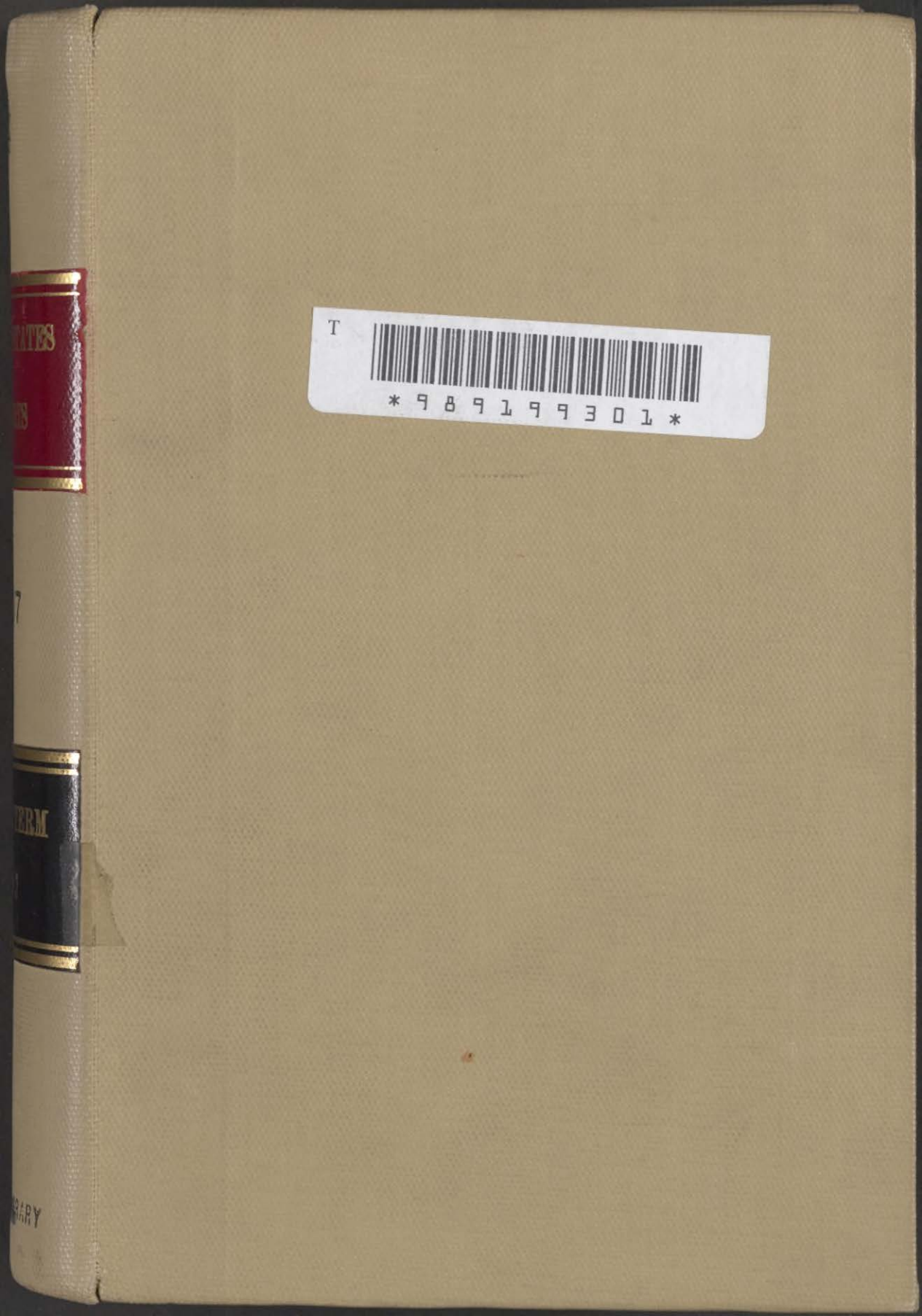


UNITED STATES REPORTS

VOLUME 207

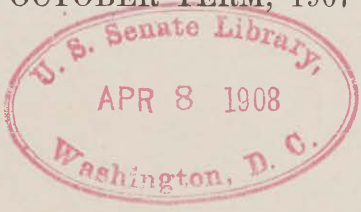
CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1907



CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1908

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.

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.

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, 1907.

LAWSON *v.* UNITED STATES MINING COMPANY.

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

No. 2. Argued October 11, 12, 1906.—Decided October 21, 1907.

One in possession of the surface of a mining claim under a patent from the United States is presumably in possession of all beneath the surface, and, under § 3511, Rev. Stat. Utah, may maintain an action in equity to quiet title to a vein beneath the surface and to enjoin the removal of ore therefrom. *Holland* v. *Challen*, 110 U. S. 15, followed; *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, distinguished.

The ownership of the apex of a vein must be established before any extralateral title to the vein can be recognized.

Discovery is the all-important fact upon which title to mines depends, and where there is a single broad vein whose apex or outcroppings extend into two adjoining mining claims the discoverer has an extralateral right to the entire vein on its dip.

It is the duty of this court to accept the findings of the Circuit Court of Appeals unless clearly and manifestly wrong.

Acceptance by the Government of location proceedings had before the statute of 1866, and issue of a patent thereon, is evidence that such proceedings were in accordance with the rules and customs of the local mining district.

Priority of right to a single broad vein in the discoverer is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by testimony other than the entries and patents.

In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface.

134 Fed. Rep. 769, affirmed.

THIS suit was commenced in the Circuit Court of the United States for the District of Utah by the United States Mining Company, claiming to be the owner of certain mining property, and praying that its title thereto be quieted and the defendant restrained from taking any ore therefrom. Jurisdiction was founded on diverse citizenship. In an amended complaint, filed June 2, 1902, it was alleged that the plaintiff is the owner and in possession of four mining claims known as the Jordan Extension, the Northern Light, the Grizzly and the Fairview lode mining claims, the boundaries of each being given; that these mining claims are adjacent to each other and to certain other mining claims, all owned and worked by the plaintiff as one property for mining purposes; that beneath the surface of the claims above mentioned is a vein or lode of great value; that the defendants wrongfully claim to own said vein or lode and the ores and minerals therein contained; that they have by means of secret underground works obtained access thereto and have mined, extracted and removed large quantities of valuable ores therefrom; that they threaten to continue such wrongful and unlawful invasion of the premises and to continue to mine, extract and remove ores and minerals; that the defendants are in possession of a mining claim adjacent to the four mining claims of plaintiff, known as the Kempton mining claim, United States Lot 255, which was located in the year 1871, and on information and belief that the defendants pretend that the mineral deposits and ores under and beneath the surface of the four mining claims above mentioned are in and part of a mineral vein and lode belonging to and having its apex in said Kempton mining claim and on the dip of said alleged vein, which pretense the plaintiff charges to be contrary to the truth. The plaintiff further alleges that it is the owner and in possession of two certain mining claims, one named the Jordan Silver Mining Company's Mine, but usually known as the "Old Jordan," located December 17, 1863; the other the Mountain Gem Lode and Mining Claim, located August 20, 1864, the boundaries of each of which are given;

that in these two claims there is a lode, bearing silver and other metals, whose apex is within the surface boundaries; that the dip of said lodes is toward the Kempton claim occupied by the defendants, and that if there be any mineral vein or lode in the Kempton claim it is not one that has its apex within the limits of that claim but is a part of the lodes apexing within the "Old Jordan" and Mountain Gem claims. The relief prayed for was a decree quieting plaintiff's title and restraining the defendants from mining and removing any ores or minerals. To this amended complaint the defendants filed a demurrer, stating, as one of the grounds thereof, that the plaintiff had an adequate remedy at law. This demurrer was overruled, and thereupon the defendants filed an answer and subsequently an amended answer, setting forth their title to the Kempton mining claim, and also to a claim known as the Ashland mining claim, and alleging that there are lodes whose apices are within these claims; that on their dip they enter beneath the surface of the plaintiff's claims, and that it is upon them that defendants have been mining; that the Kempton claim was patented to their grantors and predecessors in interest on February 23, 1875. They further deny that the "Old Jordan" claim was located on December 17, 1863, or patented July 14, 1877; deny that the Mountain Gem claim was located on August 20, 1864, or that a patent had been issued on said alleged location. They further aver that if there be any lode or vein in either the "Old Jordan" or the Mountain Gem claims, that such lode or vein is entirely distinct from those which have their apices in the Kempton and Ashland claims. On the hearing the court denied the application of the defendants to set the case for trial as a law case before a jury. At the same time it entered a decree dismissing the plaintiff's bill. From this decree the plaintiff appealed to the Circuit Court of Appeals (67 C. C. A. 587; 134 Fed. Rep. 769), which reversed the decree of dismissal, and remanded the case with instructions to enter a decree for the plaintiff in conformity with the prayer of the bill. Thereupon,

on application of the defendants, the case was brought to this court on certiorari.

Mr. Charles J. Hughes, Jr., with whom *Mr. Ogden Hiles* and *Mr. Charles C. Dey* were on the brief, for petitioners:

This action should be dismissed for want of equity. The bill, which alleges that respondent has the legal title and is in possession of the ore, was drafted so as to obviate a demurrer for want of equity, and to render it immune to the objection that it is an ejectment bill, and thus evade a jury trial.

Failure to allege that the title of complainant has been established by at least one trial and verdict at law, is a prime test and proof that it is an ejectment bill. In order for a party in possession to maintain a bill of peace for the purpose of quieting his title to land against a single adverse claimant ineffectually seeking to establish a legal title, by repeated actions of ejectment, it is necessary for the bill to aver that complainant's title has been established at law; and where it appears from the bill that an action at law involving the same questions has been commenced but has not been tried, it is a fatal defect. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 641; 1 Daniell's Chan. Pl. Perkins, 3d Am. Ed., 573; Pomeroy, Eq., §§ 177, 248, 253; Adams, Eq., 331; Bainbridge on Mines, 505.

In mining cases where irreparable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, and the legal title is in dispute, the modern practice is to require an action at law to be brought to try the legal title, and then to allow an ancillary action on the equity side of the court, in aid of the action at law, and for an injunction to preserve the property, pending the legal proceedings for the determination of the title. *Earhart* v. *Boaro*, 113 U. S. 537, 538; *Stevens* v. *Williams*, 5 Morrison's Min. Rep. 449–453; Morrison's Min. Rights, 12th ed., 334, 335.

In this case there is no ground of equitable jurisdiction.

All the matters set up affecting the title are of legal cognizance in which the parties have a constitutional right to a trial by jury. *Hipp* v. *Babin*, 19 How. 271; *Lewis* v. *Cocks*, 23 Wall. 466.

Section 3511, Rev. Stat. of Utah of 1898, is not applicable in suits to quiet title in the Federal courts of that State; nor by that statute can the legal title to land be settled in a suit to quiet title without the intervention of a jury. *Park* v. *Williamson*, 21 Utah, 279, 285, held that where there are both equitable issues, and issues of fact in the case, the court should first determine the equitable issue, and then submit the issues of fact to a jury upon proper instruction, and a failure to do so constitutes reversible error.

All other questions apart, the court below ought to have dismissed this bill *sua sponte*, according to the rule established by this court in numerous decisions. *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipieseogee*, 2 Black, 545, 550; *Lewis* v. *Cocks*, 23 Wall. 466, 470; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 573; *Grand Chute* v. *Winegar*, 15 Wall. 375; *Allen* v. *Pullman Car Co:*, 139 U. S. 658, 662.

Not only do the pleadings show that this is a dispute concerning the legal title only, but the evidence adduced by the respondent in its case in chief proves, without more, that the petitioners were in the actual possession and immediate occupation of the segment of the lode in controversy.

The evidence on the part of respondent, in its case in chief, proves that the "Kempton people" when this suit was brought, were working in mines or workings "owned by them" and which extended from the surface to the lowest level. The testimony shows that the Kempton workings at the surface are inside the Kempton exterior surface boundaries, and on the apex of the lode. Such a possession is an actual and not a constructive possession of the lode throughout its entire depth, on its dip, beyond the northerly side line of the Kempton claim, under adjacent surface ground.

This evidence, in itself, is sufficient to warrant the court in

dismissing the bill. It proves that when the respondent filed this bill it was not actually in possession of the disputed premises, and that its allegation of possession in itself was not true.

Whoever is in possession of the apex of a lode, or of any part of it, is in the *actual* possession of every extralateral part of the lode, which possession of the apex legally secures. *Montana Min. Co.* v. *St. Louis M. & M. Co.*, 102 Fed. Rep. 430.

Mr. William H. Dickson, with whom *Mr. George Sutherland*, *Mr. A. C. Ellis*, *Mr. A. C. Ellis, Jr.*, *Mr. E. M. Allison* and *Mr. Waldemar Van Cott* were on the brief, for respondent:

Where the owner of land is in the possession thereof, and one out of possession asserts an adverse claim or interest therein, the owner, under the laws of the State of Utah, is not required to wait until his title has been settled by an action at law. Sec. 3511, Rev. Stat. of Utah of 1898.

The Federal courts will give effect to the enlarged equitable relief provided for by this act in all cases where the land is vacant, where neither the owner nor the person asserting the adverse claim is in possession, and in all cases where the owner is in the possession of the lands. *Central Pacific R. R. Co.* v. *Dyer et al.*, 1 Sawyer Reps. 641; *Holland* v. *Challen*, 110 U. S. 16; *Reynolds* v. *Crawfordsville First National Bank*, 112 U. S. 405.

While under such statutory provisions a bill to quiet title could not be maintained in the Federal courts where the plaintiff was out of possession and the defendant in possession, *Whitehead* v. *Shattuck*, 138 U. S. 146, it in no way calls in question the correctness of the decisions above cited. See also *Prentice* v. *Duluth Storage Co.*, 58 Fed. Rep. 437; *Stark* v. *Starr*, 6 Wall. 402; *Gillis* v. *Downey*, 85 Fed. Rep. 483; *Dahl* v. *Raunheim*, 132 U. S. 260.

The owner of a legal title, being in possession of a part of a tract of land, is, in contemplation of law, in possession of every-

thing within its exterior boundaries, except as to such part only as he may have been actually ousted from; that the legal title and possession of a part draws to it the possession of the whole, except to the extent that there may have been an actual adverse possession by some other party; that the possession of an intruder, or one without title, or of one even who enters under color of title, is not extended beyond his actual enclosure, or that of which he has taken actual physical possession as against the true owner who is in possession of a part. The possession of a mere trespasser, or even of one entering under color of title, on a lode or vein, who has engaged in the extraction of ore therefrom, cannot be extended beyond the point of his pick, the face of his drift, or other actual opening made by him, as against the true owner who is also in possession. *Labory* v. *Orphan Asylum*, 97 California, 270; *Clark* v. *Courtney*, 5 Pet. 319; *Hunnicut* v. *Peyton*, 102 U. S. 333, 369.

The rule, or doctrine, announced in the foregoing cases applies also to a case in which is involved the question of ownership or possession of a mining claim and the ores beneath the same, and the respondent having title to the Jordan Extension, Northern Light, Grizzly and Fairview, and being also in possession of the surface and portions of the underground works and ore bodies in said claims, is deemed to be in possession of every part and parcel of each of the claims, including all the ore bodies therein, except so far only as the evidence might show it had been actually ousted by petitioners.

Here there is nothing to show an ouster of the respondent by petitioners, from any part or portion of either of said claims, or of any ore body lying beneath them, or either of them.

Respondent's possession is such as enables it to maintain an action of trespass against petitioners, and is the requisite possession to maintain this suit in equity to quiet title. *Mining Company* v. *Tarbet*, 98 U. S. 462; *Empire State-Idaho Co.* v. *Bunker Hill Co.*, 121 Fed. Rep. 973.

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

The first question is, whether the plaintiff can maintain this suit in equity without a prior adjudication in an action at law of its legal title. The bill alleges ownership and possession. It supported this allegation by patents from the United States of the first four claims mentioned in the bill, and proved that the defendants were working on a vein or body of mineral beneath the surface and extracting ores therefrom. The bill has a double aspect, to quiet title and to restrain defendants from removing any more ores from beneath the surface of these claims. Title by patent from the United States to a tract of ground, theretofore public, *prima facie* carries ownership of all beneath the surface, and possession under such patent of the surface is presumptively possession of all beneath the surface. This is the general law of real estate. True, in respect to mining property, this presumption of title to mineral beneath the surface may be overthrown by proof that such mineral is a part of a vein apexing in a claim belonging to some other party. But this is a matter of defense, and while proof of ownership of the apex may be proof of the ownership of the vein descending on its dip below the surface of property belonging to another, yet such ownership of the apex must first be established before any extralateral title to the vein can be recognized. This suit was not in the nature of an ejectment, to put the defendants out of possession of the space beneath the surface of plaintiff's claims from which they had extracted ore, but to quiet the title of the plaintiff to the vein in which they had been working, and to restrain them from mining and removing any more ore.

Sec. 3511, Rev. Stats., Utah, 1898, reads:

"SEC. 3511. An action may be brought by any person against another who claims an estate or interest in any real property adverse to him, for the purpose of determining such adverse claim."

A statute of a similar character was before this court in *Holland* v. *Challen*, 110 U. S. 15, and it was held that under it a suit might be maintained by one out of possession against another also out of possession to quiet the title of the former to the premises. It was said, quoting from a prior opinion, that it was "a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding." It was also said (p. 20):

"To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long continued possession, *Alexander* v. *Pendleton*, 8 Cranch, 462; *Peirsoll* v. *Elliott*, 6 Pet. 95; *Orton* v. *Smith*, 18 How. 263.

"The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title."

The same question was considered and decided in the same way in respect to a suit, based upon a similar statute, in Iowa, in *Wehrman* v. *Conklin*, 155 U. S. 314. Of course, as pointed out in *Whitehead* v. *Shattuck*, 138 U. S. 146, such a statute cannot be relied upon in the Federal courts to sustain a bill in equity by one out of possession against one in possession, for an action at law in the nature of an action of ejectment affords a perfectly adequate legal remedy. There is nothing in the point decided in *Boston &c. Mining Company* v. *Montana Ore Company*, 188 U. S. 632, which, rightly considered, conflicts with the case of *Holland* v. *Challen*.

It will be further borne in mind that this question was raised by demurrer to the plaintiff's bill and by motion after the

plaintiff had finished its testimony and before the defendants had introduced theirs, and was not renewed at the close of the trial, although until then the motion was not decided. At the time the motion was made the case presented was one of a clear legal title to the four mining claims by patent from the United States, and an unauthorized entry by subterranean workings into the ground below the surface and the mining and extracting of ores therefrom—a case for restraint by injunction, which was part of the relief asked for in the bill. It is insisted that in *Park* v. *Wilkinson*, 21 Utah, 279, the Supreme Court of that State has given a different construction to the statute, but in this we think counsel are mistaken. In that case the plaintiff brought an action which the court says "was in the nature of one in ejectment." To the complaint the defendant, as authorized by the practice in Utah, answered with a cross complaint demanding equitable relief. A jury was empaneled. After the testimony was all in the court ruled against the claim for equitable relief, discharged the jury and entered judgment for the plaintiff. This was held to be erroneous, the Supreme Court saying that "after determining the equitable issue the court should have submitted the case to the jury upon proper instructions." In other words, the equitable relief sought by the defendant having been denied, the case stood as one in the nature of an action of ejectment, which was a common law action, entitling the party to a jury. But in this case upon the allegations of the complaint the plaintiff was in possession and therefore could not maintain an action of ejectment. The testimony which plaintiff offered showed that it was the owner and in possession, and, of course, at that time nothing in the nature of an action of ejectment was shown. And it was only by demurrer to the complaint and by motion after the plaintiff had rested that the question of a right to a jury was raised by the defendants. The decision of the Court of Appeals in this matter was right.

Coming now to the merits, it is not open to dispute that the defendants were taking ore from beneath the surface of the

plaintiff's four claims. The question, therefore, arises, What right had they to thus mine and remove ore? They must show that the ore was taken from a vein belonging to them. Was there a vein? Where was its apex, and who was the owner or that apex? The testimony is voluminous, and even with the diagrams accompanying it, it is difficult to come to a satisfactory conclusion as to the facts.

It is insisted that the findings of the Circuit Court should have bound and concluded the Court of Appeals upon questions of fact. The difficulty with this contention is that there is nothing to show what the Circuit Court found to be the facts. Whatever might have been suggested by the course of the argument at the hearing, the comments of the court upon such argument, or in announcing its decision, there is nothing in the record to indicate whether its decision was based upon a question of fact or a matter of law. The record only contains its decree, dismissing the bill. All else is a matter of surmise, except as may be inferred from the allegations of the pleadings and the scope of the testimony. While it is apparent that the Circuit Court must have based its decision upon one of two or three grounds, yet upon which it is not certain. The Circuit Court of Appeals made no separate finding of facts, but it filed an opinion which indicates the scope of its decision, and it is the decree of that court which is before us for consideration. The attitude of the case is very like that of one in which a trial court refers all things to a master who takes the testimony and reports it, with a general finding for the plaintiff or defendant, upon which report the trial court states its views of the facts and the law and enters its decree. An appellate court reviewing such decree will give its consideration to the conclusions stated by the trial court, irrespective of the report of the master, unless the issue be so narrow that sustaining the decree of the court necessarily involves an overruling of the master on a matter of fact.

From the opinion of the Court of Appeals it appears that it found that there was a broad vein. It says: "A careful ex-

amination and consideration of the evidence clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral bearing rock extending from the quartzite on one side to the quartzite on the other." This stratum of limestone underlies the four claims of the plaintiff, and one of the contentions of the defendants is that there are several independent veins, one of which has its apex within the surface lines of the Kempton and another its apex in the Ashland, that these independent veins continue down through the stratum of limestone beneath the surface of the plaintiff's claims, and that it was only from these independent veins that the defendants were mining and removing ore. Of course, this difference between the conclusions of the court and the contentions of the defendants affects materially the scope of the inquiry. If the limestone is not, strictly speaking, a vein, but a mere stratum of rock through which run several independent veins, then the inquiry must extend to the location of the apex of each separate vein, whereas if the stratum of limestone is itself a single broad vein, then the inquiry is narrowed to the location of its apex.

With reference to the conclusion of the Court of Appeals it is sufficient to say that if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong.

Treating this limestone as a single broad vein, it is apparent that the entire apex is not within the surface of either the Kempton or Ashland, but that it is also found in the "Old Jordan" and Mountain Gem, the properties of the plaintiff. The line which divides the surface of the claims of the defendants from the "Old Jordan" and Mountain Gem claims also bisects the vein as it comes to the surface. In other words, part of the apex is within plaintiff's claims and part within defendants'. In such a case the senior location takes the entire width of the vein on its dip. This was the conclusion of the

Court of Appeals, as shown by this quotation from its opinion (p. 592):

"Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines. This is so because it has been the custom among miners, since before the enactment of the mining laws, to regard and treat the vein as a unit and indivisible, in point of width, as respects the right to pursue it extralaterally beneath the surface; because usually the width of the vein is so irregular, and its strike and dip depart so far from right lines, that it is altogether impracticable, if not impossible, to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course; and because it conforms to the principle pervading the mining laws, that priority of discovery and of location gives the better right, as is illustrated in the provision giving to the senior claim all ore contained in the space of intersection where two or more veins intersect or cross each other, and in the further provision giving to the senior claim the entire vein at and below the point of union, where two or more veins with distinct apices and embraced in separate claims unite in their course downward. Rev. Stat. sec. 2336."

We fully endorse the views thus expressed. Discovery is the all-important fact upon which title to mines depends. Lindley, in his work on Mines, 2d ed., vol. 1, sec. 335, says:

"Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. 'Rewards so bestowed,' says Gamboa, 'besides being a proper return for the labor and anxiety of the discoverers, have the further effect of

stimulating others to search for veins and mines, on which the general prosperity of the State depends.' "

The two thoughts here presented are reward for the time and labor spent in making the discovery, thus adding to the general wealth, and incentive to others to prosecute searches for veins and mines. To take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery and without any previous searching for mineral is manifest injustice.

Again, as indicated in the quotation from the Court of Appeals, continuing the line of division shown upon the surface through the descending vein would be attended with great difficulty and uncertainty. Dealing with questions of this nature, a practical view must be taken. Veins do not continue of uniform width in their descent, but are often irregular and broken, and to attempt to make a division of ore according as it appears on the surface, or equally, would require the constant supervision of a court. It is not strange, then, that the custom of miners has been, as stated by the Court of Appeals, to regard and treat the vein as a unit and indivisible in point of width and belonging to the discoverer. This question has been before this court, as well as several of the courts in the mining districts. In *Argentine Company* v. *Terrible Company*, 122 U. S. 478, 484, we said:

"Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein."

In *Mining Co.* v. *Mining Co.*, 5 Utah, 3, the question is discussed at some length by Chief Justice Zane. In the course of the opinion it is said (p. 54):

"Under the law of 1866 the surface ground was merely for the convenient working of the lode. The discoverer and first locator took the lode in its entirety. The law contemplated its segregation in its length, not in its width. It refers to lodes between the end lines, not to a part of a lode. No ex-

pression can be found in it indicating an intention to limit the rights of the locator to a portion of the lode in its width. The discovery of any part of the apex of a vein is regarded by it as a discovery of the entire apex. And we think that the law of 1872, when all of its provisions are considered together, and in connection with the former law on the subject, as it should be, evinces the same intent. Under this law the discoverer of any part of the apex gets the right to its entire width, despite the fact that a portion of the width may be outside of the surface side lines of his claim extended downwards vertically. While he has no right to the extralateral surface he has a right to the extralateral lode beneath the surface."

See also *St. Louis M. & M. Company* v. *Montana M. Company*, Circuit Court of Appeals (9th Cir.), 44 C. C. A. 120; *Empire State-Idaho M. & D. Company* v. *Bunker Hill M. & C. Company*, Circuit Court of Appeals (9th Cir.), 52 C. C. A. 219. Also another suit between the same parties in the same court, 66 C. C. A. 99; *Last Chance M. Company* v. *Bunker Hill S. M. & C. Company*, Circuit Court of Appeals (9th Cir.), 66 C. C. A. 299.

But it is contended by the defendants that both the entries and patents of the Ashland and Kempton claims were prior in time to the entries and patents of the "Old Jordan" and Mountain Gem, and that such priority of entry and patent conclusively establishes the prior right of the owners to this broad vein; that the failure of the owners of the "Old Jordan" and Mountain Gem to adverse the applications of the owners of the Ashland and Kempton for patent was an admission that the latter had priority of right, and is conclusive against any present testimony as to the dates of the locations. We had occasion in the recent case of *Mining Company* v. *Tunnel Company*, 196 U. S. 337, to consider to what extent the issue of a mining patent worked an estoppel of the claims of third parties, and it is unnecessary now to repeat the discussion there had.

This case presents the question under different aspects. The entries and patents of the Ashland and Kempton claims

were, as stated, prior in time to the entries and patents of the "Old Jordan" and Mountain Gem. There is no record of any adverse suits, although it is intimated that there were such suits. In the absence of a record thereof we cannot assume that anything more was presented and decided than was necessary to justify the patents. A patent is issued for the land described and all that is necessarily determined in an adverse suit is the priority of right to the land. This is evident from section 2325, Rev. Stat., which says: "A patent for any land claimed and located for valuable deposit may be obtained in the following manner." In the section the only matters mentioned for examination and consideration relate to the surface of the ground. There is no suggestion or provision for any inquiry or determination of subterranean rights. Lindley, in his work on Mines, 2d ed., vol. 2, sec. 730, says:

"An application for patent invites only such contests as affects the surface area. A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such a condition arises, it is adjusted by reference to surface apex ownership and priority of location not involving any surface conflict. The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts are not the subject of adverse claims."

In *New York Hill Company* v. *Rocky Bar Company*, 6 L. D. 318, the Commissioner of the General Land Office declined to recognize an adverse claim where there was no surface conflict, saying (p. 320):

"In the event that patent should be issued upon said application and any question should thereafter arise as to the right under such patent to follow any vein or lode, as indicated in sec. 2322, it would be a matter for the courts to settle, and I am of the opinion, there being no surface conflict alleged in this case, and without considering any other question relating to the sufficiency of the so-called adverse claim, that you properly

declined to receive the same as an adverse claim, and to that extent your decision is affirmed."

The same ruling was made in *Smuggler Mining Company* v. *Trueworthy Lode Claim*, 19 L. D. 356.

Without determining what would be the effect of a judgment in an adverse suit in respect to subterranean rights, if any were in fact presented and adjudicated, it is enough now to hold that there is no presumption, in the absence of the record, that any such rights were considered and determined. Indeed, in the absence of a record, or some satisfactory evidence, it is to be assumed that the patents were issued without any contest and upon the surveys made under the direction of the United States surveyor general, and included only ground in respect to which there was no conflict. If the surface ground included in an application does not conflict with that of an adjoining claimant, the latter is in no position to question the right of the former to a patent. Take the not infrequent case of two claims adjoining each other, the boundary line between which is undisputed. If the owner of one applies for a patent the owner of the other is clearly under no obligation to adverse that application, even if under any circumstances he might have a right to do so. Other necessary conditions being proved, the applicant is entitled to a patent for the ground. Generally speaking, if the boundary between the two claims is undisputed the foundation for an adverse suit is lacking. While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that that right was initiated prior to the right of the patentee of adjoining tract to the ground within his claim.

Section 2336, Rev. Stat., makes provision for conflict as to certain subterranean rights. The last sentence of the section reads: "And where two or more veins unite the oldest or prior location shall take the vein below the point of union, including all the space of intersection." *Argentine Company* v. *Terrible Company, supra.* As the place of union may be far below the surface, this evidently contemplates inquiry and decision

after patent, and then it can only be in the courts. And the same rule will obtain as to other subterranean rights.

It is further contended that there is no evidence of a valid location of the "Old Jordan" and Mountain Gem prior to the entries of the Ashland and Kempton. Location notices of the "Old Jordan" and Mountain Gem were admitted in evidence, that of the former being as follows:

"Notice. Jordan S. M. Co.

"The undersigned members of the Jordan Silver Mining Co. claim for mining purposes one share of two hundred feet each and one additional claim of two hundred feet for original discoverer, George R. Ogilvie, on this lead of mineral ore, with all its dips, spurs and angles, beginning at the stake situated one hundred feet northeast of Gardner's shanties in Bingham (Canion) Kanyon, in West Mountain, and running two thousand two hundred feet in a westerly direction along the side of said mountain, on a line with Bingham Canyon, and intend to work the same according to the mining laws of this mining district.

"(Signed by 25 locators.)

"Bingham Kanyon, Salt Lake City, Utah Territory, Sept. 17, 1863.

"A. GARDNER, Recorder."

The Mountain Gem location was similar in form, dated August 20, 1864, and recorded August 24, 1864. Now these location notices were long before the time of the locations of the defendants' claims. It is further contended that the locations of the "Old Jordan" and Mountain Gem were anterior to the act of July 26, 1866 (14 Stat. 251), which was the first legislation of Congress in respect to the granting of mineral claims, and that while that act in its second section recognizes the rights of locators in so far as they have proceeded according to the local custom or rules of miners of the districts in which the mines are situated, yet in this case there is no evidence that these locations were made in conformity to any such local custom or rules. It is sufficient to say that by stipula-

tion of counsel it was agreed that the patents to the "Old Jordan" and Mountain Gem were issued upon the location notices. Inasmuch as they were accepted by the Government, and patents issued thereon it was a recognition by the department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to such notices.

Summing up our conclusions, the findings of fact as stated in the opinion of the Court of Appeals are not clearly against the testimony, and must, therefore, be sustained. According to those findings there was a single broad vein—the apex or outcroppings of which extended through the limits of some of the plaintiff's and defendants' claims—and not several independent veins. The ore which was being mined and removed by the defendants was taken from this single broad vein beneath the surface ground of claims belonging to the plaintiff. Where there is a single broad vein whose apex or outcroppings extend into two adjoining mining claims the discoverer has an extralateral right to the entire vein on its dip. Acceptance by the Government of location proceedings had before the statute of 1866, and issue of a patent thereon, is evidence that those location proceedings were in accordance with the rules and customs of the local mining district. The priority of right to a single broad vein vested in the discoverer is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by testimony other than the entries and patents. In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface.

From these conclusions it is obvious that the decision of the Circuit Court of Appeals was right, and it is

Affirmed.

RAYMOND, TREASURER OF COOK COUNTY, ILLINOIS, *v.* CHICAGO UNION TRACTION COMPANY.

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

No. 115. Argued April 8, 9, 1907.—Decided October 21, 1907.

The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislative, executive or judicial authority, but relate to all instrumentalities through which the State acts; and so *held* that the action of a state board of equalization, the decisions whereof are conclusive, except as proceedings for relief may be taken in the courts, is reviewable in the Federal courts at the instance of one claiming to be thereby deprived of his property without due process of law and denied the equal protection of the law.

Action of a board of equalization resulting in illegal discrimination held in this case not to be action forbidden by the state legislature and therefore beyond review by the Federal courts under the Fourteenth Amendment. *Barney* v. *City of New York*, 193 N. Y. 430, distinguished.

Where a corporation has paid the full amount of its tax as based upon the same rate as that levied upon other property of the same class, equity will restrain the collection of the excess illegally assessed, there being no adequate remedy at law, when it appears that it would require a multiplicity of suits against the various taxing authorities to recover the tax and that a portion of it would go to the State against which no action would lie, and where the amount is so great that its payment would cause insolvency, and a levy upon the property—in this case a street car system—would embarrass and injure the public.

114 Fed. Rep. 557, affirmed.

THE appellants, who were defendants below, have appealed from the judgment of the Circuit Court of the United States for the Northern District of Illinois. The case is one of several argued together, the facts in regard to which are substantially the same. It was brought to enjoin the appellants from taking any further proceedings towards the collection of certain taxes assessed against the appellee upon an assessment alleged to be in violation of the Fourteenth Amendment to the Constitution of the United States, and which, if enforced, would result in the taking of appellee's property without due process of law and in denying to it the equal protection of the laws.

The case was brought in the Circuit Court of the United States at Chicago and an opinion was delivered by that court at the time of the judgment for appellee. 114 Fed. Rep. 557. An earlier opinion upon a previous motion in certain traction company cases, relating to one phase of the matter in controversy, which was pending at the time in the Southern District of Illinois, is to be found in 112 Fed. Rep. 607. The questions arise by reason of the provisions of the constitution of the State of Illinois and certain sections of its tax statutes or revenue laws. The material part of article 9, section 1, of the constitution of Illinois, 1870, is as follows:

"The general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise; but the general assembly shall have power to tax . . . insurance, telegraph and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

The following are the statutes in question:

"Real property shall be valued as follows: First, each tract or lot of real property shall be valued at its fair cash value estimated at the price it would bring at a fair voluntary sale." Hurd's Rev. Stat. 1899, c. 120, par. 4.

"Personal property shall be valued as follows: First, all personal property, except as herein otherwise directed, shall be valued at its fair cash value. . . . Fourth, the capital stock of all companies and associations now or hereafter created under the laws of this State, except those required to be assessed by the local assessors and hereinafter provided, shall be so valued by the state board of equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of

the tangible property of such company or association; such board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just, and such rules and principles when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject, however, to such change, alteration or amendment as may be found from time to time to be necessary by said board." Hurd's Rev. Stat. 1899, c. 120, § 3.

The state board of equalization is the body that makes the original assessments upon the capital stock, etc., of corporations like the ones in question here, and there is no appeal from its valuation or decision.

The following are some of the averments of the bill of complaint filed by the appellee in this suit: The defendants were, respectively, the town collector of the town of North Chicago and the county treasurer of Cook County, the city of Chicago being within the limits of that county. In November or December of the year 1900 a valid assessment was made by the state board of equalization, assessing the full value of the capital stock of the appellee, including franchises, at the sum of three millions of dollars over and above the value of the tangible property of the appellee, and in accordance with the provisions of the revenue law then in force it decided, ascertained and set down the sum of six hundred thousand dollars, one-fifth of the above-mentioned three million dollars, as the assessed value of the appellee's property, designated as "capital stock, including the franchise," for all purposes of taxation. This assessment was never vacated, annulled or set aside, but was duly certified to the proper officer, and the state, county, city and all other kinds of taxes levied for the year 1900, for and against property situated in the said town of North Chicago, were duly extended against such assessed value of six hundred thousand dollars, and the taxes were also extended against said assessment made upon the tangible property of the appellee for the year 1900, and a warrant was duly issued to the town collector

of the town of North Chicago, directing him to collect the taxes so extended. On or about the twenty-eighth day of January, 1901, appellee paid to the collector of the town of North Chicago the sum of fifty-two thousand nine hundred and two dollars, in full satisfaction of all the taxes assessed against the appellee, and no part of the money so paid by appellee in satisfaction of the taxes has ever been returned or tendered back to the company, but, on the contrary, the money has been paid over by the collector, less his commission, either directly or through the county treasurer of the county, to the various taxing and public bodies entitled to receive the same, and has been used or is still retained by said bodies, respectively.

On the tenth day of November, 1900, proceedings by taxpayers were instituted against the state board of equalization to compel that board to make an assessment for that same year against the appellee upon its capital stock and franchises. This application was made while the state board of equalization was in session, but before any final action had been taken by the board to determine and fix the proper assessment to be made on the capital stock of the appellee. It was alleged in the petition that the state board of equalization intended to adjourn its session without making any assessment upon the capital stock, including the franchises of the appellee, and on twenty-two other corporations doing business in the city of Chicago, and that it intended illegally to neglect and refuse to discharge the statutory duty obligatory upon it in that regard. Neither the appellee nor the other corporations mentioned in the petition were made parties to the proceedings, nor did they ever become parties thereto. The defendants therein, members of the state board of equalization, denied that they had refused or intended to refuse to discharge their duties as members of the board. Thereafter the board assessed the capital stock of the respondent, including the franchise, as already stated, and on the third of December, 1900, adjourned *sine die*.

Before this adjournment, and on the sixteenth of November, 1900, the mandamus proceedings had been continued, and no

action was thereafter taken therein until about the twelfth day of March, 1901. About the first of May, 1901, the proceedings came on for trial and terminated in a judgment directing that a writ should issue against the members of the state board of equalization, requiring the board to convene and forthwith value and assess the capital stock of the appellee, "so as to ascertain and determine respectively, as to each of said corporations, the fair cash value of its capital stock, including its franchises over and above the assessed value of the tangible property of such company for the year 1900."

An appeal was taken to the Supreme Court from that judgment, but no evidence was introduced on the trial of the case in support of the merits of the assessment theretofore made upon the capital stock, including franchises, of the appellee, and no argument was made either in the trial court or in the Supreme Court upon appeal in support of the merits of the assessment, the defense being rested almost wholly on objections to jurisdiction, and other legal grounds, touching the power of the court to grant the relief prayed for. (A method of assessing the capital stock had been adopted by the board, which omitted the indebtedness of the corporations as a factor in the valuation of such stock, and it was this error which led to the original assessments upon those corporations, and that caused the mandamus proceedings.)

The amount of the assessment against the appellee for the year 1900 appeared upon the trial of the mandamus proceedings, and it was found by the trial court that the assessment was so low as to show that it was in fact a fraudulent assessment, and therefore in law no assessment at all, and upon appeal the Supreme Court held that the finding of the court below was justified, and that under such circumstances, where there was in law no assessment, the court might compel the board to fulfill its duty by assessing the property of the taxpayer thus fraudulently undervalued. See *State Board of Equalization* v. *People*, 191 Illinois, 528. The state court held that under the provisions of the statute of Illinois the state board of

equalization, acting as the original assessor of the capital stock and franchises of corporations, might make an assessment of omitted capital stock and franchises of corporations under the section of the statute referred to. See secs. 276, 277 of the Revenue Act, Hurd's Stat. 1899, page 441.

The judgment of the Circuit Court granting the writ of mandamus was thereupon affirmed by the Supreme Court, and the writ was issued on the twenty-second of November, 1901, against the board. The writ, as issued under the direction of the Supreme Court, after reciting that the previous assessment was in fact no assessment in law and was unreasonable, arbitrary and fraudulent, and was not the expression or the result of the honest judgment and discretion of the state board of equalization and the members thereof, and amounted to a wrongful, willful and arbitrary failure, omission and refusal to assess the capital stock of the appellee at its fair cash value over and above tangible property of the appellee, and was a fraud in law and upon the relators and the people, directed the members of the board to assemble and to forthwith proceed to value and assess the capital stock, including the franchises, of the appellee as of the first day of April, 1900, in the manner provided by law, "and that you, the said state board of equalization and the members thereof, do value the capital stock of said corporations and each of them so as to ascertain and determine, respectively, as to each of them, the fair cash value of its capital stock, including the franchise, over and above the equalized assessed value of the tangible property of such corporation on the first day of April, A. D. 1900, and that in arriving at said valuations and assessments of capital stock, including the franchises of the corporations herein named, the said state board and the members thereof, from the best information obtainable by it and them, shall ascertain and take into consideration, among other things, as to each said corporation, as the same was on April 1, 1900, the market value, or, if no market value, then the fair cash value of its shares of stock and the total amount of all indebtedness, except the indebted-

ness for current expenses, excluding from such expenses the amount for purchase or improvement of property and the assessed or equalized value of tangible property owned by said corporations, respectively, on April 1, 1900."

Pursuant to what the defendants believed to be the command of the writ, and without any independent judgment of their own, the members of the board proceeded to make an assessment upon the aggregate of the value of the capital stock, including franchises, of the appellee and including its indebtedness, deducting therefrom the assessed equalized valuation of the real estate and tangible personal property belonging to the appellee, and then assessing for taxation one-fifth thereof. At this time and for years previous thereto all property, real and personal, corporate or individual, throughout the State, as well as in Cook County, had been assessed at not to exceed sixty-five or seventy per cent of its fair cash value, and one-fifth of that per cent was the amount upon which the tax was laid. This assessment, however, was not so made, but one-fifth of the full value was assessed, and the roll thus made up was delivered to the proper officer and an extension of the taxes made and a warrant delivered to the town collector for collection. The total tax of the appellee on the second assessment amounted to about the sum of one million dollars more than the tax paid under the first assessment. It is the duty of the collector and the county treasurer to enforce the collection of these taxes, together with a penalty by reason of the delay in payment, and to that end levy the amount by distress and sale of the goods and chattels of the appellee, and which cannot be prevented or defended by the appellee otherwise than by payment or by a bill in chancery. The appellee's personal property consists chiefly of its cars and other personal property actually used in its business of transporting passengers, and levy of said tax would greatly embarrass it in its business and also injure the public using its cars. After collecting the taxes it is the duty of the collector, and he is required by law, to pay over and distribute them in the proportions designated in the

tax book to the city treasurer of the city of Chicago, the county treasurer of Cook County, the treasurer of the sanitary district and the other officers and authorities entitled to receive the same. In order to recover back the amount thus paid to the collector appellee would be obliged to bring separate suits against each one of the bodies receiving its proportionate share of said tax, necessitating a multiplicity of suits. Repayment of the amount which should be paid for the uses and purposes of the State of Illinois could not be enforced by any legal proceeding whatever, nor could repayment be obtained from anyone which would cover the costs, including the commissions deducted for the recovery of the taxes; and if proceedings to collect the taxes were not enjoined great and irreparable injury would result to the appellee, for which there was no complete or adequate remedy at law. It was then alleged that to pay the enormous sum of over a million of dollars, claimed as the tax for 1900, would render it impossible for the company to pay its rentals or preserve its leasehold interests, and would necessarily result in its insolvency. It was also averred that there were hundreds of corporations subject to be assessed by such board in the same manner that the appellee was assessed under the writ of mandamus issued in respect to the taxes assessed against it, and that not one of such corporations was, as a matter of fact, so assessed, but a discriminating, crushing tax burden was placed upon appellee and the other corporations mentioned in the writ, contrary to the provisions of the Constitution of the United States and in violation of the constitution of the State of Illinois.

Within a month of the time when the assessment of 1900 was made under the command of the writ the same board of equalization made an assessment upon the property of the appellee for the year 1901, using the best judgment of its members, and at that time it equalized the assessment with other property assessed throughout the State, and the difference between the two assessments is most material. The facts are stated in the opinion of the circuit judge, as follows:

"A comparison between these records of the state board is significant. In the case of the Chicago Union Traction Company the assessment for the year 1901, capital stock and tangible property aggregated, falls from a little over fourteen millions of dollars (the reassessment for 1900) to about eight millions two hundred and fifty thousand dollars, a loss of about forty per cent.

"In the case of the Chicago Consolidated Traction Company, the depreciation is from a little over three millions seven hundred and fifty thousand dollars to about two millions of dollars, or about forty-seven per cent.

"In the case of the People's Gas Company, the depreciation is from over twelve millions and a half to about eight millions and a half, or about thirty-two per cent.

"In the case of the Chicago City Railway, the depreciation is from a little over six millions to a little over four millions and a quarter, or about thirty per cent.

"In the case of the Chicago Telephone Company, the depreciation is from a little less than two millions six hundred thousand dollars to a little over one million seven hundred thousand dollars, or about thirty-four and one-half per cent.

"In the case of the Chicago Edison Company, the depreciation is from a little over two millions four hundred thousand dollars to a little over one million three hundred thousand dollars, or about forty-six per cent.

"In the case of the South Chicago City Railway, the depreciation is from nearly five hundred and seventy thousand dollars to a little less than three hundred thousand dollars, or about forty-seven per cent.

"These assessments, so widely divergent, were upon the same properties, by the same board, entered almost on the same day. The dates as of which they spoke were, it is true, a year apart; the one being the first of April, 1900, and the other of the first of April, 1901. But the tide of stock quotations, and the tide of current values, were higher on the latter day than the former. If between these two assessments a considerable disparity

should exist, the increase ought to be found in the assessment for 1901, and not in that of 1900."

Other averments were made in the bill, designed to raise other questions than the ones discussed in the following opinion, and for that reason are not set forth.

The defendants put in their answer and joined issue in regard to many of the material averments contained in the bill. The case was referred to a master and testimony was taken and a report made by the master to the court, in which he found all the material averments of the bill had been proved. The court approved the findings of the master, but before granting the injunction it ordered that the appellee should pay to the city an amount which the court found was fairly and equitably due from the appellee as its proportion of the taxes for 1900. The sum was arrived at by the court by a computation which, in its judgment, produced a fair and proper result. The amount directed to be paid by the court before the injunction should issue was the sum of $134,350.03, which sum the appellee paid, and the injunction issued as directed. The appellants duly excepted to the findings of the master that the amount of taxes equitably due from the appellee was as just stated, and the appellants insisted that the finding of the master of the amount of tax to be paid should have been the sum of $961,154.15 for general taxes, and $58,057.63 for interest thereon, making a total of $1,019,211.78 as due from the appellee for the taxes of 1900, as evidenced by the collector's warrant in the hands of the defendants in this suit.

It was also averred that the assessment was grossly excessive and the property greatly overvalued.

Mr. David K. Tone and *Mr. James Hamilton Lewis*, with whom *Mr. Edward J. Brundage*, *Mr. Harry A. Lewis*, *Mr. William F. Struckmann*, *Mr. William H. Stead* and *Mr. George B. Gillespie* were on the brief, for appellants:

Equality and uniformity of taxation is not a right guaranteed by the Federal Constitution. *State Railroad Tax Cases*,

92 U. S. 575, 618; *Davidson* v. *Board of Admrs. of New Orleans*, 96 U. S. 97; *Kelly* v. *City of Pittsburgh*, 104 U. S. 78; *Merchants & Mfrs. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 464; *Henderson Bridge Co.* v. *City of Henderson*, 173 U. S. 592; *Magoun* v. *Ill. Trust & Sav. Bank*, 170 U. S. 283, 293, 295; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562; *State of Missouri ex rel. Hill* v. *Dockery*, 191 U. S. 165, 170; *Travelers Ins. Co.* v. *Connecticut*, 185 U. S. 364, 371.

Where the constitution and the laws of a State are just and fair, and the sole grievance of which a party complains, is that the officers of the State, charged with executing those laws, have deprived that party of his property, contrary to the constitution and the laws of the State, and in violation of the terms thereof, no Federal question is presented, for, under the above circumstances, it will be presumed that the state courts will give full relief against the illegal and unauthorized acts of the officers of the State. *Illinois Central R. R. Co.* v. *Hodges*, 113 Illinois, 323; *New Haven Clock Co.* v. *Kochersperger*, 175 Illinois, 383; *Coxe Bros. Co.* v. *Raymond*, 188 Illinois, 571; *Siegfried* v. *Raymond*, 190 Illinois, 424.

The mere unauthorized acts of state officers, when performed contrary to state law fail to give Federal jurisdiction as has been frequently pointed out by this court when determining under what circumstances criminal prosecutions may be removed from a state court into a court of the United States by reason of the denial by the State of the rights and immunities guaranteed to accused persons under the Fourteenth Amendment.

In finding what constitutes state action within the meaning of § 641, Rev. Stats., this court has necessarily determined what constitutes state action within the meaning of the Fourteenth Amendment. *Strauder* v. *West Virginia*, 100 U. S. 303.

Under *Barney* v. *City of New York*, 193 U. S. 430, appellee's bill of complaint should be dismissed for want of jurisdiction. See also *Manhattan Ry. Co.* v. *New York*, 18 Fed. Rep. 195;

Kierman v. *Multnomah County*, 95 Fed. Rep. 849; *Re Storti*, 109 Fed. Rep. 807.

Equally untenable is the claim in appellee's bill of complaint, that under the circumstances there described the appellee was deprived of its property without due process of law because it had no opportunity to be heard at the time the assessment complained of was levied against it.

Even the *ex parte* orders and directions of the executive and ministerial departments of the Federal Government affecting property and property rights, constitute due process of law if the party aggrieved may go into a court of equity and obtain redress against the unauthorized or wrongful acts of such officers. *Clearing House* v. *Coyne*, 194 U. S. 497.

Courts of equity in Illinois furnish complete redress in case the state board of equalization has exceeded its authority, or if its action is palpably wrong. *Illinois Central Railroad Company* v. *Hodges*, 113 Illinois, 323.

There is no competent evidence in this record tending to sustain the material allegations of appellee's bill of complaint with reference to the assessment complained of.

The testimony of the individual members of the state board of equalization in reference to the operation of their minds at the time they made the assessment complained of was incompetent, and should have been excluded by the Circuit Court. The recorded judgments of judicial and quasi-judicial bodies, cannot be impeached by the subsequent testimony of the members of said bodies, as to how their conclusions were arrived at. *Wright* v. *Chicago*, 48 Illinois, 285; *Quick* v. *Village of River Forest*, 130 Illinois, 323; *Ryder Estate* v. *Alton*, 175 Illinois, 94; *Washington Park Club* v. *Chicago*, 219 Illinois, 323; *Insurance Co.* v. *Pollak*, 75 Illinois, 292; *Stock Exchange* v. *Gleason*, 121 Illinois, 502; *Packet Co.* v. *Sickles*, 5 Wall. 580; *Fayerweather* v. *Ritch*, 195 U. S. 276.

The extracts from the reports of the Railroad and Warehouse Commissioners and from the reports of the Board of Agriculture for the State of Illinois were incompetent. *Hegler*

v. *Faulkner*, 153 U. S. 109; *Chaffee* v. *United States*, 18 Wall. 516; *Swift* v. *State of New York*, 89 N. Y. 52; *Culver* v. *Caldwell*, 137 Alabama, 125; *Gordon* v. *Bucknell*, 38 Iowa, 438; *State* v. *Krause*, 58 Kansas, 651; *Wellington* v. *Railroad Co.*, 158 Massachusetts, 185; *Jones* v. *Guano Co.*, 94 Georgia, 14; *State* v. *Wells*, 11 Ohio, 261.

The figures taken from the books of the Union Stock Yard and Transit Company and from Brown's Directory of American Gas Companies were not competent evidence and should have been excluded.

Private publications, whether written or printed, are incompetent as evidence, unless accompanied by the testimony of the person who compiled the information, to the effect that the compilations therein made are true, of his own personal knowledge. *Seymour* v. *McCormick*, 19 How. 96; *Langley* v. *Smith*, 3 N. Y. St. Rep. 276; *State* v. *Daniels*, 44 N. H. 383; *Richardson* v. *Stringfellow*, 100 Alabama, 416; *Cooke* v. *Slate Co.*, 36 Ohio St. Rep. 135; *Spalding* v. *Hedges*, 2 Pa. St. 240.

If the contention of appellee be sound, that the reassessment of 1900 was void and illegal because the board had exhausted its power in making the first assessment, then appellee had an adequate remedy at law, for it could have paid the void assessment and then have recovered the money back.

The Supreme Court of Illinois held that the first assessment was fraudulent and void, and affirmed the judgment of the state circuit court directing the making of the second. A construction placed by the highest court of the State upon the taxing laws of that State is binding upon a Federal court. *State Railroad Tax Cases*, 92 U. S. 575, 618.

Where a tax is illegal and void and can be paid under protest and then recovered back from the collector, the aggrieved party has an adequate remedy at law, and a court of equity will not assume jurisdiction. *Shelton* v. *Platt*, 139 U. S. 591.

Overvaluation of property by an assessing body, unaccompanied with fraud or bad faith, furnishes no ground for

equitable intervention. *State Railroad Tax Cases*, 92 U. S. 575; *Railroad Co.* v. *Backus*, 154 U. S. 421; *Maish* v. *Arizona*, 164 U. S. 599.

Mr. William G. Beale for The Chicago Edison Company and The Chicago Telephone Company, with whom *Mr. Gilbert E. Porter*, *Mr. Buell McKeever*, *Mr. Waldo F. Tobey*, *Mr. Charles S. Holt* and *Mr. William P. Sidley* were on the briefs; *Mr. James F. Meagher* for The People's Gas Light and Coke Company; *Mr. John P. Wilson* for The Chicago City Railway Company. *Mr. John S. Miller* and *Mr. Merritt Starr* filed a brief for the South Chicago City Railway Company; *Mr. William W. Gurley*, *Mr. Arthur Dyrenforth*, *Mr. Isaac M. Jordan* and *Mr. Howard M. Carter* filed a brief for The Chicago Consolidated Traction Company; and *Mr. William W. Gurley*, *Mr. Arthur Dyrenforth* and *Mr. Howard M. Carter* filed a brief for The Chicago Union Traction Company:[1]

Although to make out a case under the Fourteenth Amendment it must be shown that the act complained of is the act of the State; the prohibitions of the amendment refer to all instrumentalities of the State—to its legislative, executive and judicial authorities and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by the amendment against deprivation by the State violates the constitutional inhibition and, as he acts in the name of the State and for the State, and is clothed with the State's power, his act is that of the State. Were that not so, the constitutional prohibition would have no meaning and the State would be placed in the position of having clothed one of its agents with power to annul or evade the Constitution of the United States. *Ex parte Virginia*, 100 U. S. 339–347; *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226; *Scott* v. *McNeal*, 154 U. S. 34; *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362; *Neal* v. *Delaware*, 103 U. S. 370; *Coulter* v. *L. & N. Ry.*

[1] For other cases argued simultaneously herewith, see *post*, p. 42.

Co., 196 U. S. 599; *Williams* v. *Mississippi*, 170 U. S. 213; *Chi Lung* v. *Freeman*, 92 U. S. 275; *Soon King* v. *Crowley*, 113 U. S. 703; *Arrowsmith* v. *Harmoning*, 118 U. S. 194; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Railroad and Telephone Cos.* v. *Board of Equalizers*, 85 Fed. Rep. 302; *Nashville, C. & St. L. Ry.* v. *Taylor*, 86 Fed. Rep. 168; *Taylor* v. *L. & N. R. Co.*, 88 Fed. Rep. 350; *Louisville Trust Co.* v. *Stone*, 107 Fed. Rep. 305.

The collection of the taxes extended upon the reassessment of the capital stock of appellee made by the state board of equalization, will deprive appellee of its property without due process of law. Every step, regulation and provision in any proceeding under the law of a State making for the protection of a person's rights or property must be observed. *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226.

The action of the state board did not constitute due process of law. The members of the state board did not exercise their judgment. The exercise of such judgment is an indispensable element of due process. In considering whether due process has been had, this court has frequently said it is the substance that the law regards, not the form. An exercise of the judicial officer's judgment, in whatever legal form it may have been made, is the substance of a trial, or of an assessment. *C., B. & Q. R. R. Co.* v. *Paddock*, 75 Illinois, 616.

