subject under investigation has been many times expressly ruled by the courts of the United States. *Turnbull* v. *Richardson*, 69 Michigan, 413; *Denver & Rio Grande Ry.* v. *Roller*, 100 Fed. Rep. 738; *Brooks* v. *City*, 87 N. W. Rep. 682; *Cole* v. *Fall Brook Co.*, 159 N. Y. 59; *S. C.*, 53 N. E. Rep. 670; *Stearns* v. *Field*, 90 N. Y. 640; *Horn* v. *Steamboat Co.*, 48 N. Y. Supp. 348.

The plaintiffs desired a direction to the jury, as to their duty in the event it was found that there was a modification of the original contract. The court by its eighth instruction discharged its full duty in that regard. *Continental Improvement Co.* v. *Stead*, 95 U. S. 165; *Boyce* v. *California Stage Co.*, 25 California, 960; *Birmingham Fire Ins. Co.* v. *Pulveri*, 126 Illinois, 329; *White* v. *Gregory*, 126 Indiana, 95; *Larsh* v. *Des Moines*, 74 Iowa, 512; *Missouri Pacific R. R. Co.* v. *Cassity*, 44 Kansas, 207; *Naples* v. *Raymond*, 72 Maine, 213; *Kersner* v. *Kersham*, 36 Maryland, 334; *Champlain* v. *Detroit Stamping Co.*, 68 Michigan, 238; *Norwood* v. *Sommerville*, 159 Massachusetts, 105; *Law* v. *Grimes Dry Goods Co.*, 38 Nebraska, 215; *Ayers* v. *Watson*, 137 U. S. 584.

The complaint in this case alleges that the defendants employed the plaintiff Jones to render services for them, and agreed to pay the said Jones the reasonable value of his services, and that the reasonable value of such services is $75,000.

The answer of the defendants as to that allegation was a general denial. Under the ordinary rules, there can be no question upon whom the burden of proving his case rests, if the pleadings in the case are to control that question.

Under the general issue, or a general denial, the plaintiff has the burden of proving his claim; and in case the defendant denies merely, or answers so as not to admit, the plaintiff has the burden throughout the trial as to every point of the case. *Selma &c. Ry. Co.* v. *United States*, 139 U. S. 560; *Heineman* v. *Hurd*, 62 N. Y. 456; *Murphy* v. *Harris*, 77 California, 104.

The general rule is that the one who makes a claim which is denied has the burden of establishing the claim. *McEvoy* v. *Swayze*, 34 Nebraska, 315.

And in fixing the burden of proof a pleading or evidence that amounts to a denial has the effect of a denial although cast in the form of an assertion. *Union Nat'l Bank* v. *Baldenwick*, 45 Illinois, 375; *Burnham* v. *Noyes*, 125 Massachusetts, 85; *Berringer* v. *Lake, S. I. Co.*, 41 Michigan, 305; *Eastman* v. *Gould*, 63 N. H. 89.

Courts have, in determining the question upon what side the burden of proof rests, invented various tests.

One common test to determine upon which party lies the burden is to ask which would be entitled to a verdict if no evidence were offered on either side.

Applying these various tests, it follows that a defendant who simply denies should never have the burden of proof. *Turner* v. *Wells*, 64 N. J. Law, 269; *Scars* v. *Daly*, 73 Pac. Rep. 5; *Benton* v. *Burbank*, 54 N. H. 583.

And if the evidence or pleading amounts to a denial, although either may take the form of an allegation, the rule is the same. *Cook* v. *Malone*, 128 Alabama, 662; *East* v. *Crow*, 70 Illinois, 91; *Denver Fire Brick Co.* v. *Platt*, 11 Colorado, 509; *Coffin* v. *President &c.*, 136 N. Y. 655; *Perley* v. *Perley*, 144 Massachusetts, 104.

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

The plaintiff Jones was engaged as an attorney at law by the defendants, in an action of ejectment to recover certain lands from one of the defendants, in which the other defendant had an interest. Under his employment Jones rendered services in the preparation and trial of the case in the District and Supreme Courts of the Territory of New Mexico and in the Supreme Court of the United States. The plaintiffs brought this action to recover the reasonable value of Jones' services. The defendants, admitting the employment and the services, contended that they were rendered under a special contract, whereby Jones agreed to accept five hundred dollars in full payment for the entire litigation, and that payment was made in conformity with the agreement. The plaintiffs, admitting that a payment of five hundred dollars was made to and accepted by Jones, contended that it was made and accepted in pursuance of an agreement to accept that sum as full payment for the service to be rendered in the first trial of the case in

the District and Supreme Courts of the Territory, and did not cover the services in this court, or in the subsequent proceedings in the courts of the Territory, for which they claimed the sum of seventy-five thousand dollars as a reasonable compensation. The parties introduced evidence in support of their respective contentions. The jury returned a verdict for the defendants. Exceptions to the rulings and instructions of the court are presented here for consideration.

Both parties offered testimony of witnesses, who qualified as experts, as to the value of Jones' services, and their estimates ranged from two thousand to one hundred and twenty-five thousand dollars. Three witnesses called by the defendants on this branch of the case, after testifying to their qualifications and their knowledge of the course of the litigation in which Jones was employed, gave their opinion of the value of Jones' services on the assumption that his fee was not fixed by contract. No objection was made to the testimony at the time it was given, but it appearing upon cross-examination that each witness assumed in his own mind some value of the land in dispute in the litigation in which Jones was employed, counsel for the plaintiff, without asking what that value was, in the case of each witness at the conclusion of his testimony, moved to strike it out, because it was based upon an assumption of the value of the land in controversy in the original case, which was not disclosed to the jury and not based upon the evidence in the case on trial. To the refusal of the court to strike out the testimony the plaintiff excepted.

These three exceptions do not materially differ, and may, therefore, be considered together. They illustrate the importance of a strict application of the principle that the excepting party should make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appellate court in disturbing the verdict. The witnesses were testifying in chief in response to hypothetical questions which do not appear in the record. The plaintiff had the right to the fullest cross-examination for the purpose of determining their competency

and affecting the weight of their testimony. If there was in the mind of either of the witnesses an assumption of fact not fairly presented by the evidence, or one which the jury might regard as improbable, it might have been elicited upon cross-examination, and the testimony then excluded or discredited accordingly. This course was not pursued by counsel, who preferred to obtain the benefit of an exception. To say the least, it is difficult to detect any error in the rulings. But assuming, without deciding or intimating, that there was error in the refusal of the court to strike out the testimony of these witnesses, the error was not prejudicial to the plaintiffs, because, by the course of the trial, this branch of the case became entirely immaterial. The defendants' contention was that Jones was employed under a contract by which he agreed to give his services throughout the entire litigation for $500, and that he had been paid in accordance with the terms of the contract. The plaintiffs' contention was that he agreed upon $500 as his compensation for the trial of the case in the District Court and the Supreme Court of the Territory, and that for all subsequent services he was entitled to be paid a reasonable compensation. In the charge to the jury these conflicting contentions were clearly submitted for determination. The jury were instructed that if, as the defendants asserted, Jones had agreed to give his services throughout the entire litigation for $500, and that that $500 had been paid to him, that the verdict should be for the defendants. The jury were instructed on the other hand that, if the contract between the parties was as asserted by the plaintiffs, the jury should find for the plaintiffs whatever part of the $500 remained unpaid and, in addition thereto, the reasonable value of the services Jones rendered in the subsequent proceedings. In other words, the jury were instructed that, only in the case Jones agreed to give his services throughout the entire litigation for $500, which had been paid, there should be a verdict for the defendants; otherwise there should be a verdict for the plaintiffs in a sum to be fixed by the jury. The jury did return a verdict