The state board of equalization did not equalize the assessment so made with the assessments of other property in the State of Illinois. Equalization is the primary duty of the board, both with reference to assessments within the original jurisdiction of the local assessors and assessments within the original jurisdiction of the state board of equalization. *Railroad Co.* v. *Taylor*, 86 Fed. Rep. 184; *Law* v. *People*, 87 Illinois, 405; *Railroad and Telephone Cos.* v. *Board of Equalizers*, 85 Fed. Rep. 302 (305, 306).

The reassessments made by the state board are so grossly excessive as to amount to fraudulent assessments. *People ex rel. Goggin* v. *Board of Equalization*, 191 Illinois, 529.

Other corporations of the same class were not assessed on the same basis.

Discrimination and unauthorized classification are contrary to the principle of equality in taxation prescribed by the constitution and statutes of Illinois and a discriminating assessment does not constitute a due observance of the regulations of the law of the land made for the protection of appellee's rights, under the definition of due process above referred to. *Cummings* v. *Bank*, 101 U. S. 153.

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

The claim that the action of the state board of equalization in making the assessment under consideration was the action of the State, and if carried out would violate the provisions of the Fourteenth Amendment to the Constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a Federal question beyond all controversy. How that question should be decided is another matter which we will proceed at once to discuss.

The state board of equalization is one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation. In regard to corporations of the class of which the appellee and the other corporations involved here are members, it is the duty of that board to make an original assessment upon them. From the decision of the board in making such assessment no appeal is provided for, and such decision is therefore conclusive, except as proceedings for relief may thereafter be taken in the courts. As to the assessments of local assessing bodies, the board is one of review, but its decisions are equally conclusive, as in the case of original assessments. Acting under the constitution and laws of the State, the board therefore represents the State, and its action is the action of the State. The provisions of the Fourteenth

Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State. *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226. Following the above case the Federal courts throughout the country have frequently reviewed the action of taxing bodies when under the facts such action was in effect the action of the State, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question. See *Nashville &c. Ry.* v. *Taylor*, 86 Fed. Rep. 168; *Louisville Trust Co.* v. *Stone*, 107 Fed. Rep. 305. In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the court said: "It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by taxing officers of the State, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment."

The same principle has been recognized in *Reagan* v. *Trust Co.*, 154 U. S. 362, 390; *Backus* v. *Depot Co.*, 169 U. S. 557, 565; *Fargo* v. *Hart*, 193 U. S. 490, 502.

The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in

the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the State through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the State, which the State might do, *Coulter* v. *Railroad,* 196 U. S. 599, but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the State in levying a tax by valuation, "so that every person shall pay a tax in proportion to the value of his, her or its property," was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the board. *Barney* v. *City of New York,* 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here.

We are also of opinion that the case is one over which equity has jurisdiction. In *Cummings* v. *National Bank,* 101 U. S. 153, this court held that the case was one properly brought in equity. It was to restrain the collection of a tax. While the court held that the position of the bank as trustee entitled it to maintain an action in equity and also under the statute of Ohio, it was further held (page 157): "Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when

this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power." We have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid and provide for a proper valuation, yet if, through mistake on the part of the State, through its board of equalization and while acting as a *quasi*-judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity.

In all these cases, however, where there is jurisdiction to tax at all, equity will not grant an injunction to restrain the collection, even of an illegal tax, without the payment on the part of the taxpayer of the amount of a tax fairly and equitably due. *Bank* v. *Marye,* 191 U. S. 272, and cases cited. Acting upon this principle, the Circuit Court refused to issue the injunction until the appellee paid the amount which the court found to be a fair and just amount due from the appellee for the tax of the year 1900, based upon a tax at the same rate as that levied upon other property and on corporations of the same class within the State. The sum to be paid by the appellee herein, as decided by the circuit judge, was $134,350.03. That sum was paid instead of $1,019,211.78, called for by the warrant in the hands of the collector.

Finally it is objected that the appellee had a complete and adequate remedy at law by paying the amount of the warrant, and then suing the collector to recover the same back as money paid under duress, although upon a void warrant. Undoubtedly if there be a complete and adequate remedy at law in such

a case as this, the remedy in equity will not be recognized. Assuming the tax to be void, equity will not restrain by injunction its collection, unless there be some other ground for equitable interposition. *Shelton* v. *Platt*, 139 U. S. 591; *Allen* v. *Palace Car Co.*, 139 U. S. 658; *Express Co.* v. *Seibert*, 142 U. S. 339. In the cases in 139 U. S., *supra*, it was recognized that no ground appeared for the interposition of a court of equity, because of the existence of a statute in the State of Tennessee providing for paying the amount of the alleged illegal tax to the officer holding the warrant, and granting to the taxpayer a right to commence an action to recover back the tax thus paid, the statute providing that the officer should pay the amount received into the state treasury, where it was to remain until the question was decided, and, if it was decided in favor of the taxpayer, provision was made for the repayment of the amount by the State. The other averments, beside that of the illegality of the tax, made in these two cases, were held not to constitute a ground for the interposition of a court of equity by restraining the collection of the tax. In the case in 142 U. S., *supra*, the court held that there was no ground to warrant the interposition of a court of equity. The case was decided upon the ground that the averment of illegality of the tax was not sustained. There is no statute of a similar kind in Illinois which has been called to our attention, but some of the cases in that State hold that such a suit may be maintained against the collector when the money was paid under protest.

In the case at bar it is averred that it is the duty of the collector, having received the money on his warrant, to pay the sum so received in the proportions designated in his tax books to the city treasurer of the city of Chicago, the county treasurer of the county of Cook, the treasurer of the sanitary district, and other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the taxes so paid to the town or county collector he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of the tax,

thereby necessitating a multiplicity of suits, and the proportion of the tax which would go to the State of Illinois could not be collected back by any legal proceeding whatsoever; and if repayment could be compelled from the city of Chicago and other taxing bodies, such repayment would not cover the cost, including commissions deducted for the collection of the tax, and in that way it was averred that the appellee would be subjected to great and irreparable injury, for which there was not a complete or adequate remedy at law. There was also the allegation, already referred to in the foregoing statement, that if compelled to pay this enormous tax it would be rendered insolvent. We think all these allegations combined take the case out of the class where relief is prayed for, founded simply upon the unconstitutionality of the law under which the tax is levied, or upon the illegality for any other reason, of the tax itself, and bring the case within the jurisdiction of a court of equity. And, in addition, there is the allegation that a levy upon the property of the appellee would interfere with the operation of the street car system in the city of Chicago, operated by the appellee, and would greatly embarrass and injure the public who have to use the cars.

Upon the whole, we think it is apparent that no adequate remedy at law exists in this case, and that the judgment enjoining the collection of the balance of the tax levied against the appellee, above that which has been paid under the direction of the Circuit Court, must be *Affirmed.*

MR. JUSTICE HOLMES, dissenting: Notwithstanding my unfeigned deference to the judgment of my brethren I cannot but think that the Circuit Court was wrong in taking jurisdiction of this case. We all agree, I suppose, that it is only in most exceptional cases that a State can be said to deprive a person of his property without due process of law merely because of the decision of a court without more. The discussion in *Chicago, Burlington & Quincy R. R.* v. *Chicago,* 166 U. S. 226, concerned a judgment assumed to be authorized by a

statute of the State, and in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know this is the first instance in which a Circuit Court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the Fourteenth Amendment.

It seems to me that the appellee should not be heard until it has exhausted its local remedies; that the action of the state board of equalization should not be held to be the action of the State until, at least, it has been sanctioned directly, in a proceeding which the appellee is entitled to bring, by the final tribunal of the State, the Supreme Court. I am unable to grasp the principle on which the State is said to deprive the appellee of its property without due process of law because a subordinate board, subject to the control of the Supreme Court of the State, is said to have violated the express requirement of the State in its constitution; because, in other words, the board has disobeyed the authentic command of the State by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property. I should have thought that the action of the State was to be found in its constitution, and that no fault could be found with that until the authorized interpreter of that constitution, the Supreme Court, had said that it sanctioned the alleged wrong. *Barney* v. *New York*, 193 U. S. 430.

As I think that the Circuit Court ought to be ordered to dismiss this case, I shall not discuss the merits. But I cannot forbear adding that, so far as the appellee is complaining that it has been compelled to pay the full amount of the tax due from it, and is founding its complaint on the fact that other parties are escaping their liabilities whether through mistake or still uncorrected fraud, it seems to me to show no sufficient ground for relief, unless exceptional reasons exist not adverted to in the judgment of the court.

MR. JUSTICE MOODY concurs in this dissent.

RAYMOND, COUNTY TREASURER, *v.* CHICAGO EDISON COMPANY.

SAME *v.* CHICAGO CITY RAILWAY COMPANY.

SAME *v.* SOUTH CHICAGO CITY RAILWAY COMPANY.

SAME *v.* PEOPLE'S GAS LIGHT AND COKE COMPANY.

SAME *v.* CHICAGO TELEPHONE COMPANY.

SAME *v.* CHICAGO CONSOLIDATED TRACTION COMPANY.

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

Nos. 116, 117, 118, 119, 120, 121. Argued April 8, 9, 1907.—Decided October 21, 1907.

Decided on the authority of *Raymond* v. *Chicago Union Traction Company*, *ante*, p. 20.

Argued simultaneously with No. 115.[1]

MR. JUSTICE PECKHAM delivered the opinion of the court.

These cases involve the same principle as that already decided in No. 115, *ante*, p. 20, and although the facts differ somewhat in the various cases, yet they present substantially the same questions, and the judgment in each case is therefore

Affirmed.

[1] For names of counsel see *ante*, pp. 29, 33.

TILT *v.* KELSEY, COMPTROLLER OF THE STATE OF NEW YORK.

ERROR TO THE SURROGATES' COURT OF THE COUNTY OF NEW YORK AND STATE OF NEW YORK.

No. 18. Argued January 28, 1907.—Decided October 21, 1907.

Where judicial proceedings in one State are relied upon as a defense to an assessment by the authorities of another State a right under the Constitution of the United States is specially set up and claimed though it was not in terms stated to be such a right.

An adjudication by the probate court that a testator was a resident of the State though essential to the assumption of jurisdiction to grant letters testamentary is not necessarily conclusive on the question of domicil nor even evidence of it in a collateral proceeding, and, under the full faith and credit clause of the Federal Constitution, is not binding upon the courts of another State.

In respect to the settlement of successions to property on death the States are sovereign and may give to their courts the authority to determine finally as against all the world all questions which arise therein, subject to applicable constitutional limitations.

Where the decree of the probate court is final and bars all persons having claims against the estate, the courts of another State must, under the full faith and credit clause of the Federal Constitution, give similar force and effect to such a decree, when rendered by a court having jurisdiction to probate the will and administer the estate, and *held* that such a final decree in New Jersey was a bar in the courts of another State against the taxing authorities of the latter State attempting to enforce a claim for inheritance tax on the ground that the testator was at the time of his death domiciled therein.

182 N. Y. 557, reversed.

THIS is a writ of error from this court to the Surrogates' Court of the County and State of New York to review a judgment entered in that court in pursuance of an order of the Court of Appeals of that State. The judgment assessed a succession tax upon the personal estate of Albert Tilt, deceased, upon the ground that he was at the time of his death a resident of the State of New York. Before the assessment of the tax the estate of Tilt, who died testate, was fully administered in

the courts of New Jersey, where the will was probated. In the course of the administration all the personal property, after paying debts, taxes and charges of administration, was distributed by the executors to the beneficiaries under the will. A reversal of the judgment of the Surrogates' Court is sought for the reason that it did not give full faith and credit to the judicial proceedings of the State of New Jersey, as required by the Constitution and laws of the United States.

Mr. William G. Wilson for plaintiffs in error:

The legal residence of deceased at the time of his death was in New Jersey. The right, in this country, of each individual, to change his residence at will, cannot be questioned.

Change of citizenship, as distinguished from change of residence, is not always so simple a matter, and a change of residence does not in itself necessarily involve any change of citizenship. Where the intent is not clear, it has to be inferred from the circumstances surrounding the act. But when the intent is clear, acts in furtherance of it should be interpreted in the light of the known intent. *Dupuy* v. *Wurtz*, 53 N. Y. 556; *Thorndike* v. *Boston*, 1 Met. 242.

The right which every individual has to change his residence at will could not be denied or restricted by reason of the fact that a party already possessed two "homes," one in New York City, and one in Mount Arlington, New Jersey, and occupied each, with his family, for about one-half of each year. This is one of the cases where, in the language of Chief Justice Shaw, "very slight circumstances must often decide the question." Story on Conflict of Laws, § 47; *Somerville* v. *Somerville*, 5 Vesey, 750; *Thayer* v. *Boston*, 124 Massachusetts, 132.

The probate of the will in New Jersey is conclusive upon the question of his residence for purposes of administration and tax under the full faith and credit clause of the Constitution.

To no proceedings does this provision apply with greater force than to those which involve the administration of the

estates of decedents in which the State acts in the exercise of its sovereignty. It has absolute control, except for the limitations imposed by the Federal Constitution which recognize and enforce the sovereignty of the State within those limitations, in the very provision above quoted. See *Plant* v. *Harrison*, 36 Misc. (N. Y.) 649.

The decree of the surrogate of Morris County, New Jersey, admitting the will of Albert Tilt to probate as the will of a resident of that county, is conclusive here if it is conclusive in New Jersey. If the probate is conclusive in New Jersey the question is not an open one. This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of New Jersey. *Hancock National Bank* v. *Farnum*, 176 U. S. 643.

New Jersey is not, as Connecticut is, an exception to the general rule that the record of probate should be collaterally invulnerable. In *Matter of Caursen's Will*, 3 Green's Ch. 406; *Straub's case*, 49 N. J. Eq. 264; *Quidort's case*, 3 C. E. Green, 472; *Ryno's Exr.* v. *Ryno's Admr.*, 12 C. E. Green, 522.

Mr. George M. Judd, for defendant in error, submitted:

The decree of a probate court is in the nature of a proceeding *in rem*, and therefore any ground or fact upon which that decree professes to be founded can be inquired into in a proceeding in another State, brought by a person not a party to the probate proceedings. *Life Ins. Co.* v. *Tisdale*, 91 U. S. 238.

The decree of the Surrogate's Court in New Jersey, granting letters testamentary, is conclusive only upon the point adjudicated—whether the parties named receive letters testamentary. That was the *res*, and upon that only has there been an adjudication. Residence was not the *res* and it was not the point adjudicated; therefore said decree is not conclusive as to residence in a distinct and separate proceeding brought by the Comptroller of the State of New York to fix a transfer tax

alleged to be due the State of New York. *Brigham* v. *Fayerweather*, 140 Massachusetts, 411.

The probate proceeding in New Jersey was only formal, the probate of the will was not opposed; there was not a full and fair investigation of the facts; the state comptroller was not a party in the sense that he was entitled to be heard, or to take an appeal, and unless he had that right, he was not concluded by the adjudication of facts upon which the decree is grounded. 3 Wigmore on Evidence, § 1347, p. 1636.

Leaving out of consideration the *ex parte* nature of the probate proceedings, in view of the fact that by § 15 of the statutes of New Jersey, residence of the decedent in the county is made one of the jurisdictional facts upon which the probate court of that county bases its decree admitting the will to probate, and in view of the further fact that an exemplified copy of the decree of that probate court has been offered in evidence by the appellant's claiming a benefit under it, it is a general rule of law, applicable to the circumstances of this case, that this court is not precluded from inquiring into the question of residence.

The fact that the record of the probate proceedings in New Jersey recites the jurisdictional fact of residence can make no difference. General Statutes of New Jersey, published by authority of the legislature under acts of April 4, 1894, and March 20, 1895, Chapter 234 of Laws of 1898 (fols. 148–150). See also *Hard* v. *Shipman*, 6 Barb. 623; *Bolton* v. *Schriever*, 135 N. Y. 73; *Matter of Law*, 56 App. Div. 454; *Ferguson* v. *Crawford*, 70 N. Y. 253; *Thompson* v. *Whitman*, 18 Wall. 457; *Thorman* v. *Frame*, 176 U. S. 350; *Plant* v. *Harrison*, 36 Misc. Rep. 649, cited by plaintiffs in error, distinguished.

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

In the disposition of this case we are somewhat embarrassed by our ignorance of the reasons which controlled the decision of the highest court of the State. The opinion of the surro-

gate was very brief. His judgment was affirmed upon appeal successively by the Supreme Court and the Court of Appeals —in each court without an opinion and with two judges dissenting. The record shows the following facts: Albert Tilt was engaged in business as a silk manufacturer in Paterson, New Jersey, until the time of his death. Until 1888 he was a resident and citizen of Paterson. In that year he removed to New York City, became a resident and citizen of New York, and remained such until some time in the year 1899. He died in New York on May 2, 1900. His residence and citizenship at the time of his death was in dispute. For many years he had owned a house in New York City, where he lived during the greater part of the year, and another house in Roxbury, New Jersey, where he lived during the summer and early autumn. It is contended by the executors of his will, the plaintiffs in error, that in the last year of his life he changed his domicil from New York City to Roxbury and that at the time of his death he was domiciled in New Jersey. On the other hand, it is contended by the Comptroller of New York, the defendant in error, that his domicil continued until his death to be in New York. Upon this question the evidence was conflicting.

After the death of Mr. Tilt, his will was admitted to probate by the surrogate of Morris County, New Jersey, who by law had jurisdiction to do this if the testator resided in the county at the time of his death. The petition for probate described the testator as "late of the township of Roxbury, in said county," and the letters testamentary granted on May 23, 1900, by the surrogate described him as "late of the county of Morris, deceased." An order was made fixing a time within which creditors must prove claims against the estate. On the expiration of this time a further order was made, that all creditors who had neglected to bring in their claims and demands should "be forever barred from their action therefor against the executors of said deceased." Succession taxes, imposed by the law of New Jersey and the law of the United

States, and all debts, were paid. The executors presented their accounts to the Orphans' Court of the county, and that court, acting within its jurisdiction, on June 20, 1901, allowed the accounts and directed the distribution of the estate, according to the terms of the will. The executors made the distribution in conformity with the court's order, thereby parting with all the property of the testator which had been in their hands. After the distribution had been accomplished the State of New York for the first time made known its claim for a transfer tax. The comptroller of the State filed his petition with the surrogate of the county of New York. In response to this petition, on August 16, 1901, Robert Mazet was appointed by the surrogate as appraiser to fix the fair market value of the property of Albert Tilt, deceased. This was done with the view of ascertaining the amount of a transfer tax due under a section of a statute providing for such a tax "when the transfer is by will or by the intestate laws of this State from any person dying seized and possessed of the property while a resident of the State." On March 6, 1903, Mazet filed his report in the Surrogates' Court. The material part of this report was: first, that the net personal property of the deceased "subject to tax herein" was at the time of his death of the fair market value of $1,056,951.22; second, that Tilt was a resident of New York City at the time of his death; third, that he left a will which had been "duly admitted to probate in the Surrogate's Court of the County of Morris, State of New Jersey;" fourth, after stating the disposition of his property made by the testator by this will, the report appraised the estate "subject to tax herein" at its fair market value at the amount already stated. On June 15, 1903, the surrogate entered an order adopting the value of the property reported by the appraiser and assessing the amount of the transfer tax specifically on each bequest contained in the will. The total tax amounted to about thirteen thousand dollars. On August 10, 1903, a paper, entitled "Appeal to the Surrogate," was filed by the executors. This paper gave notice of an ap-

peal to the surrogate from the appraisement, assessment, and determination of the transfer tax, and from the surrogate's own order of June 15. The only ground of appeal which need be stated here is the fifth, which alleged "that the right to assess or impose a tax under the laws of the State of New York upon the transfer of the property of the testator, if there ever was any such right, was barred before the commencement of this proceeding, by a decree of the Orphans' Court of Morris County, New Jersey, a court of competent jurisdiction, made on the twenty-fifth day of February, 1901, barring all claims against the said testator or his estate which had not been presented and proved to said executors, pursuant to public notice heretofore given and published, as prescribed by the laws of the State of New Jersey; and by the further decree of the same court, made on the twentieth day of June, 1901, directing the distribution of the estate of said testator in the hands of said executors, according to the terms of the will of the said Albert Tilt, deceased; in obedience to which the said executors, without any notice or knowledge of any claim or liability for the payment of a transfer tax under the laws of the State of New York, distributed the said estate, so that there was not at the time of the commencement of this proceeding, and is not now, any property of the said estate in the hands of said executors." It was then agreed by counsel that the surrogate should determine on affidavits whether or not Albert Tilt was a resident of New York at the time of his death. Pending the consideration of this question the executor requested in writing certain findings of facts and conclusions of law, of which only two need be stated here. They are as follows: (2) "Under the Constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the State of New Jersey, and to the accounting and distribution made by his executors under the decree of the Orphans' Court of Morris County in said State, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death." (3) "None of the personal

estate of said Albert Tilt is subject to the payment of a transfer tax under the laws of the State of New York, excepting only such of his personal estate as was actually within the State of New York at the time of his death." These requests were refused by the surrogate, who, in a short opinion, found as a fact that Tilt was a resident of New York at the time of his death, and ruled that his personal estate, wherever situated, was subject to the payment of a transfer tax under the laws of New York. An order was accordingly entered affirming the order of June 15. Thereupon the executors filed exceptions, the last two of which were as follows: (20) "To the refusal of the said Surrogate to find as a conclusion of law that under the Constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the State of New Jersey, and to the accounting and distribution made by his executors under the decree of the Orphans' Court of Morris County in said State, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death. (21) To the refusal of the said Surrogate to find as a conclusion of law that none of the personal estate of said Albert Tilt is subject to the payment of a transfer tax under the laws of the State of New York, excepting only such of his personal estate as was actually within the State of New York at the time of his death." An appeal was then taken, and, as already stated, the action of the surrogate was affirmed by the Supreme Court and the Court of Appeals. The proceedings before the surrogate are somewhat fully set forth, because it is contended that no Federal question was properly and seasonably raised in the state courts. We think, however, that a right under the Constitution of the United States was specially set up and claimed by the executors, as required by § 709 of the Revised Statutes, and denied by the highest court of the State, and that therefore we have authority to reëxamine the decision. It appears clearly in the paper entitled "Appeal to the Surrogate" that the executors relied upon the judicial proceedings in New Jersey as a defense to the assessment of

the New York tax. They "specially set up and claimed" a right under those proceedings, though it was not in terms stated to be a right claimed under the Constitution. This, in the case of a judgment of the court of another State, has been held to be a sufficient compliance with the statute. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329; *Bell* v. *Bell*, 181 U. S. 175; *Andrews* v. *Andrews*, 188 U. S. 14, and see the remark of the Chief Justice in *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 291, 311. Moreover, while the surrogate still had the appeal under consideration and undecided, requests in writing were made to him which clearly and specifically set up the claim that the full faith and credit due, under the Constitution, to the judicial proceedings of the State of New Jersey forbade the assessment of the tax. These requests were entertained and the claim denied by the surrogate and an exception taken. Upon the record thus made an appeal was taken, and in the disposition of the appeal the Federal question was necessarily passed upon by the highest court of the State, whose decision, therefore, we may reëxamine.

That reëxamination, however, must be confined to the single question whether by the assessment of the tax full faith and credit has been denied to the judicial proceeding of the State of New Jersey in violation of Article IV, section 1, of the Constitution. In the consideration of this question, the first inquiry which presents itself is whether the adjudication of the New Jersey court, that Tilt was at the time of his death a resident of New Jersey, was conclusive upon the State of New York, a stranger to the proceedings. If it was that is the end of the case, because then New York could not take the first step necessary to bring the estate within the provision of the tax law of that State. But upon principle and authority that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicil, nor even evidence of it in a collateral proceeding. *Thormann* v. *Frame*, 176 U. S. 350;

Overby v. *Gordon*, 177 U. S. 214; *Dallinger* v. *Richardson*, 176 Massachusetts, 77; and see *Mutual Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S. 238; *De Mora* v. *Concha*, 29 Ch. Div. 268; aff'd 11 App. Cases, 541; *Brigham* v. *Fayerweather*, 140 Massachusetts, 411. The difference in the effect of a judgment on the *res* before the court and of the adjudication of the facts on which the judgment is based is pointed out by Mr. Justice Holmes in the last case. In an opinion, holding that a decree of a probate court admitting a will to probate was not, on an issue between parties one of whom was not a party to the probate proceedings, competent evidence of the testator's mental capacity, he said: "A judgment *in rem* is an act of the sovereign power; and, as such, its effects cannot be disputed, at least within the jurisdiction. If a competent court declares a vessel forfeited, or orders it sold free of all claims, or divorces a couple, or establishes a will, . . . a paramount title is passed, the couple is divorced, the will is established as against all the world, whether parties or not, because the sovereign has said that it shall be so. But the same is true when the judgment is that A recover a debt of B. The public force is pledged to collect the debt from B, and no one within the jurisdiction can oppose it. And it does not follow in the former case any more than in the latter, nor is it true, that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments, such as sentences of prize courts, to which the greatest effect has been given in collateral proceedings, are said to be conclusive evidence of the facts upon which they proceed only against parties who were entitled to be heard before they were rendered. We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the

findings of fact, although bound to admit the title or status which the judgment establishes." We think that this quotation expresses the correct rule and that it is sustained by the decisions of this court. Applying it here, it follows that the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased.

But assuming that the New York court had the right to determine, and determined rightly, the domicil of the deceased, what then? The grievance here is not the finding that Mr. Tilt died a resident of New York. It is the assessment, based upon that finding, of a transfer tax upon the legacies contained in his will. The real question in the case is whether the assessment of that tax by the State of New York is consistent with the full faith and credit required by the Constitution to be given to the judicial proceedings of another State. After the will had been allowed and letters testamentary had been issued by the New Jersey surrogate, the executors named in the will took possession of all the personal property of the testator (the real property not being concerned in this litigation) and began to administer it in accordance with the terms of the will and under the direction of the court. That property, appraised at about one million dollars, consisted of bank deposits almost entirely in New Jersey banks, life insurance policies, a few small mortgages, notes and accounts receivable, furniture, horses and carriages, and (constituting more than eight-tenths of the whole of the personal estate) stock in New Jersey corporations. A limit of time was fixed for the presentation of claims against the estate, at the expiration of which it was decreed that all creditors who had neglected to bring in their demands should be barred from any action thereon against the executors. What was then done appears in an affidavit of a witness, which was agreed by counsel in

the hearing before the New York surrogate to show the facts. The affidavit is in part as follows: "Said executors accounted as such in the Orphans' Court of said Morris County, New Jersey, which court had jurisdiction under the laws of New Jersey to entertain such accounting and to direct final distribution of the estate of said testator thereon, and such proceedings were thereupon had that on June 20, 1901, a decree was made in said Orphans' Court by the judge presiding therein, finally settling and allowing the accounts of said executors, and directing the distribution of the balance of the estate of said Albert Tilt remaining in the hands of said executors according to the terms of said will. Thereupon and prior to August, 1901, such distribution was made by said executors pursuant to the terms of said will, in conformity with the direction of said decree, and thereafter there remained in the hands of said executors no money or personal property whatsoever of the estate of said Albert Tilt."

Thus executors appointed by a court having upon the face of the record authority to make the appointment, had accounted for the property which had come into their hands to the court having jurisdiction under the laws of the State to pass on the accounts, and, without knowledge of any claim by the State of New York, had, by the direction of the court acting within its jurisdiction, paid out the whole estate to those who were entitled to it by the will. All that was done by the executors, and all that was received by the beneficiaries in the disposition of the estate, was done and received by orders of court, duly entered in the course of judicial proceedings. For the purpose of enabling the executors to distribute the estate with safety to themselves, in accordance with a common practice in the settlement of the estate of deceased persons, and under authority conferred by the laws of the State, the court, prior to the distribution, had decreed that all those who had neglected to bring in their claims should be "forever barred from their action therefor against the executors of the deceased." Upon these facts does the assessment of this

transfer tax by the State of New York, by whose laws the tax thus assessed is made a lien on the property transferred and a personal obligation of the transferee and the executors (§ 222, ch. 908, Laws of 1896), give the full faith and credit to which these judicial proceedings are entitled? The answer to this question depends upon the nature of the proceedings and their effect upon the rights of those persons who were not parties or privies to them. If they are binding upon such persons the State of New York may not levy a tax upon property which has been transferred free from the burden and impose a personal liability on the executors who have been declared forever exempt from all demands against the estate. The enforcement of the claim for such a tax against the property, against the distributees of the property, and against those who have distributed it, under the direction of the court, and with its assurance that no claims against them shall longer exist, is plainly inconsistent with the judicial proceedings by which the property has been administered. Is then the nature of the proceedings such that they are binding not only upon those who were parties or privies to them, but upon all others as well?

When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the State, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice, or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it. Sometimes this duty is

performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be termed ecclesiastical, probate, orphans', surrogate or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign shall determine. But somewhere the power must exist to decide finally as against the world all questions which arise in the settlement of the succession. Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. As was said by Mr. Justice Bradley, speaking on this subject in *Broderick's Will*, 21 Wall. 503, p. 519: "The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*." It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions which arise therein. *Grignon* v. *Astor*, 2 How. 319, per Baldwin, J., p. 338; *Beauregard* v. *New Orleans*, 18 How. 497; *Foulke* v. *Zimmerman*, 14 Wall. 113; *Board of Public Works* v. *Columbia College*, 17 Wall. 521; *Broderick's Will*, 21 Wall. 503; *Simmons* v. *Saul*, 138 U. S. 439; *Byers* v. *McAuley*, 149 U. S. 608; *Goodrich* v. *Ferris*, 145 Fed. Rep. 844; *Loring* v. *Steineman*, 1 Met. (Mass.) 204; *Kellogg* v. *Johnson*, 38 Connecticut, 269; *State* v. *Blake*, 69 Connecticut, 64; *Exton* v. *Zule*, 14 N. J. Eq. 501; *Search* v. *Search*, 27 N. J. Eq. 137; *Harlow* v. *Harlow*, 65 Maine, 448; *Ladd* v. *Weiskoff*, 62 Minnesota, 29.

In respect to the settlement of the successions to property on death the States of the Union are sovereign and may give to their judicial proceedings such conclusive effect, subject to the requirements of due process of law and to any other constitutional limitation which may be applicable.

But though a State may attach to the judicial proceedings of the courts, through which the devolution of the estates of deceased persons is accomplished, the conclusive effect which has been described, it may not choose to do so, or may choose to do so only in respect of part of the adjudications made in the course of the settlement of the succession. It may, for instance, choose to regard the probate of a will or the grant of letters of administration as conclusive on all, and on the other hand to regard an order of distribution as open to attack in a collateral proceeding by those who were not parties to it. The extent to which such proceedings shall be held conclusive is a matter to be determined by each State according to its own views of public policy. The variations in practice in the different States are considerable and no good purpose would be served by considering them. It is enough to instance that in the States of Connecticut and Massachusetts, according to the cases just cited, a decree of distribution is binding upon all, while in the State of New York it appears not to be binding on one who was not a party to it. *In re Killan*, 172 N. Y. 547.

When, therefore, we come to consider what faith and credit must be given to these judicial proceedings of New Jersey, we must first ascertain what effect that State attaches to them. The statute enacted to carry into effect the constitutional provision provided that they should have in any court within the United States such faith and credit "as they have by law and usage in the courts of the States from which they are taken." Act of May 26, 1790, now sec. 905, Rev. Stat. They can have no greater or less or other effect in other courts than in those of their own State. *Cheever* v. *Wilson*, 9 Wall. 108; *Board of Public Works* v. *Columbia College*, 17 Wall. 521; *Robertson* v. *Pickrell*, 109 U. S. 608; *Hancock National Bank* v. *Farnum*, 176 U. S. 640. In ascertaining, on a writ of error to a state court, what credit is given to these judicial proceedings by the laws and usages of the State of New Jersey, we are limited to the evidence on that subject before the court whose judgment we are reviewing. *Hanley* v. *Donoghue*, 116 U. S. 1;

Chicago & Alton Railroad v. *Wiggins Ferry Co.*, 119 U. S. 615, 622. The only evidence upon this point was in an affidavit of an attorney and counsellor at law of that State. The evidence is meagre and not entirely satisfactory and conclusive. It was, however, uncontradicted. It tended to show that the surrogate had jurisdiction to probate the will and issue letters testamentary and that the probate and issue of letters could not be impeached in a collateral proceeding; that the surrogate had "under the laws of New Jersey full and competent jurisdiction" to make the order limiting the time for creditors of the estate to bring in their demands, and the subsequent order that all who had neglected to do so "should be forever barred from their action therefor against the executors of said deceased;" that the acts of the surrogate cannot be impeached collaterally, and that the Orphans' Court had jurisdiction under the laws of New Jersey "to direct final distribution of the estate of said testator," and it cited four cases from the New Jersey reports, *Coursen's Will*, 3 Green's Ch. 408, *Quidort's Adm'r* v. *Pergeaux*, 18 N. J. Eq. 472, *Ryno's Ex'r* v. *Ryno's Adm'r*, 27 N. J. Eq. 522, and *Straub's case*, 49 N. J. Eq. 264. In relying upon evidence of this kind we are quite aware that we may not ascertain with the precision which might be desired the credit which the State of New Jersey attaches to these judicial proceedings. But it is all that we can have. We think that we may safely infer from it that the order of the surrogate barring all creditors who had failed to bring in the demand from any further claim against the executors was binding upon all. It was an order which he had "full and competent authority to make," and it was one of the acts which could not be impeached collaterally. We think also that the jurisdiction to direct a final distribution means a distribution which shall be final, so far at least as any person having a demand against the estate is concerned. If we have discerned correctly the effect which New Jersey gives to these judicial proceedings, it is obvious that the assessment of this tax denies them full faith and credit in two respects: First, in seeking a part of an estate

which has been finally distributed to those who were entitled to it under the will; and, second, in fixing a personal responsibility for the tax upon the executors who had been conclusively exonerated from such a liability.

Up to this point it has been assumed that the New Jersey court had jurisdiction to probate the will and administer the estate, and what has been said upon the effect of the judicial proceedings has been based upon that assumption. When, however, full faith and credit is demanded for a judgment in the courts of other States, an inquiry into the jurisdiction is always permitted, and if it be shown that the proceedings relied upon were without the jurisdiction of the court, they need not be respected. *Thompson* v. *Whitman,* 18 Wall. 457; *Thormann* v. *Frame,* 176 U. S. 350, and cases cited.

The defendant in error, acting upon this well-settled rule, might have attacked the jurisdiction of the New Jersey courts, and thus brought forward for consideration many important questions which, in the view we take of the case, need not even be stated. But there was no attempt, except in argument here, to deny the right of the New Jersey court to act upon the paper writing purporting to dispose of the estate of Tilt, and by admitting it to probate to convert it into an operative will. It is true that, as a basis of assessing transfer taxes, it was proved that Tilt was a resident of New York at the time of his death, a fact which would be relevant to the question of jurisdiction. But that fact was not proved or used for the purpose of invalidating the proceedings taken in probating the will and administering the estate. On the contrary, the taxes were based upon the provisions of the instrument, which derived all its authenticity as a will and all its capacity to transmit property from the judicial proceedings in New Jersey. It appears conclusively from the action taken in the New York Surrogates' Court that there was no attempt to declare the New Jersey proceedings void because they were taken without jurisdiction. In the appraiser's report it is said that the deceased had left a will "which was duly admitted to probate in

the Surrogate's Court of the county of Morris, State of New Jersey, and that letters testamentary were issued by said Surrogate Court." The specific legacies and the disposition of the residue of the estate were then stated. The Surrogate, in assessing the taxes, assessed them specifically on the beneficiaries, giving their respective names and the values of the property they respectively took under the will. Two life estates and several remainders, created by the will, were valued appropriately and the taxes assessed accordingly. All this is utterly inconsistent with an attack upon the jurisdiction, and we need not consider whether it could have been made with success.

It is quite obvious that what was done here was the assessment by one State of taxes upon transfers of personal property, taking effect under the laws of another State, entirely regardless of the *situs* of the property transferred. This suggests grave constitutional questions, which we cannot consider because they were not properly and seasonably raised in the court below.

For the foregoing reasons we think that the judgment below denied to the New Jersey proceedings the full faith and credit to which they were entitled by the Constitution and laws of the United States, and accordingly it is

Reversed.

MR. JUSTICE HARLAN dissents.

Ex parte THE FIRST NATIONAL BANK OF CHICAGO.

PETITION FOR MANDAMUS DIRECTED TO THE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE HONORABLE SOLOMON H. BETHEA AS JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, ETC.

THE FIRST NATIONAL BANK OF CHICAGO *v.* THE CHICAGO TITLE AND TRUST COMPANY.

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

Nos. 8 Original, and 38. Submitted May 13, 1907.—Decided October 28, 1907.

Where the Circuit Court of Appeals after issuing mandamus to the district judge requiring him to modify a decree so as to conform to the decision of this court, allows the party in interest a writ of error and the district judge declines to sue out or join in the writ, the writ will not be dismissed because the district judge is not a party and the fact that he has obeyed the order will not prejudice the position of the plaintiff in error.

This court customarily issues a single mandate, and if in a case originating in the District Court it is addressed to the Circuit Court of Appeals the directions are simply to be communicated to the District Court to be followed by it on the authority of this court and not of the Circuit Court of Appeals, and that court has no jurisdiction to compel the District Court to alter its decree.

Where the Circuit Court of Appeals has improperly issued mandamus to the district judge to modify a decree to conform to the decision of this court, this court will reverse the judgment and issue mandamus to the District Court to set aside the decree entered in pursuance thereof.

The decision of this court in *First National Bank* v. *Chicago Title & Trust Co.*, 198 U. S. 280, merely gave directions in general form to be carried out by the District Court and it was not intended to supersede the authority given to that court by the bankruptcy law to control litigation by the trustee.

THE facts are stated in the opinion.

Mr. Henry S. Robbins, Mr. Wallace Heckman and *Mr. James G. Elsdon,* for petitioners and plaintiffs in error:

Mandamus from this court is a proper remedy to compel a

compliance by the lower court with this court's decisions. *Gaines* v. *Rugg*, 148 U. S. 228; *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *In re Delgado*, 140 U. S. 586, 591.

Such a writ is available, not only to compel the entry of a proper decree, but incidentally to compel the lower court to set aside a judgment or decree entered after the filing of a mandate, which does not comply with its directions. The writ in such case commands the lower court to vacate and erase the former order and enter a proper one. *Ex parte Dubuque and Pacific R. R.*, 1 Wall. 69; *In re Potts, Petitioner*, 166 U. S. 263.

Hence this court may by mandamus compel the Circuit Court of Appeals to set aside its order and recall its peremptory writ of mandamus, and also require the District Court to set aside the order entered by it in compliance with such peremptory writ, when this is necessary to give to the parties the decree, to which the decision of this court entitles them. But whether mandamus is a concurrent remedy with appeal or writ of error to compel compliance with a mandate or not, is not here material, as, if the petitioners were not entitled to prosecute this writ of error, as contended by the defendants in error, this application for mandamus is their only remedy.

The Circuit Court of Appeals was without power or jurisdiction to grant this writ of mandamus.

This court has directed the entry in the District Court of a modified order. This is tantamount to directing a new decree in that court, and the question here is the same as it would have been if this court had directed an entirely new order in that court.

But when this court does this, the order entered in the lower court is in reality the decree of this court. *Stewart* v. *Salamon*, 97 U. S. 361.

So, under the rule which requires leave from the court entering the decree as a prerequisite to a bill of review, it has been held that no such bill may be filed in a cause in which

this court has directed a certain decree, without leave of this court, because the decree sought to be reviewed is in effect the decree of this court. *Kimberly* v. *Arms*, 40 Fed. Rep. 549; *In re Potts*, 166 U. S. 263; *Skillern's Exrs.* v. *May's Exrs.*, 6 Cranch, 267; *Ex parte Story*, 12 Pet. 339; *United States* v. *Knight*, 1 Black, 488.

Under these authorities, the modified order first entered in the District Court, which the mandamus writ sought to change, was in effect the decree of this court, and the Circuit Court of Appeals was without jurisdiction to change it.

Mr. Newton Wyeth and *Mr. Joseph E. Paden*, for respondents:

The decrees of dismissal with directions of the Circuit Court of Appeals were actual decrees of that court, to be carried out and enforced.

The Circuit Court of Appeals rightfully issued mandates to the District Court, and was bound by mandamus to compel compliance. The mandamus was in aid of its appellate jurisdiction.

The Circuit Court of Appeals sent, and was bound to send, mandates to the District Court. The Circuit Court of Appeals by the writ of mandamus simply sent down a more specific mandate to the District Court.

The decrees of dismissal and direction entered by the Court of Appeals were actual decrees, as much so as if no certiorari had arisen and they had been entered as the original decrees and orders of the Court of Appeals, had that court in the first instance conceived that the objections of the petitioners in the District Court to the jurisdiction of the District Court to proceed on the merits were well taken and had not been waived. The decrees of dismissal in the Court of Appeals and remand of the causes were not mere forms, and that court was not a mere instrument, and that court had power which it could rightfully exercise over the decrees to carry them into execution.

The modification originally made in the District Court was not a compliance. The modification as finally made was a compliance. Petitioners show that the matters of which they complain in the modifications made are immaterial, and that they have been deprived of nothing to which they were entitled under the decrees and mandates of the Circuit Court of Appeals, and the opinion of the Supreme Court.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases arise out of the proceedings subsequent to the decision of this court in *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280. In that case the Trust Company, as receiver, subsequently trustee, in bankruptcy, filed a petition in the District Court alleging possession of certain property and asking for directions in respect of a sale. The District Court found that a storage company had the possession and right of possession, but nevertheless retained jurisdiction and, a sale having been had by consent, made a summary order for transfer to the petitioner of part of the proceeds of the sale. An appeal was taken to the Circuit Court of Appeals, and that court sustained the jurisdiction of the District Court. On certiorari this court held that the Circuit Court of Appeals had no jurisdiction of the appeal and that the District Court, having found that the receiver and trustee was not in possession of the fund, had no jurisdiction to proceed further. It thereupon rendered a judgment and issued a mandate reversing the decree of the Circuit Court of Appeals, and directing that court to dismiss the appeal and to remand the case to the District Court for further proceedings in conformity with the opinion upon which the mandate was based.

The Circuit Court of Appeals thereupon dismissed the appeal and remanded the cause for further proceedings as directed. The opinion to which the proceedings of the District Court were to conform concluded with these words: "In our

view the District Court should have declined upon its findings to retain jurisdiction, and in that event the decree for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made." The District Court made a decree "without prejudice to the rights of the Chicago Title and Trust Company, the trustee herein, if this court shall so authorize, to litigate in any proper court the question of the right of said trustee to recover said funds as a part of the bankrupt's general estate." The trustee complained of the form of this decree, especially because of the insertion of the words "if this court shall so authorize," and moved in this court for leave to file a petition for mandamus requiring the district judge to modify it, but leave was denied. 200 U. S. 613.

The trustee next made a similar application to the Circuit Court of Appeals, whereupon that court granted it and issued a peremptory writ requiring modifications to be made. 77 C. C. A. 408; 146 Fed. Rep. 742. The petitioners and plaintiffs in error, claiming an interest in the fund, then applied for leave to intervene for the purpose of prosecuting a writ of error, their application was allowed, and leave was granted them to sue out the writ, the order reciting that the district judge was present by counsel, but declined to sue out or join in the same. On the same day the Circuit Court of Appeals refused to make the writ act as a supersedeas, and on the next day the district judge entered a decree conforming to the mandate of the Circuit Court of Appeals. The present proceedings are brought for the purpose of reversing the action of the Circuit Court of Appeals and of reinstating the former decree of the District Court.

There is a motion to dismiss the writ of error on the grounds that the judge, who was the only party to the mandate alleged to be erroneous, did not sue out the writ, but that, on the contrary, he has obeyed the order, and that the plaintiffs in error are not privy to the judgment. We deem it a sufficient answer

to this motion to say that it appears on the record that the judge declined to join, *Masterson* v. *Herndon*, 10 Wall. 416; *Hardee* v. *Wilson*, 146 U. S. 179, that he has no personal interest in the judgment, *Davis* v. *Mercantile Trust Co.*, 152 U. S. 590, 593, and that the plaintiffs have such an interest and were made parties for the purpose of protecting their rights. The fact that the judge obeyed the order in force against him cannot prejudice the position of the plaintiffs. They have the same interest in having the former decree of the District Court reinstated that they had in having it stand.

We are of opinion that the order of the Circuit Court of Appeals was wrong. The mandate of this court was addressed to it alone, it is true, in point of form. It is customary to issue but a single mandate. But the directions as to the further proceedings of the District Court were not an order to the Circuit Court of Appeals to issue an order to the District Court. They were directions which the Circuit Court of Appeals was simply to communicate to the District Court and which the District Court was to follow on the authority of this court, not of the Circuit Court of Appeals. The suggestion of the need of speedy relief seems to have counted for something in the making of the order appealed from, and the denial of a mandamus by this court was treated as an intimation that the final direction to the District Court was to be regarded as proceeding from the Circuit Court of Appeals. Such was not the import of the action of this court. The Circuit Court of Appeals had no jurisdiction in the matter, and the denial of a mandamus by this court did not confer or declare jurisdiction to grant what this court denied. It follows that the judgment of the Circuit Court of Appeals must be reversed.

As the judgment reversed has been acted upon by the District Court it becomes necessary to consider whether the former or the present decree of the District Court was the proper one to enter. The present one might be right notwithstanding the want of jurisdiction on the part of the higher court to order it to be made. We need not determine whether the language

quoted from our former opinion was improvidently used. It is enough to say that the opinion did not purport to fix the words of the new decree. It merely gave a general direction which was to be carried out in a form to be settled by the District Court. It declared, perhaps unnecessarily, that the decree was to be without prejudice to whatever right the respondents might have to litigate in a proper court, not that they were entitled to litigate, or that the authority given by the Bankruptcy Law [§§ 2 (7) 11 c, 47 (2)] to the District Court to control such litigation was superseded. We are of opinion that the decree first entered by the District Court complied with the language of the opinion, and that the subsequent decree having been entered only in obedience to an unwarranted judgment should be set aside. *Re Potts,* 166 U. S. 263; *Ex parte Dubuque & Pacific R. R.,* 1 Wall. 69.

Judgment of the Circuit Court of Appeals reversed.

Mandamus to go to the District Court to set aside its decree entered in pursuance of said judgment.

LEE *v.* STATE OF NEW JERSEY.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 16. Argued October 16, 1907.—Decided October 28, 1907.

A State has power to regulate the oyster industry although carried on under tidal waters in the State.

Although a state statute may be unconstitutional as against a class to which the party complaining does not belong, that fact does not authorize the reversal of a judgment not enforcing the statute so as to deprive that party of any right protected by the Federal Constitution.

Where it appears that a conviction under the New Jersey statute for the protection of the oyster industry depended both in the charge and in the testimony upon the actual illegal use of oyster dredges, and the possible construction of the statute which made it a crime to merely

navigate interstate waters was not essential to the case, no valid constitutional objection can be raised for want of power to pass or enforce the statute.

70 N. J. L. 368, affirmed.

THE facts are stated in the opinion.

Mr. E. A. Armstrong, with whom *Mr. William T. Read* was on the brief, for plaintiffs in error:

This act is unconstitutional, in that it discriminates between citizens of the United States and by its terms prohibits citizens from sailing, with oyster-boats equipped for taking oysters in the tidal waters of Delaware Bay, over oyster grounds leased by the oyster commission to another person. In doing so it conflicts with the commerce and navigation clause, section 8, Article I, of the Constitution of the United States. It is also in conflict with the Fourteenth Amendment of the Constitution.

There could be no valid state enactment prohibiting the sailing of a properly equipped oyster-boat anywhere in the tidal waters of the State. The right and power of the State to the oysters and to the tide waters is held subject to the paramount right of navigation, the regulation of which is entirely within the power of the Congress of the United States. *McCready* v. *Virginia*, 94 U. S. 391.

While this statute clearly conflicts with the commerce clause of the Constitution, in that it attempts to regulate what a person may or may not have upon his boat or vessel, it is also contrary to the Fourteenth Amendment, because it restricts a citizen in prosecuting his lawful vocation in a lawful way and making it impossible for one situated like the plaintiffs in error, who owned staked oyster lands, to sail to them in the tidal waters of the United States, because in doing that he would have to sail over the staked lands of other persons. If he could not take his vessel equipped for catching oysters, it would be useless for him to go. Of course he has and must have a lawful right to take upon his own lands any and all

dredges and instruments for catching oysters. In doing this he has a right to use the surface and body of navigable waters for navigating his craft, and any law of the State which tends to restrict, limit, or prevent that right is in conflict with the Constitution of the United States.

Mr. Nelson B. Gaskill for defendant in error, with whom *Mr. Robert H. McCarter*, Attorney General of the State of New Jersey, was on the brief.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiffs in error were convicted in the Court of Quarter Sessions of Cumberland County, New Jersey, at the May term, 1903, of the offense of unlawfully dredging upon certain oyster beds for the purpose of catching oysters, contrary to the statute enacted in that State. This judgment was affirmed in the Court of Errors and Appeals of New Jersey and this writ of error seeks the reversal of that judgment.

Section 20 of the act of 1899, amended, Laws of 1901, p. 307, provides:

"Any person or persons who shall hereafter dredge upon or throw, take or cast his oyster dredge, or any other instrument used for the purpose of catching oysters, upon any oyster bed or ground duly marked, buoyed or staked up within the waters of the Delaware River, Delaware Bay and Maurice River Cove, in this State, belonging to any other person, without the permission of the lessee or lessees thereof, shall be guilty of a misdemeanor and of the violation of the provisions of this act."

It is the contention of the plaintiffs in error that this statute violates the right of free navigation, and undertakes to regulate interstate commerce in violation of section 8, Article I, of the Federal Constitution, and deprives the plaintiff in error of rights secured by the Fourteenth Amendment.

The power of the State to regulate the oyster industry,

although the same is carried on under tidal waters in the State, is not contested, and could not successfully be. *Smith* v. *Maryland*, 18 How. 71; *McCready* v. *Virginia*, 94 U. S. 391; *Manchester* v. *Massachusetts*, 139 U. S. 240.

The objection to the legality of the conviction from the standpoint of rights protected by the Federal Constitution, as urged upon our attention, rests upon the argument that § 20, amended as above quoted, permits the conviction of a person who shall *take* an oyster dredge or other instrument used for the purpose of catching oysters, on any oyster bed or grounds within such navigable waters, thereby abridging and interfering with the right of free commerce with foreign nations, and among the several States. And it is argued that persons sailing over such waters, having an oyster-dredge aboard a boat, might be convicted of thus taking a dredge over such ground, in violation of the statute. Of this contention it is enough to say that in this case no such construction of the statute was made or enforced against the plaintiffs in error. Nor were they convicted because of any such state of facts; and it is well settled in this court that, because a state statute, when enforced in a state court against a class to which the party complaining does not belong, may work a deprivation of constitutional rights, that fact does not authorize the reversal of a judgment of a state court not enforcing the statute so as to deprive the party complaining of rights which are protected by the Federal Constitution. *Hatch* v. *Reardon*, 204 U. S. 152, 160, and cases there cited.

An inspection of this record shows that the count of the indictment under which the plaintiffs in error were convicted charged them with unlawfully dredging, throwing and casting dredges for the purpose of catching oysters upon certain leased lands in violation of the statute.

The testimony offered on the part of the State tends to show that certain dredges were thus thrown and cast for the purpose of catching oysters upon leased lands belonging to one Allen.

On the part of the defense the witnesses testify that the dredges were not thus cast and used upon the lands in question. There was no pretense in the charge, in the indictment, or in the testimony offered by the people, that a conviction could be had for the mere taking of a dredge over the leased lands. The conviction depended, both in the charge and in the testimony, upon establishing the fact that the plaintiffs in error thus illegally used the dredges.

It is contended that the plaintiffs in error might have been convicted for the mere sailing over the lands with a dredge aboard the boat, because of the following language in the court's charge:

"It then remains to be considered whether or not the defendants on that day dredged or threw, took or cast a dredge or other instrument used for the purpose of catching oysters upon that ground. If you find that they did, then they should be convicted of illegal dredging, as charged in the first count of the indictment."

But this excerpt must be read in connection with the rest of the charge, and it is perfectly apparent that it was not intended that the jury might convict for taking a dredge across the lands in sailing over them, under an indictment which made no mention of such taking, but distinctly counted upon the unlawful throwing and casting of the dredge upon the leased ground for the purpose of catching oysters. For immediately following the language quoted the learned judge goes on to say:

"Now, the State produces, bearing upon that question, the owner of the ground, and he testifies that on the day named in the indictment he, aboard of the Golden Light with Captain Hilton, visited his ground; that as they approached it—you will recall just how near they placed themselves, from their testimony—as they approached it they saw these defendants aboard of a vessel called the Lee maneuvering up and down this ground, No. 137, section B, of Captain Allen, and heaving their dredges thereon. Now, gentlemen, if you believe that

testimony, if you believe that occurred as these witnesses for the State say it occurred, then, regardless of whether or not they got any oysters, if they were throwing their dredges there upon that ground they should be convicted under the first count of this indictment.

* * * * * * * *

"Now, considering all of this testimony and any other testimony in the case, you ought to determine whether or not the defendants were there heaving their dredges and dredging upon this ground. And in endeavoring to ascertain the truth from this conflicting testimony it is but the dictate of common sense that you should consider whether any of the witnesses have a motive to testify falsely."

It is, therefore, apparent that the possible construction of the statute in such manner as to convict plaintiffs in error of a crime in merely exercising their right to navigate interstate waters was not made essential to the determination of the case.

A conviction was had because of the use of a dredge upon leased lands, in violation of the New Jersey statute for the protection of the oyster industry. Against the statute, as thus enforced, no valid objection can be urged for want of power to pass or enforce it because of rights protected by the Federal Constitution.

Judgment of the Court of Errors and Appeals of New Jersey is

Affirmed.

SEABOARD AIR LINE RAILWAY *v.* SEEGERS.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 15. Argued October 16, 1907.—Decided November 4, 1907.

Where a state statute applies to both intrastate and interstate shipments, but the shipment involved is wholly intrastate, this court will not consider the validity of the statute when applied to interstate shipments.

A state statute may, without violating the equal protection clause of the Fourteenth Amendment, put into one class all engaged in business of a special and public character, and require them to perform a duty which they can do better and more quickly than others and impose a not exorbitant penalty for the non-performance thereof.

The statute of South Carolina of 1903 imposing a penalty of fifty dollars on all common carriers for failure to adjust damage claims within forty days is not, as to intrastate shipments, unconstitutional as violative of the Fourteenth Amendment, neither the classification, the amount of the penalty nor the time of adjustment being beyond the power of the State to determine. And so held in regard to a claim of $1.75, as small shipments are the ones which especially need the protection of penal statutes of this nature.

73 S. Car. 71, affirmed.

THE facts, which involve the constitutionality of a statute of South Carolina providing for penalty on common carriers for not promptly adjusting damage claims, are stated in the opinion.

Mr. W. F. Stevenson, with whom *Mr. Edward McIver* was on the brief, for plaintiff in error:

This statute discriminates against carriers as between them and other debtors of the same class. It is an attempt to make a common carrier pay one class of debts growing out of transportation under penalties and forfeitures that are not inflicted on other people, even other debts growing out of the same relation. The title of the act shows its partisan character and that it was leveled at one party to the contract of transportation.

No other individual or corporation is thus punished. It is an arbitrary classification and discrimination against common carriers. The courts are not open to them as to other litigants to adjudicate such claims, but this law says to them "if you lose your case, you will be subject to a heavy penalty (in this case nearly thirty times as large as the claim in controversy), if your adversary loses his case he has no penalty to pay." This is unjust discrimination. Corporations are the same as persons within the provisions both of the state and the United States constitutions, and a State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

The legislature has the power to classify persons or corporations, yet it is equally true that such classification cannot be made arbitrarily. Classification for legislative purposes must have some reasonable basis upon which to stand, and must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. *Porter* v. *Ry.*, 63 S. Car. 180; *G. C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150.