for the defendants. The verdict, therefore, affirmed the defendants' version of the contract and thereby rendered all of the testimony as to the value of Jones' services immaterial. The plaintiffs, however, urged in argument before us that the evidence of the value of Jones' services was competent not only as fixing the amount which he might recover in case his version of the contract should be found by the jury to be true, but also in the settlement of the dispute as to the terms of the contract between the parties, upon the theory that if the services of Jones were reasonably worth a far larger sum than $500, that fact would have some tendency to show that he did not agree to render them for $500. However this may be, the testimony on the value of the services was not admitted for any such purpose. Each witness testified upon the assumption that the compensation was not fixed by contract, and it was upon that assumption alone that the testimony was submitted for the consideration of the jury. It was not admitted for the purpose of determining the dispute between the parties as to the terms of the contract. Moreover, in submitting that testimony to the jury under instructions which were clear and adequate, the judge who presided at the trial limited it to the purposes for which it was admitted, and instructed the jury that if they believed from the evidence that the contract was that Jones should give his services throughout the entire litigation for $500, then the jury "should not consider the evidence of the various attorneys who have testified to the reasonable value of the services of the said Jones, but should disregard the same, for the reason that the contract has limited and fixed the amount to which said Jones is entitled." To the admission of the evidence for this limited purpose, to the instructions of the judge thus limiting it and directing that it should be disregarded if the jury found the defendants' version of the contract to be true, the plaintiffs did not object. It is too late now to claim that it might have been admissible for a broader purpose. There is, therefore, presented a case of evidence admitted and used solely upon an

issue which has become immaterial by the verdict of the jury. Any errors, therefore, if such there were, in admitting the evidence became immaterial. *Greenleaf* v. *Birth*, 5 Pet. 131; *Brobst* v. *Brock*, 10 Wall. 519, 526; *Poland* v. *Brownell*, 131 Massachusetts, 138; *Sullivan* v. *Railway*, 162 Massachusetts, 536; *Hotel Co.* v. *Grove Co.*, 165 Massachusetts, 260; *Geary* v. *Stevenson*, 169 Massachusetts, 23; *Read* v. *Nichols et al.*, 118 N. Y. 224; *Schrubbe* v. *Connell*, 69 Wisconsin, 476; *Nones* v. *Northouse*, 46 Vermont, 587; *Carruthers & Murray* v. *McMurray*, 75 Iowa, 173; *Allen* v. *Blunt*, 2 Woodb. & M. 121; *Burnett* v. *Lutterell*, 52 Ill. App. 19. For these reasons the three foregoing exceptions should be overruled.

The thirteenth instruction to the jury was as follows:

"In this case the burden of proof is upon the plaintiffs as to every material fact, except that of payment, as to which fact the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case, they must establish every such material fact, with the exception aforesaid, by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiffs cannot recover, and you shall find for the defendants."

To this instruction the plaintiff excepted. Thereupon the judge said to the jury:

"In the thirteenth instruction given you by the court, in which I spoke about the burden of proof, I have concluded to modify that instruction by striking out the words *material fact* in the second line and inserting in lieu thereof the word *issue;* and also in same line the word *fact* and insert in lieu the word *issue,* and in the fifth line strike out the words *material fact* and put in the word *issue*—so the instruction will read, gentlemen, as follows:

"'In this case the burden of proof is on the plaintiffs as to every issue, except that of payment, as to which issue the burden of proof is upon the defendants. In order to entitle the plaintiffs to recover in this case they must establish every such

issue, with the exception aforesaid, by a preponderance of the evidence; and if you find that the evidence bearing upon the plaintiffs' case is evenly balanced, or that it preponderates in favor of the defendants, then the plaintiffs cannot recover, and you should find for the defendants.'

"Now, gentlemen, I will withdraw instruction No. thirteen given to you before and insert and give this amended instruction instead."

The court read the foregoing amended instruction from a carbon copy of the original charge, in which the words above mentioned as stricken out were crossed out with a pencil, and the words mentioned as having been inserted were written in with a pencil. After the foregoing amended instruction was read to the jury, the counsel for the plaintiffs said to the court:

"As thus modified I think the charge is absolutely without objection, if the court please."

The exception, therefore, was abandoned in open court, but it is argued that reversible error appears in the record because it goes on to say:

"The amendment to the thirteenth instruction by the court to the jury as thus made was also taken down by the court's stenographer and transcribed by the said stenographer from his notes of the proceedings of the trial and attached to the original charge on file, after the verdict of the jury had been returned."

In support of this contention it was said that by section 2922 of the statute of New Mexico "all instructions to the jury must be in writing;" and that by section 3002 "the jury, when it retires, shall be allowed to take the pleadings in the case, instructions of the court and any instruments in writing admitted as evidence," and urged that either the record shows that the amended instruction in writing was not taken to the jury room, and therefore the plaintiff is entitled to claim this failure as an error, although it was not alleged at the time of the occurrence, or that by the failure of the court

to send the amended instruction to the jury the plaintiff is entitled to the benefit of the original exception which was abandoned in open court. Whatever merit this contention may have rests upon the assumption that the amended instruction was not taken by the jury when it retired. We do not know whether it was so taken or not. It is enough to say that the record does not affirmatively disclose that the judge failed to give the written amendment to the jury when it retired. If the plaintiffs' counsel did not discover at the time that the instructions were not taken by the jury, in accordance with the terms of the statute, it is too much to expect this court to conjecture that they were not taken, in the absence of any such statement in the record. *Grove* v. *City of Kansas*, 75 Missouri, 672.

An exception is alleged to the refusal of the court to give the following instruction:

"If the jury believes from the evidence that the plaintiff A. A. Jones agreed with the defendant Charles Springer to defend the case of the *Maxwell Land Grant Company* v. *John B. Dawson*, for a fee of $500, and that thereafter and before the rendition of all the services agreed to be rendered by said Jones in said cause, the said Springer said to the said Jones, 'You cannot be expected to attend to this business for any $500; go on with the case, and we will see how we come out, and after it is all over, you will be paid what is right,' or words to that effect, and such proposition was accepted and acted on by said Jones, then the plaintiffs in this case are entitled to recover for the services of said Jones in said case whatever the same may be reasonably worth, as shown by the evidence in this case."

But the instruction requested was substantially as given by the court in instructions five and eight, which are as follows:

"Plaintiffs claim, however, that the original contract in relation to the services of A. A. Jones was modified by a subsequent agreement made with the defendant Charles Springer to the effect that his compensation was not to be limited to

the $500 originally fixed, but that he was to go on with the litigation, see how it came out, and then Charles Springer would do what was right, and after the property should be sold he would pay said Jones a big cash fee.