Clear and hostile discrimination against particular persons and classes cannot be made. *Bells Gap R. R.* v. *Pa.*, 141 U. S. 232.

Here is a clear, and perhaps hostile, discrimination against common carriers, requiring them to pay their debts within a given time, or suffer a heavy penalty, imposed on no one else, even though the conditions be identical.

Similar statutes in other States have been held unconstitutional. *Railroad Co.* v. *Morris*, 65 Alabama, 193; *Railroad Co.* v. *Moss*, 60 Mississippi, 641; *Wilder* v. *Railroad Co.*, 70 Michigan, 382; *Railroad Co.* v. *Williams*, 49 Arkansas, 492; *Railroad Co.* v. *Baty*, 6 Nebraska, 37; *Frorer* v. *People*, 141 Illinois, 171; *Braceville Coal Co.* v. *People*, 147 Illinois, 66.

By the statute in question carriers are denied access to the courts on equal terms with other litigants.

The State has no right to say, as it does by this statute, that two parties can enter into a contract and if one party fails to

carry out his part he can refuse to pay and stand a suit, and, if he loses, he shall not be liable for any penalty except for costs, but if the other party fail and appeal to the court and lose he shall be liable to a penalty in favor of his co-contractor. Such a statute denies equality before the courts, and courts exist to afford the protection of the laws, and therefore denial of equality before the courts is a denial of the equal protection of the laws. *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Davidson* v. *Jennings*, 48 L. R. A. 340, and cases there cited; *C., S. L. & N. O. Ry. Co.* v. *Moss*, 60 Mississippi, 641; *Wilder* v. *Chicago & W. M. R. Co.*, 70 Michigan, 382, 38 N. W. Rep. 289; *Randolph* v. *Builders' Supply Co.*, 106 Alabama, 501, 17 So. Rep. 721.

The cases cited by the Supreme Court of South Carolina do not sustain its position herein. *A. T. & S. F. Ry.* v. *Matthews*, 174 U. S. 96; *Erb, Rec'r*, v. *Monarch*, 177 U. S. 584, and *Fidelity Mut. Life Asso.* v. *Mettler*, 185 U. S. 308, distinguished.

No counsel appeared for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The question in this case is the constitutionality of section 2 of an act of the State of South Carolina, approved February 23, 1903 (24 Stat. 81), which reads:

"SEC. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments from without this State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: *Provided*, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor

until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: *Provided*, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: *Provided, further*, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of section 1710, vol. 1, of the Code of Laws of South Carolina, 1902."

The difference between the value of the goods shipped and the freight charges, $1.75, and the amount of the penalty, $50, naturally excites attention. The Supreme Court of the State held the section constitutional, a decision conclusive so far as the state constitution is concerned, and therefore we are limited to a consideration of its alleged conflict with the Constitution of the United States. The shipment was wholly intrastate, being from Columbia, S. C., to McBee, S. C., and undoubtedly subject to the control of the State. It is of course unnecessary to consider the validity of the statute when applied to a shipment from without the State.

It is contended that the equal protection of the laws, guaranteed by the first section of the Fourteenth Amendment, is denied. The power of classification is conceded, but this will not uphold one that is purely arbitrary. There must be some substantial foundation and basis therefor. It is asserted that this is merely legislation to compel carriers to pay their debts within a given time, by an unreasonable penalty for any delay, while no one else is so punished, and that there is no excuse for such distinction. We have had before us several cases involving classification statutes, and while the principles upon which classifications may rightfully be made are clear and easily stated, yet the application of those principles to the different

cases is often attended with much difficulty. See among others, on the general principles of classification, *Barbier* v. *Connolly*, 113 U. S. 27; *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232, and of cases making application of those principles; *Gulf, Colorado & Santa Fe Railway Company* v. *Ellis*, 165 U. S. 150; *A. T. & S. F. R. R. Co.* v. *Matthews*, 174 U. S. 96, and cases cited in the opinion; *Erb* v. *Morasch*, 177 U. S. 584; *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308; *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301; *M. K. & T. Ry. Co.* v. *May*, 194 U. S. 267.

We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the nonpayment of debts. As the Supreme Court of South Carolina said in *Best* v. *Seaboard Air Line R. R. Co.*, 72 S. Car., 479, 484:

"The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary."

This ruling of the Supreme Court finds support, if any be needed, in the preamble of the statute, which reads: "An act to regulate the manner in which common carriers doing business in this State shall adjust freight charges and claims for loss of or damage to freight."

It is not an act levelled against corporations alone, but includes all common carriers. The classification is based solely upon the nature of the business, that being of a public character. It is true that no penalty is cast upon the shipper, yet there is some guarantee against excessive claims in that, as held by the Supreme Court of the State in *Best* v. *Railroad Company*, *supra*, there can be no award of a penalty unless there be a recovery of the full amount claimed.

Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than any one else, and for the adjustment of loss or damage to shipments within the State forty days cannot be said to be an unreasonably short length of time. It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification.

While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute, and yet justice requires that his claim be adjusted and paid with reasonable promptness. Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go—even in cases where classification is legitimate—but we are not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be

made is so short that the act imposing the penalty and fixing the time is beyond the power of the State.

The judgment of the Supreme Court of South Carolina is

Affirmed.

MR. JUSTICE PECKHAM dissents.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 13. Argued October 15, 16, 1907.—Decided November 4, 1907.

Requirements contained in another statute or document may be incorporated in a charter by generic or specific reference and, if clearly identified, the charter has the same effect as if it itself contained the restrictive words, and the question of the constitutionality of the statute referred to is immaterial.

A street railway corporation taking a legislative charter subject to all duties and restrictions set forth in all general laws relating to corporations of that class cannot complain of the unconstitutionality of a prior enacted statute compelling them to transport children attending public schools at half price.

187 Massachusetts, 436, affirmed.

THE facts, which involve the constitutionality of the statute of Massachusetts requiring the transportation of school children by certain railways at half fare, are stated in the opinion.

Mr. Everett Watson Burdett, with whom *Mr. Joseph H. Knight* was on the brief, for plaintiff in error:

The statute is invalid as a rate regulation. It makes an arbitrary and unreasonable discrimination, at the expense of the plaintiff in error, in favor of certain members of the community, to wit, school children, and of a portion only of such children, to wit, those attending public schools. That this is unlawful is

admitted by the Supreme Judicial Court of Massachusetts in its opinion in this case, where it says that if the statute were to be regarded as an absolute and arbitrary selection of a class, independently of good reasons for making a distinction, the provision would be unconstitutional and void. *Commonwealth* v. *Interstate Street Ry. Co.*, 187 Massachusetts, 436, 438; *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150. And see *Lake Shore &c. Ry.* v. *Smith*, 173 U. S. 684, holding it unlawful to charge one class of passengers, to wit, those who can afford to buy 1000-mile tickets, less than those who are not fortunate enough to be members thereof. As a question of rate regulation, there is no distinction between that case and this.

Plaintiff in error is not estopped to set up the unconstitutionality of the statute. *O'Brien* v. *Wheelock*, 184 U. S. 450, 489.

The statute is invalid as a police regulation.

The promotion of education has no real or direct relation to the statute in question. It does not bear any reasonable or just relation to the act in respect to which the classification is proposed. *Lake Shore &c. Ry.* v. *Ohio*, 173 U. S. 285, 290.

While education may be promoted in aid of the general welfare, like all subjects of legislation in aid of the general welfare, it is subject to the limitations of the Constitution, and a statute in order to be valid must not impinge upon the fundamental rights guaranteed thereby. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, at 558; *Barbier* v. *Connolly*, 113 U. S. 27, 31, 32; *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684.

While the destruction of property or of its use is not subject to the limitation of the constitution respecting compensation, if such destruction is in pursuance of police regulations for the public health, morals or safety; if a taking of property or of its use is involved, then it can only be done subject to the constitutional guaranties of just compensation and equal protection of the laws. In the present case plaintiff's property, or the use of its property, is taken without due process of law, *i. e.*, without just compensation; and the corporation is dis-

criminated against in favor of certain favored individuals, and is thus deprived of the equal protection of the laws.

It, therefore, is not the exercise of the police power, but of the general power of sovereignty to enact laws for the general welfare. But, in either case, it would be subject to the limitations of the constitution against the taking of property without due process of law, and against the deprivation of the right enjoyed by every citizen that he shall not be denied the equal protection of the laws.

If otherwise valid as a police regulation, the statute is partial and unequal in its application, and is therefore invalid.

If street railways are selected by the State as proper instrumentalities to be used, without reward, for the promotion of education, then all street railways must be so used. If one system can be exempted, then any other can likewise be exempted, and the logical conclusion follows that the legislature may impose this obligation upon any one or more companies of this character, and exempt all the rest. This would clearly be discrimination, without reason or justice, and would be invalid. It would not be rate regulation at all, but an improper exercise of the police power. *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, 159. See also *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

The statute takes the property of the plaintiff in error without just compensation, and therefore without due process of law.

The statute prescribes that the rate to be charged for public school children shall be one-half the regular rate. The regular rate of a common carrier must be a reasonable one. *Interstate Commerce Commission* v. *Railway Company*, 167 U. S. 479, 494.

The statute, therefore, in effect prescribes that public school children shall be carried at one-half the reasonable rate, and hence on its face deprives the transportation company of its service, that is to say, its property, without just compensation.

Hutchinson on Carriers, 3d ed. § 521, p. 568; Rorer on Railroads, 1372; *Tift* v. *Railway Company*, 123 Fed. Rep. 789.

Mr. Dana Malone, with whom *Mr. Fred. T. Field* was on the brief, for defendant in error:

Since the decision of *Munn* v. *Illinois*, 94 U. S. 113, the law has been settled that a State has power to limit the amount of charges by railroad companies for the transportation of persons or property within its own jurisdiction. *Ruggles* v. *Illinois*, 108 U. S. 526; *Railroad Commission Cases*, 116 U. S. 307, *et seq.*; *Dow* v. *Beidelman*, 125 U. S. 680; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; *Chicago & Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S. 339; *St. Louis & San Francisco R. R. Co.* v. *Gill*, 156 U. S. 649; *Smyth* v. *Ames*, 169 U. S. 466; *Louisville & Nashville R. R. Co.* v. *Kentucky*, 183 U. S. 503; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257.

The plaintiff in error cannot object that, by reason of the provisions of § 72 of ch. 112, Rev. Laws, its property is taken or it is deprived of the equal protection of the laws, for it accepted its charter subject to these provisions. The law was enacted as St. 1900, c. 197, approved April 4, 1900, and took effect upon its passage and its provisions are in substance the same; hence they are to be construed as continuations thereof, and not as new enactments. R. L., c. 226, § 2; *Commonwealth* v. *Anselvich*, 186 Massachusetts, 376, 379. The burden upon the plaintiff in error was not increased by the revision of the statute.

The plaintiff in error was incorporated by St. 1901, c. 159, approved March 15, 1901, and took effect upon its passage. This statute was a public act, R. L., c. 175, § 72, and may be referred to here. See *Covington Draw Bridge Co.* v. *Shepherd*, 20 How. 227, 232; *Case* v. *Kelley*, 133 U. S. 21, 27; *Harris* v. *Quincy*, 171 Massachusetts, 472.

The statute was, therefore, in force when the plaintiff in error was incorporated, and it became subject to it. In fact,

the act of incorporation expressly provided that the plaintiff in error should be subject to general laws. St. 1901, c. 159, § 2. See also section 3. This condition was express as well as implied, and upon which the State granted the franchise. The Fourteenth Amendment is not violated by the subjecting of a corporation to the general laws in force at the time of its incorporation. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 247. A State may properly impose such a restriction as a condition upon which it grants a franchise. *Railroad Company* v. *Maryland*, 21 Wall. 456; *Ashley* v. *Ryan*, 153 U. S. 436; *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677; *Purdy* v. *Erie Railroad Company*, 162 N. Y., 42.

Mr. Justice Holmes delivered the opinion of the court.

This was a complaint against the plaintiff in error for refusing to sell tickets for the transportation of pupils to and from the public schools at one-half the regular fare charged by it, as required by Mass. Rev. Laws, c. 112, § 72. At the trial the Railway Company admitted the fact, but set up that the statute was unconstitutional, in that it denied to the company the equal protection of the laws and deprived it of its property without just compensation and without due process of law. In support of this defence it made an offer of proof which may be abridged into the propositions that the regular fare was five cents; that during the last fiscal year the actual and reasonable cost of transportation per passenger was 3.86 cents, or, including taxes, 4.10 cents; that pupils of the public schools formed a considerable part of the passengers carried by it, and that the one street railway expressly exempted by the law transported nearly one-half the passengers transported on street railways and received nearly one-half the revenue received for such transportation in the Commonwealth. The offer was stated to be made for the purpose of showing that the plaintiff in error could not comply with the statute without carrying passengers for less than a reasonable compensation

and for less than cost. The offer of proof was rejected, and a ruling that the statute was repugnant to the Fourteenth Amendment was refused. The plaintiff in error excepted and, after a verdict of guilty and sentence, took the case to the Supreme Judicial Court. 187 Massachusetts, 436. That Court overruled the exceptions, whereupon the plaintiff in error brought the case here.

This court is of opinion that the decision below was right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground. The section of the Revised Laws (c. 112, § 72), was a continuation of St. 1900, c. 197. Rev. Laws, c. 226, § 2. *Commonwealth* v. *Anselvich*, 186 Massachusetts, 376, 379, 380. The act of incorporation went into effect March 15, 1901. St. 1901, c. 159. By the latter act the plaintiff in error was "subject to all the duties, liabilities and restrictions set forth n all general laws now or hereafter in force relating to street railway companies, except," etc. § 1. See also § 2. There is no doubt that, by the law as understood in Massachusetts, at least, the provisions of Rev. L. c. 112, § 72, St. 1900, c. 197, if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already existing corporation or not. The railroad company would have come into being and have consented to come into being subject to the liability and could not be heard to complain. *Rockport Water Co.* v. *Rockport*, 161 Massachusetts, 279; *Ashley* v. *Ryan*, 153 U. S. 436, 443; *Wight* v. *Davidson*, 181 U. S. 371, 377; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 579.

If the charter, instead of writing out the requirements of Rev. L. 112, § 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, as the force given to it

by reference and incorporation would be derived wholly from the charter. The document, therefore, might as well be an unconstitutional as a constitutional law. See *Commonwealth* v. *Melville*, 160 Massachusetts, 307, 308. But the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear. *Corry* v. *Baltimore*, 196 U. S. 466, 477. See *Purdy* v. *Erie R. R. Co.*, 162 N. Y., 42.

Speaking for myself alone, I think that there are considerations on the other side from the foregoing argument that make it unsafe not to discuss the validity of the regulation apart from the supposition that the plaintiff in error has accepted it. See *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468. Therefore I proceed to state my grounds for thinking the statute constitutional irrespective of any disabilities to object to its terms.

The discrimination alleged is the express exception from the act of 1900 of the Boston Elevated Railway Company and the railways then owned, leased or operated by it. But, in the first place, this was a legislative adjudication concerning a specific road, as in *Wight* v. *Davidson*, 181 U. S. 371, not a general prospective classification as in *Martin* v. *District of Columbia*, 205 U. S. 135, 138. A general law must be judged by public facts, but a specific adjudication may depend upon many things not judicially known. Therefore the law must be sustained on this point unless the facts offered in evidence clearly show that the exception cannot be upheld. But the local facts are not before us, and it follows that we cannot say that the legislature could not have been justified in thus limiting its action. *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 597, 598. In the next place, if the only ground were that the charter of the Elevated Railway contained a contract against the imposition of such a requirement, it would be attributing to the Fourteenth Amendment an excessively nice operation to say that the immunity of a single corporation prevented the passage of an otherwise desirable and wholesome law. It is unnecessary to consider what would be the

effect on the statute by construction in Massachusetts if the exception could not be upheld. For, if in order to avoid the Scylla of unjustifiable class legislation, the law were read as universal, (see *Dunbar* v. *Boston & Providence R. R. Co.*, 181 Massachusetts, 383, 386) it might be thought by this Court to fall into the Charybdis of impairing the obligation of a contract with the elevated road, although that objection might perhaps be held not to be open to the plaintiff in error here. *Hatch* v. *Reardon*, 204 U. S. 152, 160.

The objection that seems to me, as it seemed to the court below, most serious is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss. The conventional fare of five cents presumably is not more than a reasonable fare, and it is at least questionable whether street railway companies would be permitted to increase it on the ground of this burden. It is assumed by the statute in question that the ordinary fare may be charged for these children or some of them when not going to or from school. Whatever the fare, the statute fairly construed means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage, if we looked only to the business aspect of the question. Moreover, while it may be true that in some cases rates or fares may be reduced to an unprofitable point in view of the business as a whole or upon special considerations, *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 256, 267, it is not enough to justify a general law like this, that the companies concerned still may be able to make a profit from other sources, for all that appears. *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 24, 25.

Notwithstanding the foregoing considerations I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights like others

are matters of degree and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation. *Martin* v. *District of Columbia*, 205 U. S. 135, 139; *Camfield* v. *United States*, 167 U. S. 518, 524.

If the Fourteenth Amendment is not to be a greater hamper upon the established practices of the States in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed.

Education is one of the purposes for which what is called the police power may be exercised. *Barbier* v. *Connolly*, 113 U. S. 27, 31. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line. And, to return to the taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt. The present requirement is not different in fundamental principle, although the tax is paid in kind and falls only on the class capable of paying that kind of tax—a class of *quasi* public corporations specially subject to legislative control.

Thus the question narrows itself to the magnitude of the burden imposed—to whether the tax is so great as to exceed

the limits of the police power. Looking at the law without regard to its special operation I should hesitate to assume that its total effect, direct and indirect, upon the roads outside of Boston amounted to a more serious burden than a change in the law of nuisance, for example, might be. See further, *Williams* v. *Parker*, 188 U. S. 491. Turning to the specific effect, the offer of proof was cautious. It was simply that a "considerable percentage" of the passengers carried by the company consisted of pupils of the public schools. This might be true without the burden becoming serious. I am not prepared to overrule the decision of the legislature and of the highest court of Massachusetts that the requirement is reasonable under the conditions existing there, upon evidence that goes no higher than this. It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

Mr. Justice Harlan is of opinion that the constitutionality of the act of 1900 is necessarily involved in the determination of this case. He thinks the act is not liable to the objection that it denies to the railway company the equal protection of the laws. Nor does he think that it can be held, upon any showing made by this record, to be unconstitutional as depriving the plaintiff in error of its property without due process of law. Upon these grounds alone, and independent of any other question discussed, he joins in a judgment of affirmance.

Judgment affirmed.

Mr. Justice Moody, having been of counsel, did not sit in this case.

CHAPMAN, TRUSTEE IN BANKRUPTCY OF McCOY, *v.* BOWEN.

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

No. 168. Submitted October 14, 1907.—Decided November 11, 1907.

Clause 3 of general order in bankruptcy XXXVI applies to appealable cases and must be complied with.

This appeal cannot be maintained because it does not come within either paragraph 1 or paragraph 2 of § 25 *b* of the bankruptcy act.

Where the decision below proceeds on principles of general law broad enough to sustain it without reference to provisions of the bankruptcy act, the question involved is not one which would justify a writ of error from the highest court of a State to this court.

Appeal from 150 Fed. Rep. 106, dismissed.

THE firm of A. McCoy & Company, a banking copartnership at Rensselaer, Indiana, was composed of Alfred McCoy and Thomas McCoy, and on July 11, 1904, the copartnership and its individual members were respectively adjudicated bankrupts.

Abner T. Bowen presented claims, on notes signed by the firm and also by its members, against the estate of the copartnership, which were allowed, and against the individual estate of Alfred McCoy, which were disallowed, by the referee, "subject only to such right as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Company, bankrupts, after the payment of the individual creditors of the estate of said Alfred McCoy, bankrupt."

Petition for review was filed and the matter certified to the District Court for the District of Indiana, by which the decision and order of the referee were approved and affirmed. Thereupon the case was carried by appeal to the Circuit Court of Appeals for the Seventh Circuit, which reversed the judgment of the District Court and remanded the cause "with instructions to allow the claim as a debt against the individual estate

of Alfred McCoy to be paid therefrom ratably with other creditors of the estate to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Company." 150 Fed. Rep. 106.

An appeal to this court was allowed by a judge of the Circuit Court of Appeals, and the case having been docketed here was submitted on a motion to dismiss or affirm.

Mr. Harry R. Kurrie, Mr. Frank Foltz and *Mr. S. P. Thompson,* for appellant:

This record does show that the court below complied with this court's order, XXXVI, § 3, at or before the time of entering its judgment, and did make as the record shows, a finding of facts.

The court here did all that the statute required of it.

First. It stated the inferential facts, *secundum allegata et probata.*

Second. It interpreted the statute of bankruptcy, by citing authorities and by reason and analogy.

Third. It stated its conclusion of law.

Fourth. It set forth the judgment and mandate of the court. There is no recital of the testimony as to the value received, the identification of the payee, the explanation of the maker, A. McCoy & Co., or as to the appellee receiving dividends from the estate of A. McCoy & Co.

So that in the light of the findings each note is made to read "for value received by A. McCoy & Co., a firm composed of Alfred McCoy and Thomas J. McCoy, promised to pay Abner T. Bowen." This court only required a reasonable conformity to its order. The statute of bankruptcy as a scheme seeks to reach the merits of the controversy and not to enforce technicalities.

The amount involved as deposed by claimant is more than the jurisdictional amount of $2,000. The determination of the proper rule of distribution under § 5, subd. *f,* of the bankrupt law is essential to the uniform operation of the bankrupt act throughout the United States.

Mr. M. Winfield, for appellee.

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

The motion to dismiss was rested on two grounds: (1) That appellant had failed to comply with clause 3 of general order in bankruptcy XXXVI; (2) That the case was not appealable to this court.

Clause 3 of general order XXXVI reads as follows:

"In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

No such finding of facts and conclusions of law was made in this case, nor was the court requested to make such finding. The appeal was a general appeal, and the entire record was sent up. The omission cannot be supplied by reference to the opinion as is attempted in argument. *British Queen Mining Company* v. *Baker Silver Mining Company*, 139 U. S. 222, and cases cited; *Lehnen* v. *Dickson*, 148 U. S. 71, 74.

But if the case was not appealable, the appeal must be dismissed, even though clause 3 had been complied with.

The bankruptcy act provides, sec. 25, *b:*

"From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which

might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

"2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

As to paragraph 2, there was no such certificate here; and as to paragraph 1, we are not able to perceive that a writ of error from the highest court of a State to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question; nor the validity of a statute of, or an authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against.

The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act. And, moreover, even if it could be held that by his claim Bowen asserted any right within the meaning of section 709, Rev. Stat., the decision was in his favor, and the trustee's bare denial of the claim could not be relied on under that statute. *New Jersey City & Bergen Railroad Company* v. *Morgan*, 160 U. S. 288.

Appeal dismissed.

LEATHE *v.* THOMAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 21. Argued October 17, 1907.—Decided November 11, 1907.

In a case coming from a state court this court can consider only Federal questions decided adversely to the plaintiff in error and upon which a decision was necessary to the decision of the case, and if the judgment complained of is supported also upon other and independent grounds it must be affirmed or the writ of error dismissed.

When the record discloses other and completely adequate grounds on which to support the judgment of a state court, this court does not commonly inquire whether the decision upon them was correct or reach a Federal question by determining that they ought not to have been held to warrant the result.

Writ of error to review 218 Illinois, 246, dismissed.

THE facts are stated in the opinion.

Mr. John Maynard Harlan, with whom *Mr. James S. Harlan* and *Mr. Victor Koerner* were on the brief, for plaintiff in error:

The issue raised by the third and fourth pleas of set-off is identical with the issue adjudicated in the case of *Belleville & St. Louis Railway Co. for the use of Thomas* v. *Leathe,* 84 Fed. Rep. 103, namely, Leathe's personal liability or non-liability under the instrument of March 25, for the debts of the railway company, and, therefore, the subject matter of these pleas is *res judicata.* Moreover, the only issue in this case in the lower court was that raised by the third and fourth pleas of set-off and that issue having been decided in favor of Leathe in the Federal court, the state court should have given full faith and credit in this suit to the judgment of the Federal court. This it did not do.

If, as claimed by the defendant in error and as held by the Supreme Court of Illinois in its second and final opinion, the judgment in that court was founded, not on the third and fourth pleas, but on the first and second pleas of set-off, then

the plaintiff in error has not been accorded due process of law since no evidence whatever was adduced in support of the first and second pleas; there were no findings based upon those pleas and no trial whatever was had upon them.

This court has jurisdiction to inquire whether full faith and credit and full force and effect have been given to the judgment of the Federal court; in determining this question the court may examine the entire record. *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316.

Rights acquired under a Federal judgment are substantial rights which this court will guard and protect. When a Federal court has, by its final judgment, disposed of a controversy, the person in whose favor the judgment was so rendered may confidently rest upon it as giving him a substantial and practical immunity from further prosecution on the same subject matter.

This court will not be controlled by the mere surface appearance of things as created by the opinion of a state court, but, in the protection of rights acquired under a Federal judgment, will look into the substance of things and ascertain their real character.

Whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States and comes within the jurisdiction of this Court. *Crescent Live Stock Co.* v. *Butchers' &c. Co.*, 120 U. S. 141; *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316.

Mr. Edward L. Thomas, defendant in error, *pro se:*

The errors assigned on the record upon the appeal from the appellate court to the Supreme Court of Illinois, were too general to raise the question of former adjudication, and presented no question for determination upon that issue. *Louisiana, A. & M. R. R. Co.* v. *Board of Levee Com.*, 87 Fed. Rep. 594.

Not being properly presented to the court below, this court will not consider it. *Ansbro* v. *United States*, 159 U. S. 695.

There is ample evidence to support the first and second pleas,

and the affirmance of the case by the Supreme Court of Illinois is in pursuance of a statute of Illinois. This court will not review or reverse a decision of a state court upon a question of statutory practice. *Nobles* v. *Georgia*, 168 U. S. 398–405; *Egan* v. *Hart*, 165 U. S. 188; *Eustis* v. *Bolles*, 150 U. S. 361.

This court is bound by the construction of a statute of a State given to it by the courts of that State. *Nobles* v. *Georgia*, 168 U. S. 388–405.

The question as to the effect to be given the report of a referee under the Illinois statute is governed by the practice and decisions of the local courts. The statement of the referee as to the facts is no part of his verdict. The conclusions of law are his verdict and are treated as a general verdict of a jury.

This construction is not reviewable in this court, and is binding on this court.

The three foregoing propositions are questions of state practice under state statutes and, being determined by the state court, that determination is final.

When a party invokes an adjudication, he is bound by it in every particular, and the adjudication must have the effect given it by the court that made it, and when that court itself finds what it adjudicated, and what it did not adjudicate, that finding is to be taken in all courts as the extent of its adjudication.

The Circuit Court of Appeals held that the original cause of action had not been adjudicated and was still at large. *Belleville & St. Louis R. R. for use of Thomas* v. *Leathe*, 84 Fed. Rep. 103; *Leathe* v. *Thomas*, 109 Ill. App. 434.

The doctrine of former adjudication does not extend to matters not in issue in the former suit. Black on Judgments, § 731; *Gray* v. *Gillian*, 15 Illinois, 457.

The case cited by the dissenting justices and by counsel, namely, *Beloit* v. *Morgan*, 7 Wall. 619, was practically overruled in *Cromwell* v. *County of Sac*, 94 U. S. 351; and see *Belleville & St. Louis R. R. Co.* v. *Leathe*, 84 Fed. Rep. 103, and authorities there cited.

A party is not bound to join and prove all of his causes of action, although they arise from the same transaction. Black on Judgments, § 733; Van Fleet on Former Adjudication, § 279.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon judgments obtained in Missouri by the plaintiff in error against the defendant in error, hereafter called respectively plaintiff and defendant. The defendant, not denying the judgments, pleaded four pleas in set-off. The first was for money had and received, interest, and upon an account stated. The second was upon an alleged contract of January 24, 1893. The third set up an alleged contract of March 25, 1893, to pay the debt of a railroad company to the defendant, a suit and judgment for the defendant against the railroad company, a bill in equity brought by the plaintiff to enjoin the proceedings in that suit, upon which one of the issues was the liability under the contract, and that after a hearing the bill was dismissed. The fourth plea was on the contract of March 25, without more. There was a general replication denying the pleas, and also a special replication to the third and fourth, to the effect that a suit upon the alleged contract was brought against the plaintiff for the use of the defendant and removed to the United States Circuit Court and there determined in favor of the present plaintiff, the proceedings set up in the third plea being held not conclusive. (The suit referred to is *Belleville & St. Louis Ry. Co.* v. *Leathe*, 84 Fed. Rep. 103.) The case was sent to a referee to report his conclusions of law and fact. The referee reported in favor of the defendant and also reported the evidence. The trial court ordered judgment on the referee's report. This judgment was affirmed by an intermediate court and then was taken by writ of error to the Supreme Court of the State. That court held that the judgment of the United States Circuit Court made the matter of the third and fourth pleas in set-off *res judicata*, and reversed the judgment of the court below. But, upon a rehearing, the court, while adhering

to its judgment upon the third and fourth pleas, stated that it had overlooked the first and second, that the judgment could be sustained upon them, that there was evidence to support them both, or at least the first, and that the referee's finding might be supported under the first. On these grounds the judgment was affirmed. 218 Illinois, 246.

The case now is here on a writ of error, the errors alleged being that full faith and credit was not given to the judgment of the United States court, and that the present judgment was rendered without due process of law. It is true that the judgment of the United States court was held binding against the pleas to which it applies, but it is said that it is emptied of all real effect if a judgment can be entered upon the first and second pleas, referring to earlier stages of the same transaction, because it is said that there was no evidence to support those pleas and no finding upon them, so that to support the judgment by their presence on the record is a mere pretense, and either is a denial of due credit to the former judgment or deprives the plaintiff of his property without due process of law.

In order to dispose of the case it is not necessary to state the dealings in detail; the following outline is enough: The defendant wanted money from the plaintiff to start a railway company. An agreement with regard to it was made on January 24, 1893, out of which, with the accompanying and subsequent transactions, the defendant sought to establish a right to be reimbursed for his advances to the road. Later, on March 25, of the same year, there was a conveyance of its property by the railway company to the plaintiff and a conveyance by him to another company. The former deed was for one dollar and "other valuable considerations to it from him moving," and the defendant alleged that the other considerations embraced a promise of the plaintiff to reimburse him. The referee's report refers to the dealings of January, but seemingly discovers no contract of reimbursement in them. It shows that the plaintiff insisted that all that he did was under the agreement of that month, but says that the evidence does not prove it con-

clusively. It says that matters culminated in the agreement of March 25, and finds that as part of the consideration of that deed the plaintiff promised to pay.

The judgment purported to be based upon the referee's report, and it may be that, if it were our concern to deal with it, we should find it hard to discover sufficient warrant for a judgment on the first or second pleas. The general line of thought which the report follows seems to lead to the third and fourth. The conclusion is that the defendant is entitled to recover the amount of the judgment mentioned in the third plea, and this follows immediately after the finding of the plaintiff's promise. The plaintiff excepted to the referee's failure to find that everything was done under the January contract. And further reasons might be given for thinking that the court below was wrong. Even if the words of the judgment, "renders judgment on said referee's report," should be held to include the evidence as well as the referee's findings, and if it should be presumed that one of the courts below the Supreme Court of the State had reconsidered the evidence before entering or affirming the judgment, still, although there was evidence enough of the defendant's advances to the railway company, we might assume, for purposes of argument, that there was nothing sufficient to make out a promise on the plaintiff's part before March. But on the most favorable statement that we can make on the side of the plaintiff in error we can see no ground for coming to this court.

It is admitted that the general and well-settled rule is that in a case coming from a state court this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. *Murdock* v. *Memphis*, 20 Wall. 590; *Sauer* v. *New York*, 206 U. S. 536, 546. It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be.

Murdock v. *Memphis, supra.* But *Murdock* v. *Memphis* does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result. 20 Wall. 590, 635; *Eustis* v. *Bolles,* 150 U. S. 361, 369; *Castillo* v. *McConnico,* 168 U. S. 674, 679.

Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a state court even if, ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction. *Johnson* v. *Risk,* 137 U. S. 300, 307. But there is nothing of that sort in this case. At first, having in mind only the third and fourth pleas, to which alone the judgment of the United States court was a bar, the Supreme Court decided in favor of the plaintiff. It affirmed the judgment below only upon a rehearing, and after its attention had been called to the first and second pleas. It did not recede from or qualify its former decision so far as that went, but simply pointed out that there were other pleas to which the replication of *res judicata* did not apply and on which the judgment might be upheld. Suppose that it was mistaken as to the evidence, the mistake was upon a matter admitting of hesitation, for which it would seem from the opinion that there were special reasons in the state of the record and the admission of counsel. The question is one with which by the general rule we have nothing to do, and we see no reason why the general rule should not be applied.

The first and second pleas were on the record and at issue.

The plaintiff had notice that the defendant meant to prevail on whatever ground he could. He had his hearing, even if it should be thought that he might have insisted on a ruling that there was no evidence to support those pleas. However it is put, the claim of a right to resort to this court after the only Federal question has been decided in the plaintiff's favor, must fail.

Writ of error dismissed.

MR. JUSTICE HARLAN and MR. JUSTICE DAY dissent.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* McNICHOLS *v.* PEASE, SHERIFF OF COOK COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 19. Argued October 16, 17, 1907.—Decided November 18, 1907.

Habeas corpus is an appropriate proceeding for determining whether one held under an extradition warrant is a fugitive from justice; and he should be discharged if he shows by competent evidence, overcoming the presumption of a properly issued warrant, that he is not a fugitive from the demanding State.

A faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the States; and provisions of the Constitution should not be so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State. *Appleyard* v. *Massachusetts*, 203 U. S. 222.

A person, held in custody as a fugitive from justice under an extradition warrant in proper form which shows upon its face all that is required by law to be shown as a prerequisite to its being issued, should not be discharged unless it clearly and satisfactorily appears that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States.

Where the requisition is based on an indictment for a crime committed on a certain day, without specifying any hour, the accused does not overcome the *prima facie* case by proof that he was not at the place of the crime for a part of that day, the record not disclosing the hour of the crime, and it appearing that the accused might have been at the place named during a part of the day.

On writ of error to review a final judgment in *habeas corpus* proceedings

this court must determine by the record whether the state court erred and its decision cannot be controlled or affected by an apparent admission of defendant in error that certain affidavits annexed to the petition were used without objection as evidence.

This court takes judicial knowledge of facts known to every one as to the distance between two neighboring cities and the time necessary to travel from one to the other.

THE facts are stated in the opinion.

Mr. John F. Geeting for plaintiff in error:

The term "fugitive from justice," as used in § 5278, Rev. Stat., does not apply to one who constructively commits a crime in another State, but only to one physically present within a State at the time of the commission of a crime and subsequently fleeing therefrom. *Hyatt* v. *Corkran,* 188 U. S. 691; *In re Tod,* 12 S. D. 386; *Ex parte Smith,* 3 McLean, 121.

The fact that the person demanded is a fugitive from justice is a jurisdictional prerequisite to an extradition warrant. The governor upon whom the demand is made has no authority to issue his extradition warrant, unless competent proof has been made to him that the person demanded was within the jurisdiction of the demanding State at the time of the commission of the crime in question and subsequently fled therefrom. *Ex parte Reggel,* 114 U. S. 642, 651; *Roberts* v. *Reilly,* 116 U. S. 80; *Hyatt* v. *Corkran, supra; In re Jackson,* 2 Flippin, 182.

A warrant for the extradition of a person cannot be lawfully issued, unless the accused has been indicted in a court of competent jurisdiction in the demanding State, or charged by affidavit before a magistrate in such State. § 5278, Rev. Stat.

While each State has a right to create its own code of criminal procedure, the practice of the demanding State must come within the requirements of § 5278. The filing of an information, although consistent with the practice of the demanding State, is not a basis for extradition proceedings; the accused is not indicted, neither is he charged by affidavit before a magistrate. *Ex parte Hart,* 63 Fed. Rep. 249. In Wisconsin, where a

justice of the peace sits as an examining magistrate, to hold to bail or to commit for trial, an affidavit is not necessary. The warrant issues upon oral testimony taken by the justice. § 4776, Wis. Rev. Stat.; *State* v. *Davies*, 62 Wisconsin, 305.

A written statement under oath made in the positive form, if made under circumstances, or as to matters which indicate that it was made upon information and belief, will be so considered. *M. & T. Bank* v. *Loucheims*, 8 N. Y. Supp. 520; *Tim* v. *Smith*, 93 N. Y. 91; *Hart* v. *Grant*, 8 S. D. 248; *S. C.*, 66 N. W. Rep. 622; *Finely et al.* v. *De Castroverde*, 22 N. Y. Supp. 716; *Crowns* v. *Vail*, 51 Hun, 204, 206; *Bank of Pittsburg* v. *Murphy*, 18 N. Y. Supp. 575; *Van Egan* v. *Herold*, 19 N. Y. Supp. 456; *Talbert* v. *Strom*, 21 N. Y. Supp. 719. See also *Griel* v. *Backius*, 114 Pa. St. 187, 190; *Davis* v. *Mouat Lumber Co.*, 2 Colo. App. 381, 387; *Shattuck* v. *Myers*, 13 Indiana, 46, 48, 49; *People* v. *Spaulding*, 2 Paige, 336.

It is not to be presumed that the alleged larceny was committed in the presence of the chief of police and the culprit allowed to escape. A criminal complaint which does not set out facts sufficient to constitute a crime is void, and does not confer jurisdiction upon the magistrate taking it. *Moore* v. *Watts*, Breese, 18, B. B. 42; *Housh* v. *People*, 75 Illinois, 487; *Sarah Way's Case*, 41 Michigan, 299; *United States* v. *Collins*, 79 Fed. Rep. 65; *The Shattuck Case, supra; Warenzak's Case* (note, 11 Am. Crim. Rep. 376); *Armstrong* v. *Van de Venter* (extradition case), 21 Washington, 682; *S. C.*, 12 Am. Crim. Rep. 327.

All of the elements of the crime must be stated. *State* v. *Murray*, 41 Iowa, 580; *Cranor* v. *State*, 39 Indiana, 64; *Slusser* v. *State*, 71 Indiana, 280; *Barfield* v. *State*, 39 Tex. Crim. Rep. 342; *S. C.*, 11 Am. Crim. Rep. 384; *State* v. *Cruikshank*, 71 Vermont, 94; *S. C.*, 11 Am. Crim. Rep. 385; *State* v. *Fiske*, 20 R. I. 416 (and see note, 11 Am. Crim. Rep. 375). A criminal complaint, being a statement of facts, should be at least as specific as an indictment. *Lawrence* v. *Brady* (extradition case), 56 N. Y. 182; *Vandever* v. *State*, 1 Marvel, 209.

The words "complaint" and "affidavit" are not synony-

mous; and accordingly, the word "affidavit," instead of "complaint," should be used in extradition proceedings. *State* v. *Richardson*, 34 Minnesota, 115.

In the following extradition cases the affidavit or complaint was held insufficient. *State* v. *Smith*, 21 Nebraska, 552; *Ex parte Spears*, 88 California, 640; *Ex parte McCabe*, 46 Fed. Rep. 363; *In re Heilbonn*, 1 Parker Cr. R. 429; *Ex parte Rowland*, 35 Tex. Crim. Rep. 108; *In re Coleman*, 15 Blatchf. 406.

Mr. E. C. Lindley, *Mr. John J. Healy* and *Mr. F. L. Barnett*, for defendant in error, submitted:

A fugitive from justice is a person charged with a crime in the courts of one State and being there wanted to answer for said offense is found in another State. Church on Hab. Cor., §§ 478, 480; *Roberts* v. *Reily*, 116 U. S. 80; *Ex parte Reggel*, 114 U. S. 642.

Wherever the validity of a governor's warrant is made the subject of judicial inquiry, the recitals in said warrant are to be taken *prima facie* as true. *Ex parte Stanley*, 25 Tex. Civ. App. 372; Church on Hab. Cor., 626, § 486; *Leary's Case*, 10 Ben. 197; *Hyatt* v. *Corkran*, 188 U. S. 709, 715; *Munsey* v. *Clough*, 196 U. S. 372.

The technical sufficiency of the indictment or complaint charging a crime against a defendant, will not be considered on writ of *habeas corpus* in extradition procedure—that is a question for the courts of the demanding State. *Davis' Case*, 122 Massachusetts, 324; *Brown's Case*, 112 Massachusetts, 409; *Ex parte Sheldon*, 34 Ohio St. 319; *State* v. *Schleman*, 4 Harr. (Del.) 577; *Ex parte Vorhees*, 32 N. J. L. 141; *Pea* v. *Brady*, 56 N. Y. 182; *Re Greenough*, 31 Vermont, 279; *Re Manchester*, 5 California, 237; *In re Leland*, 7 Abb. Pr. N. S. 64; *Re Briscoe*, 51 How. Pr. 422; *In re Clark*, 9 Wendell, 212. Technical defect of indictment apparent upon its face will not make void governor's warrant. Church on Hab. Cor., 316, § 246.

Evidence of an *alibi* cannot defeat extradition warrant. It is not conclusive evidence. *Hyatt* v. *Corkran*, 188 U. S. 715.

The issue of a warrant of extradition is wholly a matter of executive discretion, which discretion is not subject to review by the courts. Only questions of law and fact arising upon the face of the record are subjects of judicial inquiry. 55 L. R. A. 325; 7 Colorado, 384; 21 Iowa, 467; 116 U. S. 80; *In re Leary*, Fed. Cas. No. 8,162; 2 Spellman Ex. Rem., § 1291.

Evidentiary facts need not be set out in the affidavit. It is sufficient to make the charge explicit and certain. Hurd on Habeas Corpus (2d Ed.), 611.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a final judgment of the Supreme Court of Illinois in a case of *habeas corpus* arising under that clause of the Constitution providing that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime;" also, under section 5278 of the Revised Statutes, which provides, among other things, that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

It appears from the record that the Governor of Wisconsin

made his requisition upon the Governor of Illinois, stating that John McNichols (the present plaintiff in error) was charged by affidavit with the crime of larceny from the person of one Thomas Hansen—a crime under the laws of Wisconsin—committed in the county of Kenosha, Wisconsin, and that he had fled from the justice of that State and taken refuge in Illinois, and requiring that McNichols be apprehended and delivered to the appointed agent of Wisconsin, who was authorized to receive and convey the accused to Wisconsin, there to be dealt with according to law. Accompanying the requisition were duly certified copies of three documents: 1. An official application to the Governor of Wisconsin by the District Attorney for Kenosha County for a requisition upon the Governor of Illinois for McNichols as a fugitive from the justice of Wisconsin, it being stated in such application that McNichols was there charged by affidavit before a Justice of the Peace with the crime of larceny from the person committed in that county on the thirtieth day of September, 1905. 2. A verified complaint or affidavit before a Wisconsin Justice of the Peace, alleging that McNichols did, on the thirtieth day of September, A. D. 1905, at the city of Kenosha, feloniously steal, take and carry away from the person of Thomas Hansen, against his will, two hundred dollars, lawful money of the United States, etc. 3. A warrant of arrest issued by such Justice of the Peace, based on the above affidavit, for the apprehension of McNichols.

The Governor of Illinois, in conformity with the demand of the Governor of Wisconsin, issued his warrant for the arrest and delivery of McNichols to the agent designated by the Governor of the latter State. That warrant recited—and its recitals are important—: "The Executive authority of the State of Wisconsin demands of me the apprehension and delivery of John McNichols, represented to be a fugitive from justice and has moreover, produced and laid before me the copy of a complaint and affidavit made by and before a properly empowered officer in and of the said State in accordance with the laws thereof charging John McNichols, the person so de-

manded, with having committed against the laws of the said State of Wisconsin the crime of larceny from the person which appears by the said copy of a complaint and affidavit certified as authentic by the Governor of the said State now on file in the office of the Secretary of State of Illinois, and being satisfied that said John McNichols is a fugitive from justice and has fled from the State of Wisconsin," etc.

Having been arrested under the authority of that warrant, and being in the custody of the sheriff of Cook County, Illinois, McNichols presented his petition to the Supreme Court of that State—whose jurisdiction in the premises is not disputed—praying to be discharged from custody. That petition states that prior to the issuing of the above extradition warrant he was arrested upon a warrant issued by a Justice of the Peace in Chicago, based upon the supposed criminal offense, and that he presented his petition to the Criminal Court of Cook County for a writ of *habeas corpus*, setting forth that he was not a fugitive from justice; that pending that proceeding the above extradition warrant was issued and brought to the attention of the Criminal Court, and thereupon that court, because of the gravity of the case, suspended proceedings in order to give the accused an opportunity to apply to the Supreme Court of Illinois for a writ of *habeas corpus*.

The present petition for *habeas corpus* presented to the Supreme Court of Illinois contained this paragraph: "Your petitioner further shows that he has heard Thomas Hansen testify in a certain *habeas corpus* proceeding heretofore pending regarding this same matter [no doubt the above proceeding in the Criminal Court of Cook County], the said Thomas Hansen stating in his testimony that he was the same person mentioned in said complaint, and the said Thomas Hansen then and there testifying that the said supposed crime occurred on September 30, 1905, at the hour of *two* P. M., about a block and a half from the Northwestern depot in Kenosha, Wisconsin; and your petitioner states that he was not in the State of Wisconsin on September 30, 1905, and did not commit the said offense, and

in further proof thereof your petitioner herewith presents and attaches to this petition the affidavits of John F. Graff, William Oakley, Simon F. Bower, John A. Dennison, and Hugh Campbell, the same being marked respectively Exhibits C, D, E, F, and G." In one of the affidavits here referred to the affiant stated "that upon the thirtieth day of September, A. D. 1905, the said John McNichols to this affiant's personal knowledge was in the city of Chicago at about the hour of *one* o'clock P. M. and that this affiant remained in the company of the said McNichols until 2:15 P. M. and again met the said McNichols about three o'clock P. M. said day; this affiant further says that it would have been impossible for the said McNichols to have been in the city of Kenosha, State of Wisconsin, on the said thirtieth day of September, A. D. 1905." In the remaining five affidavits the respective affiants, using precisely the same words, stated "that upon the thirtieth day of September, A. D. 1905, said John McNichols to this affiant's personal knowledge was in the city of Chicago, the whole of the *afternoon* of the said day, this affiant and the said John McNichols *during the said afternoon* being in attendance at a baseball game in the said city of Chicago, between the Chicago and Boston teams, which said game was played at the West Side Ball Park."

The record shows that the case was heard in the Supreme Court of Illinois upon "the allegations and proofs" of the parties, and it was adjudged that the custody of the sheriff who held the accused should not be disturbed. But no bill of exceptions was taken embodying any evidence before the Supreme Court of Illinois. So that we do not know what were the "proofs" adduced by the parties. The sheriff stood upon his answer to the petition for the writ of *habeas corpus*. That answer, it will be recalled, embodied the extradition warrant issued by the Governor of Illinois.

Did the Supreme Court of Illinois err, when adjudging, as in effect it did, that the accused did not appear to be held in custody in violation of the Constitution and laws of the United States?

Some of the questions discussed at the bar have been concluded by decisions in former cases involving the meaning and scope of the above constitutional and statutory provisions. We will not extend this opinion by giving a full analysis of those cases. It is sufficient to say that the following principles are to be deduced from *Robb* v. *Connolly*, 111 U. S. 624, 639; *Ex parte Reggel*, 114 U. S. 642, 652–653; *Roberts* v. *Reilly*, 116 U. S. 80, 95; *Hyatt* v. *Corkran*, 188 U. S. 691, 719; *Munsey* v. *Clough*, 196 U. S. 364, 372; *Pettibone* v. *Nichols*, 203 U. S. 192, and *Appleyard* v. *Massachusettss*, 203 U. S. 222.

1. A person charged with crime against the laws of a State and who flees from justice, that is, after committing the crime, leaves the State, in whatever way or for whatever reason, and is found in another State, may, under the authority of the Constitution and laws of the United States, be brought back to the State in which he stands charged with the crime, to be there dealt with according to law.

2. When the Executive authority of the State whose laws have been thus violated makes such a demand upon the Executive of the State in which the alleged fugitive is found as is indicated by the above section (5278) of the Revised Statutes—producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate charging the person demanded with a crime against the laws of the demanding State—it becomes, under the Constitution and laws of the United States, the duty of the Executive of the State where the fugitive is found to cause him to be arrested, surrendered and delivered to the appointed agent of the demanding State, to be taken to that State.

3. Nevertheless, the Executive, upon whom such demand is made, not being authorized by the Constitution and laws of the United States to cause the arrest of one charged with crime in another State unless he is a fugitive from justice, may decline to issue an extradition warrant, unless it is made to appear to him, by competent proof, that the accused is substantially charged with crime against the laws of the demanding

State, and is, in fact, a fugitive from the justice of that State.

4. Whether the alleged criminal is or is not such fugitive from justice may, so far as the Constitution and laws of the United States are concerned, be determined by the Executive upon whom the demand is made in such way as he deems satisfactory, and he is not obliged to demand proof apart from proper requisition papers from the demanding State, that the accused is a fugitive from justice.

5. If it be determined that the alleged criminal is a fugitive from justice—whether such determination be based upon the requisition and accompanying papers in proper form, or after an original, independent inquiry into the facts—and if a warrant of arrest is issued after such determination, the warrant will be regarded as making a *prima facie* case in favor of the demanding State and as requiring the removal of the alleged criminal to the State in which he stands charged with crime, unless in some appropriate proceeding it is made to appear that he is not a fugitive from the justice of the demanding State.

6. A proceeding by *habeas corpus* in a court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the State in which he is found to the State whose laws he is charged with violating.

7. One arrested and held as a fugitive from justice is entitled, of right, upon *habeas corpus*, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding State, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant.

Turning now to the record of this case we find that the accused is in custody under an extradition warrant which appears upon its face to be warranted by the Constitution and laws of the United States. But we fail to find evidence sufficient to

overcome the *prima facie* case thus made by that warrant. It is said that the plaintiff in error was not in the State of Wisconsin on the day when the alleged larceny from the person of Hansen was committed; therefore, it is contended, he could not have committed the crime charged, and thereafter become a fugitive from the justice of that State. If the authorities of Wisconsin were bound by the date named in the requisition papers, which we do not concede (1 Pomeroy's Archbold's Cr. Pr. & Pl. 363), still the record presents no such case as is contended for by the accused. It was incumbent upon him, by competent proof, to rebut the presumption arising on the face of the extradition warrant and requisition papers that he was a fugitive from justice for a crime committed in Wisconsin on September 30, 1905. As already stated, no bill of exceptions embracing the evidence was taken and we cannot, therefore, say that the proofs established the fact that the accused was not a fugitive as charged, as stated in the warrant of arrest.

It is argued, however, that the affidavits accompanying the petition for *habeas corpus* show that the accused was not in Wisconsin when the crime in question was alleged to have been committed. The record does not justify us in assuming that those affidavits were in fact offered as evidence, or were used with the consent of the State as evidence, or were treated as evidence by the Supreme Court of Illinois. It is true that the counsel for the sheriff uses some language in his brief which is construed as admitting that the affidavits were used, without objection, as evidence. But such an apparent admission cannot control or affect our decision; for, whether the Supreme Court of Illinois erred in its final judgment must be determined by the record before us.

But if it be assumed that the affidavits were accepted in the court below as evidence the result must still be the same; for the affidavits do not satisfactorily establish the fact that the accused was absent from Wisconsin when the alleged crime in question was committed. The charge, as set forth in the requisition papers, was that he committed the crime of larceny

from the person of Hansen on the thirtieth day of September, 1905—no particular hour of that day being mentioned—while the affidavits import nothing more than that McNichols was at Chicago at one o'clock and during the whole of the *afternoon* of that day. The affidavits give no account of the whereabouts of McNichols during the forenoon of the day specified in the papers accompanying the requisition by the Governor of Wisconsin. We know, because everyone knows without the testimony of witnesses, that Kenosha, the place of the alleged crime, is only a short distance—within not more than one hour and a half's travel, by rail—from Chicago. It was entirely possible for the accused to have passed the whole or a larger part of the forenoon of September 30, in that city, and yet have been in Chicago at one o'clock and during the whole afternoon of the same day. So that the affidavits relied on by no means prove the absence of the accused from Wisconsin during the whole of the thirtieth day of September.

Here, it is suggested, that the crime, if committed at all, was committed at *two* o'clock of September 30, while the affidavits show that McNichols was at Chicago at *one* o'clock and during the entire afternoon of that day. So far as the record discloses this suggestion finds no support in anything said or done at the hearing by those who opposed the discharge of the accused. The requisition papers do not state that the alleged crime was committed at two o'clock or at any other specified hour of the day named. The whole foundation for the suggestion was an allegation in the petition for the writ, in this case, to the effect that the accused had *heard* Thomas Hansen testify in another *habeas corpus* proceeding that the crime was committed at two o'clock on the day named. But the record does not show that Hansen or any other person so testified in the present case. Indeed, it does not appear that anyone testified orally before the court—not even McNichols. Upon the record before us it must be taken that McNichols was charged with committing the crime in question on the thirtieth day of September, and that he could have been at

Kenosha during the forenoon of that day, although he may have been, as stated in the affidavits, in Chicago during the whole of the afternoon of the same day. So that the accused entirely failed to overcome the *prima facie* case made by the official documents before the court of his having become a fugitive from the justice of Wisconsin, after committing a crime against its laws on the thirtieth day of September, 1905.

When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States. We may repeat the thought expressed in *Appleyard's case*, above cited, that a faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the States, and that "while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State."

No error appearing in the record, the judgment of the Supreme Court of Illinois must be affirmed.

It is so ordered.

KENT *v.* PEOPLE OF PORTO RICO.

ERROR TO THE SUPREME COURT OF PORTO RICO.

No. 31. Argued October 30, 31, 1907.—Decided November 18, 1907.

Amado v. *United States*, 195 U. S. 172, followed as to when this court cannot review the final judgment of the Supreme Court of Porto Rico in a criminal case.

Where the jurisdiction of this court to review a judgment of the Supreme Court of a Territory depends on the presence of a Federal question the mere assertion of a Federal right indubitably frivolous and without color of merit is not sufficient to confer jurisdiction, nor in such a case has this court jurisdiction to pass upon other questions non-Federal in nature, and the judgment will not be affirmed but the writ of error dismissed.

While the contention that a local law of Porto Rico passed in 1904, changing the boundaries of the judicial districts, was void because in conflict with § 33 of the act of April 12, 1900, so that no district courts have existed since that time, presents a formal Federal question, it is frivolous and without color of merit and therefore insufficient to confer jurisdiction on this court to review a judgment of the Supreme Court of Porto Rico under § 35 of that act.

Where, at the request of the accused, the question of the voluntary nature of a written confession has been submitted to the jury no constitutional right under the Fifth Amendment has been asserted and denied and errors assigned on that subject do not present any Federal question or furnish any basis for the jurisdiction of this court.

THE facts are stated in the opinion.

Mr. N. B. K. Pettingill, with whom *Mr. Nemesio Perez Moris* and *Mr. Harry P. Leake* were on the brief, for plaintiff in error.

Mr. Frank Feuille, Attorney General of Porto Rico, for defendant in error, submitted.

MR. JUSTICE WHITE delivered the opinion of the court.

Whether the Supreme Court of Porto Rico erred in affirming the conviction and sentence of the plaintiff in error of a crime held to constitute embezzlement, is the question presented by this record. Twenty-seven errors are assigned. At the thresh-

old we are concerned with our right to consider them. Our jurisdiction arises from the thirty-fifth section of the act of April 12, 1900 (31 Stat. 77, 85, chap. 191). For the purposes of this case it suffices to say that by the section in question our power to review extends, first, to "the same cases as from the Territories of the United States;" and, second, to "all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied. . . ." As we have no authority to review the action of the Supreme Court of a Territory of the United States in a criminal case like this (*Amado* v. *United States*, 195 U. S. 172, 175), the first of the above clauses may be put out of view. A few only of the errors assigned are relied upon at bar as presenting Federal questions within the scope of the second clause, yet it is urged that all the assigned errors are open. This rests upon the proposition that in a case coming from Porto Rico, where jurisdiction arises from the presence of a Federal question, the duty devolves of passing upon all the errors relied upon, irrespective of their Federal character. Passing for the moment a consideration of the deduction involved in the proposition, we come to consider the premise, that is, the alleged existence of Federal contentions embraced by the second clause of section 35. We do this because, if it be that there are no such questions, it will become unnecessary further to notice the argument. In determining whether the assignments of error present Federal questions it is to be borne in mind that the mere fact that some of the assignments relied on assert Federal rights is not determinative, since, even although the assignments formally involve such rights, we are nevertheless without jurisdiction "where it indubitably appears that the Federal right asserted is frivolous, that is, without color of merit." *American Railroad Co.* v. *Castro*, 204 U. S. 453.