"(8) If the jury believes from the evidence that the original contract in relation to Mr. Jones' compensation was afterward modified so that such compensation was not to be the $500 agreed upon, then you should find for the plaintiffs in such sum as you believe from the evidence to be the reasonable value for the services of Jones less whatever sum may have been paid thereon."

The plaintiff excepted to the refusal of the court to instruct the jury as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is that where two witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or the lack of intelligence, and from all of the other surrounding circumstances appearing on the trial, which witness is the more worthy of credit and to give credit accordingly."

But so far as the plaintiff was entitled to this instruction it was given to the jury by instruction 14. A judge is not bound to charge the jury in the exact words proposed to him by counsel. The form of expression may be his own. If he instructs the jury correctly and in substance covers the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt the exact words of the request. *Continental Improvement Company* v. *Stead*, 95 U. S. 161.

The judgment of the Supreme Court of New Mexico is, therefore,

Affirmed.

COFFEY *v.* COUNTY OF HARLAN.

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

No. 177. Argued January 24, 1907.—Decided February 25, 1907.

The power of the State to enact laws creating and defining crimes against its sovereignty, regulating procedure in the trial of those charged with committing them, and prescribing the character of the sentence of those found guilty is absolute and without limits other than those prescribed by the Constitution of the United States.

The statute of Nebraska, providing that one embezzling public money shall be imprisoned and pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of the persons whose money was embezzled, is not unconstitutional as depriving the person convicted of embezzlement of his property without due process of law because it provides for such judgment irrespective of whether restitution has been made or not.

In such a case the fine is a part of the punishment and it is immaterial whether it is called a penalty or a civil judgment, and the only question on which defendant can be heard is as to the fact and amount of the embezzlement, and if he has an opportunity to be heard as to that he is not denied due process of law.

THE facts are stated in the opinion.

Mr. C. C. Flansburg, with whom *Mr. R. O. Williams* was on the brief, for plaintiff in error:

An unconstitutional statute affords protection to no one who has acted under it. And the judgment rendered in accordance with its mandate is a nullity everywhere. *Simonds* v. *Simonds* 103 Massachusetts, 572; *Campbell* v. *Sherman*, 35 Wisconsin, 103; *Monore* v. *Collins*, 17 Ohio St. 665; *Astrom* v. *Hammond*, 3 McLean, 107; *Woolsey* v. *Dodge*, 6 McLean, 142.

A judgment rendered by the court upon a matter not within the pleadings nor tendered by the issues of the case must be treated as a nullity. *Reynolds* v. *Stockton*, 43 N. J. Eq. 211;

S. C., 140 U. S. 254; *Munday* v. *Vail*, 34 N. J. L. 418; *Unfried* v. *Heberer*, 63 Indiana, 67; *Smith* v. *Ontario*, 18 Blatchf. 454.

A judgment in a criminal case is not a bar in a civil case and cannot be pleaded as an estoppel. *United States* v. *Schneider*, 35 Fed. Rep. 107; *Coffey* v. *United States*, 116 U. S. 436; *Betts* v. *New Hartford*, 25 Connecticut, 180; *Clark* v. *Irwin*, 9 Ohio, 131; *Mead* v. *Boston*, 3 Cush. 404; *Corbley* v. *Wilson*, 71 Illinois, 209; *Ches. & O. Ry.* v. *Dyer County* (Tenn.), 11 S. W. Rep. 943, 945; *Hutchinson* v. *The Bank &c.*, 41 Pa. St. 42; Wharton, Evidence, § 777; *Potter* v. *Baker*, 19 N. H. 166.

Mr. J. W. Deweese, with whom *Mr. W. A. Myers* and *Mr. W. S. Morlan* were on the brief, for defendant in error:

At common law, a fine could be enforced by levy of execution and a sale of property thereunder. Statutes providing for the issuance of execution upon a fine are declaratory of the common law. *Gill* v. *State*, 39 W. Va. 479; *Howard* v. *Fuller*, 100 Kentucky, 148; *Huddleson* v. *Ruffin*, 6 Ohio St. 604; *Ex parte Dickerson*, 30 Texas, 448; *State* v. *Terry*, 17 S. W. Rep. 1075.

A statute that provides, as part of the punishment for embezzlement, for a fine for the use of the party whose money or property has been embezzled, is not unconstitutional for the reason that it makes the amount of the fine equal to double the amount of money or property embezzled. *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S. 512; *Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Mier* v. *Phillips Fuel Co.*, 107 N. W. Rep. 621.

The construction of a state statute and its effect upon sheriff's sale of land as determined by the highest court of a State, is conclusive upon the Federal court as to the land in that State. *Henry* v. *Pittsburg Clay Mf'g Co.*, 80 Fed. Rep. 485.

The constitutionality of a state statute cannot be attacked on the ground that it is repugnant to the clause of the Four-

teenth Amendment prohibiting a State from depriving any person of property without due process of law, by one who is not thereby deprived of any property.

If there had been, prior thereto, any doubt as to the validity of the county's title to the land in question, that question was resolved in its favor by the proceedings brought against John Everson for destroying the timber on the premises, and the matter is one that has been adjudicated. *Everson* v. *State*, 66 Nebraska, 154.

"Due course of law" simply means that a person should be brought into court and have an opportunity to prove any fact for his protection; the regular course of the administration of the law being through courts of justice by timely and regular proceedings to judgment and execution, according to the fixed forms of law. *Morley* v. *Lake &c.*, 146 U. S. 162; *Murray* v. *Hoboken Land Co.*, 18 How. 272; *People* v. *Essex County*, 70 N. Y. 229; *Central Land Co.* v. *Laidley*, 159 U. S. 103.

Mr. Justice Moody delivered the opinion of the court.

The plaintiff in error, a citizen of Kansas, brought an action of ejectment against the defendant in error, a citizen of Nebraska, in the Circuit Court for the District of Nebraska, where there was judgment for the defendant, which is brought here by writ of error on a constitutional question. The land sought to be recovered was once the property of Ezra S. Whitney, through whom both parties claim title; the plaintiff, through a deed of the land executed and delivered by Whitney, on November 30, 1898; the defendant, under a sale of the land on execution in pursuance of a levy duly made on April 12, 1898. The defendant's paper title is therefore the earlier one and must prevail if the sale upon execution was valid. The validity of this sale is the only question in the case.

The execution issued on a judgment in a criminal case, in which, by information, Whitney was charged with the

embezzlement, while County Treasurer of Harlan County, in the State of Nebraska, of eleven thousand one hundred and ninety dollars of the public money in his possession by virtue of his office. Upon trial by jury Whitney was found guilty as charged and sentenced to imprisonment for a term of years, and to "pay a fine in the sum of $22,390," which was double the amount of the embezzlement found by the jury. On appeal the conviction was affirmed by the Supreme Court of Nebraska. *Whitney* v. *State*, 53 Nebraska, 287. The sentence awarded was that prescribed by section 124 of the Nebraska criminal code, which provides that a public officer who embezzles the public money "*shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds, property, bonds or securities, assets or effects of any kind as aforesaid has been so embezzled.*" Compiled Statutes of Nebraska, 1903, p. 1942.

The proceedings which ended in the sale on execution under which the defendant claims title were in conformity with the constitution and laws of Nebraska, and the sheriff's deed vested title in the defendant. *Everson* v. *State*, 66 Nebraska, 154. It is within the power of the State to enact laws creating and defining crimes against its sovereignty, regulating the procedure in the trial of those who are charged with committing them, and prescribing the character of the sentence which shall be awarded against those who have been found guilty. In these respects the State is supreme and its power absolute, and without any limits other than those prescribed by the Constitution of the United States. The exercise of the power of the State in this field cannot be drawn in question in this court or elsewhere than in its own courts, except for

the purpose of restraining it within the limits thus established. One of the limitations upon the power of the State, imposed by the Fourteenth Amendment, is that the State shall not deprive any person of life, liberty or property without due process of law. The plaintiff contends that the sentence awarded against Whitney violated this prohibition, in that Whitney had no opportunity to be heard upon and defend against that part of the sentence which imposed a fine and authorized a judgment against his estate for its collection. The plaintiff therefore insists that the sale on execution of Whitney's land was bad, because the execution issued upon a judgment which was void. The short and conclusive answer to the whole contention is, that it is not true in fact. Whitney was given an opportunity to be heard and to defend. The information charged him with embezzling $11,190, the property of Harlan County. The trial was had upon this information and the jury returned a verdict in the following terms:

"We, the jury, duly empanelled and sworn in the above-entitled cause, do find the defendant guilty, as charged in the information, and we further find the sum so embezzled to be $11,190." Thereupon it became the duty of the court to impose a sentence of imprisonment of not less than one year nor more than twenty-one years, and of a fine that should be equal to double the amount of the money embezzled. This was done. The case was then appealed to the Supreme Court of Nebraska, argued by counsel and the conviction affirmed. It is idle to say that Whitney was denied a hearing, or an opportunity for every defense, permitted to him by the laws of Nebraska.

The plaintiff in error rests his contention upon some language used by the Supreme Court of Nebraska in *Everson* v. *State*, *ub. sup.* In that case Everson was convicted of a trespass upon the land in dispute. He defended against the charge by claiming title through the deed from Whitney, under which, as Everson's grantee, the plaintiff in this case claims title. The State on the other hand contended that the title

was in Harlan County by virtue of the sale on execution hereinbefore stated. Everson, asserting, as the plaintiff here asserts, that the execution sale passed no title, attacked the judgment upon which it was issued upon two grounds:

First, that the law under which it was rendered was repealed by a subsequent provision of the Constitution of the State.

Second, that it was unconstitutional in inflicting a double punishment, in that the fine was added to imprisonment.

In overruling these two contentions the court described the statute as one giving a fixed sum "in the nature of liquidated damages . . . to one who has suffered injury by the wrongful act of a public officer," and said: "We do not care to put ourselves on record as holding that the return of the property or the value of the property which the thief has embezzled or stolen, either voluntarily or by compulsory process, should be considered any part of his punishment within the meaning of our Bill of Rights," p. 158. Seizing hold of this language, the plaintiff in error in this case argues that by an interpretation of the statute binding upon us it authorizes a mere civil judgment for damages, against which the defendant has been denied the right to defend, by showing that his civil liability for the embezzlement had been discharged, and that therefore the judgment was wanting in due process of law. But this argument misinterprets the decision of the Supreme Court of Nebraska by giving to its language a meaning not expressed or intended.

As part of the consequences of a conviction of the crime of embezzlement by a public officer, the law of Nebraska provides that a fine double the amount embezzled shall be inflicted, which shall operate as a judgment against the estate of the convict. It is not of the slightest importance whether this fine is called a penalty, a punishment, or a civil judgment. Whatever it is called, it comes to the convict as the result of his crime. The amount of the judgment is fixed by the amount of the embezzlement, and not by the amount re-

maining due on account of the embezzlement, and the only question left open to the accused is the fact and amount of the embezzlement. It is provided that the judgment shall issue for double that amount, entirely irrespective of the question whether restitution has been made in whole or in part. Upon the only question therefore open to him Whitney had an opportunity to be heard, and, in point of fact, was heard. Upon his appeal, 53 Nebraska, 287, the amount of the embezzlement was expressly affirmed by the court (p. 304), and the claim that the restitution of the stolen property relieves the offender from criminal liability was pronounced "a monstrous doctrine," and it was said: "Whether or not Harlan County has been successful in collecting or securing the payment of the money which the defendant is charged with having embezzled, is of no consequence in this case." Whitney had full opportunity to present every defense allowed to him by the law of the State. The law itself was justified by the plenary power of the State, and neither it nor its administration in this case discloses any violation of a right secured by the Constitution of the United States, and the judgment of the Circuit Court is therefore

Affirmed.

OPINIONS PER CURIAM, ETC., FROM JANUARY 7 TO FEBRUARY 25, 1907.

No. 13. Original. *Ex parte:* In the Matter of the Montana Mining Company, Limited, Petitioner. Petition for a writ of mandamus. Argued November 6 and 7, 1906. Decided January 14, 1907. Stricken from the docket. *Mr. Charles J. Hughes, Jr., Mr. W. E. Cullen, Mr. Aldis B. Browne* and *Mr. Alexander Britton* for petitioner. *Mr. Arthur Brown, Mr. J. H. Ralston, Mr. M. S. Gunn, Mr. F. L. Siddons* and *Mr. T. C. Bach* for respondent.

No. 150. Abel P. Borden et al., Plaintiffs in Error, *v.* The Trespalacios Rice and Irrigation Company. In error to the Supreme Court of the State of Texas. Submitted January 11, 1907. Decided January 14, 1907. *Per Curiam:* Judgment affirmed with costs. *Strickley* v. *Highland Boy Mining Company*, 200 U. S. 527, 531; *Clark* v. *Nash*, 198 U. S. 361. *Mr. Venable B. Proctor* for plaintiffs in error. *Mr. Henry C. Coke* for defendant in error.

No. 160. The United States, Appellant, *v.* Benjamin H. Howell, Son & Co. Appeal from the Circuit Court of the United States for the Southern District of New York. Confession of error and motion to reverse and remand submitted January 14, 1907. Decided January 15, 1907. *Per Curiam:* Decree reversed on confession of error by appellees, and case remanded for further proceedings according to law. *The Attorney General* for appellant. *Mr. Bronson Winthrop* for appellees.

No. 3. The State of South Carolina ex relatione O. W. Buchanan, Plaintiff in Error, *v.* R. H. Jennings

ET AL., ETC. In error to the Supreme Court of the State of South Carolina. Submitted October 10, 1906. Decided January 21, 1907. *Per Curiam:* Dismissed for the want of jurisdiction. *French* v. *Taylor,* 199 U. S. 274; *Leonard* v. *Railroad Company,* 198 U. S. 416; *Murdock* v. *Memphis,* 20 Wall. 590; *Eustis* v. *Bolles,* 150 U. S. 361. *Mr. Levi H. David* and *Mr. Charles A. Douglass* for plaintiff in error. *Mr. Duncan C. Ray* for defendants in error.