The first error assigned alleged to embody a Federal right is that the trial below was absolutely void because the District Court in which the information was filed and trial had was not

a legal tribunal within the intendment of the act of Congress of April 12, 1900, the organic act of Porto Rico. To test the merit of the contention it is necessary to briefly state the organization of the judicial system of Porto Rico under the American domination and the legislation of Congress relating to the same. By an order promulgated during the control of Porto Rico by the military authorities the judicial system was made to consist, generally speaking, of District Courts composed of three judges, and of a Supreme Court. By section 33 of the act of Congress above referred to it was, in part, provided (31 Stat. 84):

"That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of General Orders, numbered one hundred and eighteen, as promulgated by Brigadier-General Davis, United States Volunteers, August sixteenth, eighteen hundred and ninety-nine, and including also the police courts established by General Orders numbered one hundred and ninety-five, promulgated November twenty-ninth, eighteen hundred and ninety-nine, by Brigadier General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all which courts and tribunals are hereby continued."

In March, 1904, a law was enacted by the legislature of Porto Rico, modifying the judicial system as established by the military orders referred to in the act of Congress. For the purposes of the contention now under consideration it suffices to say that by this local law the boundaries of the judicial districts were changed, caused by the creation of additional districts, and it was provided that such courts, instead of being composed of three, should consist of one judge in each district. The argument is that this local law, in so far as it changed the District Courts, and especially in so far as it provided for one instead of three judges to preside over each court, was void, because in conflict with the provision of the thirty-third section of the

act of Congress. The contention amounts to this, that there were no District Courts in Porto Rico from the time of the going into effect of the Porto Rican act in 1904 up to the present time. Whilst the proposition presents a formal Federal question, we think it is clear that it is so frivolous as to bring it within the rule announced in *American Railroad Co.* v. *Castro, supra.* We say this, because we think that no other conclusion is reasonably possible from a consideration of the whole of section 33 of the act of Congress and the context of that act, particularly section 15 thereof, both of which are reproduced in the margin.[1]

We do not deem it necessary to analyze the text of the act

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[1] SEC. 15, 31 Stat. 80. That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may from time to time see fit.

SEC. 33, 31 Stat. 84. That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of General Orders, Numbered One hundred and eighteen, as promulgated by Brigadier-General Davis United States Volunteers, August sixteenth, eighteen hundred and ninety-nine, and including also the police courts established by General Orders, Numbered One hundred and ninety-five, promulgated November twenty-ninth, eighteen hundred and ninety-nine, by Brigadier-General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said General Orders, Numbered One hundred and eighteen and One hundred and ninety-five, until otherwise provided by law: *Provided, however,* That the chief justice and associate justices of the supreme court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts shall be appointed by the governor, by and with the advice and consent of the executive council, and all other officials and attachés of all the other courts shall be chosen as may be directed by the legislative assembly, which shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attachés for each, their jurisdiction, their procedure, and all other matters affecting them.

of Congress to point out the inevitable result just stated, since the obvious meaning of the act is established by a decision heretofore rendered. *Dones* v. *Urrutia*, 202 U. S. 614. In that case Dones, who had been convicted and sentenced to death for murder, unsuccessfully sought release by *habeas corpus* at the hands of the Supreme Court of Porto Rico upon the identical ground presented in the assignment of error which we are considering, and upon an additional ground relating to an alleged personal disqualification of the judge who presided at his trial. On appeal to this court the questions raised were fully argued in printed briefs, but were deemed to be of such a frivolous character as not to require an opinion, and were hence disposed of *per curiam*, referring to the provisions of the statute and pertinent authorities. True it is that in the *Dones case*, in conformity to the practice in cases of *habeas corpus*, the formal order was to affirm, but this would not justify us in assuming jurisdiction on this record when the necessary result of the action of the court in the *Dones case* is to establish the frivolous nature of the contention here relied upon as the basis of jurisdiction. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311, 314.

The second of the asserted Federal questions relates to the action of the courts below in respect to a certain letter claimed to constitute a confession of guilt and written by the accused to a private person before this prosecution was commenced. It is insisted that by the actions of the trial court on the subject the plaintiff in error was deprived of rights guaranteed by the Fifth Amendment to the Constitution of the United States. Conceding, *arguendo*, the applicability of the constitutional provision relied upon to the subject and that it was operative in the island of Porto Rico, we think the record demonstrates that the claim here made was not raised below, is a mere afterthought, and is established by the record to be without color of merit.

When the document was offered in evidence the record recites that "the defendant objected on the ground that its com-

petency had not been established in accordance with the custom in law, inasmuch as it had not been shown to have been free and voluntary and given without promise of reward or without promise of freedom from prosecution."

It is next stated that "the accused requested that the jury withdraw while the question of the competency of the evidence should be decided by the court." The request was acceded to and evidence was introduced on the subject of the voluntary nature of the alleged confession. The court decided to admit the document and overruled "an extensive oral argument, requesting the court to reconsider its decision to admit the document in evidence." After such admission in evidence it is stated merely that "the defendant duly excepted to the admission."

Again, after the close of all the evidence, the record recites:

"Counsel for the defense asked that that part of the record in which appeared the testimony of the witnesses Dix, Kent, and Dexter concerning the so-called confession which the Fiscal had offered in evidence be transcribed by the stenographer and given to the jury so that the jury might have full knowledge of all of the circumstances connected with the so-called confession, which motion was denied by the court, in accordance with the law and especially section 274 of the Code of Criminal Procedure, and the accused duly excepted.

"Whereupon, the defendant moved through his attorney, that Messrs. Dexter and Kent be allowed to testify as to the circumstances surrounding the alleged confession before the jury, which motion was granted by the court, and the witnesses testified."

Further, after thus, at the request of the counsel for the accused, allowing testimony as to the voluntary nature of the confession to go to the jury, the court in instructing them, after calling their attention to the proceedings had at the trial in respect to the circumstances surrounding the making of the confession which had been given before the jury, submitted the matter to the jury and no exception was noted. That this ac-

tion of the court was proper, if there was conflict of testimony, is not open to controversy. *Wilson* v. *United States,* 162 U. S. 613.

Nor does the record disclose that the errors assigned in the Supreme Court of Porto Rico involved any contention that rights under the Constitution of the United States had been denied. The Supreme Court, in approaching the consideration of an assigned error which complained of the action of the trial court in admitting the confession in evidence, made an elaborate statement of what it deemed to be the rules applicable to the admissibility of confessions, and in so doing referred to the Fifth Amendment and to a multitude of cases in this and other courts concerning the principle to be applied in determining such admissibility. It is a matter of no concern, however, in ascertaining whether rights under the Federal Constitution were asserted and denied to consider the accuracy of all the statements made by the appellate court in its elaborate review of the subject, since the conclusion which it reached was that as a general principle of law confessions in order to be admissible "must have been made without compulsion or undue promise or inducement and be entirely voluntary." Besides the ultimate and decisive ruling of the Supreme Court of Porto Rico was that the trial court had not erred in acceding to the request of the accused in allowing the evidence concerning the voluntary nature of the confession to be heard by the jury and leaving that subject to its determination. True it is that the opinion indicates that the court deemed that the proof as to the voluntary nature of the confession was of such a preponderating character that the court would have been authorized in not submitting it to the jury. But the correctness of that conclusion is not a matter of concern in view of the fact that the question of the voluntary nature of the confession was submitted to the jury at the request of the accused. As from no possible view of the action of the courts below concerning the confession can we discover even the semblance of the assertion or denial of a right under the Constitution, it follows

that the errors assigned on that subject furnish no basis for the exercise of our jurisdiction.

As the matters which we have considered dispose of all the alleged Federal questions asserted to come within the second clause of § 35 of the act of April 12, 1900, the conclusion follows that we are without jurisdiction, and the writ of error is, therefore,

Dismissed for want of jurisdiction.

TAYLOR *v.* UNITED STATES.
UNITED STATES *v.* MACDONALD.

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

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

Nos. 238, 404. Argued October 24, 25, 1907.—Decided November 18, 1907.

Even though one who makes it possible for an alien to land by omitting due precautions to prevent it, may permit him to land within the meaning of the penal clause of § 18 of the Immigration Act of March 3, 1903, 32 Stat. 1217, that section does not apply to the ordinary case of a sailor deserting while on shore leave.

This construction is reached both by the literal meaning of the expressions "bringing to the United States" and "landing from such vessel" and by a reasonable interpretation of the statute which will not be construed as intending to altogether prohibit sailors from going ashore while the vessel is in port.

The fact that an alien has been refused leave to land in the United States and has been ordered to be deported does not make it impossible for the master of a foreign vessel, bound to an American port, subsequently to accept him as a sailor on the high seas.

Under the act of March 2, 1907, 34 Stat. 1246, the United States can be allowed a writ of error to the District Court quashing an indictment in a criminal case. The act is directed to judgments rendered before the

moment of jeopardy is reached and is not violative of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States.

152 Fed. Rep. 1, reversed.

THE facts, which involve the construction of § 18 of the Immigration Act of 1903, are stated in the opinion.

Mr. William G. Choate and *Mr. Lucius H. Beers* for petitioner, Taylor, in No. 238:

To sustain the conviction below it has been necessary to give to the word "landing," as applied to a seaman, a special and unusual meaning different from that in which it is used when applied to alien passengers. Such a construction of this statute is in palpable violation of the rule that penal statutes should be strictly construed.

If there is a class of persons literally within the terms of this immigration statute, but who for sufficient reasons cannot be held subject to its obvious requirements (as in this instance seamen who must leave the ship on ship's duty, and virtually must be allowed to leave the ship on shore leave), then the only permissible conclusion is, not that the rule of the statute will be modified as to them by giving it an entirely different meaning so as to reach them, but that they do not come within the statute, because a thing may be within the letter of a statute yet not within the statute, because not within its spirit, nor within the intention of its makers. *Holy Trinity Church* v. *United States*, 143 U. S. 457.

The Immigration Act of 1903 and its several provisions were not intended to apply to *bona fide* seamen; and the general purpose of the statute of 1903 as a whole and of § 18 in particular is not in harmony with the application of the statute to the desertion of alien seamen, but the principal object is to deal with alien passengers or alien immigrants, as indicated by the title of the act. The title of an act can aid in construing a doubtful provision. *United States* v. *Fisher*, 2 Cranch, 358, 386; *United States* v. *Palmer*, 3 Wheat. 610, 631; *Myer* v. *Car Co.*,

102 U. S. 1, 12; *Coosaw Mining Co.* v. *So. Carolina*, 144 U. S. 550, 563.

The use of the word "alien" throughout the Immigration Act of 1903 indicates that as it is used in § 18 it was not intended to include *bona fide* seamen.

Immigration statutes prior to 1903 did not apply to *bona fide* seamen, and it appears from the Congressional history of the act of 1903 that Congress did not then intend to change the law on that subject.

To hold that Congress intended to make § 18 apply to desertion of *bona fide* seamen involves attributing to Congress the intention to hold a shipmaster responsible as a criminal for failing to prevent the unavoidable, and the intention to punish him for the act of another by which he himself is the immediate sufferer.

Mr. Harrington Putnam for defendant in error, Macdonald, in No. 404:

A writ of error does not lie in behalf of the United States, from the judgment of the Circuit Court, in favor of the defendant in error.

Notwithstanding the distinction attempted to be taken in the act of March 2, 1907, the constitutional safeguard to the defendant extends equally to the case of a decision upon a demurrer to the indictment as to a hearing and trial of the facts by a jury. *United States* v. *Sanges*, 144 U. S. 310.

Repeated hearings by writs of error may prove as harassing to a citizen, as if taken after verdicts. Such an innovation in the established criminal procedure of the United States deserves to be closely scrutinized; otherwise a constitutional safeguard may be gradually undermined, leaving a poor defendant to be run down by the powerful and persistent action of the Government.

Mr. Assistant Attorney General Cooley for the United States:

The facts proved fall within the letter of § 18 of the act of March 3, 1903.

There is uncontradicted evidence to the effect, and the jury found, that plaintiff in error failed to adopt due precautions to prevent the landing of the alien from his vessel at a time or place other than that designated by the immigration officers.

The legislative history of the act indicates that it was the intention of Congress to include all aliens within the provisions of § 18 of the act of 1903 which was not a mere codification of laws previously existing. The word "immigrant" was omitted wherever it was found in the text of earlier acts for a deliberate purpose.

A study of the various sections of the statute shows that Congress intended to include something more than passengers in using the words "alien" or "any alien."

The fact that the act retains the title of the former acts and is called "An act to regulate the immigration of aliens into the United States" is not inconsistent with the application of the text to all aliens and even if it were, it could not override the plain purpose of the text to refer to all such aliens.

MR. JUSTICE HOLMES delivered the opinion of the court.

The first of these cases comes up on certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit, affirming a conviction of the petitioner under the Immigration Act of March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217.[1] That section makes it the duty of any officer in charge of any

[1] SEC. 18. That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported, as provided by law.

vessel bringing an alien to the United States to adopt due precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishes him if he lands or permits to land any alien at any other time or place. The indictment was for willfully permitting an alien to land at another place. The evidence was that the defendant was master of the Cunard Steamship "Slavonia," that the alien was an Austrian sailor who shipped as a cook at Fiume, Hungary, for the round trip, not to be paid off until he returned, and that on the evening of the day of arrival at New York, after he had reported his work finished, he went ashore intending to come back, but changed his mind. He did not formally ask leave to go, but leave habitually was given and no additional precautions were taken when leave was asked. The judge was requested to direct a verdict for the defendant and to instruct the jury that if the sailor intended to return when he left the ship they must acquit, etc.; but he left it to the jury to say whether the defendant had used reasonable precautions, adverting to the fact that there were other desertions, and emphasizing the failure to enforce a rule requiring the men to ask leave to go ashore. Exceptions were taken, but the Circuit Court of Appeals sustained the judgment, as we have said. 152 Fed. Rep. 1.

We assume for purposes of decision that one who makes it possible for an alien to land, by omitting due precautions to prevent it, permits him to land within the meaning of the penal clause in § 18. But we are of opinion that the section does not apply to the ordinary case of a sailor deserting while on shore leave, and that therefore the judgment must be reversed. We are led to this opinion by what seems to us the literal meaning of the section and also by the construction that would be almost necessary if the literal meaning seemed to us less plain.

The reasoning is not long. The phrase which qualifies the whole section is, "bringing an alien to the United States." It is only "such" officers of "such" vessels that are punished. "Bringing to the United States," taken literally and nicely,

means, as a similar phrase in § 8 plainly means, transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport. So again, literally, the later words "to land" mean to go ashore. To avoid certain inconveniences the Government and the courts below say that sailors do not land unless they permanently leave the ship. But the single word is used for all cases and must mean the same thing for all, for sailors and other aliens. It hardly can be supposed that a master would be held justified under this section for allowing a leper to wander through the streets of New York on the ground that, as he expected the passenger to return and his expectations had been fulfilled, he could not be said to have allowed the leper to land. The words must be taken in their literal sense. "Landing from such vessel" takes place and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice. If we reject the ambiguous interpretation of "to land," as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American port with a *bona fide* intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words "bringing an alien to the United States," that has been suggested, or on the ground that the statute cannot have intended its precautions to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, does not matter for this case. We think it superfluous to go through all the sections of the act for confirmation of our opin-

ion. It is enough to say that we feel no doubt when we read the act as a whole.

A reason for the construction adopted below was found in the omission of the word "immigrant" which had followed "alien" in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is "An Act to regulate the immigration of aliens into the United States."

Upon our construction of the statute we need not go further into the particular circumstances. But we may add that even on a different reading the jury was permitted to establish a questionably high standard of conduct, if it be admitted, as it was, that shore leave might be granted. No practicable method of preventing sailors from occasionally yielding to the seductions of an unduly prolonged stay on land was suggested or occurs to our mind.

In the second case the District Judge declined to follow the decision in *Taylor* v. *The United States*, 152 Fed. Rep. 1, which we have been considering, and quashed an indictment which disclosed that the alien alleged to have been permitted unlawfully to land was a seaman. The United States brings a writ of error under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, on the ground, it must be presumed, that the judgment was based upon the construction of the statute. There are other technical questions apparent on the record, but, if they are open, the Government very properly has not pressed them, but has confined itself to the question of law with which we have dealt. There is an allegation in the indictment that the alien was a stowaway under order of deportation, and there is a suggestion that this raises a doubt if he was a *bona fide* seaman. This is the only additional point raised.

But we perceive nothing in the fact that an alien has been refused leave to land from a British ship and has been ordered

to be deported, to make it impossible as matter of law for the British master subsequently to accept him as a sailor on the high seas, even if bound for an American port. If the Government had wished to try the good faith of this particular transaction, and not simply to get a construction of the act, there was no need to rely on the allegation mentioned alone. Of course it is possible for a master unlawfully to permit an alien to land, even if the alien is a sailor, and it was alleged that the master did so. But we take the Government at its word.

The defendant argues that the United States cannot be allowed a writ of error in a criminal case like this. We do not perceive the difficulty. No doubt of the power of Congress is intimated in *United States* v. *Sanges*, 144 U. S. 310. If the Fifth Amendment has any bearing, the act of 1907 is directed to judgments rendered before the moment of jeopardy is reached. *Kepner* v. *United States*, 195 U. S. 100, 128. We think it unnecessary to discuss the question at length.

Judgment in No. 238 *reversed.*
Judgment in No. 404 *affirmed.*

CENTRAL OF GEORGIA RAILWAY COMPANY *v.* WRIGHT, COMPTROLLER-GENERAL OF GEORGIA.

GEORGIA RAILROAD AND BANKING COMPANY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

Nos. 85, 89. Argued October 21, 22, 23, 1907.—Decided November 18, 1907.

Due process of law requires that opportunity to be heard as to the validity of the tax and the amount of the assessment be given to a taxpayer, who, without fraudulent intent and in the honest belief that it is not taxable, withholds property from tax returns; and this requirement is not satisfied where the taxpayer is allowed to attack the assessment only for fraud and corruption.

The assessment of a tax is action judicial in its nature requiring for the legal exertion of the power such opportunity to appear as the circumstances of the case require, and this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining whether the taxpayer has been afforded due process of law.

The system provided by the Political Code of Georgia, §§ 804, 879, as construed by the highest court of that State, not allowing the taxpayer any opportunity to be heard as to the valuation of property not returned by him and honestly withheld, except as to fraud and corruption, does not afford due process of law, which adjudges upon notice and opportunity to be heard, within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

124 Georgia, 596, 630; 125 Georgia, 589, 617, reversed.

THE facts are stated in the opinion.

Mr. T. M. Cunningham, Jr., Mr. Joseph R. Lamar and *Mr. Joseph B. Cumming*, with whom *Mr. Henry C. Cunningham, Mr. A. R. Lawton* and *Mr. Alex. C. King* were on the briefs, for plaintiffs in error:

The statutes of the State of Georgia as construed by the Supreme Court of Georgia in the matter of back tax assessments do not provide for either notice or hearing and therefore do not provide due process of law and are contrary to the Fourteenth Amendment of the Constitution of the United States.

The question of due process of law was dealt with by the Supreme Court of Georgia only in the first decision. That opinion greatly simplifies the issue, because there is now no question as to the character of the notice required or the notice given, since the court holds not only that the statutes do not provide for notice, but that the closing of the "door of opportunity" was intentional and the deprivation of the right to be heard was a penalty.

When the Fourteenth Amendment provided that no person shall be deprived of his property without a hearing, it also declared that he should not be deprived of a hearing as a penalty. Whatever the crime, however great the contempt, howsoever contumacious a party, he cannot be deprived of the right to be heard when his property is to be taken. Judgment

of any sort must be after notice. It is contrary to the first principles of the social compact to deprive one of the right to be heard. *Hovey* v. *Elliott*, 167 U. S. 414.

A party, by his misconduct, cannot forfeit a right so that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form. Cooley, Con. Lim. 518; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 235; *Galpin* v. *Page*, 18 Wall. 350. Where the proceedings are arbitrary, oppressive, or unjust, they are declared not to be "due process of law." *Glidden* v. *Harrington*, 189 U. S. 258.

Under the Fourteenth Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall be in conformity with natural justice, *Turpin* v. *Lemon*, 187 U. S. 51, and notice is specially necessary where, as in Georgia, the assessment is equivalent to a judgment *in personam* and binds not merely the particular property assessed for taxation, but all the estate of the taxpayer. Pol. Code, 880–883.

The statute must provide an opportunity to be heard on the charge, whether that charge be an assessment for the current year or a reassessment for previous years. As long as the State can change the assessment, the citizen has a right to be heard on the question as to whether the change shall be made, and as to the amount of the new assessment. *Davidson* v. *New Orleans*, 96 U. S. 105.

The rule is the same whether the reassessment is by a change in the valuation, or by the addition of the property omitted. *Kuntz* v. *Sumption*, 117 Indiana, 1; *Walsh* v. *State*, 142 Indiana, 557; *Cleghorn* v. *Postlewait*, 43 Illinois, 431; *Tolmon* v. *Solomon*, 191 Illinois, 204.

The assessment of back taxes on omitted property involves the determination of value; is judicial in its nature, and notice and a statutory right to be heard in back tax assessments are essential to the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Gray on Limitations of Taxing Power, § 1295, p. 639; 27 Am. & Eng.

Enc. of Law, 705; *The Redwood Case*, 42 N. W. Rep. 713; *Overing* v. *Foote*, 65 N. Y. 269–277; *Douglas* v. *Westchester Co.*, 172 N. Y. 309.

Mr. John C. Hart, Attorney General of the State of Georgia, and *Mr. Boykin Wright* for defendant in error:

Due process in matters of taxation means notice of suitable character, and an opportunity to be heard at some stage of the proceedings. *Taylor* v. *Secor* (*State R. R. Tax Cases*, 111), 92 U. S. 575; *Kentucky Tax Case*, 115 U. S. 321. The notice need not be personal or individual. In fact, the usual and proper notice is statutory and collective. *Pittsburg* v. *Backus*, 154 U. S. 421; Judson on Taxation, §§ 321, 329.

The process of taxation does not require the same kind of notice as is required in a suit at law, or even proceedings for taking private property under the power of eminent domain. It involves no violation of the process of law when it is executed according to the customary forms and established usages, etc. *Bell's Gap &c. Co.* v. *Pennsylvania*, 134 U. S. 232.

Opportunity to be heard at some stage of the proceedings is all that is requisite. It may be either before or after the assessment or at any time before final judgment is entered. *Gallup* v. *Schmidt*, 183 U. S. 300; *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Spencer* v. *Merchant*, 125 U. S. 345; *Pittsburg &c.* v. *Backus*, 154 U. S. 421.

It is no denial of due process to withdraw the opportunity to be heard as a penalty for the taxpayer's failure or refusal to make a proper return of his property to a designated officer, in the manner and at the time required by law. *Glidden* v. *Harrington*, 189 U. S. 255, 259, 260.

The right exists to discriminate in some manner against those who fail to hand in tax lists. When the discrimination consists in merely submitting the party to the doom of the assessor and depriving him of any appeal, it would seem that there could be no valid objection to it. Cooley on Taxation (3d Ed.), 619 to 624 and notes; *Board of Commissioners* v. *Anderson*,

68 Fed. Rep. 341; *Lott* v. *Hubbard*, 44 Alabama, 493; *State* v. *Louisiana*, 19 La. Ann. 474; *Railway Co.* v. *Johnson*, 108 Illinois, 11; *Morris* v. *Jones*, 150 Illinois, 542; *S. C.*, 37 N. E. R. 929; *McMillan* v. *Carter*, 6 Montana, 215; *S. C.*, 9 Pac. Rep. 906; *Valencia County* v. *Railroad Co.*, 3 N. M. 380; *S. C.*, 10 Pac. Rep. 294; *Orena* v. *Sherman*, 61 California, 101; *Tucker* v. *Aiken*, 7 N. H. 113; *Hartford* v. *Champion*, 58 Connecticut, 268; *S. C.*, 20 Atl. Rep. 471; *State* v. *County Commissioner*, 5 Nevada, 317; *McTwiggan* v. *Hunter* (R. I.), 29 L. R. A. 526; *Tripp* v. *Torrey*, 17 R. I. 359; *Grigsby &c.* v. *Freeman* (Va.), 58 L. R. A. 349; *Georgia &c.* v. *Wright*, 124 Georgia, 617 and citations.

Mr. Justice Day delivered the opinion of the court.

These cases are writs of error to the Supreme Court of the State of Georgia, in suits brought to enjoin the collection of certain taxes. In the view we take of them they may be considered together.

Actions were begun by the plaintiffs in error, in the Superior Court of Fulton County, to enjoin the enforcement of executions in the hands of the sheriff, issued for taxes assessed by the comptroller-general on shares of the corporate stock of the Western Railway of Alabama, an Alabama corporation, which stock was alleged to be held and owned by the plaintiffs in error.

The Superior Court refused to award an injunction.

Upon writs of error the Supreme Court affirmed the judgments of the court below. 124 Georgia, 596, 630. The cases were remitted to the Superior Court of Fulton County, and that court rendered final decrees in favor of the defendants below, holding the tax executions to be lawful. The cases were again taken to the Supreme Court of Georgia and there affirmed. 125 Georgia, 589, 617.

The question of the taxability of these shares was a matter of litigation in the Federal courts of the Georgia District, and it was held such shares were not taxable. 116 Fed. Rep. 669;

affirmed in the Court of Appeals, 117 Fed. Rep. 1007. The latter case was reversed and the stock held taxable in the case of *Wright* v. *Louisville & Nashville Railroad Company*, decided by this court at the October term, 1904. 195 U. S. 219.

Thereupon says the Supreme Court of Georgia (124 Georgia, 612):

"On January 27, 1905, the comptroller-general wrote to the president of the Georgia Railroad and Banking Company the following letter: 'The Supreme Court of the United States having recently held, as you doubtless are aware, that the shares of stock of the Western Railway of Alabama owned by the Georgia Railroad and Banking Company are taxable in Georgia, it becomes my duty to assess these shares of stock for taxation for each of the years in which they are in default for their taxes. This assessment is required to be made by the comptroller-general from "the best information obtainable." I desire to proceed to the discharge of this duty intelligently, and therefore respectfully request you to furnish me any data in your possession which will enable me to make perfectly fair, just, and legal assessments of this property. From your long connection with the property as president of the Georgia Railroad and Banking Company, and your familiarity with its value, you doubtless are in possession of information which will very greatly aid me in making an equitable assessment of the property. I trust, therefore, you will submit at your earliest possible convenience any facts or suggestions bearing upon this line which you may deem proper. I would be glad to have any data which you may submit with reference to its value for each year, beginning with the year 1883, the year I am informed your corporation became the owner of these shares of stock. I expect to proceed with this matter some time the early part of next week if possible.' Other correspondence took place between the comptroller-general and various officers of the Georgia Railroad, including the general counsel, who eventually submitted to the comptroller-general a statement regarding what he considered the value of the railroad property in ques-

tion, together with a tabulated statement of the dividends which the Georgia Railroad had received from the stock, at the same time protesting that the stock was not liable for taxation, and refusing to make any return of it for that purpose. The comptroller-general thereupon, according to his affidavit, 'assessed the same from the best information obtainable.' It is insisted with great earnestness and ability that the levy of executions under these circumstances, without giving notice to the railroad company or allowing it any opportunity to be heard as to the basis of valuation upon which the assessment was made, amounted to a seizure of its property without due process of law. It is not claimed that the comptroller-general has violated the provisions of any existing statute, but that the laws of Georgia do not provide for the collection of taxes on omitted property after a return has been made by the taxpayer and accepted by the comptroller-general."

The first and perhaps principal question argued in the case arises upon the contention of the plaintiffs in error that the method of assessment provided for the taxation of property in such cases as the present, as laid down in the statutes of the State of Georgia, as construed by the Supreme Court of the State, do not afford the taxpayer due process of law. The pertinent sections of the Political Code of Georgia are copied in the margin.[1]

[1] SEC. 804. *Returns to comptroller, how made.*—The returns of all companies, or persons, required to be made to the comptroller-general must be in writing and sworn to, by the presiding officer, etc.

SEC. 805. *Returns and taxes, etc.*—The returns of all railroad and insurance and express companies, and agents of foreign companies, authorized in this State, shall be made to the comptroller-general by the first day of May in each year, and the taxes thereof paid to the state treasurer by the first day of October, and not later than December twentieth of each year.

SEC. 812. *Returns to comptroller must be itemized.*—Whenever corporations, companies, persons, agencies, or institutions, are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the comptroller-general, for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income, as above defined, or other

Of the system of taxation thus provided the Supreme Court of Georgia in a summary of its provisions says (124 Georgia, 613):

"The Political Code, section 812, prescribes the method by which 'corporations, companies, persons, agencies, or institutions,' shall make returns of their property to the comptroller-general for taxation, and provides that 'such returns shall be carefully scrutinized by the comptroller-general, and if in his judgment the property embraced therein is returned below its value, he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of . . . matters required to be returned as aforesaid, below the true amount, or false in any particular, or in anywise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such

matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained, and such returns shall be carefully scrutinized by the comptroller-general, and if in his judgment the property embraced therein is returned below its value, he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of gross receipts, or business, or income, as above defined, or other matters required to be returned as aforesaid, below the true amount, or false in any particular, or in anywise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or correction of returns, as herein provided, the officers or person making such returns shall receive notice and shall have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators—one chosen by himself, and one chosen by the comptroller-general—with power to choose an umpire in case of disagreement, and their award shall be final.

Sec. 813. *When no return comptroller to assess.*—In case of failure to make return, the comptroller-general shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions.

Sec. 814. *Collection of tax, how enforced.*—In all cases of default of payment of taxes upon returns or assessment the comptroller-general shall enforce collections in the manner now provided by law.

Sec. 847. *Defaulters to be doubly taxed.*—If a person fails to make a re-

returns shall receive notice and shall have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators, . . . and their award shall be final.' Section 813 is as follows: 'In cases of failure to make return, the comptroller-general shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions.' By section 814 it is provided that 'in all cases of default of payment of taxes upon returns or assessments, the comptroller-general shall enforce collections in the manner now provided by law.' 'If any corporation, company, person, agency, or institution, who are required to make their returns to the comptroller-general, shall fail to return the taxable property or specifics, or pay annually the taxes for which they are liable to the state treasury, the comptroller-general shall issue against them an execution for the amount of taxes due, according to law, together with the cost and penalties.' Section 874. 'When there is no return

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turn, in whole or in part, or fails to affix a value to his property, it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain, and having done so, he shall double the tax in the last column of the digest against such defaulters, after having placed the proper market value or specific return in the proper column; and for every year's default the defaulter shall be taxed double until a return is made.

Sec. 855. *Taxes for former years, how returned and collected.*—Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest.

Sec. 874. *Defaulting corporations.*—If any corporation, company, person, agency, or institution, who are required to make their returns to the comptroller-general, shall fail to return the taxable property, or specifics, or pay annually the taxes for which they are liable to the state treasury, the comptroller-general shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties.

Sec. 879. *When there is no return.*—When there is no return by which to assess the tax, the comptroller-general shall, from the best information he can procure, assess in his discretion.

by which to assess the tax, the comptroller-general shall, from the best information he can procure, assess in his discretion.' Section 879. These sections of the Political Code are thus set out in order that we may have before us at the outset the various statutes bearing on the power of the comptroller-general to collect taxes on property which has not been returned. And at this point we will take occasion to say that in our opinion all considerations of the good faith of the railroad company should be eliminated from this discussion. It may be conceded that the officials of the company honestly believed that this stock was not taxable, and that there has never been on their part the slightest effort to conceal the Georgia Railroad's ownership of it, or to deceive the comptroller-general in any way. In no jurisdiction has the maxim '*Ignorantia legis neminem excusat*' been more rigidly applied than in Georgia. The railroad company was bound to know that this stock was taxable, and its mistaken, though honest, belief to the contrary furnishes no excuse for non-payment."

In view of this statute as thus construed the question made is, whether due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds, withholds property from tax returns with an honest belief that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward upon a suit to collect taxes, or by independent suit to enjoin their collection.

Considerable discussion was had in the oral argument of the case concerning the effect of the rulings of the Supreme Court of Georgia in construing the sections of the Political Code governing this subject.

A perusal of the opinions delivered in these cases leaves no doubt in our minds that the Supreme Court of Georgia has held the taxing scheme of the State of Georgia, as laid down in its statutes, to be that, while it provides for a method of valuation in case of the return of property for taxation, it does not in-

tend to give to the taxpayer who fails to return property legally liable to be assessed any opportunity to be heard as to the value of the property or the amount of the assessment. But the failure to return places it within the power and duty of the collector to make an assessment final and conclusive upon the taxpayer without hearing, for in its latest utterance upon the subject (124 Georgia, 617), that learned court said:

"The Georgia law affords to every citizen, individual or corporate, ample facilities for the preservation of his rights as against the tax gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes that the taxpayer will disclose to the officer all of his taxable property, and it requires him to know whether his property is taxable or not. The requirement of candor in disclosing the ownership of property is really at the foundation of our tax system. So long as the citizen complies with that requirement, he is afforded every opportunity to dispute with the State the question of the value of his property and the amount of tax to be levied thereon. When he fails to return, in whole or in part, fraudulently or through an honest mistake, he then and there becomes a defaulter, and the door of opportunity is closed to him, so far as the right to have the mutual rights between himself and the taxing power adjusted by arbitration is concerned. In other words, ample 'machinery' is available to the citizen who makes full returns; deprivation of the right to be further heard is one of the penalties visited upon the defaulter. The collecting officer must ascertain as best he can the amount of property to be taxed, as well as its value, and take summary means for its collection. This, it seems to us, is the scheme of taxation contemplated by the laws of this State. Whether or not it is consistent with a wise public policy we do not undertake to determine. That it is not unconstitutional we are fully satisfied."

It would be impossible to reconcile the different holdings in the state courts upon this subject. One class holds that upon the assessment of omitted property the taxpayer has no right

to be heard, having by his failure to return submitted himself to "the doom of the assessor." Another class holds that in such cases there must be an opportunity to be heard before the taxpayer can be thus assessed, and that to deny him such right as a penalty for failure to return is a denial of due process of law secured to the taxpayer by many state constitutions as well as the Fourteenth Amendment of the Constitution of the United States.

Of course, this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining this question for itself.

Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. *Davidson* v. *New Orleans*, 96 U. S. 97; *Weyerhauser* v. *Minnesota*, 176 U. S. 550; *Hager* v. *Reclamation District*, 111 U. S. 701.

In the late case of *Security Trust & Safety Vault Company* v. *The City of Lexington*, 203 U. S. 323, decided at the last term of this court, the subject underwent consideration, and it was there held that before an assessment of taxes could be made upon omitted property notice to the taxpayer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In that case it was further held that where the procedure in the state court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied.

Applying the principles thus settled to the statutory law of Georgia, as construed by its highest court, does the system provide due process of law for the taxpayer in contesting the validity of taxes assessed under its requirements?

Under the scheme provided for, if the property is withheld

from return, the comptroller, without notice or opportunity for hearing, must proceed to value the property, and his valuation is final and conclusive, unless the taxpayer can show—a very unlikely contingency—that the taxing officer has acted in bad faith in making the assessment. Against the assessment thus made there is no relief in the courts of the State upon proceedings brought to collect the taxes or by bill to enjoin their collection. The penalty of failure to return, no matter how honest or well grounded the taxpayer may have been in his belief that the property was not subject to taxation, compels him to submit to the final and conclusive assessment made by the taxing officer.

It may be conceded that under the provisions of § 855 the duty to return property omitted in former years is a continuing one, and that under § 812 of the Political Code upon such return the system of arbitration of value may be open to the taxpayer, but if for good reason the taxpayer contests the taxability of his property and does not return it the door of opportunity is closed upon him.

As in the present case, courts may differ as to the taxable character of the property, but the taxpayer must concede its taxability, or be forever concluded by a determination of its value judicial in its nature (*Hager* v. *Reclamation District,* 111 U. S. 701, 710) in a proceeding where he has no legal right to a hearing.

But it is contended that plaintiffs in error had an opportunity to be heard, and were in fact heard, upon the question of the value of their property upon an issue made by an amendment to the answer in the Superior Court, after the case went back from the Supreme Court, tendering an issue and asking the court to pass upon the value of the property.

Upon this subject we think the decision of the Supreme Court does not leave in doubt the effect of such hearing upon this issue. For it is said (125 Georgia, 605):

"As to those years in which the plaintiff had an opportunity to return its property for taxation and failed to do so, and for

which the property has been assessed by the comptroller-general, whether the property has been excessively assessed cannot now be inquired into. Under the former ruling in this case it is concluded by the failure to return the property at the time required by law, and must bear the burden of the assessment made in conformity to law. There was neither averment nor proof that the assessment was the result of fraud or corruption on the part of the comptroller-general. If there had been, a different question would have been presented."

And further in the same opinion (125 Georgia, 616):

"The plaintiffs contend that the valuation placed by the comptroller-general upon the stock was excessive. The defendant contended that, as the plaintiff was a defaulter, the valuation of the comptroller-general was conclusive under the law. In an amendment to the answer the defendant alleged that the valuation placed upon the stock by the plaintiff was not its true market value, 'but on the contrary the true market value is as assessed by the comptroller-general,' and concluded the amendment with a prayer 'that the court may so find and decree.' The plaintiff objected to the allowance of this amendment on the ground that the court was without jurisdiction to assess or re-value the same for the purpose of taxation, and that the prayer was vague and indefinite. The court ruled that it could not in this case decide or fix the value of the stock for the purpose of determining the amount for which the execution should proceed, but that it would hear evidence with a view of determining whether the assessment was excessive, and refused to strike the prayer. Evidence was heard in reference to the method adopted by the comptroller-general in reaching the valuation placed by him upon the stock, and there was a finding, in the final decree, that the valuation was not excessive. As has been said, there was evidence justifying this finding of fact. Under the circumstances, even if there was any error in refusing to strike the prayer of the amendment to the answer, the error was not of such a character as to require a reversal of the judgment."

That is to say, the Supreme Court had already decided that the taxpayer being in default of return was not entitled to be heard upon the valuation of his property, except for the purpose of attacking the assessment for "fraud or corruption" in the assessing officer, and the testimony did not show such excessive valuation as within the rule laid down in both decisions would avoid the action of the comptroller-general.

The record discloses that for many years this class of property was not regarded as taxable in Georgia, and was not returned for taxation in the State. But it is contended that the taxpayer here stands in the attitude of one acting contumaciously, and denying the validity of the tax after this court had practically decided its validity against the plaintiffs in error in *Wright* v. *Railroad Co.*, 195 U. S. 219. But, as we have seen, the Supreme Court of Georgia has expressly eliminated the element of bad faith in the taxpayer from the findings upon which its decision rests. The *Wright case* was held not to have concluded the contention that plaintiffs were denied the equal protection of the laws, in that no other person or corporation in Georgia was assessed upon stock in a foreign corporation, nor the validity of the claim that the stock was not held in Georgia, nor other grounds alleged in the petitions, except so far as the Georgia Railroad was concerned for the year 1900. 124 Georgia, 607. We must decide the case in view of its relations to a taxpayer not fraudulently concealing his property and honestly contending, with reasonable grounds for the contention, that it is not taxable under the laws of the State.

As we have seen, the system provided in Georgia by the statutes of the State as construed by its highest court requires of the taxpayer that he return all his property, whether its liability is fairly contestable or not, upon pain of an *ex parte* valuation, against which there is no relief in the tax proceedings or in the courts, except in those cases where fraud or corruption can be shown in the action of the assessing officer.

Reluctant as we are to interfere with the enforcement of

the tax laws of a State, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by state action.

The judgments of the Supreme Court of Georgia are reversed and the cases remanded for further proceedings not inconsistent with this opinion.

CHAMBERS *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 22. Argued October 17, 18, 1907.—Decided November 18, 1907.

This court has jurisdiction to review the judgment on writ of error under § 709, Rev. Stat., if the opinion of the highest court of the State clearly shows that the Federal question was assumed to be in issue, was decided adversely, and the decision was essential to the judgment rendered.

The right to sue and defend in the courts of the States is one of the privileges and immunities comprehended by § 2 of Art. IV of the Constitution of the United States, and equality of treatment in regard thereto does not depend upon comity between the States, but is granted and protected by that provision in the Constitution; subject, however, to the restrictions of that instrument that the limitations imposed by a State must operate in the same way on its own citizens and on those of other States. The State's own policy may determine the jurisdiction of its courts and the character of the controversies which shall be heard therein.

The statute of Ohio of 1902 providing that no action can be maintained in the courts of that State for wrongful death occurring in another State except where the deceased was a citizen of Ohio, the restriction operating equally upon representatives of the deceased whether they are citizens of Ohio or of other States, does not violate the privilege and immunity provision of the Federal Constitution.

73 Ohio St. 1, affirmed.

THE facts are stated in the opinion.

Mr. Charles Koonce, Jr., with whom *Mr. R. B. Murray* and *Mr. W. S. Anderson* were on the brief, for plaintiff in error:

The right to maintain a transitory action by a citizen of one of the States of the United States, in the courts of a sister State, is one of the privileges and immunities comprehended by § 2 of Art. IV of the Constitution of the United States. *Corfield* v. *Coryell*, 4 Wash. C. C. 371–380; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Cole* v. *Cunningham*, 133 U. S. 107–114; *Blake* v. *McClung*, 172 U. S. 239–256; *Moredock* v. *Kirby*, 118 Fed. Rep. 180–182; *Paul* v. *Virginia*, 8 Wall. 168–180; *Cofrode* v. *Gartner*, 79 Michigan, 332–343; *Railroad Co.* v. *Hendricks*, 41 Indiana, 48; *Schell* v. *Youngstown Sheet & Tube Co.*, 26 O. C. C. Reps. 209; *State* v. *Cadigan*, 73 Vermont, 245; *Hoadley* v. *Insurance Commissioners*, 37 Florida, 564; *S. C.*, 33 L. R. A. 388; *Roby* v. *Smith*, 131 Indiana, 342; *Shirk* v. *Lafayette* 52 Fed. Rep. 857; *Farmers' &c. Co.* v. *Railroad Co.*, 27 Fed. Rep. 146; *State* v. *Duckworth*, 5 Idaho, 642; *S. C.*, 39 L. R. A. 365.

While the doctrine of comity with reference to the maintenance of an action applies as between the citizens of different nations, and between the citizens of foreign nations and the several States of the United States, it is not the foundation upon which the citizens of the several States rest their right in invoking the courts of sister States. The foundation of that right is the privilege and immunity provision of the Federal Constitution and it is not within the power of either legislature or court to annul a constitutional right on the pretended theory that the right exists only in comity and is subject to the rules and principles governing comity rather than those which control constitutional guarantees.

The statute is not saved by the holding of the Supreme Court of Ohio that non-resident next of kin have equal rights, and the courts of Ohio are equally open to them, as to resident next of kin, provided only that the person whose wrongful death is the subject of action, was at the time of his death a citizen of Ohio.

The real purpose and effect of the act, as construed, was and

is to discriminate in favor of citizens of Ohio and against citizens of other States. Theoretical exceptions cannot save it from the ban of the constitutional provision herein in question.

The statute, as construed, is a denial of the right of the citizens of a sister State to have the cause of action resulting from the wrongful act enforced in favor of his wife and children.

The State of Ohio cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people. *Eingartner* v. *Steel Company*, 94 Wisconsin, 70–78; *Blake* v. *McClung*, 172 U. S. 239–256.

In order that the statement that it is against the public policy of the State of Ohio to enforce in its courts a cause of action in favor of a citizen of another State can avail, it must first appear that it would be against the public policy of said State to enforce a like cause of action in favor of a citizen of its own State, or a like cause of action arising in its own State. The only qualification which can be attached to the right of such non-resident to maintain his action in the courts of a sister State is that the character of the cause of action must not be against the actual public policy of the State. And, to justify a court in refusing to enforce a right of action accruing under the laws of another State because against the policy of the laws of the forum, it must appear that it is against good morals or natural justice. *Huntington* v. *Attrill*, 146 U. S. 657, and cases there cited; *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445; *Railroad Co.* v. *Rouse*, 178 Illinois, 132; *Railroad Company* v. *Babcock*, 154 U. S. 190; *Law* v. *Railroad Company*, 91 Fed. Rep. 817; *Davidow* v. *Railroad Company*, 85 Fed. Rep. 193; *Van Dorn* v. *Railroad Company*, 35 C. C. A. 282; *Wilson* v. *Tootle*, 55 Fed. Rep. 211; *Walsh* v. *Railroad Company*, 160 Massachusetts, 571; *Burns* v. *Railroad Company*, 113 Indiana, 169.

Mr. George F. Arrel, with whom *Mr. James P. Wilson* and *Mr. John G. Wilson* were on the brief, for defendant in error:

This statute creates no discrimination between the citizens of Ohio and citizens of any other State. Under its provisions

it is only essential to the maintenance of the action to enforce the right in the courts of Ohio, that the decedent shall have been, at the time of his death, a citizen of Ohio. If the beneficiary under the statute of the State, giving the right, and in which the wrongful act took place, and the death resulted, happens to be a citizen of Ohio, the right secured by the statute could not be enforced in the courts of Ohio.

Unless an act of the state legislature in fact, and in some way discriminates as to the right in question between its citizens and citizens of another State, such act does not offend against this provision in the Federal Constitution. *Paul* v. *Virginia*, 8 Wall. 180; *Slaughter House Cases*, 16 Wall. 36.

True, the right to maintain the action in the courts of Ohio is made to depend in part upon the fact that the decedent at the time of his wrongful death was a citizen of Ohio, but such fact does not in any wise tend to show discrimination between or among beneficiaries, no matter where they may reside, or of what State or States they may be citizens. The act is open to no constitutional objection on the ground that it provides that an action may be maintained in the courts of Ohio for the wrongful death of one of its citizens, if the statutory law of the State in which he came to his death by wrongful act gives a right of such action. In other words, the act is free from objection in so far as it relates to the death of a citizen of Ohio. It is only objectionable, if at all, when applied to the maintenance of an action in the courts of Ohio for the wrongful death of a citizen of another State. It cannot be possible that by this provision of the Federal Constitution, the legislature of Ohio is inhibited from providing that where a citizen of another State meets his death by wrongful act in the State of which he is a citizen, that an action to recover compensation for his death cannot be maintained in the courts of Ohio.

The decision of the Supreme Court of Ohio herein clearly determines and establishes the public policy of the State of Ohio upon this subject, and this public policy, so determined and established, is clearly the result not only of legislative

enactment, but of judicial decision. This is clearly a subject upon which a State by its legislative and judicial departments may establish its own public policy. *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 829; *Stewart's Admr.* v. *B. & O. R. R. Co.*, 168 U. S. 445.

If, then, a foreign statute may not be enforced in a State whose policy is directly opposed to the policy of the State wherein the death occurred, under the doctrine of the *Stewart case* and other cases in this Supreme Court, no privilege or immunity has been denied to this citizen of the State of Pennsylvania.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error directed to the Supreme Court of the State of Ohio. The plaintiff in error is the widow of Henry E. Chambers, who, while in the employ of the defendant in error as a locomotive engineer and engaged in the performance of his duty, received injuries from which he shortly afterwards died. Both husband and wife were at the time of the injuries and death citizens of Pennsylvania, and the wife has since continued to be such. The injuries and death occurred in Pennsylvania. The widow brought an action, in the Court of Common Pleas of the State of Ohio, against the defendant railroad, alleging that the injuries were caused by its negligence. In that action she sought to recover damages under certain parts of the Constitution and laws of Pennsylvania printed in the margin,[1] which provided for the recovery of damages

[1] Sections 18 and 19 of the act of April 15, 1851, are as follows, Pennsylvania Laws, 1851, p. 674: "SEC. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction. SEC. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

for death. The plaintiff had a verdict and judgment in the Court of Common Pleas, from which, by petition in error, the case was removed first to an intermediate court and then to the Supreme Court of the State. There it was insisted by the defendant that the action could not be maintained in the courts of Ohio. The Supreme Court sustained this contention, reversed the judgments of the court below, and entered judgment for the defendant. A statute of Ohio provided that "whenever *the death of a citizen of this State* has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other State, territory or foreign country, such right of action may be enforced in this State within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country." There was no other statutory provision on the subject. The Supreme Court held that the action authorized by this statute for a death occurring in another State was only when the death was that of a citizen of Ohio; that the common law of the State forbade such action; and that as the person, for whose death damages were demanded in this case, was not a citizen of Ohio, the action would not lie. The plaintiff brings the case here on writ of error, alleging that the statute thus construed and the judg-

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Sections 1 and 2 of the act of April 26, 1855, are as follows, Pennsylvania Laws, 1856, p. 309: "SEC. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they take his or her personal estate in case of intestacy, and that without liability to creditors. SEC. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter." By section 21, article III, of the constitution of the State of Pennsylvania of 1874, it is provided as follows, to wit: "SEC. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

ment based upon that construction violates Article IV, section 2, paragraph 1, of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This allegation presents the only question for our consideration.

The defendant objects to our jurisdiction to reëxamine the judgment because the Federal question was not properly and seasonably raised in the courts of the State. But it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to reëxamine that question on writ of error. *San José Land & Water Company* v. *San José Ranch Company*, 189 U. S. 177; *Haire* v. *Rice*, 204 U. S. 291.

In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380, per Washington, J.; *Ward* v. *Maryland*, 12 Wall. 418, 430, per Clifford, J.; *Cole* v. *Cunningham*, 133 U. S. 107, 114, per Fuller, C. J.; *Blake* v. *McClung*, 172 U. S. 239, 252, per Harlan, J.

But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what

extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land.

The law of Ohio must be brought to the test of these fundamental principles. It appears from the decision under review (and we need no other authority) that by the common law of the State the courts had no jurisdiction to entertain actions to recover damages for death where the cause of action arose under the laws of other States or countries. This rule was universal in its application. The citizenship of the persons who brought action or of the person for whose death a remedy was sought was immaterial. If the death was caused outside the State and the right of action arose under laws foreign to the State, its courts were impartially closed to all persons seeking a remedy, entirely irrespective of their citizenship. The common law, however, was modified by a statute which, as amended, became the statute under consideration here. By this statute the courts were given jurisdiction over certain actions of this description, while the common law was left to control all others. A discrimination was thus introduced into the law of the State. The discrimination was based solely on the citizenship of the deceased. The courts were open in such cases to plaintiffs who were citizens of other States if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another State. So far as the parties to the litigation are concerned, the State by its laws made no discrimination based on citizenship, and offered precisely the same privileges to citizens of

other States which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the Constitution.

But it may be urged, on the other hand, that the conformity is only superficial; that the death action may be given by the foreign law to the person killed, at the instant when he was *vivus et mortuus*, and made to survive and pass to his representatives (*Higgins* v. *Railroad*, 155 Massachusetts, 176); that in such cases it is the right of action of the deceased which is brought into court by those who have it by survivorship; and that, as the test of jurisdiction is the citizenship of the person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another State, there is in a real and substantial sense a discrimination forbidden by the Constitution.

If such a case should arise, and be denied hearing in the Ohio courts by the Ohio law, then as the denial would be based upon the citizenship of that person in whom the right of action originally vested, it might be necessary to consider whether the Ohio law did not in substance grant privileges to Ohio citizens which it withheld from citizens of other States. But no such case is before us. The Pennsylvania statute, which created the right of action sought to be enforced in the Ohio courts, has been construed by the courts of Pennsylvania. The applicable section is section 19 of the act of 1851. Of it the Pennsylvania court said in *Fink* v. *Garman*, 40 Pa. St. 95, 103:

"The 18th section was apparently intended to regulate a common law right of action, by securing to it survivorship; but the 19th section was creative of a new cause of action, wholly unknown to the common law. And the right of action was not given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representative. It was not survivorship of the cause of action which the legislature meant to provide for by this section, but

the creation of an original cause of action in favor of a surviving widow or personal representative."

This is the settled interpretation of the act. *Mann* v. *Weiand* 81½ Pa. St. 243; *Pennsylvania Railroad* v. *Bock*, 93 Pa. St. 427; *Engle's Estate*, 21 Pa. C. C. 299; *McCafferty* v. *Pennsylvania Railroad*, 193 Pa. St. 339. It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio courts because she is not a citizen of that State, but because the cause of action which she presents is not cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. We are unable to see that in this case the plaintiff has been refused any right which the Constitution of the United States confers upon her, and accordingly the judgment is

Affirmed.

MR. JUSTICE HOLMES, concurring.

Although I do not dissent from the reasoning of the judgment, I prefer to rest my agreement on the proposition that if the statute cannot operate as it purports to operate it does not operate at all. I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565. Apart from the statute no one can maintain an action like this in Ohio. I may add that I do not understand that there is anything in the judgment that contradicts my opinion as to the law.

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA), dissenting.

The plaintiff in error, Elizabeth M. Chambers, a citizen of Pennsylvania, sought by this action against the Baltimore and

Ohio Railroad Company in the Common Pleas Court of Mahoning County, Ohio, to recover damages on account of her husband's death in Pennsylvania in 1902—his death having been caused, it was alleged, by the negligence of the defendant railroad company while operating a part of its line in Pennsylvania. The railroad company was brought into court by due service of summons, and there was a trial resulting in a verdict and judgment in favor of the plaintiff for three thousand dollars. The case was carried upon writ of error to the Circuit Court of Mahoning County and the judgment was there affirmed. That judgment of affirmance was reversed by the Supreme Court of Ohio with directions to enter judgment for the railroad company.

That the laws of Pennsylvania give a right of action, in favor of the widow of a deceased whose death is "occasioned by unlawful violence or negligence," is not disputed. It is equally clear that the present plaintiff's cause of action is not local but is transitory in its nature, and, speaking generally, can be maintained in any jurisdiction where the wrongdoer may be found and be brought before the court. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445.

By a statute of Ohio (1902) in force when this action was brought, it was provided that "whenever the death of a citizen of this State has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other State, territory, or foreign country, such right of action may be enforced in this State within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country." 95 O. L. 401. By a previous statute (1894) suits of that kind were allowed in Ohio when death was caused by a wrongful act, negligence or default in another State if such suits were allowed in the State where the death occurred. But that statute, as stated by the court in this case, was repealed by the above act of 1902. So that the

court, in the present case, held that the act of 1902 changed the former law in two essential particulars: "1. It dispenses with the condition that the State in which the wrongful death occurs shall enforce in its courts the statute of this State of like character. 2. It in terms limits the right therein given to maintain an action in this State for wrongful death occurring in another State, to actions for causing the death of *citizens* of Ohio, whereas the original section 6134*a* gave such right without limitation or restriction as to citizenship." Again, the court said: "Having regard then to the scope and effect of the provisions of the section amended, and to the special character of the amendments made, we think it clear that the legislature, by the adoption of amended section 6134*a* [the act of 1902], undertook and intended thereby to limit and restrict the right to recover in the courts of this State for a wrongful death occurring in another State, to those cases where the person killed was, at the time of his death, a citizen of Ohio." That there may be no mistake as to the decision, I quote the official syllabus of the present case which, by the law of Ohio, is to be taken as indicating the point actually in judgment: "No action can be maintained in the courts of this State upon a cause of action for wrongful death occurring in another State, *except* where the person wrongfully killed was a *citizen of the State of Ohio*." 73 Ohio St. 1.