No. 182. SUM GAY ALIAS SAM LEE, APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Northern District of California. Submitted by appellee January 25, 1907. Decided January 28, 1907. *Per Curiam:* Decree affirmed. *The Attorney General* and *Mr. Assistant Attorney General Cooley* for the appellee. No brief filed for appellant.

No. —. Original. *Ex parte:* IN THE MATTER OF HARRISON BOYNTON, PETITIONER. Submitted January 28, 1907. Decided February 4, 1907. *Per Curiam:* Motion for leave to file petition for a writ of *habeas corpus* and to proceed *in forma pauperis* denied. *Mr. A. B. Browne* for petitioner.

No. 136. THE UNITED STATES ET AL., APPELLANTS, *v.* WILLIAM B. KIRK. Appeal from the United States Circuit Court of Appeals for the Second Circuit. Argued January 25, 1907. Decided February 25, 1907. Decree affirmed by a divided court, and cause remanded to the Circuit Court of the United States for the Northern District of New York. *The Attorney General, The Solicitor General, Mr. Robert A. Howard* and *Mr. Henry C. Lewis* for appellants. *Mr. Abram J. Rose* and *Mr. Alfred C. Petté* for appellee.

No. 200. SIGMOND ORNSTINE, PLAINTIFF IN ERROR, *v.* W. J. CARY. In error to the Supreme Court of the State of Wisconsin. Argued January 31, 1907. Decided February 25, 1907. *Per Curiam:* Dismissed for the want of jurisdiction. *DeWolf* v. *Johnson,* 10 Wheat. 386; *Missouri, Kansas and Texas Trust Company* v. *Krumseig,* 172 U. S. 351; *Louisville and Nashville Railroad Company* v. *Kentucky,* 161 U. S. 677, 700; *Frisbie* v. *United States,* 157 U. S. 160; *Lawton* v. *Steele,* 152 U. S. 133; *Dunham* v. *Gould,* 16 Johnson, 378; *Commonwealth* v. *Danziger,* 176 Massachusetts, 290; *Ex parte Berger,* 193 Missouri, 16; case below, *State* v. *Cary,* 126 Wisconsin, 135, and see *State* v. *Kreutzberg,* 114 Wisconsin, 530. *Mr. E. M. McVicker* for plaintiff in error. *Mr. A. C. Titus* and *Mr. L. M. Sturdevant* for defendant in error.

No. 386. KATHARINE TODD STEARNS ET AL., APPELLANTS, *v.* JAMES E. TODD ET AL. Appeal from the Circuit Court of the United States for the Western District of Virginia. Submitted January 28, 1907. Decided February 25, 1907, *Per Curiam:* Decree affirmed with costs. *Wheless* v. *St. Louis et al.,* 180 U. S. 379, 382; *Miller* v. *Clark,* 138 U. S. 223. *Mr. James Bumgardner, Jr.,* and *Mr. C. S. W. Barnes* for appellants. *Mr. Charles Curry* for appellees.

Decisions on Petitions for Writs of Certiorari from January 7 to February 25, 1907.

No. 528. FRANK D. ZELL, PETITIONER, *v.* B. W. LEIGH ET AL. January 7, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William L. Royall, Mr. Charles L. Frailey, Mr. Charles H. Burr, Mr. Reynolds D. Brown* and *Mr. Malcolm*

Lloyd, Jr., for petitioner. *Mr. D. Lawrence Groner, Mr. Tazewell Taylor* and *Mr. Floyd Hughes* for respondents.

No. 533. EMPIRE STATE CATTLE COMPANY ET AL., PETITIONERS, *v.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; and No. 534. THE MINNESOTA AND DAKOTA CATTLE COMPANY, PETITIONER, *v.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY. January 21, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. James S. Botsford* and *Mr. R. E. Ball* for petitioners. *Mr. Gardiner Lathrop, Mr. Robert Dunlap* and *Mr. A. B. Browne* for respondent.

No. 559. EDWARD S. THOMAS ET AL., TRUSTEES, PETITIONERS, *v.* ANNA D. TAGGART ET AL. January 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Abram I. Elkus* for petitioners. *Mr. Thomas Thacher, Mr. Richard L. Sweezy* and *Mr. George E. Hall* for respondents.

No. 542. THE NEWS AND COURIER COMPANY ET AL., PETITIONERS, *v.* FRANK E. BUTLER ET UX. January 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry A. M. Smith* and *Mr. Wm. Henry Parker* for petitioners. *Mr. Adrian H. Joline* and *Mr. Augustine T. Smythe* for respondents.

No. 549. KNUDSEN-FERGUSON FRUIT COMPANY, PETITIONER, *v.* CHICAGO, ST. LOUIS, MINNEAPOLIS AND OMAHA RAILWAY

COMPANY. January 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Roger S. Powell* for petitioner. *Mr. Cordenio A. Severance* and *Mr. Frank B. Kellogg* for respondent.

No. 550. KNUDSEN-FERGUSON FRUIT COMPANY, PETITIONER, *v.* MICHIGAN CENTRAL RAILROAD COMPANY. January 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Roger S. Powell* for petitioner. *Mr. Cordenio A. Severance* and *Mr. Frank B. Kellogg* for respondent.

No. 552. T. H. ADRIAN TROMP, PETITIONER, *v.* THE WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY. January 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Norman G. Johnson* and *Mr. Ernest Dichman* for petitioner. *Mr. Henry G. Ward* for respondent.

No. 557. MAGNUS J. PALSON ET AL., PETITIONERS, *v.* NORTH GERMAN LLOYD, CLAIMANT. January 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward E. Blodgett* for petitioners. *Mr. Joseph Larocque, Jr.,* for respondent.

No. 560. EDWARD FLICKINGER, PETITIONER, *v.* THE UNITED STATES. January 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth

Circuit denied. *Mr. Edward T. Powell, Mr. Thomas E. Powell* and *Mr. Charles W. Baker* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 551. MARY SHERMAN MCCALLUM, PETITIONER, *v.* PHILLIPS L. GOLDSBOROUGH, COLLECTOR, ETC. January 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Altheus Johnson* and *Mr. E. O. Wagenhorst* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 553. THE PHILADELPHIA AND READING RAILWAY COMPANY, PETITIONER, *v.* JULIA KLUTT, ETC. February 4, 1907. 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. *Mr. Francis Fisher Kane* for respondent.

No. 561. HORACE F. BROWN ET AL., PETITIONERS, *v.* ROBERT HENRY LANYON ET AL. February 4, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Francis M. Phelps* and *Mr. Douglas Dyrenforth* for the petitioners. No appearance for respondents.

No. 562. BOSTON AND MAINE RAILROAD, PETITIONER, *v.* JOHN N. GOKEY. February 4, 1907. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. George B. Young* and *Mr. Edgar J. Rich* for the petitioner. No appearance for respondent.

No. 563. CHARLES W. HUNTER ET AL., PETITIONERS, *v.* REBECCA A. JOHNSON ET AL. February 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. L. P. Berry* for petitioners.

No. 573. THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, PETITIONER, *v.* FREDERICK LEWISOHN ET AL., EXECUTORS, ETC. February 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Louis D. Brandeis* and *Mr. William H. Dunbar* for petitioner. *Mr. Eugene Treadwell* for respondents.

No. 582. CONTINENTAL WALL PAPER COMPANY, PETITIONER, *v.* THE LEWIS VOIGHT & SONS COMPANY. February 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Louis Marshall* and *Mr. Joseph Wilby* for petitioner. *Mr. Morison R. Waite* and *Mr. Harlan Cleveland* for respondents.

No. 570. HARRY L. HAYNES, PETITIONER, *v.* J. B. WATKINS ET AL. February 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the

Fifth Circuit denied. *Mr. George A. Titterington* for petitioner. *Mr. John W. Wray* for respondents.

No. 566. MATHIESON ALKALI WORKS, PETITIONER, *v.* T. T. MATHIESON. February 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frank W. Christian* for petitioner. *Mr. Daniel Trigg*, *Mr. Robert L. Harrison* and *Mr. William Byrd* for respondent.

No. 578. VICTOR H. WILDER ET AL., PETITIONERS, *v.* THE UNITED STATES. February 25, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Maynard F. Stiles* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM JANUARY 7 TO FEBRUARY 25, 1907.

No. 154. YEE YUEN, APPELLANT, *v.* THE UNITED STATES. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. January 10, 1907. Dismissed, pursuant to the tenth rule. *Mr. Oliver Dibble* for appellant. *The Attorney General* for appellee.

No. 327. PHŒNIX WATER COMPANY, APPELLANT, *v.* THE COMMON COUNCIL OF THE CITY OF PHŒNIX. Appeal from the Supreme Court of the Territory of Arizona. January 23,

1907. Dismissed with costs, per stipulation. *Mr. Charles F. Ainsworth*, *Mr. John F. Dillon* and *Mr. Harry Hubbard* for appellant. *Mr. Roy S. Goodrich* and *Mr. Walter Bennett* for appellees.

No. 52. GEORGE W. CROSSMAN ET AL., PLAINTIFFS IN ERROR, *v.* GEORGE R. BIDWELL. In error to the Circuit Court of the United States for the Southern District of New York. February 4, 1907. Dismissed with costs, on motion of *Mr. Solicitor-General Hoyt* in behalf of counsel for the plaintiffs in error. *Mr. W. Wickham Smith* for plaintiffs in error. *The Attorney General* for defendant in error.

No. 353. ADRIAN C. HONORÉ, EXECUTOR, ETC., ET AL., PLAINTIFFS IN ERROR, *v.* WILLIAM C. WILSON, AS ACTING COMPTROLLER OF THE STATE OF NEW YORK. In error to the Surrogates' Court of New York County, State of New York. February 4, 1907. Dismissed, per stipulation. *Mr. Charles K. Carpenter* for plaintiffs in error. *Mr. Emmet R. Olcott* for defendant in error.

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ADMIRALTY.

1. *Jurisdiction of admiralty courts.*

Admiralty courts, being free to work out their own system and to finish the adjustment of maritime rights, have jurisdiction of an action for contribution for damages paid to third parties as the result of a collision for which both vessels were in fault. The claim is of admiralty origin. *Erie R. R. Co.* v. *Erie Transportation Co.*, 220.

2. *Division of damages—Separable claims—Bar of former recovery.*

The right of division of damages to vessels when both are in fault and the contingent claim to partial indemnity for payment of damage to cargo are separable, and the decree of division in the original suit,

CONSTITUTIONAL LAW.

as to those corporations which have paid the entrance tax and receive permits to do business; nor can such a tax be justified under the power to alter, amend and repeal, reserved by the state constitution. So *held* as to Colorado Statutes of 1897 and 1902. *American Smelting Co.* v. *Colorado*, 103.

3. *Contracts, impairment of obligation—Validity of ordinance of city of Cleveland affecting franchise of street railroad company.*

The action of the city council of Cleveland, and the acceptance by the Cleveland Electric Railway Company of the various ordinances adopted by the council did not amount to a contract between the city and the company extending the time of the franchise involved in this action; and a later ordinance affecting that franchise after its expiration as originally granted is not void under the impairment clause of the Federal Constitution. *Cleveland Electric Ry. Co.* v. *Cleveland*, 116.

4. *Due process of law defined.*

Due process of law has never been precisely defined; while its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case, and proceedings in court are not always essential. *Ballard* v. *Hunter*, 241.

5. *Due process of law; deprivation of property without opportunity to be heard.*

Even though a statute providing for forfeiture and sale of buildings erected on National lands of the Choctaw Nation may be valid, the title to the buildings is not forfeited by the mere act of building, but the forfeiture must be enforced by valid action; and to deny to those erecting the buildings an opportunity to be heard would deprive them of their property without due process of law. *Walker* v. *McLoud*, 302.

6. *Due process of law; deprivation of property—Validity of law of Nebraska fixing penalty and mode of execution for embezzlement of public money.*

The statute of Nebraska, providing that one embezzling public money shall be imprisoned and pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of the persons whose money was embezzled, is not unconstitutional as depriving the person convicted of embezzlement of his property without due process of law because it provides for such judgment irrespective of whether restitution has been made or not. In such a case the fine is a part of the punishment and it is immaterial whether it is called a penalty or a civil judgment, and the only question on which defendant can be heard is as to the fact and amount of the embezzlement, and if he has an opportunity to be heard as to that he is not denied due process of law. *Coffey* v. *Harlan County*, 659.

7. *Due process of law; deprivation of property—Validity of Idaho sheep grazing law.*

Sections 1210, 1211, Revised Statutes of Idaho, prohibiting the herding and grazing of sheep on, or within two miles of, land or possessory

2. *Bonds to secure sales; liability of parties not affected by alterations of prices of articles sold.*

Where a bond given to secure payment for goods sold to the principals on a specified credit is complete on its face it is a clear and separate contract between the sellers and the signers of the bond, and the liability of the sureties is not, in the absence of any separate agreement in writing, affected by any future alterations of the prices of merchandise sold provided the specified credit is allowed; and parol evidence to show the existence of any other agreement as to prices between the principals of the bond is not admissible. *Ib.*

3. *Bonds to secure sales; effect of want of notice of non-payment or extension of credit on liability of sureties.*

The liability of sureties on the bond in this case given to secure payment for goods sold on a specified credit was not affected by failure of the sellers to notify the sureties of non-payment at the expiration of the credit, or by their giving an extension of credit, there being no definite term of such extension. *Ib.*

4. *Bonds to secure sales; pleading in action on.*

Pleas in defense to a suit on such a bond alleging damages for failure to sell on the terms and for prices agreed must be distinct and set forth the details. In order to found a cause of action on the shortcomings of another they must be so plainly set up as to show that they were the proximate and natural cause of actual damages sustained. *Ib.*

See CARRIERS, 2;
CONSTITUTIONAL LAW, 2, 3;
MINES AND MINING, 1.

CONTRIBUTION.

See ADMIRALTY, 1.

CONVEYANCES.

See LOCAL LAW (MONT.); PANAMA CANAL;
MINES AND MINING, 1, 2, 3; PRACTICE AND PROCEDURE, 4.

CORPORATIONS.

Foreign; implied assent to law of State in which it is doing business relative to service of process.