It thus appears that the final judgment in this case for the railroad company rests upon the distinct ground that the courts of Ohio cannot, under the statute of that State, take cognizance of an action for damages, on account of death occurring in another State and caused by wrongful act, neglect or default, *except* where the person wrongfully killed was a citizen of Ohio. In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, traveling together on a railroad in Pennsylvania, should both be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed, by its statute against any suit

for damages brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the State where the death occurred the widow or estate of each decedent would have in the latter State a valid cause of action.

Is a state enactment, having such effect, repugnant to the clause of the Federal Constitution, Art. 4, § 2, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?" Will not that constitutional guaranty be shorn of much of its value if any State can reserve either for its own citizens, or for the estates of its citizens, privileges and immunities which, even where the facts are the same, it denies to citizens or to the estates of citizens of other States?

It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I cordially assent to what is said upon this point in the opinion just delivered for the majority of the court. The opinion says: "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. . . . The privileges which it [the State] affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other

States is void, because in conflict with the supreme law of the land."

These views are supported by the former decisions of this and other courts. In the leading case of *Corfield* v. *Coryell*, 4 Wash. C. C. 571, 580, Mr. Justice Washington said: "The inquiry is what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate." Among the particular privileges and immunities which are clearly to be deemed fundamental, the court in that case specifies the right "*to institute and maintain actions of any kind in the courts of the State.*"

In *Paul* v. *Virginia*, 8 Wall. 168, 180, the court, speaking by Mr. Justice Field, said: "It was undoubtedly the object of the clause in question [Const. Art. 4, § 2] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of

those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

So, in *Ward* v. *Maryland*, 12 Wall. 418, 430, the court, after referring to *Corfield* v. *Coryell*, above cited, and, speaking by Mr. Justice Clifford, stated that the right "to maintain actions in the courts of the State" was fundamental and was protected by the constitutional clause in question against state enactments that discriminated against citizens of other States.

Referring to the cases just cited, and to the constitutional clause in question, Mr. Justice Miller, speaking for the court in the *Slaughter-House Cases*, 16 Wall. 36, 77, said: "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In *Cole* v. *Cunningham*, 133 U. S. 107, 114, the present Chief Justice, speaking for the court, said: "The intention of section 2 of Article IV was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, *and this includes the right to institute actions.*"

In the more recent case of *Blake* v. *McClung*, 172 U. S. 239, 256, the court said: "We must not be understood as saying that a citizen of one State is entitled to enjoy in another State *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. *For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people;* but it may require a non-resident, although a citizen of another State, to give bond for costs, although such bond be not required of a resident. Such

a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. . . . The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

These cases, I think, require the reversal of the judgment of the Supreme Court upon the ground that it denies to the plaintiff a right secured by the Constitution of the United States. The statute of Ohio, we have seen, closes the doors of the courts of that State against the present plaintiff alone because her deceased husband was not at the time of his death a citizen of Ohio. Thus, every citizen of Ohio, when in another State, for whatever purpose, is accompanied by the assurance on the part of his State that its courts will be open for suit by his widow or representative if his death, while in another State, is caused by the negligence or default of another person or company. But that privilege is denied by the Ohio statute to the representative of citizens of other States meeting death under like circumstances. Indeed, if a citizen of Ohio should go into another State and while there *willfully*, or by some wrongful act, neglect or default on his part, cause the death of some one, although he might be liable to a suit for damages in the State where death occurred, yet if sued for damages in the courts of his own State, he need only plead in bar of the action in Ohio that the decedent was not, at the time of his death, a citizen of Ohio. Such, it seems to me, is the operation of the statute of Ohio as it is interpreted by the court below.

The Supreme Court of Ohio, it will be observed, does not base its judgment upon any common law of the State apart from its statutes. It says: "From a consideration of the statutes

hereinbefore referred to, and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this State, that an action for wrongful death occurring in another State, will not be enforced in the courts of this State, *except* where the person killed was, at the time of his death, a citizen of Ohio." It places its judgment on its statutes and judicial decisions, which it regards as together indicating the policy and law of the State to be such as to preclude an action for damages, except where the deceased was a citizen of Ohio. That exception, upon whatever basis it may be rested, must fall before the Constitution of the United States and be treated as a nullity. The denial to the widow or representative of Chambers of the right to sue in Ohio upon the ground that he was not a citizen of Ohio when killed was the denial, in every essential sense, of a fundamental privilege belonging to him under the Constitution in virtue of his being a citizen of one of the States of the Union—the right to sue and defend in the courts of justice, which right this court concedes to be "one of the highest and most essential privileges of citizenship." While in life Chambers enjoyed the right—and it was a most valuable right—of such protection as came from the rule established in Pennsylvania, that, in case of his death in consequence of the negligence of others, the wrong done to the deceased in his lifetime could be remedied by means of suit brought in the name and for the benefit of his widow or personal representative. But Ohio takes this right of protection from him; for, the Ohio court would have taken cognizance of this action if the decedent Chambers had been, when killed, a citizen of Ohio, while it denies relief to his widow, and puts her out of court solely because her husband was, when killed, a citizen of another State. It thus accords to the Ohio widow of a deceased Ohio citizen a privilege which it withholds from the Pennsylvania widow of a deceased Pennsylvania citizen. If the statutes of Ohio had excluded from the jurisdiction of the courts of that State *all* actions for damages on account of death a different question would be presented. But that is

not what Ohio has assumed to do. As already shown, it allows suits for damages like the present one, where the death occurred in another State, *provided the deceased was a citizen of Ohio, but prohibits them where he was a citizen of some other State.* The final judgment in this case therefore denies a fundamental right inhering in citizenship, and protected by section 2 of Article IV of the Constitution. The Constitution is the supreme law of the land. But it would not be supreme if any right given by it could be overridden either by state enactment or by judicial decision. In *Higgins* v. *Central New Eng. &c. Railroad*, 155 Massachusetts, 176, 180, the Supreme Judicial Court of Massachusetts, after referring to transitory causes of action which did not exist at common law, but were created by the statute of another State and passed to the administrator of the deceased, said: "When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other States shall be heard here. These principles require that, in case of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties." The statute of Pennsyvania which gave the plaintiff as widow of the deceased a right to sue for damages does not offend natural justice or good morals, nor is it calculated to injure the citizens of any State, not even those of Ohio, nor can it be said to offend any policy of that State which has been made applicable equally to its own citizens and citizens of other States. The case is plainly one in which Ohio attempts, in reference to certain kinds of actions that are maintainable in perhaps every State of the Union, including Ohio, to give to its own citizens privileges which it denies, under like circumstances,

to citizens of other States. To a citizen of Ohio it says: "If you go into Pennsylvania, and are killed while there, in consequence of the negligence or default of some one, your widow may have access to the Ohio courts in a suit for damages, provided the wrongdoer can be reached in Ohio by service of process." But to the citizen of Pennsylvania it says: "If you come to your death in that State by reason of the negligence or default of some one, *even if the wrongdoer be a citizen of Ohio*, your widow shall not sue the Ohio wrongdoer in an Ohio court for damages because, and only because, you are a citizen of another State." This is an illegal discrimination against living citizens of other States, and the difficulty is not met by the suggestion that no discrimination is made against the widow of the deceased because of *her* citizenship in another State. The statute of Pennsylvania in question had in view the protection of persons, while alive, against negligence or default causing death. It must have had that object in view. I submit that no State can authorize its courts to deny or disregard the constitutional guaranty that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

With entire respect for the views of others, I am constrained to say that, in my opinion, so much of the local law, whether statutory or otherwise, as permits suits of this kind for damages, where the deceased was a citizen of Ohio, but forbids such suits where the deceased was not a citizen of Ohio, is unconstitutional. The judgment under review should be reversed.

HUNTER *v.* CITY OF PITTSBURGH.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 264. Argued October 25, 28, 1907.—Decided November 18, 1907.

The policy, wisdom, justice and fairness of a state statute, and its conformity to the state constitution are wholly for the legislature and the courts of the State to determine, and with those matters this court has nothing to do.

The Fifth Amendment to the Federal Constitution is not restrictive of state, but only of national, action.

There is no contract, within the meaning of the contract clause of the Federal Constitution, between a municipality and its citizens and taxpayers that the latter shall be taxed only for the uses of that corporation and not for the uses of any like corporation with which it may be consolidated.

Municipal corporations are political subdivisions of the State, created by it and at all times wholly under its legislative control; their charters, and the laws conferring powers on them, do not constitute contracts with the State within the contract clause of the Federal Constitution; nor are a municipality and its citizens or taxpayers deprived of its or their property without due process of law, nor is such property taken without compensation, by reason of any legislative action of the State in regard to the property held by such municipality for governmental purposes, or as to the territorial area of such municipality, or the consolidation thereof with another city, or the repeal or alteration of its charter.

The act of February 7, 1906 of Pennsylvania providing for the union of contiguous municipalities, under which the cities of Pittsburgh and Allegheny were consolidated, is not unconstitutional as depriving the City of Allegheny or the citizens and taxpayers thereof of their property without due process of law, or because it takes property without compensation or because it impairs any contract between the City of Allegheny and the State or the City of Allegheny and its citizens and taxpayers.

A LAW of the State of Pennsylvania (February 7, 1906), provides for the union of cities, which are contiguous or in close proximity, by the annexation of the lesser to the larger. The parts of that law material to this decision follow, Pennsylvania Laws, 1906, p. 7:

"SEC. 1. Be it enacted, etc., That wherever in this Common-

wealth, now or hereafter, two cities shall be contiguous or in close proximity to each other, the two, with any intervening land other than boroughs, may be united and become one by annexing and consolidating the lesser city, and the intervening land other than boroughs, if any, with the greater city, and thus making one consolidated city, if at an election, to be held as hereinafter provided, there shall be a majority of all the votes cast in favor of such union.

"SEC. 2. The councils of either of said cities may by ordinance direct that a petition be filed in the court of quarter sessions of the county in which said cities are situate, or two per centum of the registered voters of either of said cities may present their petition to said court, praying that the two cities, and any intervening land other than boroughs, shall be united and become one city. Thereupon the said petition shall be filed; and the court shall fix a time for the hearing thereof, not more than twenty days thereafter, and direct that notice be given to the mayor or chief executive officer of each of the said cities, and the clerk of the councils of each of said cities, and by publication in one or more newspapers published in either of said cities, and such notice as the court may deem proper, including notice to one or more of the officers of whatever may be the municipal subdivision of the State in which any intervening land other than boroughs may lie.

"SEC. 4. Any person interested may file exceptions to said petition prior to the day fixed for hearing. At such hearing any person in interest shall be heard; but if the court shall find that the petition and proceedings are regular and in conformity with this act, it shall order an election to be held in such cities, to vote for or against the proposed consolidation, at which all the legal voters of either of said cities, and of the said intervening land, if any, shall be qualified to vote.

* * * * * * * *

"SEC. 7. If it shall appear by the vote, when computed and certified as [provided in section 6], that a majority of all the lawful voters of the two cities and the intervening land, voting

upon such question, have voted in favor of the annexation or consolidation, the said court of quarter sessions shall enter a decree annexing and consolidating the lesser city, and any intervening land other than boroughs, with the greater city, so that they form but one city, and in the name of the greater or larger city;"

* * * * * * * *

"SEC. 8. Each of the constituent cities, and the intervening land, if any, so consolidated, shall pay its own floating and bonded indebtedness and liabilities of every kind, and the interest thereon, as the same existed at the time of annexation; and the councils of the consolidated city shall levy, respectively, on the properties in each of the said cities and intervening land so consolidated, and as they existed at the time of annexation, a tax sufficient to provide funds for each to pay its own floating and bonded indebtedness and liabilities and interest, as the same may accrue. The court of quarter sessions is given jurisdiction to ascertain what the floating and bonded indebtedness, and liabilities, and properties, and assets, of each of the said cities and the said intervening land may be; due notice being given and an opportunity to be heard being allowed, to all parties in interest.

"SEC. 9. All the citizens of each of the united cities and of the intervening land shall be entitled to, and shall enjoy and exercise, full rights of citizenship in the said enlarged and consolidated city. All the rights of creditors and all liens, and all the rights of the constituent cities and the government of the intervening land, to enforce the payment of moneys due either, or of contract liabilities, or of other claims or rights of property, existing in either city or in the government of the intervening land at the time of annexation, shall be preserved unimpaired to each; and each of the said cities and the government of the intervening land, for the purpose of enforcing its rights and claims in the premises, and also of having prior rights and claims enforced against it, shall be deemed in law to continue in existence.

"Except as herein otherwise provided, all the property, real, personal and mixed, and rights and privileges of every kind, vested in or belonging to either of said cities or to the intervening land prior to and at the time of the annexation, shall be vested in and owned by the consolidated or united city;

* * * * * * * *

"All moneys accruing, from time to time, from delinquent taxes prior to the annexation, and all assessments against private property for public improvements for which the contractors shall have been paid, shall be applied to the indebtedness of the city to which the same shall belong. In case of annexation, the court may appoint commissioners to ascertain the floating and bonded indebtedness of each of the said municipal subdivisions, at the time of annexation, including the share of the municipal indebtedness for which any intervening land may be liable, and also an account of all property, of every kind, owned or claimed by the cities or the share of the intervening land to any property owned by the municipal subdivision of the State of which it is a part, prior to and at the time of annexation. The court may also order an account to be taken by the said commissioners of all moneys on hand or receivable, applicable to the payment of the floating or bonded indebtedness of the respective municipalities or of the intervening land, at the date of annexation. Such money shall be, respectively, applied in payment of the floating or bonded indebtedness of the respective municipalities or of the intervening land;

* * * * * * * *

"After the commissioners have made report, the court shall, by its decree, fix the said indebtedness and liabilities, and also the properties and assets, of all kinds, at the time of the annexation belonging to each territory united in the consolidation."

The City of Pittsburgh under the provision of this act filed in the Court of Quarter Sessions of Allegheny County a petition asking for the union of the City of Allegheny with the City of

Pittsburgh. The plaintiffs in error (except the City of Allegheny) seasonably filed exceptions to the petition under section 4 of the act. The parts of the exceptions material here are as follows:

"1st. That they are residents and citizens, voters, taxpayers and owners of real estate and personal property, within the City of Allegheny, County of Allegheny and State of Pennsylvania.

"4th. That the population of the City of Pittsburgh by the census of 1900 was 321,616 and that it has now a population of at least 350,000. That there were polled at the last mayoralty election in the said city, on February 20th, 1906, about 62,000 votes in round numbers.

"That the population of the City of Allegheny by the census of 1900 was 129,896, and that it is probably about 150,000 at the present time; that there were polled at the last mayoralty election in the said city, on February 20th, 1906, about 24,000 votes, in round numbers.

"6th. The City of Allegheny has improved its streets, established its own system of electric lighting; and has established a satisfactory water supply. The City of Pittsburgh is largely in debt; has established large and extensive parks in the eastern part of the city; built expensive and costly boulevards; extensive and costly reservoirs for the supply of water; and is contemplating still greater expenditures of money in the cutting down and grading of the elevation of Fifth Avenue, known as the hump; and the construction of an extensive filtration plant; and a large expenditure of money in the purchase of the Monongahela Water Company plant; a plant owned by a private corporation; and the further expensive construction of an electric light plant to be owned by the City of Pittsburgh, the said city owning at the present time no light plant, it being supplied with light from a private corporation; and the further expenditure of various sums of money for the acquirement of advantages and property which the citizens of Allegheny now practically own and enjoy but which the

citizens of Pittsburgh do not, and to acquire which would largely increase the indebtedness of the City of Pittsburgh, and if the City of Allegheny should be annexed to the City of Pittsburgh, the taxpayers of Allegheny, including your respondents, will, in addition to the payment of the taxes necessary to pay and liquidate their own indebtedness, have to bear and pay their proportion of the new indebtedness that must necessarily be created to acquire the facilities, properties and improvements, herein stated, in Pittsburgh; all of which would be of no benefit to the citizens and taxpayers of Allegheny, including your respondents who now own and possess these advantages and privileges; and which will largely and unnecessarily increase the taxes of your respondents, as well as the taxes of the other citizens of Allegheny, without any material benefit to them whatever.

"12th. The Act of Assembly under which this petition is filed for the annexation of the City of Allegheny to the City of Pittsburgh is in conflict with Article I, section 9, paragraph 10, of the Constitution of the United States, in that it impairs the obligations of the contract existing between the City of Allegheny and your respondents, by which they are to be taxed only for the government of the City of Allegheny, and for improvements, repairs and expenditures incidental to the government of the said City of Allegheny, and the attempt to subject them to the increased taxes and burdens of an additional or enlarged city government, by legislation, is in violation of said Article I, section 9, paragraph 10, of the Constitution of the United States, and therefore is unconstitutional.

"13th. The Act of General Assembly under which this petition is filed, is in conflict with Article V of the amendments of the Constitution of the United States, because if the City of Allegheny shall be annexed in pursuance of the petition filed in this case, it will be depriving your respondents of their property without due process of law, and is therefore unconstitutional. Said annexation of the City of Allegheny to the City of Pittsburgh will add additional taxes to the property

of your respondents, and create additional burdens without compensation, and will depreciate the value of the property of your respondents, and they, therefore, will be deprived of their property, in violation of said Article V of the amendments to the Constitution of the United States.

"14th. The Act of Assembly under which this petition is filed is in conflict with Article XIV of the amendments to the Constitution of the United States, because the said annexation of the City of Allegheny to the City of Pittsburgh deprives your respondents of their property without due process of law. The additional taxes and burdens, which the property of your respondents will have to bear in case the annexation takes place will cause a large depreciation in the value of the property of your respondents.

"22nd. The Act of the General Assembly under which these proceedings are had is in violation of the law of the land, it being unfair, unjust and unequal; and is in conflict with the rights and privileges reserved by the people to themselves, in that it permits the qualified electors of the larger city to overpower or outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified electors of the lesser city."

The City of Pittsburgh filed an answer to the exceptions, admitting some of the allegations contained therein and denying others. As nothing turns here upon the answer it need not be set forth. Thereupon there was a hearing in the case. No evidence on the issues of fact raised by the exceptions and the answer thereto was introduced, and no decision upon those issues was made. The court "dismissed" the exceptions, and ordered an election to be held as prayed for in the petition. At the election a majority of all the voters of the two cities voted in favor of the consolidation. It is agreed that the majority of the voters of the City of Allegheny voted against the consolidation, but that majority was overcome by a larger majority of the voters of the City of Pittsburgh in favor of the consolidation. The result of the election duly appearing to the

Court of Quarter Sessions, that court thereupon decreed that the two cities should be consolidated. The case was then taken by writ of error to the Superior Court of Pennsylvania, and the error assigned was the dismissal of the exceptions. In that court the City of Allegheny on its petition was permitted "to intervene and become one of the appellants in said proceedings." The Superior Court overruled the assignments of error and affirmed the decree. Thereupon the same assignments of error were made in the Supreme Court of Pennsylvania, where the case was taken by writ of error. That court dismissed the assignments of error, affirmed the decree and refused a motion for rehearing. A writ of error was then allowed by a justice of this court. The assignments in this court are as follows:

"First. The Supreme Court of the State of Pennsylvania erred in dismissing the fourth assignment of error of the plaintiffs in error, which is as follows:

"'The Act of the General Assembly under which these proceedings are had, is in violation of the law of the land, it being unfair, unjust and unequal; and is in conflict with the rights and privileges reserved by the people to themselves, in that it permits the qualified electors of the larger city to overpower and outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified electors of the lesser city.'

"Second. The Supreme Court of the State of Pennsylvania erred in dismissing the fifth assignment of error of the plaintiffs in error, which is as follows:

"'The Act of Assembly under which this petition is filed for annexing of the City of Allegheny to the City of Pittsburgh is in conflict with Article I, section 9, paragraph 10, of the Constitution of the United States, in that it impairs the obligations of the contract existing between the City of Allegheny and your respondents, by which they are to be taxed only for the government of the City of Allegheny and for improvements, repairs and expenditures incidental to the government of said

City of Allegheny, and the attempt to subject them to the increased taxes and burdens of an additional or enlarged city government, by legislation, is in violation of Article I, section 9, paragraph 10, of the Constitution of the United States, and therefore is unconstitutional.'

"Third. The Supreme Court of the State of Pennsylvania erred in dismissing the sixth assignment of error of the plaintiffs in error, which is as follows:

"'The Act of General Assembly under which this petition is filed is in conflict with Article V of the amendments of the Constitution of the United States, because if the City of Allegheny shall be annexed in pursuance of the petition filed in this case it will be depriving your respondents of their property without due process of law, and is therefore unconstitutional. Said annexation of the City of Allegheny to the City of Pittsburgh will add additional taxes to the property of your respondents, and create additional burdens without compensation, and will depreciate the sale of the property, in violation of said Article V of the amendments to the Constitution of the United States, and they, therefore, will be deprived of their property.'

"Fourth. The Supreme Court of the State of Pennsylvania erred in dismissing the seventh assignment of error of the plaintiffs in error, which is as follows:

"'The Act of Assembly under which this petition is filed is in conflict with Article XIV of the amendments to the Constitution of the United States, because the said annexation of the City of Allegheny to the City of Pittsburgh deprives your respondents of their property without due process of law. The additional taxes and burdens which the property of your respondents will have to bear in case the annexation takes place will cause a large depreciation in value of the property of your respondents.'

"Fifth. The Supreme Court of the State of Pennsylvania erred in not holding that the Act of the General Assembly of Pennsylvania, approved February 7, A. D. 1906, entitled 'An

act to enable cities that are now, or may hereafter be, contiguous or in close proximity, to be united, with any intervening land other than boroughs, in one municipality; providing for the consequences of such consolidation, the temporary government of the consolidated city, payment of the indebtedness of each of the united territories, and the enforcement of debts and claims due to and from each,' was special or local legislation, and in conflict with Article 3, section 7, subdivision 2, of the constitution of the State of Pennsylvania, which constitutional provision provides that 'The General Assembly shall not pass any local or special law, regulating the affairs of counties, cities, townships, wards, boroughs, or school districts,' and the said Act of Assembly being in conflict with said provision of the constitution of the State of Pennsylvania, is not due process of law, and therefore is in conflict with the Fourteenth Amendment to the Constitution of the United States.

"Sixth. The Supreme Court of the State of Pennsylvania erred in not holding that the said Act of Assembly, entitled as aforesaid, was passed at an extraordinary or special session of the legislature, convened by the Governor of Pennsylvania under Article 4, section 12, of the constitution of Pennsylvania, which provides that the Governor may, on extraordinary occasions, convene the General Assembly; and that the subject of the said legislation or Act of Assembly, aforesaid, was not designated in the proclamation of the Governor calling such a session, or in the paper or proclamation issued by him dated January 9, 1906, and is therefore in conflict with Article 3, section 25, of the constitution of Pennsylvania, which provides that 'When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session,' and that the said Act of Assembly is, by reason thereof, not due process of law, and is in conflict with the Fourteenth Amendment to the Constitution of the United States.

"Seventh. The Supreme Court of Pennsylvania erred in

dismissing the exceptions filed by the plaintiffs in error, thereby confirming the judgment of the court below.

"Eighth. The Supreme Court of Pennsylvania erred in not entering judgment in favor of the plaintiffs in error and not reversing the judgment of the court below."

Mr. John G. Johnson and *Mr. William A. Stone* for plaintiffs in error:

The law in question herein is not just, fair or reasonable. The courts and not the legislature must determine whether the law is reasonable, and if it be unreasonable it is not due process of law. *Smyth* v. *Ames*, 169 U. S. 466; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

The scheme, or trick, of the law is apparent. As it was expected by the framers of the law that Allegheny would vote against consolidation, they determined to neutralize the vote of Allegheny by the larger vote of Pittsburgh. The law gave them a vote, but by a scheme which destroyed it. Legislation which thus destroys the vote it allows is not fair, just and reasonable. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Capen* v. *Foster*, 12 Pick. 488; *People* v. *Solomon*, 51 Ills. Sup. Ct. Rep. 37.

The law in controversy is one providing for the consolidation of two cities, or the annexation of the lesser to the larger city, by the majority vote of the two cities. The larger city was almost unanimously in favor of annexing the smaller. The smaller city was almost as strongly opposed to such annexation. Under the color of giving the citizens affected a vote to determine the question a scheme was adopted and put into the law, which restrained the right to determine such by vote.

It is not usual to consolidate cities in this way, and such has not been the practice in Pennsylvania. The method provided by this statute is not the usual way in that State and is not due process of law.

We find in Pennsylvania no precedent for this law. On the contrary, whenever consolidation has been effected by a

vote of the people, each municipality has been given a separate vote, which separate vote if against consolidation, determined that the municipality so voting against consolidation should not be included in the scheme.

The question for this court here to determine is, not whether Pittsburgh and Allegheny ought to be consolidated; not whether the legislature has the power to consolidate them by an Act of Assembly; but whether the method adopted in the act in controversy is reasonable, usual, customary and just.

The act in question is not "due process of law," and, therefore, is in conflict with the Fourteenth Amendment, because it limits the power and jurisdiction of the courts simply to an inquiry whether the petition and the proceedings filed are regular and in conformity therewith.

The record also presents a case in which the City of Allegheny, being possessed of valuable property, which by its charter was vested in it for the use and benefit of its citizens forever, has been stripped of its property for the benefit of the City of Pittsburgh.

The fact that the City of Pittsburgh presented the petition for consolidation, and that such petition was opposed by the City of Allegheny from the outset, is inconsistent with the idea, appearing so often in the brief of defendant in error, to the effect that the latter city is the one benefited by the consolidation.

A municipal corporation may have rights of property vested in it for the benefit of its citizens of which it cannot be deprived without due process of law, without violating the Federal protection accorded to contracts.

The water and electric plants as well as other property which belongs to the City of Allegheny were held by it under the protection of the Federal Constitution. *New Orleans* v. *Water Works Co.*, 142 U. S. 91; *Powers* v. *Detroit &c. R. R. Co.*, 201 U. S. 543; *Graham* v. *Folsom*, 200 U. S. 248.

In the present case the charter is not amended, nor changed, nor revoked, but one city, without its consent, with all of its

property, is legislated into the greater city. While the legislature might amend, and perhaps revoke the charter of Allegheny, it could not pass the property of Allegheny over to Pittsburgh by law, as was attempted. *New Orleans* v. *Water Works Co.*, 142 U. S. 91; *Broome* v. *Furner*, 176 Massachusetts, 9; *Powers* v. *Detroit &c. R. R. Co.*, 201 U. S. 543.

Mr. W. B. Rodgers and *Mr. D. T. Watson*, with whom *Mr. J. Rodgers McCreery* and *Mr. John M. Freeman* were on the brief, for defendant in error:

A city is nothing but a municipal corporation of the State, made by the State for the purpose of administering and governing a certain locality. There is no contract relation between the city and the State; as the State made, she can destroy or take away, and the law of Pennsylvania, and indeed the decisions of this court show, that the State may add to a city, may take away from a city, may merge a city or a borough or two cities, or two townships, or two boroughs, and this without any intervention of the voters and even against the wishes of the majority of the voters within the territorial limits. As the State has the absolute power to do this, to merge or take away a charter, or to add additional territory, or take it away, it may select, at its own option, the plan under which it will be carried out, and the voters of the district have no voice whatever in the determination of that question, unless the State sees fit to delegate the same to them.

If the State has the absolute power to annex one city to another without consulting the people of either city, how is it possible to say that it cannot do so when a majority of all the people in the proposed greater city are in favor of it, simply because a majority of such people in either city oppose it? That majority could not prevent the State from acting.

How the question of merger between two cities shall be left to be determined by a majority of the voters of the lesser city is certainly something new in municipal law, and is wholly unsupported by any decided case that we have any knowledge of.

How, and under what circumstances a merger of two or more municipalities shall take place is for the State and the State alone to determine, and the question is purely legislative and not judicial, and before any claim can be made that the legislation is not due process of law, the facts must be shown to demonstrate that it deprives someone of life, liberty or property. *State of Ohio* v. *Cincinnati*, 52 Ohio St. 419; Cooley on Constitutional Limitations (6th Ed.), 228; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 531.

The creation and consolidation of municipal corporations, the determination of their boundaries and the administration of their internal affairs, are matters peculiarly within the jurisdiction of the State. These are questions upon which the determination of the state authorities will be accepted by the Federal courts as authoritative and controlling. *Forsyth* v. *Hammond*, 166 U. S. 506, 518; *Williams* v. *Eggleston*, 170 U. S. 304; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 81; *Wilson* v. *North Carolina*, 169 U. S. 586, 593; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514; *Laramie County* v. *Albany Co.*, 92 U. S. 307; *Covington* v. *Kentucky*, 173 U. S. 231.

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

The plaintiffs in error seek a reversal of the judgment of the Supreme Court of Pennsylvania, which affirmed a decree of a lower court, directing the consolidation of the cities of Pittsburgh and Allegheny. This decree was entered by authority of an act of the General Assembly of that State, after proceedings taken in conformity with its requirements. The act authorized the consolidation of two cities, situated with reference to each other as Pittsburgh and Allegheny are, if upon an election the majority of the votes cast in the territory comprised within the limits of both cities favor the consolidation, even though, as happened in this instance, a majority

of the votes cast in one of the cities oppose it. The procedure prescribed by the act is that after a petition filed by one of the cities in the Court of Quarter Sessions, and a hearing upon that petition, that court, if the petition and proceedings are found to be regular and in conformity with the act, shall order an election. If the election shows a majority of the votes cast to be in favor of the consolidation, the court "shall enter a decree annexing and consolidating the lesser city . . . with the greater city." The act provides, in considerable detail, for the effect of the consolidation upon the debts, obligations, claims and property of the constituent cities; grants rights of citizenship to the citizens of those cities in the consolidated city; enacts that "except as herein otherwise provided, all the property . . . and rights and privileges . . . vested in or belonging to either of said cities . . . prior to or at the time of the annexation, shall be vested in and owned by the consolidated or united city," and establishes the form of government of the new city. This procedure was followed by the filing of a petition by the City of Pittsburgh; by an election in which the majority of all the votes cast were in the affirmative, although the majority of all the votes cast by the voters of Allegheny were in the negative, and by a decree of the court uniting the two cities.

Prior to the hearing upon the petition the plaintiffs in error, who were citizens, voters, owners of property and taxpayers in Allegheny, filed twenty-two exceptions to the petition. These exceptions were disposed of adversely to the exceptants by the Court of Quarter Sessions, and the action of that court was successively affirmed by the Superior and Supreme courts of the State. The case is here upon writ of error, and the assignment of errors alleges that eight errors were committed by the Supreme Court of the State. This assignment of errors is founded upon the dispositions by the state courts of the questions duly raised by the filing of the exceptions under the provisions of the Act of the Assembly.

The defendants in error moved to dismiss the case because

no Federal question was raised in the court below or by the assignments of error, or, if any Federal question was raised, because it was frivolous. This motion must be overruled. The plaintiffs in error claimed that the Act of Assembly was in violation of the Constitution of the United States, and specially set up and claimed in the court below rights under several sections of that Constitution, and all their claims were denied by that court. These rights were claimed in the clearest possible words, and the sections of the Constitution relied upon were specifically named. The questions raised by the denial of these claims are not so unsubstantial and devoid of all color of merit that we are warranted in dismissing the case without consideration of their merits.

Some part of the assignments of error and of the arguments in support of them may be quickly disposed of by the application of well-settled principles. We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the constitution of the State and the conformity of the enactment of the Assembly to that constitution; those questions are for the consideration of the courts of the State, and their decision of them is final. The Fifth Amendment to the Constitution of the United States is not restrictive of state, but only of national, action.

After thus eliminating all questions with which we have no lawful concern, there remain two questions which are within our jurisdiction. There were two claims of rights under the Constitution of the United States which were clearly made in the court below and as clearly denied. They appear in the second and fourth assignments of error. Briefly stated, the assertion in the second assignment of error is that the Act of Assembly impairs the obligation of a contract existing between the City of Allegheny and the plaintiffs in error, that the latter

are to be taxed only for the governmental purposes of that city, and that the legislative attempt to subject them to the taxes of the enlarged city violates Article I, section 9, paragraph 10, of the Constitution of the United States. This assignment does not rest upon the theory that the charter of the city is a contract with the State, a proposition frequently denied by this and other courts. It rests upon the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated. It is not said that the City of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it is not true. No authority or reason in support of it has been offered to us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits. This assignment of error is overruled.

Briefly stated, the assertion in the fourth assignment of error is that the Act of Assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. The manner in which the right of due process of law has been violated, as set forth in the first assignment of error and insisted upon in argument, is that the method of voting on the consolidation prescribed in the act has permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without their consent and against their protest. The precise question thus presented has not been determined by this court. It is important, and, as we have said, not so devoid of merit as to be denied consideration, although its solution by principles long settled and constantly acted upon is not difficult. This court

has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors. *Maryland* v. *Balt. & Ohio Railroad*, 3 How. 534, 550; *East Hartford* v. *Hartford Bridge Company*, 10 How. 511, 533, 534, 536; *United States* v. *Railroad Company*, 17 Wall. 322, 329; *Laramie County* v. *Albany County*, 92 U. S. 307, 308, 310–312; *Commissioners* v. *Lucas*, 93 U. S. 108, 114; *New Orleans* v. *Clark*, 95 U. S. 644, 654; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 524, 525, 531, 532; *Meriwether* v. *Garrett*, 102 U. S. 472, 511; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 80; *Forsyth* v. *Hammond*, 166 U. S. 506, 518; *Williams* v. *Eggleston*, 170 U. S. 304, 310; *Covington* v. *Kentucky*, 173 U. S. 231, 241; *Worcester* v. *Worcester Street Railway Company*, 196 U. S. 539, 549; *Kies* v. *Lowrey*, 199 U. S. 233. It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part

of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

Applying these principles to the case at bar, it follows irresistibly that this assignment of error, so far as it relates to the citizens who are plaintiffs in error, must be overruled.

It will be observed that in describing the absolute power of the State over the property of municipal corporations we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (1 Dillon, Municipal Corporations, 4th ed., sections 66 to 66*a*, inclusive, and cases cited in note to 48 L. R. A. 465), and it has been held that as to the latter class of property the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon

says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based has several times been noticed. *Commissioners* v. *Lucas*, 93 U. S. 108, 115; *Meriwether* v. *Garrett*, 102 U. S. 472, 518, 530; *Essex Board* v. *Skinkle*, 140 U. S. 334, 342; *New Orleans* v. *Water Works Co.*, 142 U. S. 79, 91; *Covington* v. *Kentucky*, 173 U. S. 231, 240; *Worcester* v. *Street Railway Co.*, 196 U. S. 539, 551; *Monterey* v. *Jacks*, 203 U. S. 360. Counsel for plaintiffs in error assert that the City of Allegheny was the owner of property held in its private and proprietary capacity, and insist that the effect of the proceedings under this act was to take its property without compensation and vest it in another corporation, and that thereby the city was deprived of its property without due process of law in violation of the Fourteenth Amendment. But no such question is presented by the record, and there is but a vague suggestion of facts upon which it might have been founded. In the sixth exception there is a recital of facts with a purpose of showing how the taxes of the citizens of Allegheny would be increased by annexation to Pittsburgh. In that connection it is alleged that while Pittsburgh intends to spend large sums of money in the purchase of the water plant of a private company and for the construction of an electric light plant, Allegheny "has improved its streets, established its own system of electric lighting, and established a satisfactory water supply." This is the only reference in the record to the property rights of Allegheny, and it falls far short of a statement that that city holds any property in its private and proprietary capacity. Nor was there any allegation that Allegheny had been deprived of its property without due process of law. The only allegation of this kind is that the taxpayers, plaintiffs in error, were deprived of their property without due process of law because of the increased taxation which would result from the annexation—an entirely different proposition. Nor is the situation varied by the fact that, in the Superior Court, Allegheny was "permitted to intervene and become one of the appellants."

The city made no new allegations and raised no new questions, but was content to rest upon the record as it was made up. Moreover, no question of the effect of the act upon private property rights of the City of Allegheny was considered in the opinions in the state courts or suggested by assignment of errors in this court. The question is entirely outside of the record and has no connection with any question which is raised in the record. For these reasons we are without jurisdiction to consider it, *Dewey* v. *Des Moines*, 173 U. S. 193; *Harding* v. *Illinois*, 196 U. S. 78, and neither express nor intimate any opinion upon it.

The judgment is

Affirmed.

WEBSTER COAL AND COKE COMPANY *v.* CASSATT.

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

No. 283. Argued October 28, 29, 1907.—Decided December 2, 1907.

An order of the Circuit Court under § 724, Rev. Stat., adjudging and decreeing that certain officers of the defendant corporation produce books and papers, held to be an interlocutory order in the suit and not a final order as against the individuals, and, therefore, not reviewable at their instance, on writ of error, by the Circuit Court of Appeals.
150 Fed. Rep. 48, reversed.

THE Webster Coal and Coke Company commenced an action at law in the Circuit Court of the United States for the Eastern District of Pennsylvania against the Pennsylvania Railroad Company, defendant, to recover damages for its alleged violation of the Interstate Commerce Act of February 4, 1887, by discriminating against plaintiff in the allowance of freight rates on coal and coke. The defendant pleaded not guilty.

In the opinion below it is stated:

"After issue was thus joined, and before the time for the trial of the action, the plaintiff filed in the Circuit Court a petition in which, after setting forth the nature of the action at law and declaring that the defendant, and Alexander J. Cassatt, president, John B. Thayer, fourth vice-president, and ten other specifically-named officers and employés of the defendant, had in their possession or power certain books and papers containing evidence pertinent to the issue, there was a prayer for an order requiring the defendant, and its said officers and employés, to produce said books and papers at the trial, and also for inspection by the plaintiff's representatives before trial. The application for the order was based on § 724 of the Revised Statutes, which is as follows:

"'In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.'

"On presentation of the petition to the Circuit Court, a rule was allowed requiring the defendant and its officers and employés named in the petition, to show cause before the court on a certain day why they 'should not produce on the trial of this cause' the books and writings above referred to; and also why they should not produce them at a certain time and place before trial 'and permit the plaintiff, its counsel and accountants, to inspect the same and take such copies as they may deem proper.' The defendant answered the petition setting forth (1) that the action was for the recovery of damages in the nature of penalties, and therefore that the defendant

was not obliged to produce its books and papers, either before or at the trial; (2) that even if the action were one in which the defendant could be required to produce its books and papers at the trial, it could not be required to do so before the trial; (3) that the petition did not describe with sufficient particularity the books and papers the production of which was desired, or state the facts which the books and papers would tend to prove; and (4) that the defendant could not produce any books which would show the rebates and drawbacks alleged to have been allowed to other companies, because they had not been so kept as to show any such allowances. With the petition and answer before it, the Circuit Court, on the return of the rule to show cause, 'adjudged, ordered and decreed' that Alexander J. Cassatt, president, John B. Thayer, fourth vice-president, and the ten other officers and employés of the defendant, 'produce on the trial of this cause' the books and papers described in the petition, and also that they produce them before trial at a specified time and place for the inspection of the plaintiff with leave to the plaintiff to make copies thereof."

To review this order, Cassatt and the other officers and agents of the Pennsylvania Company sued out, as individuals, a writ of error from the Circuit Court of Appeals for the Third Circuit, assigning as error (1) that the Circuit Court erred in entering the order requiring plaintiffs in error to submit to the inspection of the plaintiff below and its counsel, prior to the trial of the cause, the books, records and papers referred to therein; and (2) requiring the production at the trial of said books, records and papers. The case was heard, together with two similar cases, one of which was entitled *Pennsylvania Coal & Coke Company* v. *Cassatt*, and is numbered 284 on the present docket.

The Circuit Court of Appeals gave an opinion in one case applicable to the three, and reversed the judgments of the Circuit Court with costs. 150 Fed. Rep. 32, 48. That court held that the order in question was a "final decision" within

§ 6 of the Judiciary Act of March 3, 1891; that the proceeding which resulted in the order was independent of and collateral to the main action, and the order therefore reviewable on a writ of error; that the corporation's officers and agents were not "parties" within Revised Statutes, § 724; that that section did not authorize an order requiring a party to produce books and papers before trial, but if such relief was desired it must be obtained by a bill of discovery. The present cause was then brought to this court on certiorari, and is numbered 283 on its docket. It was advanced for hearing and heard October 28, 29, together with No. 284, also brought up on certiorari.

Mr. John W. Griggs, with whom *Mr. Benjamin S. Harmon*, *Mr. George S. Graham* and *Mr. David L. Krebs* were on the brief, for petitioner:

The Circuit Court of Appeals had no power to review the order of the lower court.

The order was not a collateral matter distinct from the general subject of litigation affecting only the parties to the particular controversy, and finally settling the controversy, such as was referred to in *Brush Electric Company* v. *Electric Improvement Company*, 51 Fed. Rep. 557, but had distinct and important bearing on the general subject of the litigation. In fact, the order did not affect the respondents as individuals at all, being directed against them in their representative capacities. If the penalty prescribed in § 724 Rev. Stat. for disobedience of the order is not exclusive and the court has power to punish disobedience or enforce compliance, then, under the authority of *Alexander* v. *United States*, 201 U. S. 117, the order, prior to such action on the part of the court, is interlocutory in the principal suit.

On the other hand, if the penalty be considered exclusive, then the order, so far as concerns the respondents in certiorari, was mere *fulmen brutum* and they were in no way aggrieved. Still further, the order was rendered in a proceeding for the pro-

tection of the rights of the party to the suit for whose benefit it was made and for that reason not reviewable. *Doyle* v. *London Guarantee Co.*, 204 U. S. 599.

Mr. John G. Johnson, with whom *Mr. Francis I. Gowen* was on the brief, for respondents:

The order of the Circuit Court was a final one and one, consequently, which the Court of Appeals was justified in reviewing. The procedure authorized by § 724, Rev. Stat. is a substitute for proceedings in equity in the nature of discovery.

If the petitioner had been at liberty to proceed in equity by a bill of discovery and had obtained an order or decree similar to that which it has obtained under § 724, an appeal from such order or decree would have been allowable.

But if the order now before the court would have been a final one in an equity proceeding of the character alluded to, it is a final one under the procedure authorized by § 724. The question of its finality, it would seem, ought not to be determined with reference to the character of the proceeding in which it was made, but should be determined solely with reference to the question whether the court has finally by its order or decree disposed of the controversy with respect to which the order was made.

The order was a final one, in the sense that it exhausted the power of the court in the proceeding in which it had been made. Even failure, on the part of the defendants, to comply with its directions, would not open the door to further proceedings or orders, for such failure would not subject them to any pains or penalties whatsoever. The penalty of such disobedience would be visited upon the defendant in the main action, for by the provisions of § 724, failure to produce books and papers by a defendant when ordered authorizes entry of judgment against the defendant by default, and this is the only penalty that follows such failure.

The order involved in the present proceeding was final. It finally and completely disposed of the question of the right

of the petitioner to have the defendant's papers submitted to its inspection in advance of trial and left open no question or matter for further consideration or action by the court and it was final, therefore, both as to the defendant and those to whom it was directed. *Butler* v. *Fayerweather*, 91 Fed. Rep. 458, citing: *Mackeye* v. *Mallory*, 24 C. C. A. 420, *S. C.*, 79 Fed. Rep. 1; *Rouse* v. *Hornsby*, 14 C. C. A. 377, *S. C.*, 67 Fed. Rep. 219; *Gumbel* v. *Pitkin*, 113 U. S. 545, *S. C.*, 5 Sup. Ct. 616; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207; *Alexander* v. *United States*, 201 U. S. 117, discussed and distinguished.

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

The Pennsylvania Railroad Company did not except to the order nor attempt to prosecute a writ of error therefrom if that were possible; the plaintiffs in error, who were officers of the company, excepted and carried the case up on this writ of error. They were not parties to the case between the Coal Company and the Railroad Company, had no property in the books and papers referred to, were mere custodians as officers, and any rights of theirs were not made to appear to be involved in the disclosures sought. The order as to them was purely interlocutory, not imposing penalty or liability, and not finally disposing of an independent proceeding.

What Mr. Justice Bradley said in *Williams* v. *Morgan*, 111 U. S. 684, 699, in holding a decree on intervention appealable, and citing many cases, was that the order appealed from there "was final in its nature, and was made in a matter distinct from the general subject of litigation,—a matter by itself, which affected only the parties to the particular controversy, and those whom they represented."

This order affected the plaintiff and defendant in the case itself, and not respondents as individuals at all, and if the court had power to punish disobedience or enforce compliance

then the order prior to such action on the part of the court was clearly interlocutory in the suit. *Alexander* v. *United States*, 201 U. S. 117. If the provision of § 724 in respect of disobedience of such an order was exclusive, then, of course, respondents were in no way aggrieved. *Doyle* v. *London Guarantee Co.*, 204 U. S. 599.

Whether the order to produce was valid, and whether it warranted judgment by default against the defendant company were matters in which plaintiffs in error had no concern. There was here no attachment for contempt, no judgment on default, and no independent and collateral proceeding, the order disposing of which could be considered as a final decree.

Judgment reversed and cause remanded with a direction to dismiss the writ of error.

PENNSYLVANIA COAL AND COKE COMPANY *v.* CASSATT.

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

No. 284. Argued October 28, 29, 1907.—Decided December 2, 1907.

Decided on authority of preceding case.
150 Fed. Rep. 48, reversed.

THIS case was argued simultaneously with, and by the same counsel as, No. 283.[1]

MR. CHIEF JUSTICE FULLER: For the reasons given in the preceding case the judgment is reversed, and the cause remanded with a direction to dismiss the writ of error.

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[1] *Webster Coal & Coke Co.* v. *Cassatt*, *ante*, p. 181.

SHOENER *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 161. Argued October 28, 1907.—Decided December, 2, 1907.

One is not put in jeopardy if the indictment under which he is tried is so radically defective that it would not support a judgment of conviction, and a judgment thereon would be arrested on motion.

Where the defense is that the accused is put in jeopardy for the same offense by his trial under a former indictment, if it appears from the record of that trial that the accused had not then or previously committed, and could not possibly have committed, any such crime as the one charged, and therefore that the court was without jurisdiction to have rendered any valid judgment against him—the accused is not, by such trial, put in second jeopardy for the offense specified in the last or new indictment.

Where a conviction for embezzlement has been reversed on the ground that the money had not and could not be rightfully demanded when the indictment was found the accused is not put in second jeopardy by the trial on another indictment for embezzlement after demand rightfully made.

216 Pa. St. 71, affirmed.

In a civil action brought by the County of Schuylkill, Pennsylvania, in 1901, against Shoener, the present plaintiff, for the amount of certain fees alleged to have been collected by him, as the clerk of a Quarter Sessions Court, but withheld by him from the county treasury, a judgment was rendered in favor of the county for $18,245. That judgment was affirmed upon appeal by the Supreme Court of Pennsylvania on May 4th, 1903. *Schuylkill County* v. *Shoener*, 205 Pa. St. 592.

Shoener was then proceeded against by indictment under section 65 of the Penal Code of Pennsylvania of 1860, which section is in these words: "If any State, county, township or municipal officer of this Commonwealth, charged with the collection, safekeeping, transfer or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money entrusted to him for

collection, safekeeping, transfer or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the State, county or township treasurer, or other proper officer or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of money embezzled." Pa. L. 1860, 385, 400.

This section was construed by the Supreme Court of Pennsylvania in *Commonwealth* v. *Mentzer*, 162 Pa. St. 646, the court holding that each of the acts enumerated in the statute was a distinct and separate offense, although they might be so entirely parts of the same transaction as to constitute but one offense; that whether particular acts were so combined as to make one offense depended upon the facts in each case, and raised a question of fact for the jury.

The indictment was returned November 14, 1903—the date is important—and contained thirteen counts, those other than the fourth, eighth and twelfth counts in substance charging the accused with converting public funds to his own use, and the fourth, eighth and twelfth counts charging him only *with failing to pay over the public moneys that came into his hands*, when thereunto legally required by the county. The accused was acquitted January 6, 1904, on all the counts except the fourth, eighth and twelfth, and on those counts he was convicted. On appeal to the Superior Court the conviction was sustained, 25 Pa. Superior Ct. 526, but on appeal from that court to the Supreme Court of Pennsylvania the judgments of conviction in both the lower courts were reversed June 22, 1905, and the accused was discharged from the recognizance

which he had executed. *Commonwealth* v. *Shoener*, 212 Pa. St. 527.

In the opinion of the Supreme Court it was stated that the only demand ever made on the accused was in a letter to him from the County Controller, under date of December 30, 1902. But that demand, the court said, was made at a time when the question of the right of the accused to retain the moneys he had retained was, by agreement of the county, pending and undecided in the civil court. The court, after observing that it was competent for the county to have entered into such an agreement, said (p. 531): "How could any demand have been made at that time that the defendant was bound to heed? . . . The failure to pay on demand, as contemplated by the statute under which he is indicted, is a failure to pay that which, at the time the demand is made, clearly belongs to the county making the demand, and does not apply to a case where demand is made to pay during the pendency of the dispute as to who is entitled to the money, and which dispute, by the agreement of both parties to it, is pending determination in the courts. . . . In refusing to pay over at the time the alleged demand was made he did just what any other man, similarly situated and with due regard to his rights, would have done; and it is a perversion of the sixty-fifth section of the Act of March 31, 1860, to attempt to apply it to a case like this. The only evidence of a demand to pay over was the [Controller's] letter. This was written, and received by the appellant, at a time when the county, by its own agreement, could not have enforced any civil liability against him, and in refusing to comply with the notice to pay he was standing on his right not to do so until it was determined that the county was entitled to receive the money. The learned trial judge charged the jury that the institution of the suit in Common Pleas of the county was a legal demand for the payment of the money, and should be regarded as such demand in the prosecution of the appellant on the counts charging him with failure to pay over on demand. In the civil courts constructive de-

mands may be and are recognized, but not so in a criminal court in the prosecution for an offense having as one of its statutory ingredients a refusal to pay on demand. A demand there means actual demand. The only actual demand that the Commonwealth pretends to have made was the Controller's letter. It was written after the institution of the civil suit and after the distinct agreement by the county that the question of the defendant's liability should be judicially determined. Before being so determined there was no liability to be enforced against him civilly, and, therefore, no demand to be made upon him that he was bound to recognize. He has been acquitted on the counts charging him with a conversion of the public funds to his own use, and there was *no evidence to sustain the conviction on the charge that he had failed to pay over after having been thereunto legally required on demand made.* The eleventh assignment complains of the error of the court below in instructing the jury that there had been legal demand made upon the defendant to pay over the fees. This assignment should have been sustained. If there had been proper instructions as to a legal demand, the defendant would have been acquitted on the counts on which he was convicted. The remaining assignments need not be considered. The judgment of the Superior Court is reversed, as is that of the court below, and the defendant is discharged from his recognizance."

Subsequently, on June 30, 1905, the county made another and formal demand upon Shoener to pay over $7,243.28, that being the balance of the fees or moneys then retained by him, and ascertained, on auditing of his accounts, to belong to the county. This demand was disregarded and, on September 4, 1905, the present new indictment was found, charging only one of the offenses specified in the statute, namely, that the accused had failed, on demand, to pay into the county treasury the above sum of $7,243.28.

The defendant pleaded, among other things: that the present indictment was for the same offense as that specified in the first indictment; that his acquittal on the first nine counts of the

former indictment was an acquittal of the charge contained in the present indictment, and that after the reversal of the judgment of conviction on the fourth, eighth and twelfth counts he could not be again prosecuted for the same offense.

Referring to the opinion of the Supreme Court in the former prosecution, the trial court, in its charge to the jury, said: "When that opinion was filed in the Supreme Court of Pennsylvania, and subsequently here, and the proceedings of the previous trial were reversed, there was no crime that this defendant was called upon to answer for because the Supreme Court declared that the demand that had been made upon him was illegal, had no right to be made, and he was not bound to obey it, and therefore not bound to pay over the money when they called on him in December, 1902, because the county had no right to call on him then for this money, but they were bound to wait until after the Supreme Court as well as this court decided the question of whether or not he had any claim or right to that money. . . . Now, gentlemen of the jury, under this state of facts, I come to the conclusion that there was no crime to try when he was tried before; that the crime that is now tried in this indictment exists only since the actual demand was made, which the language of that Supreme Court opinion requires to be made before he is required to pay over."

The defendant was convicted and sentenced to imprisonment for two and a half years.

The judgment of conviction was affirmed (*Commonwealth* v. *Shoener*, 30 Pa. Superior Ct. 321; 216 Pa. St. 71), the Supreme Court saying (216 Pa. St. 80): "In support of his plea of *autrefois acquit*, the appellant relies upon our reversal of the former judgment against him. The jury on the trial of the first indictment found him guilty of having failed to pay over the license fees in his hands after demand had been made upon him to do so. Our reversal of the judgment on that verdict did not acquit him of the offense charged against him in the present indictment. All that we decided was, that, as the county of Schuylkill could not, at the time the prosecution was instituted,

have made a legal demand upon the appellant for the payment of the fees in his hands, the statutory offense of failing to pay over *had not been committed.* He was discharged from his recognizance simply because the prosecution against him had been instituted before the offense charged against him *was or could have been committed under the admitted facts of the case.* He was, therefore, never in jeopardy. If, after his conviction, the court below had arrested judgment on the verdict, he would have been in the same situation in which our reversal of it placed him, but he could not have pleaded the arrest of the judgment as a bar to a new indictment against him for an offense subsequently committed, for he never was in peril."

The plaintiff insists that his trial and conviction on the present indictment would subject him to jeopardy a second time for the offense of having failed to pay over on proper demand, thereby depriving him of his liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Mr. William Wilhelm and *Mr. E. B. Sherrill,* with whom *Mr. Charles A. Douglas,* was on the brief, for plaintiff in error:

By his trial and conviction on the second indictment, plaintiff in error has been twice placed in jeopardy for the same offense.

By long settled practice, as well as by express statutory enactment, the power of the Supreme Court of Pennsylvania over the decrees and judgments of inferior courts of the State is plenary. Where error is committed the Supreme Court is not compelled to remand the case to the lower court for a new trial, but it is given power in such case to itself do what the trial court should have done. This power is expressly conferred by the act of the General Assembly of Pennsylvania of May 20, 1901.

The power expressly conferred by this act had been exercised by the Supreme Court for many years prior to the passage of the act. *Drew* v. *Commonwealth,* 1 Whart. 281; *Daniels* v.

Commonwealth, 7 Barr, 371; *Clellans* v. *Commonwealth*, 8 Pa. St. 223; *Beale* v. *Commonwealth*, 25 Pa. St. 11.

The trial court should have directed a verdict for the defendant, but it having failed to do so, the Supreme Court, by virtue of the powers vested in it, proceeded to do what the trial court should have done, and instead of remanding the case, reversed the judgment and directed the discharge of plaintiff in error, as effectually disposing of the charge against plaintiff in error as if he had been acquitted by the verdict of the jury on all of the counts of the indictment.

The crime of embezzlement with reference to this license money was committed, if committed at all, prior to the finding of the indictment in the first case, and as plaintiff in error was acquitted in that case of the charge of embezzling that money, he cannot be tried in this case on the charge of embezzling the same identical money, but is protected by the constitutional provision against double jeopardy. Bishop, Criminal Law, Vol. 1, § 1042, *et seq.; Shepherd* v. *People*, 25 N. Y. 406.

The sentence under which plaintiff in error now rests puts him twice in jeopardy for the same offense, and such double jeopardy abridges his privileges and immunities as a citizen of the United States and deprives him of his liberty without due process of law.

Due process of law requires the observance of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *In re Kemmler*, 136 U. S. 436; *Allen* v. *Georgia*, 166 U. S. 138; *Howard* v. *Kentucky*, 200 U. S. 164.

Mr. Guy E. Farquhar and *Mr. C. E. Berger*, with whom *Mr. Irvin A. Reed*, was on the brief, for defendant in error.

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

The contention that, by the judgment of the Supreme Court of Pennsylvania, the plaintiff in error has been deprived of a

right secured to him by the Constitution of the United States must be overruled. He has not been twice placed in jeopardy for the same offense. Upon the hearing of the case arising out of the first indictment the Supreme Court of Pennsylvania, construing the statute under which the defendant was prosecuted, and looking at the undisputed facts appearing of record, adjudged that he had not then committed any criminal offense; that he had not failed to pay over moneys belonging to the county upon any demand, disregard of which subjected him to criminal liability; consequently, it was held that no valid judgment of conviction could have been rendered against him in the first prosecution for failing to pay over the moneys in question, or any part thereof, on the particular demand shown in the record of that prosecution. These were questions of local and general law which it was the province of the Supreme Court of Pennsylvania to determine conclusively for the parties. They presented no question of a Federal nature.

Assuming, then, that no valid judgment could have been rendered against the accused upon the first indictment for disregarding the demand upon which that indictment was based, it necessarily follows, as held by the Supreme Court of Pennsylvania, that that prosecution did not put the accused in jeopardy in respect of the particular offense specified in the last indictment. That offense was never committed until the demand of June 30, 1905 was disregarded. The defense of double jeopardy could not be sustained unless we should hold that the charge against Shoener in the first indictment could be sustained under the statute. But we cannot so adjudge without disregarding altogether the decision of the Supreme Court of Pennsylvania and without holding that an accused is put in peril by a prosecution which could not legally result in a conviction for crime. It is an established rule that one is not put in jeopardy if the indictment under which he is tried is so radically defective that it would not support a judgment of conviction, and that a judgment thereon would be arrested on motion. So where the defense is that the accused was put

in jeopardy for the same offense by his trial under a former indictment, if it appears from the record of that trial that the accused had not then or previously committed and could not possibly have committed any such crime as the one charged, and therefore that the court was without jurisdiction to have rendered any valid judgment against him—and such is the case now before us—then the accused was not, by such trial, put in jeopardy for the offense specified in the last or new indictment.

As it was thus correctly decided that the accused was not, by the present indictment, put in jeopardy for the second time for the same offense, we need not go further or consider any question of a Federal nature, and the writ of error must be dismissed.

It is so ordered.

CORTELYOU *v.* CHARLES ENEU JOHNSON & COMPANY.

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

No. 32. Argued October 31, November 1, 1907.—Decided December 2, 1907.

In this case this court follows the unanimous opinion of the Circuit Court of Appeals that defendant did not have sufficient notice of the license restriction to be charged with contributory infringment, even if that doctrine exists, for selling ink to the vendee of a patented printing machine, sold under a license restriction that it should be used only with ink made by the patentee.

Where none of the executive officers of a manufacturing corporation knew of the license restriction under which a patented machine was sold, notice to a salesman, who was not an officer or general agent of the corporation, was held insufficient to charge the corporation with notice as to future sales of the article manufactured by it to the licensee and used by the latter in violation of the license restriction.

142 Fed. Rep. 933, affirmed.

THE facts are stated in the opinion.

Mr. Edmund Wetmore and *Mr. Samuel Owen Edmonds* for petitioners:

Defendant had notice of the license restriction imposed upon the use of other inks than that manufactured by complainants.

In order to secure the proof of the acts complained of, there was nothing for complainants to do save what they had done in every one of the preceding cases, and that was to afford the defendant an opportunity to corrupt a licensee, and if it took advantage of such opportunity, to make the transaction the basis of suit. And this is what the complainants did. In doing so, they followed a course which has not only been followed by others for many years but which has also been expressly approved by the courts, who had in mind the difficulties confronting a complainant as above suggested and the necessity for obtaining strict proof of an infringing transaction as the basis of suit or motion for preliminary injunction. *Chicago Pneumatic Tool Co.* v. *Philadelphia Pneumatic Tool Co.*, 118 Fed. Rep. 852; *Badische Anilin* v. *Klipstein*, 125 Fed. Rep. 556; *Lever Bros.* v. *Pasfield*, 88 Fed. Rep. 485; *Samuel Bros. & Co.* v. *Hostetter*, 118 Fed. Rep. 258; *Knowles* v. *Peck*, 42 Connecticut, 386, 395; *Dick* v. *Henry*, 149 Fed. Rep. 429; *Tompkins* v. *Mattress Co.*, 154 Fed. Rep. 670.

The question of notice to the defendant sifts down, in the last analysis, to the inquiry as to whether or not, under the proofs before the court, the defendant sold its ink with guilty intent, *i. e.* with intent that it be unlawfully used upon the licensed machines in question. Under such circumstances defendant need not even be shown to have actually made such a sale. The intent to do so is what governs. *German Filter Co.* v. *Loew Co.*, 103 Fed. Rep. 306, aff'd., 107 Fed. Rep. 950; *Stearns* v. *Phillips*, 43 Fed. Rep. 795; *Thomson Co.* v. *Ohio Co.*, 80 Fed. Rep. 723; *Rupp* v. *Elliott*, 131 Fed. Rep. 732; *Canœda* v. *Michigan Co.*, 124 Fed. Rep. 489; *Button Fastener Case*, 77 Fed. Rep. 297; *Goodyear Co.* v. *Jackson*, 112 Fed. Rep. 148; *Tubular Co.* v. *O'Brien*, 93 Fed. Rep. 201; *Celluloid Co.* v. *Zylonite Co.*, 30 Fed. Rep. 440; *Thomson Co.* v. *Kelsey Co.*, 72 Fed. Rep. 1017; *Wil-*

lis v. *McCullen*, 29 Fed. Rep. 641; *Schneider* v. *Pountney*, 21 Fed. Rep. 399; *Cutter Co.* v. *Union Co.*, 147 Fed. Rep. 275; *New York Co.* v. *Jackson*, 91 Fed. Rep. 426; *Coolidge* v. *McCoue*, 1 B. & A. 83.

This guilty intent may be proved in various ways. Where the article complained of is incapable of other (and lawful) use, such intent flows as a necessary inference from its sale or offer for sale. Solicitation of purchasers by advertisements, circulars, etc., is another form of adequate proof of such intent. *Willis* v. *McCullen*, 29 Fed. Rep. 641; *Municipal Co.* v. *National Co.*, 107 Fed. Rep. 289. In such cases the unlawful intent is presumed, the presumption being based upon the defendant's wrongful assertion of the right to make the sales complained of, combined with the belief that, unless restrained, such sales will in fact be made.

Defendant, in its answer, insists upon its right to sell its ink to complainants' licensees, asserting the licenses to be illegal, unenforceable and contrary to public policy. It is obviously to establish this right, and to be permitted to continue its sales to licensees, that it has defended and is defending this suit.

Mr. Francis T. Chambers, for respondent.

Mr. Justice Brewer delivered the opinion of the court.

This is a suit to restrain an alleged infringement of a patent granted June 22, 1897, for the stencil duplicating machine known as the rotary Neostyle. The plaintiffs below, petitioners here, represent the entire interest in the patent. There is no claim of any infringement by using or selling the patented machines, but of an indirect infringement in the following manner: For the last few years the rotary Neostyle has been sold subject to this license, which was plainly disclosed on the baseboard of the machine: "License agreement. This machine is sold by the Neostyle Company with the license restriction that it can be used only with stencil paper, ink and other supplies made by the Neostyle Company, New York city."

The defendant company (which is engaged in the manufacture and sale of ink) is, it is contended, engaged in selling ink to the purchasers of these machines for use thereon; that it is thus inducing a breach of the license contracts and is responsible as indirectly infringing the patent rights of plaintiffs. The Circuit Court sustained the contention and entered an interlocutory decree for an injunction and an accounting. 138 Fed. Rep. 110. On appeal the Circuit Court of Appeals for the Second Circuit reversed this decree and remanded the case to the Circuit Court, with instructions to dismiss the bill (145 Fed. Rep. 933; 76 C. C. A. 455), whereupon the case was brought here on certiorari.

The three judges of the Circuit Court of Appeals concurred in reversing the decree of the Circuit Court on the ground that the evidence was not sufficient to show that the defendant had notice that the machines for which the ink was ordered had been sold under any restrictions, but they differed upon the question whether there was any liability in case sufficient notice of the license agreement had been brought home to the defendant. The majority were of the opinion that the doctrine of contributory infringement, which they conceded to exist, should not be extended beyond those articles which are either parts of a patented combination or device, or which are produced for the sole purpose of being so used, and should not be applied to the staple articles of commerce. In that view of the case the article supplied being ink, a thing of common use, its sale to a purchaser of the Neostyle machine would be no infringement.

While in *Bement* v. *National Harrow Company*, 186 U. S. 70, this court held, in respect to patent rights, that with few exceptions "any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts," it is unnecessary to consider how far a stipulation in a contract between the owner of a patent right and the purchaser from him of a machine manufactured under that right, that it should

be used only in a certain way, will sustain an action in favor of the vendor against the purchaser in case of a breach of that stipulation. So, although "if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer," *Angle* v. *Chicago, St. Paul &c. Railway*, 151 U. S. 1, 13, it is also unnecessary to determine whether this states the full measure of liability resting upon a party interfering and inducing the breaking of a contract, for we concur in the views expressed by all the judges of the Court of Appeals that there is no sufficient evidence of notice. True, the defendant filled a few orders for ink to be used on a rotary Neostyle, but it does not appear that it ever solicited an order for ink to be so used, that it was ever notified by the plaintiffs of the rights which they claimed, or that anything which it did was considered by them an infringement upon those rights. Further, none of the chief executive officers of the company had knowledge of the special character of the rotary Neostyle machine or the restrictions on the purchase of supplies. The case of the plaintiffs in this respect rests mainly on the testimony of the witness, Gerber, who testified that at the instance of the manager of the Neostyle Company he wrote to the defendant for a one-pound can of black ink for use on the rotary Neostyle, saying, "I will be at my office Friday afternoon, between 1:30 and 3:30, and if convenient have your representative call at that time." A salesman of the defendant, named Randall, did call. The witness directed Randall's attention to the restrictions on the single machine he had in his office, and asked if he would have any trouble with the Neostyle Company if he used the defendant's ink. Randall replied in the negative, and added that "the ink in question was not patented, that anybody could make or use it; that no trouble would come to me from the use of the ink which he sold." The restriction on the machine shown to Randall was one formerly used by plaintiffs, but which had been discarded prior to this transaction and for it the present license agreement

had been substituted. The restriction shown to Randall stated that the machine was sold "with the express understanding that it is licensed to be used only with stencil paper and ink (both of which are patented) made by the Neostyle Company of New York city." Evidently from his reply Randall's attention was drawn to the question of a patent on the ink. Further he was not an officer or general agent of the defendant company, but simply a salesman and it cannot be that this talk with him is notice to and binding on his principal in respect to all future transactions.

After reviewing all the minor considerations to which our attention has been called by the plaintiffs, we see no sufficient reason for disagreeing with the unanimous opinion of the Circuit Court of Appeals in respect to the matter of notice, and its decree is

Affirmed.

VAIL *v.* TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 67. Argued November 15, 1907.—Decided December 2, 1907.

Stare decisis is a wholesome doctrine, and, while not of universal application, is especially applicable to decisions affirming the validity of securities authorized by statute. Such decisions should be regarded as conclusive even as to those not strictly parties so as to prevent wrong to innocent holders who purchased in reliance thereon.

Where bonds of a county have been declared valid in a suit of which the county had knowledge, and was heard although not a party thereto, while the question may not be *res judicata* as against the county in a subsequent suit in which it is a party, under the doctrine of *stare decisis* the question should no longer be considered an open one.

The decisions of this court in *Utter* v. *Franklin*, 172 U. S. 416, and *Murphy* v. *Utter*, 186 U. S. 95, adhered to under the doctrine of *stare decisis*.

85 Pac. Rep. 652, affirmed.

THE facts are stated in the opinion.

Mr. Samuel L. Kingan, with whom *Mr. William Herring* was on the brief, for appellants:

The Supreme Court of Arizona felt bound upon all points raised in this case, save one, by the rule of *stare decisis,* that one being the compulsory character of the act. The rule was held applicable not by reason of the former decisions of the Arizona court, but because of the decisions of this court, and evidently the decisions in the mind of the court were *Utter* v. *Franklin,* 172 U. S. 416, and *Murphy* v. *Utter,* 186 U. S. 95. The Arizona court quite misconceived the meaning of *stare decisis* and the effects of the rule.

Not only must the point have been adjudicated, but it would appear that the precise point must have been agitated. By this we mean: That if it appear that the court should not have had presented to it a certain precise point in the earlier case, but such is presented in the case in being, the former case is not *stare decisis. Hart* v. *Burnett,* 15 California, 598; *Foxcroft* v. *Mallett,* 4 How. 355; *Boyd* v. *Alabama,* 94 U. S. 648.

The question of the validity, under the Constitution, of the acts of Arizona and of Congress was not presented, considered or adjudicated in *Utter* v. *Franklin,* 172 U. S. 416, nor in *Murphy* v. *Utter,* 186 U. S. 95. The doctrine of *stare decisis* does not apply.

Nor is the doctrine of *res judicata,* as distinguished from *stare decisis,* applicable. The estoppel can only apply as between the same parties and their privies, and upon the same claim or demand, and which particular demand or claim has been contested. The parties to the suits of *Utter* v. *Franklin* and *Murphy* v. *Utter, supra,* were Utter and his privies and the loan commission of Arizona and its privies, and they would be bound upon only contested points, upon the same claims and demands. In this action Utter and his privies are not parties; the action is between the Territory of Arizona and Pima County; the claim and demand is entirely different, and the issues here have not been contested in any suit or court. *Outram* v. *Morewood,* 3 East, 346—opinion of Lord Ellenborough;

Carter v. *James*, 13 M. & W. 137–147; *Cromwell* v. *County of Sac*, 94 U. S. 351–353, 356, 361 and 363; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610, 617; *Davis* v. *Brown*, 94 U. S. 423, 428; *Craft* v. *Perkins*, 83 Georgia, 760; *Howard* v. *Kimball*, 65 Maine, 308; *Smith* v. *Sherwood*, 4 Connecticut, 276; *Watts* v. *Watts*, 160 Massachusetts, 464; *Jacobson* v. *Miller*, 41 Michigan, 90—opinion by Cooley.

Mr. William C. Prentiss, with whom *Mr. E. S. Clark* and *Mr. Horace F. Clark*, were on the brief, for appellee.

Mr. Justice Brewer delivered the opinion of the court.

This was an application by the appellee, the Territory of Arizona, for a mandamus to compel the appellants, the supervisors of Pima County, to levy a tax to pay the interest due on certain bonds. The facts are these: In 1883 an act was passed by the territorial legislature (Laws Ariz., 1883, p. 61), directing Pima County to exchange its bonds for those of the Arizona Narrow Gauge Railroad Company. The amount of the bonds and the conditions of exchange were specified in the act. One hundred and fifty thousand dollars of bonds were so exchanged. Pima County denied its liability on the bonds, refused to pay the interest coupons and an action was brought thereon, which finally reached this court. *Lewis* v. *Pima County*, 155 U. S. 54. The act was held to be in violation of the restrictions imposed upon territorial legislatures by § 1889, Rev. Stat., as amended by the act of Congress of June 8, 1878, chap. 168 (20 Stat. 101), and the bonds were adjudged void. Subsequently, by acts of Congress and the territorial legislature, provision was made for the issue of Territorial, in exchange for these, bonds and for the payment of the principal and interest thereof by the county. The validity of this legislation came before us in *Utter* v. *Franklin*, 172 U. S. 416, where the different acts are fully stated. We sustained it, and adjudged that it was the duty of the loan commissioners to re-

fund the bonds. In *Murphy* v. *Utter*, 186 U. S. 95, the ruling was reaffirmed, and it was held that neither a change in the personnel of the loan commission nor an act of the legislature of Arizona abolishing the commission put an end to the duty of refunding.

The refunding having been made, the Territory thereafter called upon Pima County to pay the interest which the Territory had paid on the funded bonds. Upon its refusal to pay, this application was made to the Supreme Court of the Territory and it granted a mandamus, and from that decision the appellants have brought the case here. They challenge the validity of the refunding legislation, while the appellee contends that the matter is *res judicata*, or if not should, upon the doctrine of *stare decisis*, be regarded as foreclosed. In the two cases, 172 and 186 U. S., in which the validity of the refunding legislation was considered, Pima County was not nominally a party. The actions were brought by the holders of the bonds against the loan commission. Whether the county was technically bound by the decisions may be a question. It was heard by its attorney in the litigation, and was the party ultimately to be affected by the refunding. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273. But if it be not so bound, still under the doctrine of *stare decisis* the question should no longer be considered an open one. The county had full knowledge of the entire litigation, having been a party in the first action and been represented by its attorney in the last two. Any defense which could be made to the refunding of the bonds and the validity of the refunding legislation could have been raised in the last cases. This court considered every question that was presented, determined that the legislation was valid, and ordered that the bonds should be refunded. They have been refunded. They have gone into the channels of trade, and now after many years—for the case of *Utter* v. *Franklin* was decided in 1899—and when it is fair to presume that many have bought, relying upon the conclusiveness of the adjudication by this court, it might work a grievous wrong to overthrow those decisions and

hold the bonds void. *Stare decisis* is a wholesome doctrine. It is not of universal application, and there have been cases where a ruling once made was wisely changed; but when the decision is one affirming the validity of bonds, notes or bills of a limited amount, the issue of which had been in terms authorized by statute, such decision should generally be held conclusive, even as to those not strictly parties to the litigation, for otherwise, as we have said, much wrong might be done to innocent holders who bought in reliance upon the decision. We are of the opinion that the Supreme Court of Arizona was right, and its judgment is

Affirmed.

BITTERMAN v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

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

No. 34. Argued November 4, 1907.—Decided December 2, 1907.

Railroad companies have the right to sell non-transferable reduced rate excursion tickets, *Mosher* v. *Railroad Co.*, 127 U. S. 390; and the non-transferability and forfeiture embodied in such tickets is not only binding upon the original purchaser and any one subsequently acquiring them but, under the provisions of § 22 of the act to regulate commerce, 24 Stat. 387, 25 Stat. 862, it is the duty of the railroad company to prevent the wrongful use of such tickets and the obtaining of a preference thereby by anyone other than the original purchaser.

An actionable wrong is committed by one who maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, *Angle* v. *Chicago & St. Paul Railway Co.*, 151 U. S. 1; and this principle applies to carrying on the business of purchasing and selling non-transferable reduced rate railroad tickets for profit to the injury of the railroad company issuing them, and this even though the ingredient of actual malice, in the sense of personal ill will, does not exist.

When, as in this case, the dealings of a class of speculators in non-transferable

tickets have assumed great magnitude, involving large cost and risk to the railroad company in preventing the wrongful use of such tickets, and the parties so dealing in them have expressly declared their intention of continuing so to do, a court of equity has power to grant relief by injunction.

Every injunction contemplates the enforcement, as against the party enjoined, of a rule of conduct for the future as to the wrongs to which the injunction relates, and a court of equity may extend an injunction so as to restrain the defendants from dealing not only in non-transferable tickets already issued by complainant, but also in all tickets of a similar nature which shall be issued in the future; and the issuing of such an injunction does not amount to an exercise of legislative, as distinct from judicial, power and a denial of due process of law.

Whether the jurisdictional amount is involved is to be determined not by the mere pecuniary damage resulting from the acts complained of, but also by the value of the business to be protected and the rights of property which complainants seek to have recognized and enforced. *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322.

Where defendants do not formally plead to the jurisdiction it is not incumbent upon complainant to offer proof in support of the averment that the amount involved exceeds the jurisdictional amount as to each defendant.

No adequate remedy at law exists to redress the wrong done to a railroad company by wrongfully dealing in vast numbers of its non-transferable reduced rate excursion tickets which will deprive the company of its right to resort to equity to restrain such wrong dealings.

An action against a number of defendants is not open to the objections of multifariousness and of misjoinder of parties if the defendants' acts are of a like character, the operation and effect whereof upon the rights of complainants are identical and in which the same relief is sought against all defendants, and the defenses to be interposed are necessarily common to all defendants and involve the same legal questions. *Hale* v. *Allinson*, 188 U. S. 56, 77.

144 Fed. Rep. 34, affirmed.

Upon a bill filed on behalf of the Louisville and Nashville Railroad Company, the Circuit Court of the United States for the Eastern District of Louisiana entered a decree perpetually enjoining the petitioners herein and four other ticket brokers, engaged in business in the city of New Orleans, from dealing in non-transferable round trip tickets issued at reduced rates for passage over the lines of railway of the complainant on account of the United Confederate Veterans' Reunion and the Mardi Gras celebration held in the city of New Orleans in the

years 1903 and 1904 respectively. On an appeal prosecuted by the railroad company complaining of the limited relief awarded, the Circuit Court of Appeals held that the defendant should also be enjoined generally from dealing in non-transferable round trip reduced rate tickets whenever issued by the complainant, and ordered the cause to be remanded to the Circuit Court with directions to enter a decree in accordance with the views expressed in the opinion. 144 Fed. Rep. 34. A writ of certiorari was thereupon allowed.

We summarize the averments of the complaint and answer. It was averred in the bill that complainant was a Kentucky corporation, operating about three thousand miles of railway for the carriage of passengers, baggage, mail, express and freight, its lines of road extending from New Orleans through various States, and making connections by which it reached all railroad stations in the United States, Canada and Mexico. The seven persons named as defendants were averred to be citizens and residents of Louisiana, each engaged in the city of New Orleans as a ticket broker or scalper in the business of buying and selling the unused return portions of railroad passenger tickets, especially excursion or special rate tickets issued on occasions of fairs, expositions, conventions and the like. It was further averred that the defendants were joined in the bill, "because their business and transactions complained of are in act, purpose and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them."

Six articles or paragraphs of the bill related to an approaching reunion of United Confederate Veterans to be held in the city of New Orleans, which it was expected would necessitate the transportation by the railroads entering New Orleans of one hundred thousand visitors, one-fourth of which number would pass over the lines of railway of the complainant. A necessity was alleged to exist for special reduced rates of fare to secure a large attendance at such reunion, and it was averred that a rate of one cent a mile, one-third the regular rate, had

been agreed upon for non-transferable round trip reduced rate tickets which were to be issued for the occasion, and it was stated "that among the conditions on the face of said ticket, which ticket contract is signed by the original purchaser and the company, is one, that said ticket is non-transferable, and if presented by any other than the original purchaser, who is required to sign the same at date of purchase, it will not be honored but will be forfeited, and any agent or conductor of any of the lines over which it reads shall have the right to take up and cancel the entire ticket." And for various alleged reasons, based mainly upon the large number of expected purchasers, it was averred that the return portion of each ticket was not required to be signed by the original purchaser or presented to an agent of the complainant in the city of New Orleans for the purpose of the identification of the holder as the purchaser of the ticket.

It was averred that each defendant was accustomed to buy and sell the return coupons of non-transferable tickets, for the express purpose, and no other, of putting them in the hands of purchasers to be fraudulently used for passage on the trains of complainant, and it was further averred that the defendants intended in like manner to fraudulently deal in the return portion of the tickets about to be issued for the reunion in question, and that complainant would sustain irreparable injury, for which it would have no adequate remedy at law, unless it was protected from such wrongful acts. It was further averred that unless relief was given the complainant would be compelled to abandon the making of reduced rates for conventions or other assemblies to be held in the city of New Orleans. Averments were also made as to the additional burden which would be cast upon complainant's conductors and train collectors by reason of the practice complained of, the danger which would arise of a multiplicity of suits for damages by reason of errors of such employés in endeavoring to prevent the fraudulent use of such tickets, and it was averred that it would be impossible, in many in-

stances, to discover the persons who were wrongfully traveling upon the tickets and who were bound to pay the lawful and reasonable one way rate for their transportation. The impossibility of securing evidence establishing the facts as to said fraud, the necessity, if such evidence could be obtained, of bringing a multiplicity of suits if a remedy at law was availed of, and the impracticability of estimating in dollars and cents the injury to its business, was set forth as making the remedy at law inadequate, and in addition it was charged that the defendants were financially irresponsible. The existence was also averred of various ticket brokers' associations, the members of which acted in concert. It was averred that a large part of the stock in trade of all ticket brokers and scalpers was the disposal of non-transferable railroad tickets, and it was further averred that ticket brokers and scalpers usually sought to avoid injunctions prohibiting the dealing in such tickets by assigning their business to some other ticket broker not named in the order, and it was averred that in order to afford complete and effective relief "the restraining injunctive orders should be broad enough to include all who knowingly do what the order of court prohibits defendants from doing or who aid or abet defendants in violating the injunction or in defeating the objects and purposes thereof." Finally, it was alleged that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of five thousand dollars, and that the value of the business, which was sought to be protected, and the rights which the complainant asked to have recognized and enforced, exceeded in the case of each defendant the sum of five thousand dollars, exclusive of interest and costs.

In addition to asking a temporary restraining order the bill prayed that defendants, their agents, etc., "and all other persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the entry of the restraining order and the existence of the injunction herein," should be perpetually enjoined "from buying, selling, dealing

in or soliciting the purchase or sale of any ticket or tickets or the return coupons or unused portions thereof issued by orator or by any other railroad company for use over orator's lines of railway or any part of them which by the terms thereof are non-transferable, or from soliciting, advertising, encouraging or procuring any person other than the original purchaser of such tickets, to use or attempt to use said tickets for passage on any train or trains of orator, especially including the non-transferable round-trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903."

Of the seven persons made defendants, three only appeared and answered, viz., Marcus K. Bitterman, Julius Mehlig and Charles T. Kelsko, the petitioners in this court, on whose behalf a joint and several answer was filed.

The averments of the bill in respect to the citizenship of the complainant and the character and extent of its railway business was admitted. It was also admitted that the answering defendants were citizens and residents of Louisiana, but it was averred that they were each separately engaged in the ticket brokerage business, duly licensed to conduct such business by the State of Louisiana and the city of New Orleans, and it was expressly denied that the business operations and transactions of all the defendants named in the bill were in act, purpose and effect identical. So also the answer admitted the averments of the bill in respect to the proposed reunion, the large attendance expected, the issue of reduced rate non-transferable tickets and the necessity therefor, and the impracticability of requiring the signing of the return portion of each ticket by the purchaser.

It was admitted in the answer that the tickets usually issued by complainant and its connections when making reduced rates as to excursion tickets purported to be non-transferable and upon condition that if presented by other than the original purchaser, who was supposed to sign the same at the date of purchase, it would not be honored, but would be forfeited, and

that any agent or conductor should have the right to take up and cancel such ticket if presented for passage. In various paragraphs these restrictions or conditions were assailed as impracticable, unenforcible and unlawful, and without consideration, and it was averred that the conditions were never enforced, and that the tickets were issued and bought with that understanding, and that no damage was caused to complainant by a person other than the original purchaser of a non-transferable reduced rate ticket, traveling upon the return portion of such ticket, and that no loss or damage could be caused complainant by reason of the expected dealing by defendants in the reunion tickets referred to in the bill.

It was not only admitted in the answer that the answering defendants had in the past dealt in non-transferable railroad tickets issued by the complainant, but it was expressly declared to be their intention to continue the practice, particularly in respect to the tickets issued on account of the approaching reunion, and coupled with such averment it was asserted that no fraud would be committed or was intended in respect to the dealing in such tickets. We insert in the margin[1] portions of the answer relating to such admissions.

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[1] IX.

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Respondents further admit that, in accordance with the general custom of the trade, they separately buy and sell the return coupons of railway tickets, whether the same are stamped "non-transferable" or not, for the reason that the term "non-transferable" does not import any practical or legal meaning in the business, according to the common understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers who in turn sell them to other persons desiring to use said tickets for transportation, when genuine and *bona fide*.

* * * * * * * *

Respondents do not deny that the complainant, on occasions of Mardi Gras festivals in the city of New Orleans, have joined in the issuing of reduced rates and the putting out of said so-called "non-transferable" tickets, but, as above set out, the general traveling public, the railways, and the ticket brokers, by common consent, by usage, and by understanding, have

It was denied that the answering defendants were insolvent, but, on the contrary, it was averred that each was able to pay any judgment for damages which might be recovered against him. Denial was made of the allegation of the bill that the

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all treated said tickets as articles of property, and as negotiable and transferable to any person desiring to purchase and travel on the same when genuine and *bona fide;* and respondents deny that these respondents have ever fraudulently dealt in the return coupons of such tickets, or that complainant has ever been damaged in respect thereto, by any act of respondents.

X.

Respondents admit that it is their hope and expectation to buy and sell the return portions of said U. C. V. Reunion tickets, but they deny that they will solicit, induce, or persuade the holders thereof to sell such return portions to respondents upon any false or fraudulent pretense or representation upon the part of respondents.

Respondents admit that they, in common with the general public, have some knowledge of the character and terms of the proposed tickets; that they are informed and believe that such tickets will be issued at low rates, to induce and enable the traveling public to attend said reunion in large numbers; that respondents expect to offer the same for sale, if they shall acquire any of said tickets, and will sell such tickets to persons other than the original purchasers, for such price as they are willing to pay, and that it is no concern of complainant or its connections, or other railways, whether respondents make a profit or a loss in the proposed dealing in said U. C. V. Reunion tickets.

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XIV.

Respondents admit that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions, or other public gatherings, and that the tickets which are usually issued by complainant purport by their terms to be non-transferable and to constitute a so-called "special contract" in express terms between complainant, the lines issuing the same, all other lines over which the same entitle the holders to travel, and the original purchasers of said tickets, whereby the said original purchasers are forced to agree that said tickets shall not be transferred by them to any other persons; but respondents show that said tickets, when issued by complainant and its connecting lines and other railways, on such occasions as expositions, reunions, conventions, Mardi Gras, and the like, are in practice and general consent and common understanding of the traveling public, the railways, and the ticket brokers, when *bona fide* and genuine tickets, good for the return passage over the lines of said complainant and its connections and other railways, in the

willingness or ability of the complainant to continue issuing special rate tickets would be affected by the failure to obtain the relief sought by the bill, and, in the main, the averments of the article of the bill relating to various ticket brokers' associations were also denied.

As a distinct ground for denying the relief prayed, it was alleged in various forms that the issue of the proposed non-transferable tickets was the result of an unlawful confederation or combination between the various railroads whose roads entered into the city of New Orleans.

Upon the bill and answer a preliminary injunction was issued, restraining the dealing in non-transferable tickets issued for the approaching United Confederate Veterans' Reunion. Replication was duly filed to the answer. Subsequently, upon depositions taken in the cause, and upon affidavit showing the character of non-transferable tickets proposed to be issued

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hands of the holders thereof, whether such holders be the original purchasers or not; that such practice and such understanding are common and general all over the United States; that such tickets are sold and dealt in as legitimate business in every large city, to the knowledge of the complainant, and such tickets are and have been for many years sold by complainant with full knowledge of the fact that they are in practice and general understanding of the traveling public good in the hands of any holder.

XV.

Respondents jointly and severally admit that each of them are and have been for some time separately engaged in the lawful business of buying, selling and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to respondents, with the intent and purpose that such tickets shall be used by the second purchaser thereof, but respondents deny that such use is a violation in law or in fact of the terms thereof. And respondents deny any knowledge that such use of said tickets by persons other than the original holders, is any fraud upon complainant or the railways issuing such tickets when the same are genuine and *bona fide*—and respondents again aver that it is a matter of no concern or interest to the complainant or the railways issuing such tickets, whether the original purchasers are the holders and presenters of the same, or whether the holder has purchased said ticket from the original purchaser, or whether such holder has purchased the same from a ticket broker, or whether, as frequently happens, one of such tickets is accidentally or otherwise exchanged for another of the same class and form.

for an approaching Mardi Gras festival, a further injunction *pendente lite* was granted as to dealings in the non-transferable reduced rate round trip tickets issued for use on the occasion of the aforesaid Mardi Gras festival.

Thereafter a demurrer was filed to the bill for want of equity and because the case made by the bill was a moot and not a real controversy, and it was overruled. Then an application was made for leave to file a plea to the jurisdiction, which was refused.

At the hearing the complainant introduced the depositions of two witnesses and no evidence was given on behalf of the defendants. As before stated, the Circuit Court entered a final decree perpetually enjoining the dealing in non-transferable reduced rate round trip tickets issued for the United Confederate Veterans' Reunion and the Mardi Gras festivals, and denying relief as to future issues of tickets of a like character.

On appeal and cross appeal the Circuit Court of Appeals held that the complainant was entitled to the full relief prayed in the bill, and consequently to an injunction restraining the dealing by the defendants not only in the tickets issued for the United Confederate Veterans' Reunion and the past Mardi Gras festival, but from carrying on the business of like dealing in non-transferable reduced rate tickets which might be issued in the future by the complainant, and the Circuit Court was directed to decree accordingly.

Mr. Louis Marshall, with whom *Mr. Henry L. Lazarus* and *Mr. Moritz Rosenthal* were on the brief, for petitioners:

The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants, even though the tickets in which they dealt, were in form non-transferable, and the original purchasers disposed of them in breach of their contracts with the complainant.

A railroad ticket is property in the constitutional sense of the term, and the business of a ticket broker is legitimate, and legislation seeking to prohibit it is a violation of the liberty of

the citizen and violative of both the state and Federal Constitutions. *People ex rel. Fleischmann* v. *Caldwell*, 64 App. Div. 46, aff'd, 168 N. Y. 671; *People ex rel. Tyroler* v. *The Warden*, 157 N. Y. 116.

A ticket broker in purchasing the unused portion of a railway ticket is not a party or a privy to the contract between the railway company and the original purchaser. He has no relation whatsoever with either, except that he has purchased from the original holder a ticket which the latter agreed that he would not sell. There is nothing to indicate that the ticket broker in purchasing the ticket from the original holder and selling it to a third person acted out of malice toward the railway company; in fact his motive is believed to be unimportant. *Adler* v. *Fenton*, 24 How. 407; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 190; *McMullen* v. *Ritchie*, 64 Fed. Rep. 253; *Toler* v. *East Tenn. Ry. Co.*, 67 Fed. Rep. 168; *Morris* v. *Tuthill*, 72 N. Y. 575; *Davis* v. *Flagg*, 35 N. J. Eq. 491; *Phelps* v. *Nowlen*, 72 N. Y. 39.

The theory of the complainant precludes the conception of a privity of contract, since the very foundation of its contention is, that the contract between it and the original purchaser of the ticket was non-assignable. *Spencer's case*, 5 Coke, 16a; 1 Smith's Leading Cases, 68; *Garst* v. *Hall & Lyon Co.*, 179 Massachusetts, 588; *Harrison* v. *Maynard Merrill Co.*, 61 Fed. Rep. 689; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659; *Apollinaris Co.* v. *Scherer*, 27 Fed. Rep. 18.

An action against these ticket brokers could not be rested upon any theory of tort. It is difficult to see in what respect the act of the broker constitutes a tort or a breach of duty owing by him to the railroad company. He certainly occupies to it no relation of trust or confidence, nor is there any statutory duty or one of a kindred nature that he owes to the railroad company.

In order to support its theory the complainant failed to establish the validity of the condition of non-transferability which it has sought to impress upon its tickets. The railroad company

doubtless had the right to impose reasonable conditions upon its passengers, the right to require the production of a ticket whenever demanded, to limit the ticket as to time, and train on which it was to be used, to require it to be stamped before being used. The ticket, however, is property and a common carrier, bound to transport all seeking its conveniences, without discrimination, has no right to prohibit the sale and disposition of such ticket, because that would have been the equivalent of depriving the owner of it of an essential attribute of the property which he had acquired, and the creation of an unjust discrimination, between those seeking transportation over its lines. *Mosher* v. *Railway Company*, 127 U. S. 390, and *Boylan* v. *Railroad Company*, 132 U. S. 146, discussed and distinguished.

But assuming that the contract of non-transferability was valid, and that the original purchaser of the ticket committed a breach of contract when he disposed of it, that fact would not support an action at law against the ticket broker under the circumstances of this case. The broker did not, by fraud, force or coercion, or by malicious act, bring about such breach of contract, and the case does not therefore fall within the rule laid down in *Angle* v. *Chicago, St. Paul &c. Ry. Co.*, 151 U. S. 1.

Even though the acts charged are wrongful, tortious or even fraudulent, complainant has a plain, adequate and complete remedy at law to redress such wrongs, and is not entitled to equitable relief. *Hipp* v. *Babin*, 19 How. 278; *Parker* v. *Winnipiseogee Lake Co.*, 2 Black, 551; *Ins. Co.* v. *Bailey*, 13 Wall. 621; *Grand Chute* v. *Winegar*, 15 Wall. 375; *Root* v. *Ry. Co.*, 105 U. S. 212; *Killian* v. *Ebbinghaus*, 110 U. S. 573; *Fussell* v. *Gregg*, 113 U. S. 555; *Buzard* v. *Houston*, 119 U. S. 351; *Cates* v. *Allen*, 149 U. S. 451; *Whitehead* v. *Shattuck*, 138 U. S. 146.

There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits. *Pfohl* v. *Simpson*, 74 N. Y. 142; *Boughton* v. *City of Brooklyn*, 15 Barb. 375; 2 Story Eq. Jur., §§ 853, 854; *Tribette* v. *Railroad Co.*, 70 Mississippi, 182.

The Circuit Court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' acts exceeded two thousand dollars, there being no foundation in fact in support of such averment.

The complainant does not indicate from the record a specific piece of property actually in existence, for which the protection of a court of equity is sought. It is asking for the protection of a business not *in esse*, but to arise in the future, and which the court will not presume will be attacked injuriously before it comes into existence. *Bank of Arapahoe* v. *David Bradley Co.*, 72 Fed. Rep. 867.

The decree of injunction awarded by the Circuit Court of Appeals, so far as it relates to non-transferable tickets, that may be hereafter issued, is in effect the exercise of legislative as distinguished from judicial power, since it undertakes to promulgate a rule applicable to conditions and circumstances, which have not yet arisen, and to prohibit the petitioners from dealing in tickets not *in esse* and not even in contemplation, and is, therefore, violative of the most fundamental principle of our government.

Mr. Joseph Paxton Blair and *Mr. Brode B. Davis*, with whom *Mr. George Denegre* was on the brief, for respondent:

Defendants filed no formal plea to the jurisdiction, but simply denied, in their answer, the averments of the bill in respect to the amount of damages. Under such circumstances, proof of damages was not necessary to sustain the jurisdiction. *Butchers & Drovers Stock Yards Co.* v. *L. & N. R. R. Co.* (C. C. A.), 67 Fed. Rep. 35, 40; *Moffet* v. *Quine*, 95 Fed. Rep. 201.

The legislatures of many States have appreciated the unlawful and fraudulent character of the ticket scalpers' business, and statutes have been enacted making their dealing in these tickets a violation of the criminal law in the following States, viz: Pennsylvania, New Jersey, Illinois, Indiana, Minnesota, Georgia, Maine, Texas, North Carolina, Tennessee, North

Dakota, Oregon, Montana, Florida and New York. Such laws have been held constitutional by the courts of last resort on the broad question of the right of the scalpers to buy and sell these tickets without the authority of the railroad company issuing them, in all those States in which the question has been raised, with the exception of New York. *Fry* v. *State*, 63 Indiana, 552; *Burdick* v. *People*, 149 Illinois, 600; *State* v. *Corbett*, 57 Minnesota, 345; *Jannen* v. *State*, 42 Texas Cr. Rep. 631; *Commonwealth* v. *Keary*, 198 Pa. St. 500; *State* v. *Bernheim*, 19 Montana, 512; *Ex parte O'Neil*, 83 Pac. Rep. 104; *Samuelson* v. *State*, 95 S. W. Rep. 1012; *State* v. *Thompson*, 84 Pac. Rep. 476.

The contract evidenced by the non-transferable tickets described in complainant's bill is a legal contract between the railroad company and the original purchaser of such tickets, and it binds the parties thereto and limits the benefits of the contract to the use of the original purchaser only. No one other than such purchaser can become the beneficiary of the contract, and under its terms the railroad company is under no obligation to carry as a passenger any person presenting such ticket unless such person is in fact the original purchaser. *Mosher* v. *Railroad Co.*, 127 U. S. 390; *Boylan* v. *Hot Springs Co.*, 123 U. S. 146; *Drummond* v. *Sou. Pac. Co.*, 7 Utah, 118; *S. C.*, 25 Pac. Rep. 733. The right of a railroad company to issue such tickets is not confined to occasional events, but may be issued at any time, or continually during a season. The right is recognized in unlimited terms in § 22 of the Interstate Commerce Act, 3 U. S. Comp. Stat. 3170.

It follows, therefore, that the sale of such a ticket by the original purchaser is a violation of a legal contract, and the use of one of these tickets by a person other than the original purchaser is a fraud upon the carrier.

Such a ticket is not property in the hands of the purchaser in the sense that it can be transferred or sold by him; and trafficking in such tickets is not, and cannot be made, a legitimate business. See also *State* v. *Corbett*, 57 Minnesota, 345; *Jannin*

v. *State*, 53 L. R. A. 349; *Burdick* v. *People*, 149 Illinois, 600; *Drummond* v. *Sou. Pac. Co.*, 25 Pac. Rep. 733; *Cody* v. *Sou. Pac. R. Co.*, 4 Sawyer, 114; *Samuelson* v. *State*, 95 S. W. Rep. 1012.

Equity has jurisdiction to enjoin the defendant ticket scalpers from present or future interference in contracts between complainant and the purchasers of its tickets. *Exchange Telegraph Co.* v. *Central News Co.*, 2 Ch. 48; *Ex. Tel. Co.* v. *Howard Agency*, L. T. Vol. 120, March 31, 1906; *Am. Law Book Co.* v. *Ed. Thompson Co.*, 84 N. Y. Supp. 225; *Fleckenstein Bros. Co.* v. *Fleckenstein* (N. J. Ch.), 57 Atl. Rep. 1025; *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. Rep. 800–1015; *Sperry & Hutchinson Co.* v. *Brady*, 134 Fed. Rep. 691; *Sperry & Hutchinson Co.* v. *Temple*, 137 Fed. Rep. 992; *Natl. Tel. Co.* v. *Western Union Co.*, 119 Fed. Rep. 294; *Garst* v. *Charles*, 187 Massachusetts, 144; *Board of Trade* v. *Christie Co.*, 198 U. S. 236; *Board of Trade* v. *Cella Co.*, 145 Fed. Rep. 28; *Board of Trade* v. *McDearmott*, 143 Fed. Rep. 188; *Knudson* v. *Benn*, 123 Fed. Rep. 636; *Martin* v. *McFall*, 65 N. J. Equity, 91; *Wells & Richardson Co.* v. *Abraham*, 146 Fed. Rep. 190.

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

The points urged at bar on behalf of the petitioners as establishing that the decrees below should be reversed and the bill of complaint dismissed, and in any event the injunction be modified and restricted, are the following:

"1. The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants, even though the tickets in which they dealt are in form non-transferable, when the original purchasers disposed of them in breach of their contract with the complainant."

"2. The complainant has shown no sufficient ground for equitable intervention, since, assuming, but not admitting, that the acts charged against the defendants are wrongful, tortious or even fraudulent, it has a plain, adequate and complete remedy at law to redress such wrongs."

"3. There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits."

"4. The Circuit Court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' act exceeded two thousand dollars, there being no foundation in fact in support of such averment."

"5. The decree of injunction awarded by the Circuit Court of Appeals, so far as it relates to non-transferable tickets, that may be hereafter issued, is in effect the exercise of legislative as distinct from judicial power, since it undertakes to promulgate a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit the petitioners from dealing in tickets not *in esse*, and not even in contemplation, and is, therefore, violative of the most fundamental principle of our Government."

Stated in logical sequence and reduced to their essence, these propositions assert:

First, want of jurisdiction from the insufficiency of the amount involved, want of power in a court of equity to grant relief because on the face of the bill relief at law was adequate, and because equitable relief was improper on account of misjoinder of parties and causes of action.

Second, because the case as made did not entitle to relief, since it did not show the commission of any legal wrong by the defendants.

Third, because conceding the right to relief the remedy by injunction which the court accorded was so broad as in effect to amount to the exertion of legislative as distinct from judicial power, and hence was equivalent to the denial of due process of law.

As, for reasons hereafter to be stated, we think the contentions embodied in the first proposition as to want of jurisdiction, etc., are without merit, we come at once to the funda-

mental question involved in the second proposition, that is, the absence of averment or proof as to the commission of a legal wrong by the defendant.

That the complainant had the lawful right to sell non-transferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of non-transferability and forfeiture embodied in such tickets was not only binding upon the original purchaser but upon any one who acquired such a ticket and attempted to use the same in violation of its terms is also settled. *Mosher* v. *Railroad Co.*, 127 U. S. 390. See, also, *Boylan* v. *Hot Springs Co.*, 132 U. S. 146.

True these cases were decided before the passage of the act to regulate commerce, but the power of carriers engaged in interstate commerce to issue non-transferable reduced rate excursion tickets was expressly recognized by that act, and the operation and binding effect of the non-transferable clause in such tickets upon all third persons acquiring the same and attempting to use them, and the duty of the carrier in such case to use due diligence to enforce a forfeiture results from the context of the act. Thus by § 22 (24 Stat. 387; 25 Stat. 862) it was provided "that nothing in this act shall prevent . . . the issuance of mileage, excursion, or commutation tickets." And it is to be observed that despite the frequent changes in the act including the comprehensive amendments embodied in the act of June 29, 1906, 34 Stat. 584, the provision in question remains in force, although the Interstate Commerce Commission, charged with the administrative enforcement of the act, has directed the attention of Congress to the importance of defining the scope of such tickets in view of the abuses which might arise from the exercise of the right to issue them. 2 Int. Com. Comm. Rep. 529, 539. And when the restrictions embodied in the act concerning equality of rates and the prohibitions against preferences are borne in mind the conclusion cannot be escaped that the right to issue tickets of the class referred to carried with it the duty on the

carrier of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and therefore caused the non-transferable clause to be operative and effective against anyone who wrongfully might attempt to use such tickets. Any other view would cause the act to destroy itself, since it would necessarily imply that the recognition of the power to issue reduced rate excursion tickets conveyed with it the right to disregard the prohibitions against preferences which it was one of the great purposes of the act to render efficacious. This must follow, since, if the return portion of the round trip ticket be used by one not entitled to the ticket, and who otherwise would have had to pay the full one way fare, the person so successfully traveling on the ticket would not only defraud the carrier but effectually enjoy a preference over similar one way travelers who had paid their full fare and who were unwilling to be participants in a fraud upon the railroad company.

Any third person acquiring a non-transferable reduced rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket amounting to a right of property therein which a court of equity would protect. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, and authorities there cited. See also, *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. Rep. 800. We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court. The case is *Angle* v. *Chicago, St. Paul &c. Ry. Co.*, 151 U. S. 1, where it was held that an actionable wrong is committed by one who "maliciously

interferes in a contract between two parties and induces one of them to break that contract to the injury of the other." That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling non-transferable reduced rate railroad tickets for profit to the injury of the railroad company issuing such tickets is, we think, clear. It is not necessary that the ingredient of actual malice in the sense of personal ill will should exist to bring this controversy within the doctrine of the *Angle case*. The wanton disregard of the rights of a carrier causing injury to it, which the business of purchasing and selling non-transferable reduced rate tickets of necessity involved, constitute legal malice within the doctrine of the *Angle case*. We deem it unnecessary to restate the grounds upon which the ruling in the *Angle case* was rested or to trace the evolution of the principle in that case announced, because of the consideration given to the subject in the *Angle case* and the full reference to the authorities which was made in the opinion in that case.

Certain is it that the doctrine of the *Angle case* has been frequently applied in cases which involved the identical question here at issue—that is, whether a legal wrong was committed by the dealing in non-transferable reduced rate railroad excursion tickets. *Pennsylvania Railroad Co.* v. *Beekman*, 30 Wash. (D. C.) Law Rep. 715; *Ill. Central R. R. Co.* v. *Caffrey*, 128 Fed. Rep. 770; *Delaware, Lack. & West. R. R. Co.* v. *Frank*, 110 Fed. Rep. 689; *Nashville, C. & St. L. Ry. Co.* v. *McConnell*, 82 Fed. Rep. 65.

Indeed, it is shown by decisions of various state courts of last resort that the wrong occasioned by the dealing in non-transferable reduced rate railroad tickets has been deemed to be so serious as to call for express legislative prohibition correcting the evil. *Kinner* v. *Lake Shore & Mich. Southern Ry. Co.*, 69 Ohio St. 339; *Schubach* v. *McDonald*, 179 Missouri, 163, and cases cited; *Samuelson* v. *State*, 95 S. W. Rep. 1012. In the case last referred to, where the subject is elaborately reviewed, the Supreme Court of Tennessee, in holding that the

prohibitive statute was not unconstitutional as forbidding a lawful business and in affirming a criminal conviction for violating the statute observed (p. 1016):

"That the sale as well as the purchase of non-transferable passage tickets is a fraud upon the carrier and the public, the tendency of which is the demoralization of rates, has been settled by the general consensus of opinion amongst the courts."

Concluding, as we do, that the commission of a legal wrong by the defendants was disclosed by the case as made, we are brought to consider the several contentions concerning the jurisdiction of the court and its right to afford relief. The bill contained an express averment that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of five thousand dollars as to each defendant. The defendants not having formally pleaded to the jurisdiction, it was not incumbent upon the complainant to offer proof in support of the averment. Nevertheless the complainant introduced testimony tending to show that on the New Orleans division of its road a loss of from fifteen to eighteen thousand dollars a year was sustained through the practice by dealers of wrongfully purchasing and selling non-transferable tickets. That hundreds of the tickets annually issued for the Mardi Gras festivals in New Orleans were wrongfully bought and sold; that other non-transferable reduced rate tickets were in a like manner illegally trafficked in to the great damage of the corporation, and that the defendants were the persons principally engaged in conducting such wrongful dealings. But even if this proof be put out of view we think the contention that a consideration of the whole bill establishes that the jurisdictional amount alleged was merely colorable and fictitious, is without merit. We say this because the averments of the bill as to the number of such tickets issued, the recurring occasions for their issue, the magnitude of the wrongful dealings in the non-transferable tickets by the defendants, the cost and the risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complainant, the

operation of the illegal dealing in such tickets upon the right of the complainant to issue them in the future, coupled with the admissions of the answer, sustain the express averment as to the requisite jurisdictional amount. Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced. *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322, 336.

The contention that, though it be admitted, for the sake of the argument, that the acts charged against the defendant "were wrongful, tortious, or even fraudulent," there was no right to resort to equity because there was a complete and adequate remedy at law to redress the threatened wrongs when committed is, we think, also devoid of merit. From the nature and character of the non-transferable tickets, the number of people to whom they were issued, the dealings of the defendants therein and their avowed purpose to continue such dealings in the future, the risk to result from mistakes in enforcing the forfeiture provision and the multiplicity of suits necessarily to be engendered if redress was sought at law, all establish the inadequacy of a legal remedy and the necessity for the intervention of equity. Indeed the want of foundation for the contention to the contrary is shown by the opinions in the cases which we have previously cited in considering whether a legal wrong resulted from acts of the character complained of, since in those cases it was expressly held that the consequences of the legal wrong flowing from the dealing in non-transferable tickets were of such a character as to entitle an injured complainant to redress in a court of equity.

There is an opinion of the Supreme Court of New York (not the court of last resort) which would seem to express contrary views, *New York Central & H. R. R. R. Co.* v. *Reeves*, 85 N. Y. Supp. 28, but the reasoning there relied on, in our opinion, is inconclusive.

The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the Circuit Court of Appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in *Hale* v. *Allinson*, 188 U. S. 56, 77.

As we have stated, the Circuit Court granted a preliminary injunction restraining the defendants from illegally dealing in tickets issued on account of the United Confederate Veterans' Reunion, and before final hearing granted a second injunction restraining such dealing in like tickets issued for the approaching Mardi Gras festival. By the final decree these injunctions were perpetuated, the court declining to grant the relief sought by the complainant in relation to non-transferable tickets to be issued for the future, without prejudice, however, to the right of the complainant to seek relief by independent proceedings on each occasion when it might issue such non-transferable tickets. The Circuit Court of Appeals decided that error had been committed in refusing to grant an injunction against dealing in non-transferable tickets to be issued in the future, and directed that the decree below be enlarged in that particular. It is insisted that the Circuit Court of Appeals erred in awarding an injunction as to dealings "in non-transferable tickets that may be hereafter issued . . . since it thereby undertook to promulgate" a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit "the petitioners from dealing in tickets not *in esse* . . . and is, therefore, violative of the most fundamental principles of our government." But when the broad nature of this proposition is considered it but denies that there is power in

a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction in the nature of things contemplates the enforcement as against the party enjoined of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. See *Slater* v. *Gunn*, 170 Massachusetts, 509, and cases cited. It may not be doubted that the authority of a court would extend, not only to restraining a particular imminent trespass, but also to prohibiting like acts for all future time. The power exerted by the court below which is complained of was in no wise different. The bill averred the custom of the complainant at frequently occurring periods to issue reduced rate non-transferable tickets for fairs, conventions, etc., charged a course of illegal dealing in such non-transferable tickets by the defendants, and sought to protect its right to issue such tickets by preventing unlawful dealings in them. The defendants in effect not only admitted the unlawful course of dealing as to particular tickets then outstanding, but expressly avowed that they possessed the right, and that it was their intention to carry on the business as to all future issues of a similar character of tickets. The action of the Circuit Court of Appeals, therefore, in causing the injunction to apply not only to the illegal dealings as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful. Indeed, in view of the state of the record, the inadequacy of the relief afforded by the decree as entered in the Circuit Court is, we think, manifest on its face. The necessary predicate of the decree was the illegal nature of the dealings by the defendants in the outstanding tickets, and the fact that such dealings if allowed would seriously impair the right of the complainant in the future to issue the tickets. Doubtless, for this reason the decree was made with-

out prejudice to the right of the complainant to apply for relief as to future issues of tickets by independent proceedings whenever on other occasions it was determined to issue non-transferable tickets. But this was to deny adequate relief, since it subjected the complainant to the necessity, as a preliminary to the exercise of the right to issue tickets, to begin a new suit with the object of restraining the defendants from the commission in the future of acts identical with those which the court had already adjudged to be wrongful and violative of the rights of the complainant.

In *Scott* v. *Donald*, 165 U. S. 107, on holding a particular seizure of liquor under the South Carolina dispensary law to be invalid, an injunction was sustained, not only addressed to the seizure in controversy, but which also operated to restrain like seizures of liquors in the future, and the exertion of the same character of power by a court of equity was upheld in the cases of *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, and *Swift* v. *United States*, 196 U. S. 375.

Nor is there merit in the contention that the decision in *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361, 404, supports the view here relied upon as to the limited authority of a court of equity to enjoin the continued commission of the same character of acts as those adjudged to be wrongful. On the contrary, the ruling in that case directly refutes the claim based on it. There certain acts of the carrier were held to have violated the act to regulate commerce. The contention of the Government was that because wrongful acts of a particular character had been committed, therefore an injunction should be awarded against any and all violations in the future of the act to regulate commerce. Whilst this broad request was denied, it was carefully pointed out that the power existed to enjoin the future commission of like acts to those found to be illegal, and the injunction was so awarded. The whole argument here made results from a failure to distinguish between an injunction generally restraining the commission of illegal acts in the

future and one which simply restrains for the future the commission of acts identical in character with those which have been the subject of controversy and which have been adjudged to be illegal.

Affirmed.

UNITED STATES *v.* R. P. ANDREWS & COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 44. Argued November 8, 11, 1907.—Decided December 2, 1907.

Whether the Philippine Islands are a distinct governmental entity for whose contracts the United States is bound, not decided; but *held* in this case that the purchase having been made by the Secretary of War through the Division of Insular Affairs, the contract was on behalf of the United States, notwithstanding the statement that the price was to be paid from Philippine funds.

Delivery of goods by a consignor to a common carrier for account of a consignee amounts to a delivery and where a purchaser directs delivery of the goods for his account to a designated carrier the latter becomes his agent. Delivery by the consignor, and acceptance by the consignee or his agent, of bills of lading issued by a common carrier for goods, constitutes a delivery.

While the presumption of delivery of goods to the consignee by delivery to a common carrier designated by him may be overcome by express contract that the goods are to remain at consignor's risk until arrival at ultimate destination, the mere statement in a government proposal that goods are to be "F. O. B. port of destination," without designating the carrier, is not sufficient to rebut that presumption where it appears that subsequently the government directed the goods to be delivered "F. O. B. port of shipment" to a designated common carrier.

The invalidity of a contract with the United States because not reduced to writing and signed by the parties with their names at the end thereof as required by § 3744, Rev. Stat., is immaterial after the contract has been performed. *St. Louis Hay Co.* v. *United States*, 191 U. S. 159.