Where an insurance company or corporation of one State goes into another State to transact business in defiance of its statute as to service of process, it will, in an action against it in such State, be held to have assented to the terms prescribed by the local statute for service of process in respect to business done in that State, but its assent in that regard will not be implied as to business not transacted in that State. *Old Wayne Life Assn.* v. *McDonough,* 8.

See CONDEMNATION, 1; JURISDICTION, C 2; E 1;
CONSTITUTIONAL LAW, 2, 10, 19; NATIONAL BANKS.

COURT AND JURY.

CRIMINAL LAW.

See CONSTITUTIONAL LAW, 6;
STATES, 2.

CUSTOMS DUTIES.

1. *Application of proviso in* § 20 *of Customs Administrative Act.*

The proviso in § 20 of the Customs Administrative Act only refers to cases in which a change in the rate of duty has been made while the merchandise is in bonded warehouse and not to difference in weight. *United States* v. *G. Falk & Brother*, 143.

2. *Construction of* § 33 *of Tariff Act of* 1897.

The Attorney General having construed the proviso of § 50 of the Tariff Act of 1890 as not restricted to the matter immediately preceding it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress will be held to have adopted that construction in the enactment of § 33 of the Tariff Act of 1897 and to have made no other change except to require as the basis of duty the weight of merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse. *Ib.*

DAMAGES.

See ADMIRALTY, 2, 3;
CONTRACTS, 4;
PARTNERSHIP.

DECREES.

See JUDGMENTS AND DECREES.

DELEGATION OF POWER.

See CONGRESS, POWERS OF, 3;
CONSTITUTIONAL LAW, 13.

DELIVERY.

See CARRIERS, 1.

DISEASE,

See ALIENS, 2.

DISTRICT OF COLUMBIA.

See STATUTES, A 1;
TRUSTS AND TRUSTEES.

DIVORCE.

See DOMESTIC RELATIONS.

DOCKET FEES.

See CLERKS OF COURT.

FRAUD.

1. *Imputation of knowledge.*

Where the direct issue of fraud is involved, knowledge may be imputed to one wilfully closing his eyes to information within reach. *Wecker* v. *National Enameling Co.*, 176.

2. *Imputation of knowledge; effect of fraud of parties whose knowledge imputed.*

Knowledge of the president of a local board of directors and of the local attorney of a building and loan association in regard to a matter coming within the sphere of their duty and acquired while acting in regard to the same is knowledge of the association, and the fact that they have committed a fraud does not alter the legal effect of their knowledge as against third parties who have no connection with, or knowledge of, the fraud perpetrated. *Armstrong* v. *Ashley*, 272.

See JURISDICTION, C 4;
LANDLORD AND TENANT, 1;
TAXES AND TAXATION, 1.

FREIGHT RATES.

See COMMERCE.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 18;
JUDGMENTS AND DECREES.

GENERAL ORDERS IN BANKRUPTCY.

See BANKRUPTCY.

GOVERNMENT CONTRACTS.

See JURISDICTION, C 3.

GOVERNMENT INSTRUMENTALITIES.

See TAXES AND TAXATION, 1.

GRANTS.

1. *Of franchises; rule as to construction.*

Grants of franchises are usually prepared by those interested in them and submitted to the legislatures with a view to obtain the most liberal grant obtainable, and for this and other reasons such grants should be in plain language, certain, definite in nature, and contain no ambiguity in their terms, and will be strictly construed against the grantee. (*Blair* v. *Chicago*, 200 U. S. 400, 471.) *Cleveland Electric Ry. Co.* v. *Cleveland*, 116.

2. *Of franchises; power of city of Cleveland to grant to street railroad companies.*

The Ohio legislature has granted the city of Cleveland comprehensive power to contract with street railroad companies with regard to the use of its streets and length of time, not exceeding twenty-five years, for

8. *Under* § 709, *Rev. Stat.—To review judgment of state court.*

Where the state court expressly decides, adversely to contention of plaintiff in error, that a statute of the United States does not preclude others from asserting rights against him, but does preclude him from asserting rights against them, a Federal question exists giving this court jurisdiction to review the judgment under § 709, Rev. Stat. *Hammond* v. *Whittredge*, 538.

9. *Under* § 709, *Rev. Stat.—Effect of certificate of judge of state court.*

While the certificate of the presiding judge of a state court can make more certain and specific what is too general and indefinite in the record it cannot give jurisdiction to this court under § 709, Rev. Stat., where there is nothing in the record in the way of a Federal question to specialize and make definite and certain. *Louisville & Nashville R. R.* v. *Smith*, 551.

10. *As to review of order of Circuit Court dismissing case for want of jurisdictional amount.*

When the Circuit Court dismisses a case under the provisions of § 1 of the act of March 3, 1875, 18 Stat. 470, as amended by § 1 of the act of August 13, 1888, 25 Stat. 434, because not substantially involving the requisite amount in controversy to confer jurisdiction, the order of the court, in this case without a jury, is subject to review in this court in respect to the rulings of law and findings of fact upon the evidence. Whatever plaintiff's motive in bringing his suit in the Federal court rather than in the state court may be, he has the right to act upon it. *Smithers* v. *Smith*, 632.

11. *Where Federal right asserted is frivolous and without color of merit.*

The mere assertion of a Federal right and its denial do not justify this court in assuming jurisdiction where it indubitably appears that the Federal right is frivolous and without color of merit, and this rule applies to cases brought to this court under the act of April 12, 1900, 31 Stat. 85, from the District Court of the United States for Porto Rico. *American R. R. Co.* v. *Castro*, 453.

12. *Sufficiency of involution of Federal question.*

Although a Federal right may not have been specially set up in the original petition or earlier proceedings if it clearly and unmistakably appears from the opinion of the state court under review that a Federal question was assumed by the highest court of the State to be in issue, and was actually decided against the Federal claim, and such decision was essential to the judgment rendered this court has jurisdiction to reexamine that question on writ of error. *Haire* v. *Rice*, 291.

13. *Certificate of question of jurisdiction of Circuit Court.*

Where the Circuit Court refuses to remand, and on the plaintiff declining to recognize its jurisdiction or proceed, dismisses the case and renders judgment that plaintiff take nothing thereby and defendant go hence

C. Of Circuit Courts.

1. *How determined.*

The jurisdiction of the Circuit Court must be determined with reference to the attitude of the case at the date of the filing of the bill. *Chicago* v. *Mills*, 321.

2. *Collusion to confer jurisdiction.*

If it does not appear that there was any collusion within the meaning of the ninety-fourth rule in equity for the purpose of conferring jurisdiction, not otherwise existing, on the Circuit Court of the United States, that court does not lose its jurisdiction of a suit brought by a non-resident stockholder, after request to and refusal by the corporation, to enjoin the enforcement of an ordinance against the corporation, and of which the court would not have had jurisdiction had the corporation been complainant, because subsequent events make it to the interest of the corporation and its officers to make common cause with the complainant stockholder. An admission by complainant that he expected the action to be brought in the United States court does not necessarily show collusion to confer jurisdiction. In this case *held* on the facts that no collusion between the stockholder bringing the suit and the corporation refusing to bring it was shown that deprived the Circuit Court of jurisdiction thereover. *Ib.*

3. *Of actions brought in name of United States for benefit of materialmen under acts of* 1894 *and* 1905.

Under the act of August 13, 1894, 28 Stat. 278, as construed in the light of the act passed the same day, 28 Stat. 282, and of the act amending the latter passed January 24, 1905, 33 Stat. 811, in suits brought in the name of the United States for the benefit of materialmen and laborers on bonds given in pursuance of the act, the United States is a real litigant, and not a mere nominal party, and the Circuit Court of the United States has jurisdiction of such suits without regard to the value of the matter in dispute. *United States Fidelity Co.* v. *Kenyon*, 349.

4. *On removal from state court; effect of fraudulent joinder as defendant of resident of same State as plaintiff.*

The right of a non-resident defendant, sued in the state court by an employé for damages, to remove the case to the Federal court cannot be defeated by the fraudulent joinder as co-defendant of another employé, resident of plaintiff's State, who has no relation to the plaintiff, rendering him liable for the injuries, and the Circuit Court can determine the question of fraudulent joinder on affidavits annexed to the non-resident defendant's petition for removal to the consideration whereof plaintiff does not object but submits affidavits counter thereto. (*Alabama Great Southern Railway Co.* v. *Thompson*, 200 U. S. 206, distinguished.) *Wecker* v. *National Enameling Co.*, 176.

5. *Amount in controversy where claim is against several defendants.*

Where a plaintiff in good faith asserts a claim against several defendants

PUBLIC LANDS.

1. *Withdrawn lands; disposition of.*

When a withdrawal order properly made ceases to be in force the lands withdrawn thereunder do not pass under a grant of unreserved, unsold or otherwise unappropriated lands, but becomes part of the public domain to be disposed of under the general land laws or acts of Congress specially describing them. *Northern Lumber Co.* v. *O'Brien*, 190.

2. *Grant to Northern Pacific Railroad Company construed.*

The grant to the Northern Pacific Railroad Company by the act of July 2, 1864, 13 Stat. 365, was *in præsenti*, although title did not attach to specific sections until they were identified, and the grant only included lands which, on that date, were not reserved, sold, granted, or otherwise appropriated; it did not include land then included within an existing and lawful withdrawal made in aid of an earlier grant for another road, although prior to the selection by the Northern Pacific it may have appeared that those lands were not within the place limits of the grant for such other road. *Ib.*

3. *Construction of Montana Enabling Act relative to administration of lands granted for educational purposes.*

In granting lands for educational purposes to Montana by § 17 of the Enabling Act of February 22, 1889, 25 Stat. 676, to be held, appropriated, etc., in such manner as the legislature of the State should provide, Congress intended to designate, and the act will be so construed, such legislature as should be established by the constitution to be adopted, and which should act as a parliamentary body in subordination to that constitution; and it did not give the management and disposal of such lands to the legislature or its members independently of the methods and limitations prescribed by the constitution of the State. *Haire* v. *Rice*, 291.

4. *Jurisdiction to try question of validity of state statute relative to lands granted.*

Whether a state statute relating to the disposition of such lands and their proceeds is or is not repugnant to the state constitution is for the state court to determine and its decision is conclusive here. *Ib.*

See CONSTITUTIONAL LAW, 7, 15.

PUBLIC RESORTS.

See CONSTITUTIONAL LAW, 8.

RAILROADS.

See CARRIERS; CONSTITUTIONAL LAW, 3, 9; GRANTS, 2; TAXES AND TAXATION, 1.

RAILROAD LAND GRANTS.

See PUBLIC LANDS, 2.

RAILROAD RATES.

See COMMERCE;
PRACTICE AND PROCEDURE, 2.

RATIFICATION.

See COURTS, 4;
INDIANS, 1.

REAL PROPERTY.

1. *Accountability to demands of State.*

Land stands accountable to the demands of the State, and owners are charged with knowledge of laws affecting it, and the manner in which those demands may be enforced. *Ballard* v. *Hunter*, 241.

2. *Duty of claimant as respects the making of improvements by another.*

While one claiming to own real property cannot stand by in silence and see another expend money in improving it, he fulfills his duty by notifying the person spending the money and claiming ownership; and, in the absence of knowledge that such person is insolvent, he is not bound to ascertain whether he is making the improvements with money realized by mortgaging the premises and notify the mortgagee also. *Armstrong* v. *Ashley*, 272.

3. *Right of defendant in ejectment to equitable lien on property for moneys expended thereon.*

Where the title of one claiming ownership of real estate in bad faith is openly questioned and attacked in actions of ejectment, neither he nor his mortgagee are entitled to an equitable lien on the property for moneys expended thereon. *Ib.*

4. *As to risk of title assumed by lender on security of; and extent of imputed knowledge.*

One loaning money on real estate, the title to which has been, to his knowledge, attacked in an equity suit which has been dismissed without prejudice and not on the merits, takes the risk of the title and his knowledge extends to all property described, not only in the declaration but also in amended declarations, notwithstanding the failure of the clerk, without any fault of the party filing them, to properly index the amended declarations. *Ib.*

See LOCAL LAW (MONT.).

RECOUPMENT.

Nature of demand.

At common law, as the doctrine has been developed, a demand in recoupment is recognized as a cross demand as distinguished from a defense. *Merchants' Heat & L. Co.* v. *Clow & Sons*, 286.

See JURISDICTION, E 1.

REDUCTION OF CAPITALIZATION.

See NATIONAL BANKS, 3.

STAMP TAXES.

See CONSTITUTIONAL LAW, 17;
TAXES AND TAXATION, 2, 3.

STATES.

1. *Police power, extent of.*

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public health, morals or safety; it is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the State. *Bacon* v. *Walker*, 311.

2. *Power of State to define crimes, regulate procedure and prescribe penalties.*

The power of the State to enact laws creating and defining crimes against its sovereignty, regulating procedure in the trial of those charged with committing them, and prescribing the character of the sentence of those found guilty is absolute and without limits other than those prescribed by the Constitution of the United States. *Coffey* v. *Harlan County*, 659.

3. *Power to discriminate between residents and non-residents in service of process.*

A State may make reasonable discriminations in regard to service of process for enforcement of liens for taxes and assessments on real estate between resident and non-resident owners, providing for personal service on the former and constructive service by publication on the latter. *Ballard* v. *Hunter*, 241.

See ACTIONS;
CONSTITUTIONAL LAW, 2, 7, 8, 14, 16, 19;
JURISDICTION, A 1;
REAL PROPERTY, 1;
TRUSTS AND TRUSTEES, 2.

STATUTES.

A. CONSTRUCTION OF.

1. *Conflicting sections in a general code to be harmonized—Rule as to controlling effect of later provision not applicable.*

In a general code such as that of the District of Columbia a later section does not nullify an earlier one as being the later expression of legislative will; the whole code should, if possible, be harmonized and to that end the letter of a particular section may be disregarded in order to accomplish the plain intent of the legislature. *Iglehart* v. *Iglehart*, 478.

2. *Office of proviso; a presumption as to, must give way to a demonstrative test of legislative intent.*

While the primary purpose of a proviso is to qualify only the provision of the statute to which it is appended, a presumption of such purpose will not prevail against a demonstrative test that the legislative intent was that the proviso was of general application. *United States* v. *G. Falk & Brother*, 143.