41 C. Cl. 48, affirmed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Van Orsdel, with whom *Mr. Charles F. Kincheloe* was on the brief, for appellant:

The Philippine Islands were, at the time of the making of this contract, a distinct political territorial entity, having practically as complete a civil territorial government as had any of the organized continental Territories of the United States. The United States was therefore no more liable on this contract of the Philippine Government than it would be upon a similar contract made by the government of the Territory of New Mexico or of Arizona.

The National Government is not liable on a contract or other obligation of one of its territorial governments, or of a political subdivision of such territorial government, even though the obligation be authorized by Congress. *National Bank* v. *Yankton County,* 101 U. S. 129; *Barnes* v. *District of Columbia,* 91 U. S. 540; *Mills* v. *Commissioners of Hendricks Co.,* 50 Ind. 436.

While according to commercial usage, delivery by a vendor to the carrier is, in the absence of special agreement to the contrary, delivery to the vendee, yet no one will question the right and power of the parties to vary this rule by contract provisions requiring delivery to be made by the vendor at the point of final destination. *Dunlop* v. *Lambert,* 6 C. & F. 620–622; *Pacific Iron Works* v. *L. I. R. R. Co.,* 62 N. Y. 272. No matter how the contract in the case at bar may be construed, it called for delivery f. o. b. Manila.

As the contract called for delivery at Manila, the contractor has no right of recovery, as it is well settled that in contracts for the sale and delivery of property the risk of damage or loss of the property follows the title. *Grant* v. *United States,* 7 Wall. 331; *Oil Company* v. *Van Etten,* 107 U. S. 325, 333; *McConihe* v. *R. R. Co.,* 20 N. Y. 497. The title does not pass until delivery is made according to contract. *Grant* v. *United States,* 7 Wall. 331; *Pacific Iron Works* v. *L. I. R. R. Co.,* 62 N. Y. 272; *Magruder* v. *Gage,* 33 Maryland, 348; *Blackwood* v. *Cutting,* 76 California, 212. The risk is therefore in him who

undertakes to deliver. Am. & Eng. Ency. (2d ed.), Vol. 24, p. 1050; Benjamin on Sales, §§ 330, 693; *Grant* v. *United States*, 7 Wall. 331; *Buckingham* v. *Dake*, 112 Fed. Rep. 258; *Pacific Iron Works* v. *L. I. R. R. Co.*, 62 N. Y. 272; *Taylor* v. *Cole*, 111 Massachusetts, 363; *McConihe* v. *N. Y. & E. R. R. Co.*, 20 N. Y. 496; *Dunlop* v. *Lambert*, 6 C. & F. 620–622; *Castle* v. *Playford*, 5 Ex. L. R. 165.

If the United States Government be held a principal party to the transaction, the contract was in violation of law, and void, on account of its not having been reduced to writing and signed by the parties in accordance with § 3744 Revised Statutes, and there can therefore be no recovery on the contract. *Clark* v. *United States*, 95 U. S. 539; *South Boston Iron Co.* v. *United States*, 118 U. S. 37.

And while there would have been a right of recovery upon a *quantum valebant* if the paper had been delivered to and accepted and used by the government, yet there was never any legal delivery, or any acceptance or use whatever of the paper by the government, at Manila or elsewhere, and there is therefore no ground for recovery even upon a *quantum valebant*. *Clark* v. *United States* and *South Boston Iron Co.* v. *United States, supra; Monroe* v. *United States*, 184 U. S. 524; *St. Louis Hay and Grain Co.* v. *United States*, 191 U. S. 159.

Mr. A. A. Hoehling, Junior, for appellee, submitted.

Mr. Justice White delivered the opinion of the court.

The United States appeals from a judgment against it (41 C. Cl. 48), for the contract price of paper purchased for use in the public printing office in the Philippine Islands. We summarize from the findings the status of the Philippine Islands at the time of the contract, stating besides the facts concerning the organization in the War Department of what is now known as the Bureau of Insular Affairs.

After the occupation of Manila, up to September 1, 1900, a

military government prevailed. From September 1, 1900, to July, 1901, authority of a legislative nature was vested in the Philippine Commission, under and subject to rules and regulations to be prescribed by the Secretary of War. From July 4, 1901, the executive authority as to civil affairs was transferred to the president of the Philippine Commission under the title of Civil Governor, his authority being exercised under instructions from the President, subject to the direction and control of the Secretary of War. The Secretary of War organized the Division of Insular Affairs, which was given general charge of departmental business concerning the Philippine Islands. The organization of the division was confirmed and ratified by Congress on July 1, 1902 (32 Stat. 712), and after that act the division became known as the Bureau of Insular Affairs of the War Department. The facts concerning the contract in controversy are these:

In May, 1901, the president of the Philippine Commission telegraphed the Secretary of War, stating the necessity for a government printing office at Manila, asking concerning the qualifications of a particular individual suggested for superintendent, and recommending the immediate purchase and shipment of an outfit for the proposed printing office. The findings expressly state or by clear implication establish the following:

In response to said cablegram, the Secretary of War directed the Insular Bureau of the War Department to purchase and forward to Manila the necessary machinery, equipment, and supplies for the establishment and operation of such printing office, and also to secure the services of a competent force of operators therefor; which duty was performed by said division.

On and prior to August 17, 1901, claimant was furnishing and supplying defendants divers papers and stationery, under contract, for use in various of its departments; and, thereupon, the chief of the Division of Insular Affairs solicited claimant to furnish and supply, for use in said Philippine Public Printing Office, being established at Manila, Philippine Islands, certain papers of described kinds, as follows:

"(Circular D.)

"War Department, Office of the Secretary,

"Division of Insular Affairs,

"Washington, D. C., August 17, 1901.

"R. P. Andrews & Co.,

"627 Louisiana avenue, Washington, D. C.

"Gentlemen: Under instructions from the Chief of Division of Insular Affairs I write you as follows:

"Will you furnish for the use of the Philippine Public Printing Office, Manila, P. I., articles called for in the inclosures 1 and 2 F. O. B., Manila, at the price at which the same is now furnished to the Government Printing Office, Washington, D. C., plus freight from New York; payment to be made from Philippine funds on invoice verification at Manila, P. I.

"Inspection at Insular Division, where samples are to be sent.

"When can supplies be shipped from port of departure?

"Bills for supplies to be submitted, in duplicate, to the Chief of Division of Insular Affairs, for verification of prices at Government Printing Office rates.

"Copies of bills of lading from New York to be submitted, in duplicate, to Chief of Division of Insular Affairs for verification.

"Very respectfully,"

III.

In reply claimant, on August 28, 1901, submitted a proposal as follows:

"Washington, D. C., August 28, 1901,

"Chief of Division of Insular Affairs,

"War Department, City.

"Dear Sir: Replying to your favor of the 17th instant, Circular D, we beg to advise you that we will furnish the different lots of paper called for in inclosures 1 and 2, which accompanied said circular, at the prices for which the same is now being furnished to the Government Printing Office, Washington, D. C., plus freight rate from New York to Manila, P. I.,

except lots. . . . All other lots mentioned we will, as stated above, furnish at the same prices that the same class of goods are being furnished to the Government Printing Office, plus, as stated above, the freight from New York to Manila, P. I. Payment to be made from Philippine funds on invoice verification at Manila, P. I. Inspection at Insular Division, where samples are to be sent. Bills for supplies to be submitted in duplicate to the Chief of Division of Insular Affairs for verification of prices at Government Printing Office rates. Copies of bills of lading from New York to be submitted in duplicate to Chief of Division of Insular Affairs for verification.

"We can have the goods ready for shipment October 1st to November 15th."

IV.

On the same date (August 28, 1901), said Chief of the Division of Insular Affairs wrote claimant as follows:

"(Circular E.)

"War Department, Office of the Secretary,

"Division of Insular Affairs,

"Washington, D. C., August 28, 1901.

"R. P. Andrews & Co.,

"627 Louisiana avenue, Washington, D. C.

"Gentlemen: Please deliver F. O. B. Manila, P. I. (via Suez Canal), the following:

"Articles called for in inclosures 1 and 2.

"To be shipped between October 20 and November 1, 1901.

"Quality of goods furnished will be considered in making future orders.

"Please acknowledge the receipt of this circular by return mail.

"To be properly packed for export shipment.

"Ship care Barber & Co., steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J. (See note inclosed.)

"Marked as follows:

"No. , Governor W. H. Taft, Manila, P. I.

"Contents, ; weight, lbs.

"For Philippine public printing plant.

"As per your agreement in your letter dated August 28, 1901, now on file in this office.

"Very respectfully."

The inclosures marked 1 and 2, referred to in this letter, were statements tabulating the quantity and quality of paper to be furnished. The note referred to and inclosed in the letter was the following:

"Note.—(Care Barber & Company, steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J.)

"A special arrangement has been made so that after F. O. B. delivery, as above, at Jersey City, the freight rate for the transportation of these supplies and the equipment of the Manila Printing Office will not be higher than $11.05 per ton (dead weight) and possibly less. Rate for measurement freight to be made on a correspondingly low basis, in accordance with the space occupied. Therefore the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment."

Before the paper was shipped the Division of Insular Affairs gave further instructions as follows:

"Note.—(Care Barber & Company, East Central Pier, Brooklyn, N. Y.)

"A special arrangement has been made so that after F. O. B. delivery, as above, at Brooklyn, the freight rate for the transportation of these supplies and equipment of the Manila Printing Office will not be higher than $11.05 per ton (dead weight) and possibly less. Rate for measurement freight to be made on a correspondingly low basis, in accordance with the space occupied. Therefore the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment."

The findings relating to the value of the paper, its forwarding to and arrival of a part at Manila, and the subsequent controversy between Andrews & Co. and the Government concerning the same, show the following to be the case.

In compliance with the directions Andrews & Co. packed the paper for export shipment, directing it to Governor W. H. Taft, Manila, Philippine Islands, in care of Barber & Co., East Central Pier, Brooklyn, N. Y., and prepaid the freight. The quoted value of the paper was $3,087.75. The freight charges from New York to Manila were $196.35, which, together with one dollar for clearance papers, prepaid by Andrews & Co., brought the total purchase or invoice price to $3,285.10. When the paper was delivered to Barber & Co., Andrews & Co. took triplicate bills of lading, consigning the paper to Governor W. H. Taft or his assigns, Manila, Philippine Islands, and delivered the duplicate bills of lading to the Chief of Division of Insular Affairs, in accordance with the instructions given. Barber & Co. forwarded the paper by the steamship Indrasamaha. When the vessel arrived at Singapore it was found that a portion of her cargo, including the consignment of paper, was badly damaged by water. Some of the paper was condemned by a board of survey convened by the agents of the ship, and was sold in Singapore. The remainder was repacked and forwarded to Manila. When it arrived it was so damaged as to render it unfit for use. The consignee (Governor Taft) refused to accept it, and a committee, which was appointed by him as Civil Governor, recommended that the paper be stored in a warehouse of the Philippine government until instructions were received from Andrews & Co., who had no agent in the islands. Thereupon the Public Printer of the Philippine Islands wrote Andrews & Co., informing them of the facts just stated, and asking instructions as to what they wished done, and on May 31, 1902, the Division of Insular Affairs also wrote Andrews & Co. on the same subject as follows:

"War Department, Office of the Secretary,
"Division of Insular Affairs,
"Washington, D. C., May 31, 1902.

"Gentlemen: I have the honor to inform you that a letter dated April 14th, 1902, has been received from Mr. John S. Leech, public printer, Manila, P. I., advising this division of the

accident which occurred to the S.S. "Indrasamaha," which resulted in damaging 500 reams linen paper, valued at $3,285.10, as per your bill of October 24th, 1901.

"Mr. Leech requested that you be informed that the paper is damaged so badly that it will be impossible to use any of it; that an insurance inspector and a Government inspection committee were then surveying and inspecting the damaged goods, and that this action was taken for the protection of the contractors, who had taken the precaution to insure their goods against losses.

"Very respectfully."

Andrews & Co. thus replied to this letter:

"Washington, D. C., June 7, 1902.

"Lieut. Col. Edwards,

"Chief Division of Insular Affairs,

"War Department, Washington, D. C.,

"Dear Sir: We are in receipt of your favor May 31st, No. 5423–1, quoting letter received from Mr. John S. Leech, public printer, Manila, P. I., with regard to map paper, therein stated to have been damaged in transportation on steamship 'Indrasamaha.'

"This paper was shipped as per your order, bills of lading being obtained as directed, and your instructions carried out implicitly. Your goods were turned over upon direction of your office to Messrs. Barber & Company, your agents in that behalf at Jersey City, N. J., in good order and condition, whereupon our responsibility ceased.

"We have the honor, therefore, to request that our bill as rendered be approved for payment.

"Kindly advise us also whether you desire us to make a duplicate of said shipment.

"Requesting the favor of an early reply, we are, very respectfully yours."

The shipment of paper was not insured either by the Government or by Andrews & Co. The proceeds of the sale at Singapore never reached either the Government or Andrews & Co.,

and the paper stored at Manila remained there until May, 1903, when it was sold, producing a sum insufficient to pay the storage charges, and the proceeds were turned into the treasury of the government of the Philippine Islands in partial payment of the charges.

All the propositions which the Government has elaborately pressed at bar are reducible to two.

First. That the paper was purchased by the Government of the Philippine Islands, and therefore in any event there was error in holding the United States liable.

Second. That even if the United States was the purchaser, it was erroneously held liable, because the paper was never delivered, and therefore was at the risk of the owner, Andrews & Co., and the loss and damage fell upon them.

We proceed to consider these propositions:

1. We need not consider the contention that the Philippine Islands were a distinct governmental entity for whose contracts the United States was not bound, because that subject is irrelevant, since it begs the real question—that is, whether the purchase was made by the United States. Testing whether the paper was bought by the United States by the contract and course of dealing as disclosed by the findings, we think there is no escape from the conclusion that the United States was the party contracting for the purchase. It cannot be doubted that the findings make clear the fact that the Secretary of War, through his agent, the Division of Insular Affairs, was the actor on one side and Andrews & Co. on the other. Nothing in the dealings as disclosed by the findings would warrant the conclusion that the Division of Insular Affairs acted or purported to act as the agent of the government of the Philippine Islands. The telegram to the Secretary of War, which opened the subject, did not even suggest a contract to be made in the name of the government of the Philippine Islands, but simply submitted recommendations to the Secretary of War for his action, accompanied with the request that if the recommendation was favorably considered he, the Secretary of War,

should make the purchase desired. In the second place, the Division of Insular Affairs undertook the negotiation under an order of the Secretary of War, directing that the paper required be purchased, without an intimation that it was contemplated that the Division of Insular Affairs in executing the authority conferred should act as the agent of the government of the Philippine Islands, instead of as the representative of the Secretary of War, as a result of the authority vested in him. The first letter written on the part of the Division of Insular Affairs to Andrews & Co., soliciting a proposal to furnish the paper, we think manifests that the purpose of the division was to make the purchase for the United States in accord with the direction under which the division was acting—that is, the authority of the Secretary of War acting for the United States. True it is the letter made it clear that the paper which the United States proposed to purchase was intended for use in the Philippine Islands, and contained a statement that the price would be "paid from Philippine funds." But the mere statement of the purpose for which the paper was intended would not justify the conclusion that the Division of Insular Affairs was acting as the mere agent of the government in the Philippine Islands, instead of as the agent of the Secretary of War representing the United States. The statement of the fund from which the payment was to be made, instead of justifying the inference that the contract was intended to be made in the name of the government of the Philippine Islands, through its agent, gives countenance to a contrary inference. This follows because if the government of the Philippine Islands was the contracting party its funds would, as a matter of course, be the source from which the payment was to be made. The reference, therefore, to the fund from which the payment was to be made but served to indicate that the United States, in making the contract, contemplated that the purchase price would be discharged by it from the Philippine funds under its control. That Andrews & Co., when they replied to the inquiry made to them as to price, etc., understood that the contract proposed was on behalf of

the United States we think is deducible from their reply. Besides, the subsequent correspondence and dealings which we shall hereafter consider in determining whether the paper was delivered under the contract prior to the happening of the damage, we think will serve to make clear the fact that both parties deemed the contract was one made in the name of and for account of the United States. Especially is this so when it is borne in mind that the findings either directly or by necessary implication establish that in October, 1901, soon after the goods were shipped, a bill for the amount of the total purchase price, including the freight to Manila, was rendered by Andrews & Co. to the Division of Insular Affairs, and there is nothing in the findings warranting even an implication that that division made any objection upon the ground that the bill should have been made out against the Philippine government as the purchaser and have been transmitted to that government for payment. Yet further, it is apparent from the letter written by the division to Andrews & Co., after it was learned that the paper had been damaged or lost, that the Division of Insular Affairs was solicitous, not because a bill had been mistakenly rendered, but as to whether the loss should fall upon the United States or upon Andrews & Co.

2. That as a general rule the delivery of goods by a consignor to a common carrier for account of a consignee has effect as delivery to such consignee is elementary. That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser is also beyond question. Certain also is it that when on the delivery of goods to a carrier bills of lading are issued for the delivery of the goods to the consignee or his order, the acceptance by the consignee of such bills of lading constitutes a delivery. Of course the presumption of delivery arising from the application of any or all of these elementary rules would not control in a case where by contract it clearly appeared that, despite the shipment, the goods should remain at the risk

of the consignor until arrival at the point of ultimate destination. And such in effect is the contention here made on behalf of the Government. We come briefly then to consider the findings concerning the contract for the purpose of showing that this contention is without merit.

In considering the matter it is to be conceded that the contract is not to be deduced alone from the letter of the Division of Insular Affairs of May 31, 1901, and the reply of Andrews & Co. of June 7, but is to be ascertained by a consideration of those letters and the subsequent correspondence under which the purchase was concluded and the shipment made.

The statement in the proposal of the Division of Insular Affairs of August 17, 1901, by which the negotiation was commenced, "F. O. B. Manila," might give rise, if standing alone, to the implication that it was intended that the goods should be delivered at the cost of the seller at Manila. But the further statement in the letter, that the freight from New York to Manila was to be a part of the purchase price and to be paid as such by the purchaser, rebuts the implication that the words "F. O. B. Manila" were understood as implying that the amount of the freight charges for the shipment of the goods to Manila should be at the cost of the seller. These words not therefore having been used in their ordinary commercial sense, their meaning must be sought in the context of the proposal in which they are found. Considering that context, it would seem most reasonable to conclude that the words implied that, as the Government desired the freight to Manila to be included in the purchase price, the freight therefore to Manila was to be primarily defrayed by the seller. That this was the understanding of Andrews & Co. we think results from their reply, in which no reference whatever was made to the F. O. B. Manila clause, but a willingness was expressed to furnish the paper at a price to be fixed by the price paid by the Government in Washington for like paper, with the addition of the freight rate to the Philippine Islands, thereby saving the seller from bearing the burden of the freight to Manila, and at the same time securing

to the Government the delivery of the paper at Manila without the payment there to the carrier of the cost of the freight as such, since that item would become a part of and be included in the price. It is certain, when the subsequent correspondence is considered, that this construction, which the reply of Andrews & Co. put upon the words "F. O. B. Manila," as used in the proposal, was deemed by the Division of Insular Affairs to be the correct one, since that reply was in the subsequent correspondence treated by the division as being directly responsive to and an acceptance of the proposal submitted. Moreover, we think the subsequent correspondence, when considered in other aspects, makes certain the conclusion that the words "F. O. B. Manila," as used in the proposal, meant precisely what we have stated the context of the proposal indicated that those words were intended to imply. This we think results from the provisions of the letter of August 28, selecting a particular firm to whom the goods were to be delivered for transport to Manila, and of all the other directions contained in the letter, since they are inconsistent with the theory that the words "F. O. B. Manila" were used as meaning that the goods should not be delivered as directed, but should remain the property of Andrews & Co., and be under their control and subject to their risk until delivered at Manila. Especially is it impossible to attribute to the words "F. O. B. Manila," used in the original proposal and reiterated in the letter of August 28, any other meaning than that which we have affixed to them, when the note which was expressly referred to in the letter of August 28, and which was inclosed therein, is considered. By the terms of that note not only were the previous specific directions as to the mode of shipment confirmed, but it was expressly provided that the delivery to the agent selected by the Division of Insular Affairs should be "F. O. B. Jersey City," thus making clear the distinction between the sense in which the words "F. O. B. Manila" were used in the proposal and their meaning applied to the final delivery at Jersey City in consummation of the contract by which the sum of the freight to Manila had been in-

cluded in the purchase price. So also the same implications arise from the final instruction, shifting the place of delivery from Jersey City and directing that the merchandise should be delivered to the agent selected, "F. O. B. Brooklyn." We think the contention made in argument, that the letter of August 28 and the acceptance by Andrews & Co. of the terms of that letter, should be alone held to constitute the contract, disregarding the note inclosed in the letter as a part thereof, is refuted by its mere statement. In any event, taking the most favorable view possible for the Government of the contract, we think it cannot be said that the presumption which arises from the delivery of the goods to the carrier designated by the Government and the acceptance by the Government of the bills of lading made to the consignee or his order, is rebutted by the contract.

Lastly, it is urged that in any event the court below erred, since the contract in question was not "reduced to writing and signed by the contracting parties with their names at the end thereof," as required by Rev. Stats., § 3744. But it is settled that the invalidity of a contract because of a noncompliance with the section referred to is immaterial after the contract has been performed. *St. Louis Hay &c. Co.* v. *United States*, 191 U. S. 159, 163. The contention that the contract in question had not been executed because there had been no delivery, is disposed of by what we have already said.

As the views which we have expressed concerning the delivery dispose also of many subsidiary contentions based upon isolated provisions of the contract, such as the right to verify the contents of the package at Manila, etc., it follows that the judgment below was right, and it is therefore

Affirmed.

EARLE *v.* MYERS.
SAME *v.* SAME.

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

Nos. 12, 388. Argued October 15, 1907.—Decided December 2, 1907.

In an accounting for attorneys' fees for collection of claims against the Government this court followed the general rule of affirming a finding of fact made and confirmed by both the courts below unless the same is clearly erroneous and held that certain services were of the character generally designated as lobbying services and could not be allowed.

Where an administrator of an attorney performs services and incurs expenses in completing the business in which his intestate and another attorney were interested he should be allowed therefor and those services and expenses as well as those rendered and incurred by the intestate can be settled in one suit where the account has been treated by both parties as one account.

Where one interested in attorney fees for collection of government claims can expect nothing until the amount adjudged has been appropriated, laches will not be charged against him if he bring the suit for an accounting within a reasonable period after the passage of the appropriation act. In this case two years was not unreasonable.

A decree of the Court of Appeals of the District of Columbia reversing the Supreme Court of the District as to some of the findings of fact and conclusions of law and directing a new decree to be entered in accordance with the opinion is not a final decree and an appeal will not lie therefrom to this court.

THE appeals in the above numbers involve the judgment of the Court of Appeals of the District of Columbia (25 App. D. C. 582, *sub nom. Waggaman* v. *Earle*), which modified the decree of the Supreme Court confirming the report of an auditor. The action was brought by the appellees against the administrator of Earle's estate for an accounting, and after issue joined it was referred to an auditor to state the account upon the pleadings and proof placed before him. The auditor reported in favor of allowing the complainant as due the Causten estate the sum of $7,462.20. After the report had been confirmed by

the Supreme Court, each side took an appeal and the Court of Appeals reversed some of the findings and conclusions of law of the court below, and directed a new decree to be entered, in accordance with the opinion of the court. The defendants appealed from that order to this court, and that appeal is the above number 12.

Fearing that there might be some doubt as to the finality of this decree for the purpose of an appeal to this court, the parties, pursuant to the decree of the Court of Appeals, took the case down to the trial court, which referred it to the auditor, who restated the account in accordance with the direction of the Court of Appeals, to which exceptions were filed by the defendant, which were overruled, the auditor's report confirmed and another decree entered, from which an appeal was taken to the Court of Appeals and there affirmed, and from the decree of affirmance an appeal has been taken to this court and allowed, which is number 388.

The material facts which appear in the record are the following: For many years a series of attempts had been made to secure legislation from Congress looking to the payment of claims made by American citizens for damages arising from illegal seizure of their vessels by the government of France, which the United States had, by treaty, undertaken to pay. Such attempts had been unsuccessful, until at length an act was passed by Congress, chapter 25 of the Laws of 1885 (23 Stat. 283), which provided for the ascertaining of claims of American citizens for spoliation prior to the thirty-first of July, 1801.

During quite a number of years preceding the act of 1885 one James H. Causten, a resident of the District of Columbia, had accumulated papers, which were regarded as of considerable value in facilitating proofs of these claims. Mr Causten died before the passage of the act of Congress, leaving these papers in the hands of Mr. William E. Earle, who was also interested in the prosecution of said claims, and therefore desired the benefit of the use of these papers, and after the act of Congress Mr. Earle and Mr. Waggaman, the administrator of the estate

of Mr. Causten, entered into a contract as of the date of June 12, 1885, by which Mr. Earle was to be allowed to continue in the possession and exclusive use of these papers in the prosecution of the spoliation claims, for which possession and exclusive use he was to pay to the administrator (Waggaman) twenty-five per centum of all fees which he should receive on account of these claims, "after deducting from all such fees received, or which shall hereafter be received by him, the proper expenses incurred by him, since the passage of the act of Congress referring said cases to the Court of Claims in the prosecution of said French spoliation claims, such as clerk hire, printing, advertising, office rent, and the compensation of other attorneys necessarily associated with him, and in whose compensation said Earle does not share. And settlements between said Earle and said Waggaman, administrator as aforesaid, or his successor in office, shall be made every six months, and the proportionate part of said fees due said administrator shall be paid over to said administrator or his successor in office, at such settlement."

Earle agreed to keep true books of account of all fees and retainers received by him, and also of all expenses attending the prosecution of the claims in which he should be engaged as counsel or otherwise, the books of account to be open at all times for the inspection of the administrator, or his successor in office.

Thereafter proceedings were taken by Earle in the Court of Claims towards proving the claims of his clients, and the action of that court recognizing such claims among others, to a certain extent, was certified to Congress, as provided in the act of 1885.

On March 3, 1891 (26 Stat. 897), Congress made an appropriation in payment of a portion of all claims so certified, and out of this appropriation Mr. Earle received as fees up to July, 1893, the sum of about $38,000, while his books showed an expenditure of over $57,000, leaving Mr. Earle some $18,000 behind. Future legislation was expected, which would turn

this deficit into a profit. It was hoped that a further appropriation would be made in 1893, but that hope was not realized. Mr. Earle died in August, 1893, and an administrator was thereafter appointed. No further appropriation was made until August 3, 1899 (30 Stat. 1161, 1191). Under this appropriation the estate of Earle received some $50,000 in fees.

Negotiations for the settlement of the accounts between the administrator of Earle's estate and the administrator of Causten's estate were proceeded with, but proved unsuccessful, when this suit was instituted by the Causten administrator for an accounting. Pleadings were had in due form, and the case was referred to an auditor of the court for a statement of the account, who, after considerable testimony had been adduced, filed his report and found the sum of $7,462.20 to be due from the defendant to the complainant. Exceptions were filed by both parties, which were overruled by the Supreme Court, and the auditor's report was confirmed.

The Court of Appeals modified the decree entered by the Supreme Court, as already stated.

Mr. Henry E. Davis and *Mr. John C. Gittings* for appellant.

Mr. T. Percy Myers and *Mr. Michael J. Colbert*, with whom *Mr. S. T. Thomas* was on the brief, for appellees.

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

In making up the account the representative of the Earle estate claimed a credit for the sum of $19,558.05 as part of the proper expenses incurred by or in behalf of defendant in obtaining the appropriations above mentioned. The auditor struck out $13,058.05 of such claimed credit, leaving $6,500 as a proper credit in favor of the administrator of Earle. The thirteen thousand and some odd dollars were stricken out by the auditor because of the fact, as he found, that these moneys

were paid for lobbying services, in efforts to secure the appropriation by Congress, which services he held were contrary to public policy and discountenanced by the courts, and therefore not to be allowed as a proper credit. The balance, $6,500, the auditor held that the proof showed had been paid by the defendant for legal services by the individuals named, and that such services were valuable, and the amount paid was not excessive or unreasonable. This amount consisted of three separate items, two items for $2,000 and one item for $2,500.

Upon the argument in the Court of Appeals the defendants' counsel insisted that the whole nineteen thousand dollars should have been allowed as a proper credit, while the plaintiff's counsel asserted that the disallowance of the thirteen thousand dollar credit was right, but that the court erred in admitting the $6,500 as a proper credit. The Court of Appeals, as we have said, affirmed that portion of the decree in which the auditor disallowed the thirteen thousand dollars claimed for credit, but reversed that portion of the decree by which the auditor allowed the credit of $6,500, and directed the decree to be amended by striking out the above credit for that sum. This was upon the ground that the $6,500 claimed was also illegal. The court said that it was impossible to read the record without coming to the conclusion that these alleged services were of the kind known as lobbying services; that, although proof on the subject was meager, yet so far as it went it tended unmistakably to show the illicit character of the services, being personal influence and personal solicitation with members of Congress, and that courts had branded services of a like nature as improper, and for which no recovery would be allowed.

The auditor before whom the case was tried and who heard the witnesses, while holding that certain of the credit claims were illegal as claims for lobbying services, yet held that these particular claims for services performed by members of the bar, and representing the $6,500 allowed, were for proper professional services, and as such should be allowed. The Supreme

Court of the District confirmed the report of the auditor, and thereby held that the credit claimed for the payment of these services was proper.

After a careful examination of the testimony in the case we are unable to concur with the Court of Appeals on this question. We cannot find any evidence to justify a reversal of the report of the auditor, confirmed as it is by the Supreme Court. The payments were proved to have been made, and there is no evidence of any illegality connected with the services performed sufficient to justify an appellate tribunal in reversing the finding of the auditor and the Supreme Court upon this question of fact. It is unnecessary to embody in this opinion a reference to the testimony in the case or to make extracts therefrom, but it is enough to say that we are satisfied, from a careful perusal thereof, that we are right in the conclusions which we have come to.

As to the thirteen thousand dollar credit which the auditor and the Supreme Court and the Court of Appeals have all disallowed, we are of the opinion that there was sufficient evidence to justify its disallowance. The evidence would seem to justify the finding of the auditor that these particular services thus paid for were of the character generally designated as lobbying services, and in such case it is proper to follow the general rule of affirming a finding of fact made and confirmed by the courts below, unless the same be clearly erroneous.

Again, the auditor disallowed in part a claim of some fifteen thousand dollars, which the defendants assert was paid to two other attorneys for their services, under a special agreement which was made between the administrator of the Earle estate and such attorneys. The auditor made a finding of the facts in regard to such employment, and carefully considered the conditions as they appeared in the proof, and stated that he was of the opinion that the services in question did not require the time and attention of these three gentlemen, and that it would not be just to impose the burden of the payment to them upon this case in such a manner as to diminish the small

amount which would be found due and payable to the complainant. He therefore in the account allowed a credit for but one-half of the amount, which he said was in his "judgment a liberal allowance for the present account." Counsel for the defendants have failed to show from the evidence in the record that this item was improperly disposed of by the auditor.

As to the alleged laches on the part of the complainant in bringing this suit, we think the courts below have committed no error in their judgments. The evidence showed that during the time of the life of Mr. Earle, although the books of account were quite meager, yet such as there were had been examined by the administrator of Causten, in the office of Mr. Earle, and that objection had been made to the payment of the moneys to these persons in regard to whom the charge of lobbying services was made. There was no account stated, and the failure to bring suit for an accounting until January, 1901, two years after the appropriation act of 1899, from which payment might be made, cannot be regarded as laches to prevent a recovery in this suit.

The objection that there was in reality no liability on the original contract arising out of services performed by the administrator after the death of William E. Earle cannot be sustained. The accounting has been treated by both parties as one proper to be made for the whole period, including that which elapsed subsequently to the death of Mr. Earle. The defendant recognized this right by making the accounting not only for fees received prior to the death of Mr. Earle, but for such fees as were received under the appropriation act of 1899. The account presented by the Earle estate to the Causten estate admits an indebtedness due from the administrator of the former of something over $2,000, and the account purports to be one between the estate of Earle and the estate of Causten, and it embraces not only fees received by William E. Earle in his lifetime under the appropriation act of 1891, but fees received by the estate of Earle under the appropriation act of 1899. Thus both parties seem to have treated the account as

one account, with reference to the act of 1891 and also to that of 1899, and we think that under the circumstances the defendants should be held liable to account therefor as indicated.

The account should be restated by allowing credit to the defendant of $6,500, the amount paid the attorneys as already stated. As to all other matters, the decree is right. The proper disposition of the case is to dismiss the appeal in No. 12, because the decree appealed from is not a final one, and to reverse the decree in No. 388, for the purpose of making the proper credit to defendants in the account.

Reversed.

OZAN LUMBER COMPANY *v.* UNION COUNTY NATIONAL BANK OF LIBERTY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 37. Submitted November 5, 1907.—Decided December 2, 1907.

Woods & Sons v. *Carl*, 203 U. S. 358, and *Allen* v. *Riley*, 203 U. S. 347, followed as to the power of a State, until Congress legislates, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens from fraud.

There cannot be an exact exclusion or inclusion of persons and things in a classification for governmental purposes, and a general classification, otherwise proper, will not be rendered invalid because certain imaginary and unforeseen cases have been overlooked. In such a case there is no substantial denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

State legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary and unreasonable. See *Heath & Milligan Mfg. Co.* v. *Worst*, *post*.

The purpose of the statute of Arkansas providing that all notes given for payment of patented articles must show that they were so given, and permitting defenses to be made to such notes in the hands of third parties, is to create and enforce a police regulation, aimed principally at itinerant vendors of patented articles, and the distinction in § 4 that it shall not apply to merchants and dealers who sell patented articles in the usual course of business is founded upon fair reasoning and is not such a discrimination as violates the equal protection provisions of the Fourteenth Amendment.

Where the case was decided below solely upon constitutional grounds upon which the decision cannot rest, it must be remanded and if there are any other facts they can be presented upon another trial.
145 Fed. Rep. 344, reversed.

THIS case comes here upon certiorari directed to the Circuit Court of Appeals for the Eighth Circuit. The action was commenced in the United States Circuit Court for the Western District of Arkansas, upon certain promissory notes, which the defendant, the Ozan Lumber Company, in its answer alleged had been given by it in payment for a patented article, such notes not being executed upon a printed form, showing they were given in consideration of a patented machine, as required by the statute of Arkansas. Sections 513 to 516, inclusive, Kirby's Digest Laws of Arkansas.

A demurrer to the defense was interposed on the ground that it did not state facts constituting a defense. The Circuit Court sustained the demurrer, because, as it held, the act was in violation of the Fourteenth Amendment, as denying to the plaintiff the equal protection of the laws. 127 Fed. Rep. 206. The case was taken by writ of error to the Circuit Court of Appeals, where the judgment was affirmed for the reason that the act was an illegal discrimination against patented articles. 145 Fed. Rep. 344. The application by defendant for a certiorari to review that judgment was granted.

Mr. T. C. McRae and *Mr. U. M. Rose*, for petitioner, submitted:

There is a manifest difference between the patent right and patented articles made under that right. The latter have entered into the common mass of merchandise of the State, and are necessarily within the police power of the State. *Stephens* v. *Cady*, 14 How. 528.

As to the domestic trade of the States, Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. *License Tax Cases*, 5 Wall. 470.

Whether Congress could legislate on this subject is a question that does not arise here. *New York* v. *Miln*, 11 Pet. 146;

Blalock v. *Alling*, 93 U. S. 99; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Cooley* v. *Board, &c.*, 12 How. 299.

The power to make police regulations for the protection of its citizens against fraud and imposition has not been taken from the States. *Brechbill* v. *Randall*, 102 Indiana, 528; *S. C.*, 52 Am. Rep. 695; *United States* v. *Dewitt*, 9 Wall. 41; *Mann* v. *Illinois*, 94 U. S. 135; *Civil Rights Cases*, 109 U. S. 14.

In the execution of its police powers the State has a right "to enact such legislation as it may deem proper, even in regard to interstate commerce for the purpose of preventing fraud or deception." *Schollenberger* v. *Pennsylvania*, 171 U. S. 14.

In *New* v. *Walker*, 108 Indiana, 365; *S. C.*, 58 Am. Rep. 40, one of these statutes relating to patent rights was held to be valid. To the same effect see *Shires* v. *Commonwealth*, 120 Pa. St. 368; *Reeves* v. *Baker*, 51 Fed. Rep. 785; *Mason* v. *McLeod*, 57 Kansas, 105; *Sandage* v. *Studebaker Co.*, 142 Indiana, 148; *Robertson* v. *Cooper*, 1 Ind. App. 78; *Pinney* v. *First Nat. Bk.*, 75 Pac. Rep. 119; *S. C.*, 78 Pac. Rep. 161; *Hankey* v. *Downey*, 116 Indiana, 119; *Pegram* v. *Am. Alkali Co.* (Pa.), 122 Fed. Rep. 1004; *Haskell* v. *Jones*, 86 Pa. St. 173.

The fact that the statute may indirectly affect patents furnishes no objection to its validity. *Slaughter-House Cases*, 16 Wall. 62.

Since the preparation of the brief on the petition for certiorari in this case, this court has determined the validity of the Arkansas statute in question, at least for the purposes of the present case. *Woods & Sons* v. *Carl*, 203 U. S. 358.

Mr. Morris M. Cohn, for respondent, submitted:

The statute in question is void because of the improper classification made by the exception from the provisions of the act of "merchants and dealers who sell patented things in the usual course of business." *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Connelly* v. *Union Sewer Pipe Company*, 184 U. S. 540; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 179; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236;

Lake Shore Ry. Co. v. *Smith*, 173 U. S. 684; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Minnesota* v. *Barber*, 136 U. S. 313; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Ward* v. *Maryland*, 12 Wall. 418; *Ex parte Deeds*, 75 Arkansas, 542; *Woods* v. *Carl*, 75 Arkansas, 328, 335; *Ex parte Ft. Smith Bridge Co.*, 62 Arkansas, 461; *State* v. *Sheriff, &c.*, 48 Minnesota, 236; *People* v. *Max*, 99 N. Y. 377; *Dickson* v. *Poe*, 159 Indiana, 492; *Hannon* v. *State*, 66 Ohio St. 249; *Brown* v. *Jacobs P. Co.*, 115 Georgia, 429; *In re Flucks*, 157 Missouri, 125; *Stinson* v. *Muskegon Brewing Co.*, 100 Michigan, 347; *Gillespie* v. *People*, 188 Illinois, 176; *Templar* v. *Michigan St. Board*, 90 N. W. Rep. 1058.

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

The validity of this very statute of Arkansas (at least until Congress legislates upon the subject) has already been affirmed by this court, *Woods & Sons* v. *Carl*, 203 U. S. 358, and the validity of statutes of a somewhat similar nature has also been affirmed in the case of *Allen* v. *Riley*, 203 U. S. 347, immediately preceding the case above cited.

It is sought to avoid the authority of our decision upon this Arkansas statute by asserting that nothing was therein decided, except the validity of the first section of the act, and that the validity of the act when considered in connection with the fourth section was not argued or decided. The fourth section reads as follows: "This act shall not apply to merchants and dealers who sell patented things in the usual course of business." Other reasons for an affirmance are set up in the brief of respondent.

The grounds given for the decision by the Circuit Court and the Circuit Court of Appeals differ somewhat. The Circuit Court says that the effect of the fourth section of the statute is to violate that portion of the Fourteenth Amendment to the Federal Constitution, which provides that no State shall

deny to any person within its jurisdiction the equal protection of the laws; while the Circuit Court of Appeals bases its judgment upon the unlawful discrimination evidenced by the act against those who are protected by a patent granted by the United States.

In 203 U. S. 358, *supra,* this court held the statute valid as against an objection of the same nature as that taken herein by the Circuit Court of Appeals. Our decision in that case had not been made at the time of the decision of this case in the courts below. The ground taken by the Circuit Court was not discussed in our opinion in 203 U. S. and although it might be urged that all objections to its validity arising upon the face of the statute, even if not specially discussed, were overruled by the decision; yet assuming that the particular question now presented is still open in this court, we are of opinion that the exception contained in section four does not render the statute invalid. The plain purpose of the whole statute is to create and enforce a proper police regulation. Its passage showed that the legislature was of opinion that fraud and imposition were frequent in the sale of property of this nature, except in the cases mentioned in § 4, and that temptations to false representations in regard to the virtues and value of the article sold were also frequently yielded to. When the sale of the article was effected by such representations, and a note given for the amount of the sale, a transfer of the note to a *bona fide* purchaser for value before its maturity prevented the vendee from showing the fraud by which the sale had been accomplished. In order to reach such a transaction and to permit the vendee to show the fraud, the statute was passed. It was doubtless thought that merchants and dealers, as mentioned in the statute, while dealing with the patented things in the manner stated, would not be so likely to make representations or to engage in a fraud to effect a sale, as those covered by the statute. The various itinerant vendors of patented articles, whose fluency of speech and carelessness regarding the truth of their representations, might almost be said to have

become proverbial, were, of course, in the mind of the legislature, and were included in this legislation. Indeed they are the principal people to be affected by it.

The manufacturer of a patented article, who also sells it in the usual course of business in his store or factory, would probably come within the exception of § 4. He may be none the less a dealer, selling in the usual course of his business, because he is also a manufacturer of the article dealt in. Exceptional and rare cases, not arising out of the sale of patented things in the ordinary way, may be imagined where this general classification separating the merchants and dealers from the rest of the people might be regarded as not sufficiently comprehensive, because in such unforeseen, unusual and exceptional cases the people affected by the statute ought, in strictness, to have been included in the exception. See opinion of Circuit Court herein, 127 Fed. Rep., *supra*. But we do not think the statute should be condemned on that account. It is because such imaginary and unforeseen cases are so rare and exceptional as to have been overlooked that the general classification ought not to be rendered invalid. In such case there is really no substantial denial of the equal protection of the laws within the meaning of the amendment.

It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an *exact* exclusion or inclusion of persons and things. See *Gulf &c. Co.* v. *Ellis*, 165 U. S. 150, and cases cited; *Missouri &c. Co.* v. *May*, 194 U. S. 267. We can see reasons for excepting merchants and dealers who sell patented things, in the usual course of business, from the provisions of the statute,

and we think the failure to exempt some few others, as above suggested, ought not to render the whole statute void as resulting in an unjust and unreasonable discrimination.

The case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, one of the cases cited by the Circuit Court, is not in our opinion applicable. The statute did not apply to agricultural products or livestock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the State the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. Those who were exempted from its provisions were numerous and stood practically in the same relation to the subject matter of the statute as did the other class upon whom the statute acted, and no valid reason could be given why, if one were included, the other should be exempted. The same reasons applied to all the classes, and should have led to the same results with regard to all. There was no room for a proper or fair discrimination.

We think there is a distinction, founded upon fair reasoning, which upholds the principle of exemption as contained in the fourth section, and that, consequently, the statute does not violate the Fourteenth Amendment on the ground stated.

The case was decided by the courts below solely upon constitutional grounds, and upon those grounds the decision cannot rest. It must, therefore, be remanded, and if there be any other facts to be urged they can be presented on another trial.

The judgments of the Circuit Court and the Circuit Court of Appeals must be reversed and the case remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

Reversed.

BANK OF KENTUCKY *v.* COMMONWEALTH OF KENTUCKY.

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

No. 87. Argued October 23, 1907.—Decided December 2, 1907.

A municipal corporation is not necessarily bound by the decree in a suit against another municipality because officers of the State were parties thereto.

The relation of the state board of valuation to the counties and other municipalities is a matter of state regulation.

In Kentucky, neither a sheriff, nor assessor, nor the board of valuation has control of the fiscal affairs of the county and a judgment against them does not bind the county.

A judgment against a county of Kentucky and the members of the state board of valuation restraining the collection of taxes of that county as impairing the obligation of a contract created by a law of the State and within the protection of the Federal Constitution is not, because such state officers were parties, *res judicata* as to the validity of taxes imposed by another county, nor is such other county privy to the judgment.

It is competent for the legislature of a State to change the day that a bank shall report its property for assessment and to provide that the lien of the assessment shall follow the property in the hands of a vendee.

94 S. W. Rep. 620, affirmed.

THE facts, which involve the liability of certain banks in Kentucky to be assessed for back taxes under the revenue law of the State of Kentucky, are stated in the opinion.

Mr. Alexander P. Humphrey for plaintiffs in error:

This court has finally determined, in a case of similar import, that the thing established by the Federal decree was the binding and conclusive character of the contract embodied in the Hewitt law and its acceptance. *Deposit Bank* v. *Frankfort*, 191 U. S. 499 (514). See also dissenting opinion in same case.

This court has therefore decided the proposition that under the Hewitt law the Bank of Kentucky had a valid and binding contract which the Commonwealth of Kentucky could not alter or change, and that by the terms of that contract the property

of the Bank of Kentucky and its shares of stock could not, during its corporate existence, be assessed for taxation for state purposes in a different mode or at a greater rate of taxation than is prescribed in said act, and could be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business.

It is further expressly decided that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they were intended to provide or did provide any assessment for taxation of the property of the Bank of Kentucky, its rights of property or franchise or shares of stock, except to the extent and in the manner provided by §§ 1, 2 and 3 of Article II of the Hewitt law, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of, and repugnant to, the Federal Constitution and void.

Property is always required to be assessed as of a certain date. *Commonwealth* v. *Riley's Curators*, 24 Ky. Law Rep. 2006; *Baldwin* v. *Shine*, 84 Kentucky, 507; *Wangler* v. *Black Hawk Co.*, 56 Iowa, 384; *S. C.*, 9 N. W. Rep. 314; *Coal Co.* v. *Porth*, 63 Wisconsin, 77; *S. C.*, 23 N. W. Rep. 105; *Southern Ins. Co.* v. *Board of Assessors*, 49 La. Ann. 401; *S. C.*, 21 So. Rep. 913.

A proceeding under § 4221 of the Kentucky Statutes is in plain contradiction of the decree of the Federal court and breaks down the contract which that decree establishes as having been made by the Bank of Kentucky.

The county of Jefferson was clearly bound by the decree of the Federal court, as privy thereto, and has no stronger case than the Bank of Kentucky.

There was no lien on the assets of the Bank of Kentucky when they were acquired by the National Bank of Kentucky.

Until assessment day it cannot be known what property exists subject to assessment, or against whom the assessment is to be made. There may be an inchoate lien after assessment day and before an actual assessment. But there can be no

inchoate lien prior to assessment day. If the day of assessment had arrived then it was the duty of the Bank of Kentucky to report its property subject to assessment and pay the taxes. If the day of assessment had not arrived, it was not the duty of the Bank of Kentucky to report or pay, and there could be no lien for taxes. The report to be made under the Hewitt law was to be made as of July 1. The condition of the bank then governed the assessment. What assets it had on the preceding 15th of September or December 31 was entirely immaterial.

The property owned by the taxpayer upon the assessment day must necessarily govern his assessment. If he parts with his property before assessment day, he cannot be liable for the taxes, nor can there be any lien for the taxes.

Mr. Henry Lane Stone, with whom *Mr. Samuel B. Kirby* was on the brief, for defendant in error:

The plea of *res judicata* as to the Jefferson county taxes is totally inapplicable, and the demurrer thereto, as well as to the whole answer of plaintiffs in error was properly sustained. § 4241, Kentucky Statutes (Carroll's Compilation, 1903); *Bank of Kentucky et al.* v. *Commonwealth of Kentucky*, 29 Ky. Law Rep. 643; *Bank of Kentucky* v. *Stone et al.*, 88 Fed. Rep. 383, 386; *Stone, Auditor &c.* v. *Bank of Kentucky* and *City of Louisville* v. *Same*, 174 U. S. 799; § 51, Civil Code of Kentucky; *Northern Bank* v. *Stone et al.*, 88 Fed. Rep. 413, 418; *Farmers' Bank of Kentucky* v. *Stone et al.*, 88 Fed. Rep. 987; aff'd 174 U. S. 409; *Joyes* v. *Jefferson County Fiscal Court*, 106 Kentucky, 615; *County of Henderson* v. *Henderson Bridge Co.*, 116 Kentucky, 164; *Deposit Bank of Frankfort* v. *Frankfort*, 88 Fed. Rep. 986; aff'd 174 U. S. 800; 191 U. S. 499; *Bank Tax Cases*, 97 Kentucky, 590; *Stone* v. *Louisville*, 22 Ky. Law Rep. 423; Equity Rule 48; § 25, Civil Code of Kentucky; *Apsden* v. *Nixon*, 4 How. 467; *Hale* v. *Finch*, 104 U. S. 265; *DuPasseur* v. *Rochereau*, 21 Wall. 130; *Metcalf* v. *Watertown*, 153 U. S. 671; *Hancock National Bank* v. *Farnum*, 167 U. S. 640.

The owner of property located within the State of Kentucky,

by a transfer thereof to another, cannot evade the taxes owing to the State thereon, it being at the time under lien therefor by the express letter of the statute. It is furthermore insisted that, on September 15, 1899, the property and assets of the Bank of Kentucky came under this statutory lien for the amount of taxes levied and fixed by law for state purposes. In other words, the National Bank of Kentucky took the property of the Bank of Kentucky *cum onore*, and this obligation to the State cannot be discharged until the taxes are actually paid for that year. On account of the failure or refusal to pay taxes for the year 1900, under the Hewitt act, the provisions of § 7 became enforcible, and the same rate of taxes must be paid to the State as on assessed taxable property in the hands of individuals, that is to say, under existing laws at the time of such failure or refusal and those laws were embodied in the General Revenue Act of November 11, 1892. *Frankfort* v. *Mason & Foard Co.*, 100 Kentucky, 54; General Statutes of Kentucky, ed. of 1888, pp. 1040, 1041 ; §169, Kentucky Constitution; §§ 4019, 4021, 4023, 4052 and 4092, Kentucky Statutes; Hewitt Act, General Statutes of Kentucky, ed. of 1888, p. 1035; Act approved April 24, 1882, General Statutes of Kentucky, ed. of 1888, p. 652; *Middlesboro* v. *Coal & Iron Bank*, 108 Kentucky, 680; *Commonwealth* v. *Walker*, 25 Ky. Law Rep. 2122; *Bank Tax Cases*, 102 Kentucky, 174; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636.

The judgment of the court below does not violate the National Banking Act. 5 Cyc. of Law and Procedure, p. 574, par. b, note 34, citing numerous authorities, both state and Federal; *Metropolitan National Bank* v. *Claggett*, 141 U. S. 527; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the liability of plaintiffs in error, Bank of Kentucky and National Bank of Kentucky, to be assessed for certain back taxes under the revenue law of the State of

Kentucky. That law makes it the duty "of auditor's agents to cause to be listed for taxation all property omitted, or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years." § 4241, Ky. Stats. (Carroll's Compilation, 1903).

In pursuance of other provisions of the section this suit was brought. There is no dispute about the facts. The Bank of Kentucky was chartered by the legislature of Kentucky in 1834. Its charter was subsequently twice extended, but was repealed by an act approved March 22, 1900. On that day the National Bank of Kentucky, was organized and took over its assets.

The purpose of the suit is to subject these assets to assessment for taxes for Jefferson county for the years 1898, 1899 and 1899–1900, and for the State for the year 1899–1900. Against the assessment for county taxes plaintiffs in error pleaded a judgment of the Circuit Court of the United States, which, it is contended, established that it had been adjudged that the Bank of Kentucky was only taxable under a law of the State, called the Hewitt law, and that such law constituted an inviolable contract between the bank and the State. And against the state taxes it was urged that the bank had ceased to exist by the repeal of its charter before liability under the Hewitt law attached.

1. By its original charter the Bank of Kentucky was required to pay twenty-five cents on each share of its stock in lieu of all other taxation. By an exercise of a power reserved the legislature increased this to fifty cents. By the Hewitt law it was provided that the banks in the Commonwealth should pay to the State seventy-five cents on each share of their capital stock outstanding, and the ordinary rate of state taxation on the amount of its profits less ten per cent thereof. The tax was to be in lieu of all local taxation, except upon the real estate occupied by the bank for the purpose of its business. It was provided that banks organized prior to its passage might accept

the terms of the law. If they failed to do so they were to be taxed as other corporations were taxed, and also should be subject to local taxation. The Bank of Kentucky accepted the terms and paid the taxes required. In 1891 Kentucky adopted a new constitution, which provided that all property of individuals and corporations should be taxed according to its value. In 1892, to enforce the provision of the constitution, the legislature passed a general revenue bill. Under the terms of the bill banks as well as other corporations are subject to taxation, and it is provided that their property at its fair cash value "shall be assessed and valued as of the 15th of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same." Corporations are also required to pay a tax on their franchise to the State and to the locality where the franchise is exercised, to be levied by a board denominated the Board of Valuation and Assessment, constituted of the auditor, treasurer and secretary. It is the duty of the board to determine the apportionment of the tax where more than one jurisdiction is entitled to a share of the tax and fix the place of its payment. The auditor is chairman of the board, and it is made his duty at the expiration of thirty days after the final determination of such values to certify to the county clerks the amount liable for local tax, who in turn certifies it to the local tax officer.

The judgment relied on as *res judicata* was entered in a suit brought by the Bank of Kentucky in the Circuit Court of the United States for the district of Kentucky, wherein it impleaded Samuel H. Stone as the Auditor of Public Accounts of the State of Kentucky, Charles Fenley as the Secretary of State, and George W. Long as the Treasurer of State, the city of Louisville as a municipal corporation, the county of Franklin as a municipal corporation and the Board of Councilmen of the city of Frankfort as a municipal corporation.

The bill alleged the rights of the bank under the Hewitt law as a contract between it and the State, its exemption from taxa-

tion except under that law, and the invalidity as to it of the act of November 11, 1892. The bill also set forth various litigations which the bank had theretofore conducted, and in which, it insisted, it had been adjudged that it could not be taxed otherwise than under the Hewitt law. And it was alleged that the defendants would proceed to value the franchise of the bank in the manner set forth in the act of November 11 for the years 1895, 1896, and 1897, and certify such value to the clerk of Jefferson county, and that those assessments would be illegal.

The bill prayed that Stone, Fenley and Long be perpetually enjoined from assessing the value of the bank's capital stock under the act of November 11 for the years mentioned; that Stone be enjoined from certifying such valuation to the said several municipalities, and that such municipalities be enjoined and restrained from collecting any tax upon such valuation; that the bank's contract be fully established; that it be declared that, upon conforming to the same by making the payments under the Hewitt law or under its charter, no other or further taxes should be exacted from it under any form or by any authority. Issue was joined and the court decreed, among other things, as follows:

"It is further adjudged, ordered and decreed, by reason of the several pleas of *res judicata,* relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the Commonwealth of Kentucky, under the provisions of Article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth of Kentucky cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot during its corporate existence be assessed for taxation for state purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for

county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property or franchise or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of Article II of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

It is insisted that this decree "decided that the Bank of Kentucky had a full and binding contract under the Hewitt law—a contract which the Commonwealth of Kentucky could not alter or change," and that by the terms of that contract its property was only subject to taxation under that law. It is further insisted that the extent of the decree is not limited by the reasons given for it, and *Deposit Bank* v. *Frankfort*, 191 U. S. 499, is cited.

The important consideration is, upon whom is the decree binding? Meeting the inquiry, the bank contends "that the county of Jefferson is clearly bound by this decree as privy thereto," notwithstanding it was not a party to the suit in which the decree was rendered, and deduces this from the dependence of the power of the county to collect taxes upon the assessment by the board of valuation of the value of the franchise of the bank and the certification of the proportion thereof that was subject to county taxation. It is hence further deduced that a judgment against the state board of valuation determines the rights of all the local communities claiming under a valuation and apportionment made by the board and the auditor.

The action of the Bank of Kentucky is inconsistent with this contention. In its litigation it made the local communities parties, and in the suit the decree in which is pleaded in

the case at bar as establishing its exemption from taxation, except under the Hewitt law, it secured an injunction against the Board of Valuation and Assessment by reason of a decree obtained against Franklin County in a suit to which the board was not a party. The court decided, and it was required to decide in order to give the bank the benefit of the decree, that the state board of valuation was the agent of the municipalities, county and city, and as a consequence that judgment rendered against the county of Franklin in the courts of the State, adjudging the Hewitt law a contract between the bank and the State, was binding upon the board of valuation. "Nor can there be any doubt," the court said, "that the parties to the former adjudications and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin County, the city of Frankfort, and the city of Louisville. It is for them that the Board of Valuation and Assessment are about to apportion the estimated value of the franchise, and to certify it to them for the collection of taxes. The members of the board of valuation are nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by prior litigation, certainly the agents acting for them under the law are equally bound. In this light the Board of Valuation and Assessment is in respect to the former judgment privy to the city of Louisville and county of Franklin, and the city of Frankfort." *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383, 395. And on account of this agency and consequent privity with those municipalities the board of valuation was enjoined from action against the contract, determined to exist by the judgment set up and to which the board was not a party by name. The reason given for the decision is now opposed by plaintiffs in error and a decree obtained on account of it is asserted to be independent of it. The vicarious character of the board, as declared by the court, is attempted to be put out of view and a decree made against it because, and only because, it was the agent of certain municipalities is

sought to be made an instrument to bind all others without power of question or resistance on their part. This attempt is not justified by *Deposit Bank* v. *Frankfort,* and, as was said by the Circuit Court of Appeals in another case, "would be extending the doctrine of *res judicata* further than any authority will justify." *Northern Bank of Kentucky* v. *Stone,* 88 Fed. Rep. 413, 415.

The Northern Bank of Kentucky had obtained a judgment against Bourbon County and its sheriff, adjudging that under the Hewitt law it had an irrevocable contract, and the bank sought to use the judgment as an estoppel against other counties and municipalities as well as against Bourbon County. It was sustained as to the latter but rejected as to the other municipalities. The argument was that Bourbon County was a municipal corporation under the state government, and that the State was bound by the litigation against it, and therefore every other municipality was bound. The court rejected the contention, making the remarks we have quoted. The relation of the board of valuation to the counties of the State was again decided to be that expressed in *Bank of Kentucky* v. *Stone.* The latter case was affirmed by this court by a division of its members. 174 U. S. 799.

There is another answer to the contention of plaintiffs in error. The relation of the board of valuation to the counties and other municipalities of the State is necessarily a matter of state regulation.

The Court of Appeals of Kentucky in the case at bar, answering the contention based on the effect of the judgment pleaded as *res judicata,* quoted, with approval, the views expressed by the Circuit Court of Appeals of the Sixth Circuit in the *Northern Bank case,* of the relation of the State to its counties and cities, and pronounced those views conclusive of "the duty of the Bank of Kentucky to pay its taxes for the years in question." And the court applied the doctrine of the case of *Henderson County* v. *Henderson Bridge Co.,* 116 Kentucky, 164, and declared that the question there considered was substantially the

same as involved in the case at bar. Quoting that doctrine, the court said: "A person or municipality is not bound by former litigation, unless it was a party, either actually or by its representative. Under our statute the fiscal court has control of the affairs of the county, and the sheriff is only a tax collector, in no wise a representative of the county in the management of its affairs, and the county is not therefore bound by any adjudication to which it was not a party." In other words, the court held that neither a sheriff nor an assessor had control of the affairs of the county, and a judgment against either did not bind the county. Applying this, the court further said "the board of assessment and valuation did not have control of the fiscal affairs of Jefferson County, and in our opinion the judgment did not bind Jefferson County."

2. To support the contention that there is no liability to the State for the tax of 1900, it is contended that the property of the Bank of Kentucky was only assessable under the Hewitt law, and before the property was required to be returned for assessment under that law the Bank of Kentucky had ceased to exist, and its property passed to the National Bank of Kentucky free from any lien.

A brief recapitulation of the facts will make the contention clear. Under the Hewitt law the stock and assets of banks were ascertained as of July 1, and the tax paid thereon. On May 1, 1900, as we have seen, by not accepting the conditions imposed upon it by the legislature, the charter of the Bank of Kentucky was repealed. On that day the National Bank of Kentucky was organized and the property of the Bank of Kentucky transferred to it. Under the general laws of the State all taxable property was required to be assessed and valued as of the fifteenth of September in the year listed, and the owner or possessor is required to list it with the assessor on that day, and remains bound for the taxes, notwithstanding he may have sold or parted with it. Section 4052. Under the act of 1892, which repealed the Hewitt law, banks were required to make reports on or before the first of March of each year as

of the preceding thirty-first of December. This provision fixed the time the property of banks should be assessed. The Court of Appeals held that this law was applicable to the Bank of Kentucky and fixed a lien on its property, which continued, notwithstanding the repeal of the charter of the bank and the transfer of the property to the National Bank of Kentucky. This result followed, the Court of Appeals further said, even viewing the Hewitt law as an irrevocable contract. In other words, it was decided that either one or the other of the two dates was the day of assessment and the commencement of the lien. That of December 31, if the Hewitt law should be regarded as repealed by the act of 1892, and the court decided that it was repealed. That of September 15, if the Hewitt law was not repealed, because the provision for the assessment of property as of the fifteenth of September was a part of the law. The court said (94 S. W. Rep. 623):

"If, under the Hewitt law, banks were assessed at the same time the taxes were due and payable, then the assessment did not take place until the day after the close of the fiscal year for which the assessment was made and the taxes were paid. The act does not say that the assessment shall take place on July 1, nor does it say that it is assessed as of that date. The bank is required to make a report and pay on that date. The Hewitt law provides that the holder of the legal title and the holder of the equitable title and the claimant or bailee in possession of the property on the fifteenth of September of the year the assessment is made, shall be liable for the taxes thereon. Hewitt Law, sec. 6, Art. 1, c. 92, Gen. Stats., ed. 1888, p. 1035."

It was further decided that the only right which the bank secured was to pay taxes upon the property as designated by the Hewitt law. "When the right to do this is maintained," the court observed, "every right it [the Bank of Kentucky] had under its irrevocable charter has been respected."

The conclusions of the court are contested by plaintiffs in error, and it is insisted that the day of assessment was not

September 15 or December 31, but July 1, the day the bank was required to make its report, and that a lien for taxes could not attach until that day, and before that day the Bank of Kentucky had ceased to exist. But we have seen that the Court of Appeals of Kentucky, construing the laws of the State, made, the fifteenth of September the day of assessment under the Hewitt law; in other words, distinguished between the day of assessment and the day that bank was required to make its report. We are not prepared to say that the conclusion is not justified. But passing that, we concur with the Court of Appeals of Kentucky that it was competent for the legislature to change the day the bank should report its property for assessment, and that the lien of assessment would follow the property in the possession of its vendee, the National Bank of Kentucky.

Judgment affirmed.

ARKANSAS SOUTHERN RAILROAD COMPANY *v.* GERMAN NATIONAL BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 56. Argued November 14, 15, 1907.—Decided December 2, 1907.

Unless the decision upon a Federal question was necessary to the judgment of the state court, or in fact made the ground of it, the writ of error must be dismissed.

Even when an erroneous decision upon a Federal question is made a ground of the judgment of a state court, if the judgment is also supported upon another ground adequate in itself and containing no Federal question the writ of error must be dismissed.

This court, ordinarily, will not inquire whether the decision upon matter not subject to its revision was right or wrong.

Although the state court may refer to and uphold the statute, the constitutionality of which is attacked, if it does so after stating the rule at common

law and that the statute is merely declaratory thereof the judgment is based on the common law rule and no Federal question exists that this court can review.

Writ of error to review 92 S. W. Rep. 522, dismissed.

THE facts are stated in the opinion.

Mr. Edward B. Peirce for plaintiff in error:

In determining whether a Federal question was decided adversely to the plaintiff in error, this court will look only to the record itself; nothing out of the record certified to this court can be taken into consideration. This must be shown; first, either by express averment or by necessary intendment in the pleadings of the case. Or, secondly, by direction given by the court and stated in the exception. Or, thirdly, it must be entered on the record of the proceeding in the appellate court in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided; and this entry must appear to have been made by the order of the court and certified by the clerk as a part of the record in the state court. *Armstrong* v. *Treasurer of Athens County*, 16 Pet. 285.

In determining whether a Federal question was decided adversely to plaintiff in error, this court will act only upon the record of the court below; and of that record the petition for writ of error or the assignment of errors made in the state court forms no part. *Clark* v. *Pennsylvania* (1888), 128 U. S. 397; *California Powder Works* v. *Davis* (1893), 151 U. S. 389; *Sayward* v. *Denny* (1894), 158 U. S. 183; *Butler* v. *Gage* (1890), 138 U. S. 52; *Manning* v. *French* (1889), 133 U. S. 186.

The assignment of errors made in the state court cannot be looked to to determine whether a Federal question was decided. *Fowler* v. *Lamson* (1896), 164 U. S. 262.

While this court will not examine the evidence, yet for the purpose, not of deciding the facts, but of throwing light on the findings, it will examine the entire record, including the

opinion of the court below. *Egan* v. *Hart* (1896), 165 U. S. 188; *Eustis* v. *Bolles* (1893), 150 U. S. 361.

A careful examination of the record in the case at bar will show conclusively that the decision of the state court was based upon the Federal question and that no other question was decided.

If it sufficiently appears from the record itself that the repugnancy of a statute of a State to the Constitution of the United States was drawn in question, or that the question was applicable to the case, this court has jurisdiction of the cause, although the record should not in terms state that the repugnancy of the statute of the State to any part of the Constitution was drawn in question. *Satterlee* v. *Matthewson*, 2 Pet. 380, 410; *McCullough* v. *Virginia* (1898), 172 U. S. 119; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143.

Mr. John Fletcher, with whom *Mr. W. C. Ratcliffe* was on the brief, for defendant in error:

It is settled that this court will not review a state judgment, although a Federal question was decided adversely to the plaintiff in error, if another question, not Federal, was also raised and decided against him, the decision of which is sufficient to sustain the judgment. It must appear that the judgment could not have been rendered without deciding the Federal question. *Harris* v. *Morton*, 171 U. S. 38; *Cook County* v. *Calumet*, 138 U. S. 635; *DeLaussure* v. *Garland*, 127 U. S. 216; *Murdock* v. *Memphis*, 20 Wall. 590; *Klinger* v. *Missouri*, 13 Wall. 257; *K. & P. R. Co.* v. *P. & K. R. R. Co.*, 14 Wall. 23; *Johnson* v. *Risk*, 137 U. S. 307; *Wood* v. *Skinner*, 139 U. S. 293; *Henderson Bridge Co.* v. *City of Henderson*, 141 U. S. 679; *Eustis* v. *Bolles*, 150 U. S. 361.

That the judgment of the court was based upon the finding that the cotton was delivered to the compress company for the account of Alphin & Lake Cotton Company and that this was the basic question underlying the judgment of the court is not only conclusively shown by the assignment of errors but

is clearly set forth in the petition for rehearing in the Supreme Court.

The determination of this question against the railroad company renders it unnecessary that the court should go into the question as to the validity of the statute of the State.

Indeed it may be said that the determination of any of the other non-Federal questions raised in the case and set out in the assignment of errors is sufficient to settle the case without considering the effect of the statute.

This court will not re-examine the evidence, and when the facts are found by the court below as in this case this court is concluded by such finding. *Egan* v. *Hart*, 165 U. S. 188; *Cornell University* v. *Fiske*, 136 U. S. 152.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the defendant in error, hereafter called the plaintiff, for the failure of the railroad company, hereafter called the defendant, to deliver cotton in accordance with the terms of bills of lading issued by the railroad and held by the plaintiff as indorsee. The cotton in question was purchased by the Alphin & Lake Cotton Company, and shipped over the defendant's road to El Dorado, Arkansas, mainly from Bernice, Louisiana. The Bank of Bernice having made advances took the bills of lading as shipper and sent them with drafts on the purchaser to the Bank of Little Rock. The Bank of Little Rock wishing to reduce the account of the Alphin & Lake Cotton Company, these bills subsequently were transferred to the plaintiff as security for an advance. The bills of lading bore the words "Consigned to S|O. % Compress El Dorado, Ark. Notify Alphin & Lake Cotton Co." They also contained a notice that the liability of the railroad as a common carrier ended on the arrival of the cotton at the station of delivery, and that unless removed by the consignees within twenty-four hours the cotton might be removed and

stored by the railroad at owner's risk and expense in a warehouse of its choice.

The only place at which the cotton could be stored at El Dorado, and the place at which all the cotton coming over the railroad was delivered, was a compress company of which Lake, a member of the purchasing company, was president. The railroad on the arrival of this cotton followed its custom and handed the cotton over to the compress company. It is stated by the Supreme Court of Arkansas, whose decision we are asked to review, that the delivery was made at once, for account of Alphin & Lake Cotton Company, with no further directions and without mention of the restriction to shipper's order, on the supposition that it belonged to the Alphin & Lake Cotton Company. The bills of lading were outstanding and were not asked for as a condition of the bailment. In the defendant's answer it is admitted that the cotton was not delivered to the plaintiff, on demand some weeks later, and while it is alleged that the delivery to the compress company was made to it as agent for the holders of the bills of lading, it is alleged also that the Alphin & Lake Cotton Company was the owner of the cotton and thereafter took possession of it, sold it and received the proceeds.

The judge before whom the case was tried directed a verdict for the plaintiff, and on exceptions the Supreme Court of the State affirmed the judgment of the trial court. 92 S. W. Rep. 522.

The statutes of Arkansas enact that such bills of lading may be transferred by endorsement and delivery of the same, with the effect of conveying a valid title to or lien upon the produce for which they are given, and forbids the delivery of such produce except on surrender and cancellation of the bills of lading, with a proviso exempting documents having the words "not negotiable" on their face. A violation of the enactment is made criminal and severely punished, and it is provided that any person aggrieved may recover all damages sustained by reason of such violation. Kirby's Digest, §§ 530, 531. It is

argued that the case could not have been withdrawn from the jury, or the judgment upheld, except on the assumption that these sections of the statutes were valid, that they invalidated the stipulation in the bills of lading for a right to store and overrode the directions contained in them, and that the plaintiff made out a case on the undisputed fact that the cotton was delivered to the compress company without a surrender of the bills of lading. It is argued further that the sections, so far as they bear on these transactions, are repugnant to the Constitution, Art. I, § 8, as an unauthorized attempt to regulate commerce among the States, and this is the error relied upon here, although, by no means the only one assigned.

But according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. *Murdock* v. *Memphis*, 20 Wall. 590; *Hale* v. *Akers*, 132 U. S. 554; *Leathe* v. *Thomas*, *ante*, p. 93. Therefore if we should be of opinion, as we are, that the Supreme Court rested its judgment upon principles of common law as it understood them, we should go no farther, although that court also upheld and relied upon the statute, whether in our opinion its views were right or wrong.

It will have been noticed that under the answer there was only a very narrow issue of fact possible, although there was one. There was an issue as to whether the delivery to the compress company was not a delivery to it as agent for the holders of the bills of lading. If that was as the defendant alleged, it might be that the contract was fulfilled and the defendant discharged, unless the statute made a change. But on the evi-

dence there was hardly room for argument or doubt. There was no real question that the cotton was handed over at once and not in the exercise of the stipulated right after twenty four hours, that no directions about delivery were given to the compress company, and that the persons handling the cotton at El Dorado thought that it belonged to the Alphin & Lake Cotton Company or acted as if it did. Both sides asked the judge to direct a verdict and evidently regarded the questions as mainly questions of law. While it may be that the judge would not have felt technically justified in directing the jury to find for the plaintiff, but for his views on the effect of the statute, the Supreme Court seems to have thought the facts indisputable, and stated them categorically with no hint of hesitation or doubt.

Whether the Supreme Court was warranted in assuming the facts to be as it set them forth is no concern of ours. The important thing is that it was at pains to state them, and that it can have had no purpose in doing so other than to establish a liability under the contract at common law. If the statute imposed liability for delivery without a surrender of the bills of lading, whether the contract was performed or not, there was no need to go into these details. It is true that the court refers to and upholds the statute, but it does so after stating the duties and liabilities of the carrier at common law, and says more than once that the relevant enactment is for the enforcement of duties already existing; that is, it would seem, that it is only declaratory so far as this case is concerned. The court treats the contract itself as requiring a delivery to shipper's order, and only upon a production of the bills of lading properly indorsed. Its concluding words are, "under the contract as shown by the bills of lading it was relieved of liability on account of the storage, but not of the failure to deliver according to law." Whether the analysis of the contract was correct or not, and whether or not there were other grounds of common law upon which the defendant ought to have escaped, are matters upon which we cannot speculate. When we see

that the opinion of the court upon the constitutional question first appearing in that opinion was not necessary to its judgment upon the case we have nothing more to do.

Writ of error dismissed.

PATCH v. WABASH RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 57. Argued November 15, 1907.—Decided December 2, 1907.

The certificate of a judge of the Circuit Court that the judgment is based solely on jurisdictional grounds is an act of record and *quære* whether it stands on any different ground from judgments and the like when the term has passed, and whether it can then be amended so as to show that it was signed inadvertently and by mistake and to certify that the question of jurisdiction was not passed on and that the decision was based on another ground. Such a mistake is not clerical.

The provision in a state statute that no non-resident shall be appointed or act as administrator or executor does not open the appointment of a non-resident to collateral attack in an action brought by him so as to deprive him of his right to file a plea that the case cannot be removed to the Federal court.

A corporation incorporated simultaneously and freely in several States exists in each State by virtue of the laws of that State and when it incurs a liability under the laws of one of the States in which it is incorporated and is sued therein it cannot escape the jurisdiction thereof and remove to the Federal court on the ground that as it is also incorporated in the other States it is not a citizen of that State. *Southern Railway* v. *Allison*, 190 U. S. 326 and other cases, holding that where the corporation originally incorporated in one State was compelled to become a corporation of another State so as to exercise its powers therein, distinguished.

THE facts are stated in the opinion.

Mr. George C. Otto for plaintiff in error:

The jurisdiction of the court was in issue. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, at 718–720; *Capron* v. *Van Noorden*, 2 Cr. 126; *Brown* v. *Keene*, 8 Pet. 112; *M. C. & L. M. Ry. Co.* v.

Swan, 111 U. S. 379, at 382; *Morris* v. *Gilmer*, 129 U. S. 315; *Wetmore* v. *Rymer*, 169 U. S. 115; *People* v. *Seelye*, 146 Illinois, 189; *Bassick Mining Co.* v. *Schoolfield*, 10 Colorado, 46; *United States* v. *Arrendondo*, 6 Pet. 691, 709; *Grignon's Lessee* v. *Astor*, 2 How. 319, 338; *Dred Scott* v. *Sandford*, 19 How. 393, 427; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217.

The defendant was a citizen and resident (1) of Illinois (the State in which the suit was brought) and, also (2) of each of the States of Missouri, Indiana, Michigan and Ohio. *Ashley* v. *Ryan*, 49 Ohio St. 504 (1892); *Ashley* v. *Ryan*, 153 U. S. 436 (1893); *Westheider* v. *Wabash R. R. Co.*, 115 Fed. Rep. 840 (1892); *Winn et al.* v. *Wabash R. R. Co.*, 118 Fed. Rep. 55; *Sheppard et al.* v. *Graves*, 14 How. 505, at 510; Chitty on Pleading, Ch. VI, Tit. I; Stephen on Pleading (Tyler's ed.), 84; Bacon Ab., Abatement; *C. & N. W. Ry. Co.* v. *Ohle*, 117 U. S. 123; *Jones et al.* v. *League*, 18 How. 76, 81; 18 U. S. Stat. at L. 472; *St. Louis & S. F. Ry. Co.* v. *James*, 161 U. S. 545; *Louisville R. R. Co.* v. *Letson*, 2 How. 497, 558; *Bank of Augusta* v. *Earle*, 13 Pet. 512; *Marshall* v. *B. & O. R. R. Co.*, 16 How. 314, 328; *Railroad Co.* v. *Harris*, 12 Wall. 65, 68; *Covington Draw Bridge Co.* v. *Shepherd et al.*, 20 How. 227; *Southern Ry. Co.* v. *Allison*, 190 U. S. 326; *Ohio & M. R. Co.* v. *Wheeler*, 1 Black, 286, at 295, 296; *Phila. & Wilm. R. R. Co.* v. *Maryland*, 10 How. 376, 392; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Paul* v. *Virginia*, 8 Wall. 168, 181; *Shields* v. *Ohio*, 95 U. S. 319; *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359; *Railway Co.* v. *Berry*, 113 U. S. 465; *Railway Co.* v. *Miller*, 114 U. S. 176; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301; *State* v. *Keokuk & W. Ry. Co.*, 99 Missouri, 30; *Evans* v. *Railway Co.*, 106 Missouri, 601; *State* v. *Leuseur*, 145 Missouri, 322; *McMahon* v. *Morrison*, 16 Indiana, 172; *Walters* v. *Railroad Co.*, 104 Fed. Rep. 377; *Pac. Ry. Co.* v. *Mo. Pac. Ry. Co.*, 23 Fed. Rep. 565; *Uphoff* v. *Chi. &c. R. Co.*, 5 Fed. Rep. 545; *Fitzgerald* v. *Mo. Pac. Ry. Co.*, 45 Fed. Rep. 812; *Johnson* v. *W. & B. R. Co.*, 9 Fed. Rep. 6; *Anderson* v. *Watt*, 138 U. S. 694, 701; *Louisville &c. R. Co.* v. *Louisville Trust Co.*, 174 U. S. 552; *Farnham* v. *Canal*

Co., 1 Sumner, 47; *Mower* v. *Kemp*, 42 La. Ann. 1007; *R. & M. R. Co.* v. *Farmers' L. & T. Co.*, 49 Illinois, 331; *C. & N. W. Ry. Co.* v. *Auditor Gen.*, 53 Michigan, 79, 91; *Market St. R. Co.* v. *Hellman*, 109 California, 571; *B. & O. R. Co.* v. *P. W. & Ky. R. Co.*, 17 W. Va. 812; *Henen, Admr.* v. *B. & O. R. Co.*, 17 W. Va. 882; *Whitton, Admr.* v. *C. & N. W. Ry. Co.*, 13 Wall. 270; *Muller* v. *Dows*, 94 U. S. 444.

Mr. Frederic D. McKenney, with whom *Mr. Wells H. Blodgett* was on the brief, for defendant in error:

For the purposes of jurisdiction of the courts of the United States, domicile is the test of citizenship; and in a jurisdictional sense the words "citizen" and "domicile" are synonymous. *Poppenhauser* v. *Comb Co.*, 14 Fed. Rep. 707; *McDonald* v. *Flour Mill Co.*, 31 Fed. Rep. 577; *Collins* v. *City of Ashland*, 112 Fed. Rep. 175; *Morris* v. *Gilmer*, 129 U. S. 315; *Anderson* v. *Watts*, 138 U. S. 694; *Sun Printing and Publishing Company* v. *Edwards*, 194 U. S. 377.

The word "resident" as used in the last proviso to § 18, chap. 3, of the Administration Statutes of Illinois as amended by the act of 1905 (Laws of Illinois, 1905, p. 2) is synonymous with domicile. *In re Mulford*, 217 Illinois, 242; *McDaniel* v. *King*, 5 Cush. 469; *Strongton* v. *Cambridge*, 165 Massachusetts, 251; *Oliviere* v. *Atkinson*, 168 Massachusetts, 28; *Harmon* v. *Grizard*, 89 N. Car. 115; *Ryall* v. *Kennedy*, 67 N. Y. 379.

The allegation of plaintiff in error in his plea in abatement to the defendant's removal petition, that "before and at the time of the commencement of this action this plaintiff was and still is a citizen of Ohio," is equivalent, in legal effect to an allegation that the domicile of plaintiff was at the time in the State of Ohio, and hence that he was at the time a non-resident of Illinois.

No question of collateral attack on the judgment of the Probate Court of Cook county, Illinois, appointing plaintiff in error administrator *de bonis non* of Maxon's estate, properly arises on this record. The sole question is whether plaintiff in

error, by his allegation of his citizenship in Ohio, affirmatively showed on the face of the record, his want of legal capacity to institute this suit or file any plea herein, under the prohibitions of § 18, chap. 3, of the Administration Statutes of Illinois, as amended by the act of 1905, which provides that no non-resident of this State shall be appointed or act as administrator or executor.

Plaintiff's plea in abatement to defendant's removal petition is insufficient.

Mr. Justice Holmes delivered the opinion of the court.

This was an action brought by the plaintiff in error to recover for the death of his intestate in a collision upon the defendant's railroad in Illinois. The action was begun in a court of the State and the defendants forthwith filed a petition for the removal of the cause to the United States Circuit Court. The petition averred, among other things, that the defendant was a corporation organized under the laws of Ohio and a citizen of that State, and was not a resident of Illinois, and that the plaintiff was a citizen and resident of Illinois. The removal was ordered and completed. Thereupon the plaintiff filed in the United States Court a plea, in which he alleged that the defendant was a corporation organized and existing under and by virtue of the laws of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other corporations, severally created by the laws of those States respectively, that the defendant was a citizen of and resident in Illinois and each of said other States, and that the plaintiff was a citizen of Ohio; and the plaintiff prayed judgment whether the court could take cognizance of the action.

The defendant, after having pleaded the general issue to the action, demurred to the plaintiff's plea. Upon a hearing the demurrer was sustained, and the plaintiff, electing to stand by his plea, a judgment was entered that the defendant recover its costs. The plaintiff prayed a writ of error, and the Judge

certified that the judgment was based solely on the ground that the controversy was one between citizens of different States, that in his opinion the record showed that the defendant was not a citizen of or resident in Illinois, that no other ground of jurisdiction appeared, and that jurisdiction was retained only for the reasons stated. A few days later, but after the writ of error had been taken out and filed, and after a new term of the Circuit Court had begun, the Judge undertook to amend the certificate on the ground that it had been signed inadvertently under a mistake as to its nature and contents, and to certify instead that the question of jurisdiction was not passed upon, but that the ground of the decision was that the plaintiff, being a citizen of Ohio, and therefore presumed not to be a resident of Illinois, was forbidden by the statutes of Illinois to act as administrator, and therefore had no standing to maintain the action or file the plea.

It is obvious that the mistake alleged by the new certificate was not clerical. The Judge did not write one thing when he meant to write another, and no inferior officer made a record not corresponding to the action of the court. We cannot read the words "Under a mistake as to the nature and contents thereof," as meaning that the Judge did not know that he was signing a certificate for this court, or as signifying more than that, if he had given the matter greater attention he would not have signed one saying what it said. The certificate must have received some consideration, as it contains a statement or ruling adverse to the plaintiff, to which we shall refer in a moment. This being so, it appears to us extremely questionable, at least, whether such a certificate, which is an act of record, stands on any different ground from judgments and the like when the term has passed; see *Wetmore* v. *Karrick*, 205 U. S. 141, 153, *et seq.; Michigan Insurance Bank* v. *Eldred*, 143 U. S 293, and also whether the so-called amendment, supposing it otherwise valid and properly made without leave of this court, can be considered by this court on the present writ of error. *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293; *McCarren* v.

McNulty, 7 Gray, 139; *Rice* v. *Minnesota & Northwestern R. R. Co.*, 21 How. 82.

If we were to consider the amendment it would amount to this: The plaintiff pleaded to the jurisdiction of the court as a court of the United States and stood upon his plea. The Judge, however, laid down a proposition of law on which he denied the right of the plaintiff to plead to the jurisdiction, and thereupon took jurisdiction so far as to give judgment for costs. By the analogies of the action of this court in other cases, we should decide for ourselves the preliminary as well as the final question of law in order to decide whether the Circuit Court, as a court of the United States, had the right to give any judgment, even for costs. If the preliminary question should be considered it would seem that the Judge below was wrong in taking the proviso in the Illinois statute (Laws of 1905, p. 2; Hurd, Rev. Stats. 1905, c. 3, § 18, pp. 107, 108), "that no non-resident of this State shall be appointed or act as administrator or executor," as opening the appointment of a citizen of Ohio to this kind of collateral attack. See *Simmons* v. *Saul*, 138 U. S. 439; *Salomon* v. *People*, 191 Illinois, 290, 294. It is not reasonable to interpret it as making such a severance between the appointment and the power to act which is a consequence of the appointment as to leave the former unimpeachable in these proceedings but its effect open to dispute. The words "or act" may have reference more especially to executors, and may be a reminiscence of the ancient law, by which they derived their powers from the will, a notion that has died hard. At all events presumably they offer an alternative to "shall be appointed," and refer to action without appointment in Illinois, for instance action by an administrator appointed elsewhere, not to action after appointment when one is made. As we read them with our present light, at least, we deem them insufficient to prevent the plaintiff from insisting upon his right to keep out of the United States court.

We proceed then to deal with the merits of the plea. The original certificate declares that the record shows that the de-

fendant is not a citizen of or resident in the State of Illinois. If this be correct, it maintains the right to remove, so far as it goes. The right is given in cases of this sort to defendants "being non-residents of that State," that is, of the State in which the suit is brought. Act of August 13, 1888, c. 866, 25 Stat. 433, 434. If the defendant is to be regarded as a citizen of Illinois, the right to remove did not exist. *Martin* v. *Snyder*, 148 U. S. 663. It was for this reason, no doubt, that the petition for removal alleged that the defendant was a citizen of Ohio, and that the certificate declared that it was not a citizen of Illinois. But the plea averred that it was organized and existed under the laws of that State as well as of the others named. It is true, however, that it did not and could not traverse the averment of the petition, considered as an averment of fact, and it was demurred to specially on that ground. Therefore the question is raised how a corporation or corporations thus organized shall be regarded for the purposes of a suit like this. No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation, are needed for an answer. The defendant exists in Illinois by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same State, and is sued in that State. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere. The assent of the State to such incorporation elsewhere, supposing it to have been given, a matter upon which we express no opinion, cannot be presumed to have intended or to import such a change. This seems to be the opinion of the Supreme Court of Illinois, as it certainly has been shown to be that of this court. *Chicago & Northwestern Ry. Co.* v. *Whitton*, 13 Wall. 270; *Muller* v. *Dows*, 94 U. S. 444; *Memphis & Charleston R. R. Co.* v. *Alabama*, 107 U. S. 581; *Quincy Railroad Bridge Co.* v. *County of Adams*, 88 Illinois, 615; *Winn* v. *Wabash R. Co.*, 118 Fed. Rep. 55. What would be the law in case of a suit brought in Illinois upon a cause of action which arose in Ohio is a question that may be left on one side, as also may be the decisions in cases where a

corporation originally created in one State afterwards becomes compulsorily a corporation of another State for some purposes in order to extend its powers. *Southern Ry. Co.* v. *Allison*, 190 U. S. 326; *St. Louis & San Francisco Ry. Co.* v. *James*, 161 U. S. 545. In the case at bar the incorporations must be taken to have been substantially simultaneous and free. See *Memphis & Charleston R. R. Co.* v. *Alabama*, 107 U. S. 581. If any distinction were to be made it hardly could be adverse to the jurisdiction of Illinois, in view of the requirements of its constitution and statutes that a majority of the directors should be residents of Illinois, and that the corporation should keep a general office in that State. We are of opinion that the defendant must be regarded in this suit as a citizen of Illinois, and therefore as having had no right to remove. It follows that the cause should be remanded to the state court.

Judgment reversed. Suit to be remanded to the state court.

AMERICAN TOBACCO COMPANY *v.* WERCKMEISTER.

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

No. 28. Argued October 30, 1907.—Decided December 2, 1907.

In construing a statute, while the court must gain the legislative intent primarily from the language used, it must remember the objects and purposes of the statute and the conditions of its enactment so as to effectuate rather than destroy the spirit of that intent.

The purpose of the copyright statute is not so much to protect the physical thing created as to protect the right of publication and reproduction, and the statute should be construed in view of the character of the property intended to be protected.

In the case of a painting, map, drawing, etc., the copyright notice required by § 4962 Rev. Stat. need not be inscribed upon the original article itself; the statute is complied with if the notice is inscribed upon the published copies thereof which it is desired to protect.

In the United States, property in copyright is the creation of Federal statute passed in the exercise of the power vested in Congress by Article I, § 8, of the Federal Constitution, to promote the progress of science and the useful

arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, and the statute should be given fair and reasonable construction to effect such purpose.

The Federal copyright statute recognizes the separate ownership of the right of copying from that which inheres in the physical control of the thing itself and gives to the assigns of the original owner of the right to copyright the right to take out copyright independently of the ownership of the article itself.

The property of an author or painter in his intellectual creation is absolute until he voluntarily parts therewith. While the public exhibition of a painting or statue where all can see and copy it might amount to a publication, where the exhibition is made subject to reservation of copyright and to restrictions rigidly enforced against copying, it does not amount to a publication.

In a suit brought in replevin under the New York Code to recover infringing copies of the plaintiff's copyrighted article it is too late to object to the form of remedy on the motion for new trial.

Adams v. *New York*, 192 U. S. 585, and *Hale* v. *Henkel*, 201 U. S. 43, followed to effect that defendant's rights under the Fourth and Fifth Amendments were not violated by the seizure of infringing copies of copyrighted articles or by the use thereof as evidence.

146 Fed. Rep. 375, affirmed.

THIS is a writ of error to the Circuit Court of Appeals for the Second Circuit, seeking reversal of a judgment affirming the judgment of the United States Circuit Court for the Southern District of New York in favor of the defendant in error, adjudging him to be entitled to the possession of 1196 sheets, each containing a copy of a certain picture called "Chorus," the same representing a company of gentlemen with filled glasses, singing in chorus. The painting was the work of an English artist, W. Dendy Sadler. The defendant in error claimed to be the owner of a copyright taken out under the laws of the United States.

The judgment was rendered under authority of § 4965, as amended March 2, 1895. 28 Stat. 965; 3 U. S. Comp. Stat. p. 3414.

In January, 1894, by agreement between the artist and Werckmeister, the defendant in error, it was agreed that the painting should be finished by March 1, and then sent to Werckmeister to be photographed and returned to Sadler in time to

exhibit at the Royal Academy in 1894. The painting was sent to Werckmeister at Berlin, where it was received on March 8, 1894, and was returned to Sadler in London on March 22, 1894. On April 2, 1904, the artist Sadler executed and delivered the following instrument:

"I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200. London, April 2, 1894. (Signed) W. Dendy Sadler."

Werckmeister was a citizen of the German Empire, doing business in Berlin, Germany, under the trade name of "Photographische Gesellschaft," and did business in New York city under the name of the "Berlin Photographic Company."

The Photographische Gesellschaft of Berlin, by letter dated March 31, 1894, received on April 16, 1894, deposited the title and description of the painting and a photograph of the same in the office of the Librarian of Congress, the intention being to obtain a copyright under the act of Congress. U. S. Comp. Stat., v. 3, p. 3407. After the painting was returned to London it was exhibited by Sadler at the exhibition of the Royal Academy at London, and was there on exhibition for about three months; the exhibition opening the first Monday of May and closing the first Monday of August, 1894. The exhibition was open to the public on week days from 8 A. M. to 7 P. M. upon the payment of the admission fee of one shilling, and during the last week was open evenings, the entrance charge being sixpence. There was a private view for the press on May 2, and on May 3 up to one o'clock, and the remainder of the day was for the Royal private view. There was also a general private view on May 4. The members and the associate members of the Royal Academy and the artists exhibiting at the exhibition and their families were entitled at all times to free admission, and they as well as the public visited the exhibition in large numbers.

During the time that the painting was shown at the exhibition it was not inscribed as a copyright, nor were any words

thereon indicating a copyright, nor on the substance on which it was mounted, nor on the frame, as required by the copyright act (3 U. S. Comp. Stat., p. 3411), if the original painting is within the requirements of the law in this respect.

The painting while on exhibition was for sale at the Royal Academy, but with the copyright reserved, which reservation was entered in the gallery sale book. The by-laws of the Royal Academy provided "that no permission to copy works on exhibition shall on any account be granted." The reasons for the by-law, as it appears upon minutes of the Academy, are as follows:

"That so much property in copyright being entrusted to the guardianship of the Royal Academy, the council feel themselves compelled to disallow, in future, all copying within their walls from pictures sent for exhibition."

The photogravures of the painting were placed on sale in June, 1894, or in the autumn of 1894; those photogravures were inscribed with the notice of copyright.

Mr. Sadler, the artist, afterwards, in October, 1899, sold the painting to a Mr. Cotterel, residing in London, England, since which time, so far as has been shown, it has been hanging in the dining room of the house of that gentleman.

On June 20, 1902, Werckmeister commenced an action, by the service of a summons, against the American Tobacco Company, plaintiff in error, and on the same day a writ of replevin was issued out of the Circuit Court of the United States for the Southern District of New York, directed to the marshal of the same district, requiring him to replevin the chattels described in an annexed affidavit. Under the writ the marshal seized upon the premises of the American Tobacco Company 203 pictures. On July 23, 1902, Werckmeister caused another writ of replevin to issue out of the same court, directed to the marshal of the Western District of New York, under which writ the marshal seized 993 pictures.

An amendment to the complaint set forth the seizure of the pictures. The copies seized were adjudged to be forfeited to the plaintiff Werckmeister and to be of the value of $1,010.

The judgment rendered in the Circuit Court was taken upon error to the United States Circuit Court of Appeals and there affirmed. 146 Fed. Rep. 373. The present writ of error is prosecuted to reverse the judgment of the Court of Appeals.

Mr. William A. Jenner for plaintiff in error:

Plaintiff below (defendant in error) had no right to maintain the action because of omission to give the notice of copyright prescribed by § 4962 on the original painting exhibited at the Royal Academy.

The statutory notice of copyright is most effectively given in the case of a painting when it is inscribed upon "some visible portion *thereof*, or of the substance on which the same shall be mounted." Every one who sees the painting sees that notice, or can see it, if he looks.

Inscription upon a copy and not upon the original is futile, if one sees only the original and does not see the copy. To be completely effective the notice should be inscribed upon copies as well as upon the original.

But in the case of a painting, there may be no copies, replicas or reproductions, and the author or proprietor may wish only to prevent copying and to preserve the painting unique. In that case, unless the statutory notice is inscribed upon the painting or its mount, no notice at all would be given. But the statute does not distinguish between those cases where the copyrightable thing, *i. e.* the painting, is kept unique and those cases where copies or reproductions are made. In both cases there must be compliance with the same requirements.

In the case at bar the *thing* copyrighted was the *painting*. Plaintiff's photogravure was not copyrighted at all and was protected only by virtue of the copyright of the painting.

Section 4962 should be construed so as to promote its apparent object, that is to require the notice to be inscribed upon the original painting. Its plain import is that the copies of every edition of the book published is to have a notice inserted in them; if a painting, the notice is to be inscribed upon

a visible portion of it or of its mount, without regard to publication.

Where the language is plain and unambiguous a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36; *Hadden* v. *Collector*, 5 Wall. 107, 111; *Scott* v. *Reid*, 10 Pet. 524, 527; *St. Paul &c. Ry. Co.* v. *Phelps*, 137 U. S. 528.

The primary rule is that a statute is to receive the meaning which the ordinary reading of its language warrants. *United States* v. *Fisher*, 2 Cranch. 386; *United States* v. *Hartwell*, 6 Wall. 395; *United States* v. *Wiltberger*, 5 Wheat. 95.

The exhibition at the Royal Academy was a publication of the painting. Published means made public.

The only way in which a painting or statue, a model or design can be published is by exhibition thereof to the public. If the public were admitted without restriction of number, the exhibition was in every sense a public exhibition.

Section 4965 cannot be enforced by an action in replevin. The writs of replevin and proceedings thereunder were unwarranted in law and illegal. Replevin under the New York Code of Civil Procedure is not adapted, and the Circuit Court is without authority to adapt or mold it, to proceedings for enforcing the forfeiture of infringing sheets accruing under Rev. Stat., § 4965.

Plaintiff's proceedings, therefore, were without authority of law, and the Circuit Court was without jurisdiction to try the action or render a judgment. *Falk* v. *Curtis Pub. Co.*, 107 Fed. Rep. 126; *Rinehart* v. *Smith*, 121 Fed. Rep. 148; *Gustin* v. *Record Pub. Co.*, 127 Fed. Rep. 603; *Hills* v. *Hoover*, 142 Fed. Rep. 904; *Morrison* v. *Pettibone*, 87 Fed. Rep. 330; *Walker* v. *Globe Newspaper Co.*, 130 Fed. Rep. 593.

Mr. Antonio Knauth for defendant in error:

The copyright statute does not require a notice on the original

painting, but only on every copy of every edition issued. *Werckmeister* v. *Pierce & Bushnell Co.*, 63 Fed. Rep. 455, and *Werckmeister* v. *Amer. Lithographic Co.*, 142 Fed. Rep. 827.

For the purposes of the present case it is immaterial whether or not the original picture is included in the words "in the several copies of every edition published," because clearly the statute cannot be construed to require a notice on the unpublished painting. The object of the statute requiring notice is to give notice to the public. The statutes refer only to the published edition, which is an edition offered to the public for sale or circulation. *Falk* v. *Gast Lith. & Eng. Co.*, 54 Fed. Rep. 890, 894 (Shipman, J.); *Burrow-Giles Lith. Co.* v. *Sarony*, 111 U. S. 53; *Snow* v. *Mast*, 65 Fed. Rep. 995; Am. & Eng. Enc. of Law, Vol. 7 (2d ed.), 555; *Thompson* v. *Hubbard*, 131 U. S. 123, 150; *Mifflin* v. *White*, 190 U. S. 260.

The action was properly brought to secure condemnation and forfeiture of the goods, adapting the pleadings as far as might be to an action of replevin. *Bolles* v. *Outing Co.*, 175 U. S. 266; *Hageman* v. *Springer*, 110 Fed. Rep. 374; *Springer Lith. Co.* v. *Falk*, 59 Fed. Rep. 707; *Morrison* v. *Pettibone*, 87 Fed. Rep. 330; *Childs* v. *N. Y. Times Co.*, 110 Fed. Rep. 527.

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

This case involves important questions under the copyright laws of the United States, upon which there has been diversity of view in the Federal courts.

Before taking up the errors assigned it may aid in the elucidation of the questions involved to briefly consider the nature of the property in copyright which it is the object of the statutes of the United States to secure and protect. A copyright, as the term imports, involves the right of publication and reproduction of works of art or literature. A copyright, as defined by Bouvier's Law Dictionary, Rawles' edition, volume 1, p. 436, is: "The exclusive privilege, secured according to certain legal

forms, of printing, or otherwise multiplying, publishing and vending copies of certain literary or artistic productions." And further, says the same author, "the foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others." That is, the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.

There was much contention in England as to whether the common law recognized this property in copyright before the Statute of Anne; the controversy resulting in the decision in the House of Lords in the case of *Donelson* v. *Beckett,* 4 Burr, 2408, the result of the decision being that a majority of the judges, while in favor of the common law right, held the same had been taken away by the statute. See *Wheaton* v. *Peters,* 8 Pet. 591, 656; *Holmes* v. *Hurst,* 174 U. S. 82.

In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution in Art. I, § 8, "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." See *Wheaton* v. *Peters,* 8 Pet. 591, *supra; Banks* v. *Manchester,* 128 U. S. 244, 252; *Thompson* v. *Hubbard,* 131 U. S. 123, 151.

Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose.

The first question presented in oral argument and upon the briefs involves the construction of § 4962 Rev. Stat. as amended (18 Stat. 78; 3 U. S. Comp. Stat., 1901, p. 3411), which is as follows:

"That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz: 'Entered according to act of Congress, in the year ——, by A. B. in the office of the Librarian of Congress, at Washington;' or, at his option, the word 'copyright,' together with the year the copyright was entered and the name of the party by whom it was taken out, thus: 'Copyright 18—, by A. B.' "

It is the contention of the plaintiff in error that the original painting was not inscribed as required by the act, and therefore no action can be maintained, and it is insisted that the inscription upon the photogravures offered for sale is not sufficient.

It must be admitted that the language of the statute is not so clear as it might be, nor have the decisions of the courts been uniform upon the subject. In *Werckmeister* v. *Pierce & Bushnell Manf. Co.*, 63 Fed. Rep. 445, Judge Putnam held that the failure to inscribe the copyright notice upon the original painting did not effect the copyright. That judgment was reversed by the Circuit Court of Appeals for the First Circuit by a divided court. 72 Fed. Rep. 54.

In the case of *Werckmeister* v. *American Lithographic Co.*, 142 Fed. Rep. 827, Judge Holt reached the same conclusion as Judge Putnam, and in the case at bar the Circuit Court of Appeals for the Second Circuit approved of the reasoning of Judges Putnam and Holt and disagreed with the majority of

the judges of the Circuit Court of Appeals for the First Circuit.

Looking to the statute, it is apparent that if read literally the words "inscribed on some visible portion thereof," etc., apply to the antecedent terms "maps, charts, musical composition, print, cut, engraving, photograph, painting," etc., and the words of the first part of the sentence requiring notice to be inserted in the several copies of every edition published apply literally to the title page or the page immediately following, if it be a book.

But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But while seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained.

We think it was the object of the statute to require this inscription, not upon the original painting, map, photograph, drawing, etc., but upon those published copies concerning which it is designed to convey information to the public which shall limit the use and circumscribe the rights of the purchaser.

As we have seen, the purpose of the copyright law is not so much the protection of the possession and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought.

We have been cited to no case, nor can we find any direct authority in this court upon the question. But the opinion of Mr. Justice Miller in *Lithographic Company* v. *Sarony*, 111 U. S. 53, is pertinent. The court there considered whether Congress had the constitutional right to protect photographs and negatives by copyright, and the second assignment of

error relates to the sufficiency of the words "Copyrighted 1892 by N. Sarony," when the copyright was the property of Napoleon Sarony. In treating this question the learned judge used this very suggestive language (p. 55):

"With regard to this latter question, it is enough to say that the object of the statute is to give notice of the copyright to the public, by placing *upon each copy*, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained."

If the contention of the plaintiff in error be sustained the statute is satisfied only when the original map, chart, etc., or painting is inscribed with the notice, and this is requisite whether the original painting is ever published or not. We think this construction ignores the purpose and object of the act, which Mr. Justice Miller has said in the language just quoted, is to give notice of the copyright to the public—that is, to the persons who buy or deal with the published thing.

It is insisted that there is reason for the distinction in the statute between books, and maps, charts, paintings, etc., in that a book can only be published in print and becomes known by reading, while paintings, drawings, etc., are published by inspection and observation.

It may be true that paintings are published in this way, but they are often sold to private individuals and go into private collections, whilst the copies, photographs or photogravures, may have a wide and extended sale.

It would seem clear that the real object of the statute is not to give notice to the artist or proprietor of the painting or the person to whose collection it may go, who needs no information, but to notify the public who purchase the circulated copies of the existing copyright in order that their ownership may be restricted.

There does not seem to be any purpose in requiring that an original map, chart or painting shall be thus inscribed, while there is every reason for requiring the copies of editions pub-

lished to bear upon their face the notice of the limited property which a purchaser may acquire therein.

This construction of the statute which requires the inscription upon the published copies is much strengthened by the review of the history of copyright legislation which is contained in Judge Putnam's opinion in *Werckmeister* v. *Pierce & Bushnell Co.*, 63 Fed. Rep. 445; that legislation before the statute of 1874, in which paintings were for the first time introduced, shows the uniform requirement of notice upon copies. The apparent incongruities in the statute, in the light of its history, have grown up from enlarging the scope of the law from time to time by the introduction of new subjects of copyright and engrafting them on the previous statutes. The same argument which requires original paintings to be inscribed would apply to all other articles in the same class in the present law, as maps, charts, etc., which were formerly classed with books, so far as requiring notice upon copies is concerned.

Such original maps and charts, etc., may and usually do remain in the possession of the original makers, and there is no necessity for any notice upon them, but the copyright is invalid, as the plaintiff in error insists, unless the original is itself inscribed with the notice of copyright.

For the learned counsel for plaintiff in error says: "If the painting or like article is ripe for copyright, it is ripe for the inscription of the notice. The statute requires the inserting of notice in published things only in respect to published editions of books. The term 'published' is not used in connection with paintings, statues and the like." And it is urged there can be no such thing as an "edition" of a painting, and copies of published editions are the only copies mentioned in the statute. But this phrase survives from former statutes, which dealt only with books, maps, charts, etc. When paintings and other things not capable of publication in "editions" were introduced into the statute, the language was not changed so as to be technically accurate in reference to the new subjects of copyright.

But the sense and purpose of the law was not changed by this lack of verbal accuracy, and we think while the construction contended for may adhere with literal accuracy and grammatical exactness to the language used, it does violence to the intent of Congress in passing the law, and that the requirement of "inscription upon some visible portion thereof" should be read in connection with the first part of the sentence, which requires notice to be inserted in the several copies of every edition published, on the title page if it be a book, upon some visible portion of the copy if it be a map, chart, painting, etc.

As we have said in the beginning, the statute is not clear. But read in the light of the purpose intended to be effected by the legislation, we think its ambiguities are best solved by the constructions here given, and that the Circuit Court of Appeals made no error in this respect.

Again, it is contended that under the facts stated Werckmeister was but the licensee of Sadler, and as such not within the terms of the statute (§ 4952 as amended 1891, 26 Stat. 1107; 3 U. S. Comp. Stat., p. 3406), which is as follows:

"The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statutary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same; and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States."

But we think the transfer in this case accomplished what it

was evidently intended to do, a complete transfer of the property right of copyright existing in the picture. There is no evidence of any intention on the part of Sadler to retain any interest in this copyright after the sale to Werckmeister; and when the painting was offered for sale at the Royal Academy it was with a reservation of the copyright.

It would be giving an entirely too narrow construction to this instrument to construe it to be a mere license or personal privilege, leaving all other rights in the assignor. That it was the purpose of the parties to make a complete transfer is shown by the instrument executed when read in the light of the attendant circumstances.

In this connection it is argued that under the statute above quoted (§ 4952 as amended March 3, 1901), an author cannot, before publication, assign the right or privilege of taking a copyright independent of the transfer of the copyrightable thing itself, and it is contended that the terms author, inventor, designer, refer to the originator of the book, map, chart, painting, etc., and that the term "proprietor" refers to the person who has a copyrightable thing made for him under such circumstances as to become the proprietor, as, for instance, one who causes a digest to be compiled or a picture to be painted.

But we think this statute must be construed in view of the character of the property intended to be protected. That it was intended to give the right of copyright to others than the author, inventor or designer is conclusively shown in the use of the terms "proprietor" and "assigns" in the statute.

It seems clear that the word "assigns" in this section is not used as descriptive of the character of the estate which the "author, inventor, designer or proprietor" may acquire under the statute, for the "assigns" of any such person, as well as the persons themselves, may, "upon complying with the provisions of this chapter," have the sole liberty of printing, publishing and vending the same. This would seem to demonstrate the intention of Congress to vest in "assigns," before copyright, the same privilege of subsequently acquiring complete

statutory copyright as the original author, inventor, designer or proprietor has. Nor do we think this result is qualified because the statute gives to assigns, together with the right of publishing, vending, etc., the right of "completing, executing and finishing" the subject-matter of copyright.

And a strong consideration in construing this statute has reference to the character of the property sought to be protected. It is not the physical thing created, but the right of printing, publishing, copying, etc., which is within the statutory protection. While not in all respects analogous, this proposition finds illustration in *Stephens* v. *Cady*, 14 How. 528, in which it was held, where the copyright for map had been taken out under the act of Congress, a sale upon execution of the copperplate engraving from which it was made did not pass the right to print and sell copies of the map. Mr. Justice Nelson, delivering the opinion of the court, said (p. 530):

"But from the consideration we have given to the case, we are satisfied that the property acquired by the sale in the engraved plate, and the copyright of the map secured to the author under the act of Congress, are altogether different and independent of each other, and have no necessary connection. The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar* v. *Taylor*, 4 Burr, 2396, 'a property in notion, and has no corporeal tangible substance.' "

And the same doctrine was thus stated by Mr. Justice Curtis in *Stevens* v. *Gladding*, 17 How. 447, 452:

"And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other."

While it is true that the property in copyright in this country is the creation of statute, the nature and character of the

property grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself, and the statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work. We think every consideration of the nature of the property and the things to be accomplished supports the conclusion that this statute means to give to the assigns of the original owner of the right to copyright an article the right to take out the copyright secured by the statute, independently of the ownership of the article itself.

It is further contended that the exhibition in the Royal Gallery was such a publication of the painting as prevents the defendant in error from having the benefit of the copyright act. This question has been dealt with in a number of cases, and the result of the authorities establishes, we think, that it is only in cases where what is known as a general publication is shown, as distinguished from a limited publication under conditions which exclude the presumption that it was intended to be dedicated to the public, that the owner of the right of copyright is deprived of the benefit of the statutory provision.

Considering this feature of the case, it is well to remember that the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same. One or many persons may be permitted to an examination under circumstances which show no intention to part with the property right, and it will remain unimpaired.

The subject was considered and the cases reviewed in the analogous case of *Werckmeister* v. *The American Lithographic Company*, 134 Fed. Rep. 321, in a full and comprehensive opinion by the late Circuit Judge Townsend, which leaves little to be added to the discussion.

The rule is thus stated in Slater on the Law of Copyright and Trademark (p. 92):

"It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself

among the public, as to justify the belief that it took place with the intention of rendering such work common property."

And that author instances as one of the occasions that does not amount to a general publication the exhibition of a work of art at a public exhibition where there are by-laws against copies, or where it is tacitly understood that no copying shall take place, and the public are admitted to view the painting on the implied understanding that no improper advantage will be taken of the privilege.

We think this doctrine is sound and the result of the best considered cases. In this case it appears that paintings are expressly entered at the gallery with copyrights reserved. There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place.

Starting with the presumption that it is the author's right to withhold his property, or only to yield to a qualified and special inspection which shall not permit the public to acquire rights in it, we think the circumstances of this exhibition conclusively show that it was the purpose of the owner, entirely consistent with the acts done, not to permit such an inspection of his picture as would throw its use open to the public. We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect. But such is not the present case, where the greatest care was taken to prevent copying.

It is next objected that the form of action in this case was the ordinary action for replevin under the New York Code, and as the plaintiff did not have the right of property or possession before the beginning of this action, no such action would lie. Whether this action was the one in the nature of replevin for the seizures of the plates and copies indicated in the case of *Bolles* v. *Outing Company*, 175 U. S. 262, 266, we do not find it necessary to determine. After verdict, and upon motion for

a new trial, plaintiff in error, defendant below, moved to set aside the verdict "On the ground that replevin under the statutes of the State of New York is not an appropriate remedy or a lawful and legal remedy for taking possession of the alleged incriminating sheets or pictures, and that the proceedings taken in that behalf by the plaintiff were illegal and invalid, and that the plaintiff cannot avail of any benefit of that proceeding, and the introduction in evidence of the replevin proceedings was an error." The motion was denied and exception duly taken.

The learned counsel for the plaintiff in error admits that this question was not formally raised until the defendant's motion for a new trial, but maintains that the same question was raised by the objection to admission in evidence of the replevin proceedings by the marshal for the Western and Southern Districts of New York respectively.

Examining this record, it is perfectly apparent that no objection was made to the form of the action until it was embodied after verdict, in the motion for a new trial. Upon the admission of the writ of replevin, addressed to the marshal of the Western District of New York, and affidavit, the objection stated was "on the ground that the process of replevin that was executed by the marshal in Buffalo was an invasion of defendant's constitutional right, was an unwarrantable search, an illegal act, and nothing done under it, or information obtained by virtue of it, can be used in evidence against defendant under the Fourth and Fifth Amendments of the United States Constitution."

The same objection was made when the writs of replevin, affidavit and return were offered in evidence concerning the Southern District of New York, and it was said: "Defendant's counsel objects on the same grounds as stated in the introduction of the stipulation, namely, that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the Fourth and Fifth Amendments, and plaintiff cannot avail of them as evidence in this case, on account of their illegality."

The argument which followed, could it be assumed to broaden the objection, was far from complaining of the form of action as such, but rested upon the Constitution and the character of the seizure of the goods of which it was maintained the plaintiff was not entitled to possession until after a judgment of forfeiture.

The record shows that the objection to the form of the remedy was first taken in any adequate way upon the motion for a new trial when it was too late.

In conclusion, it was suggested rather than argued that the constitutional rights of the plaintiff in error were violated by the seizure of the goods, and reference was made to the Fourth and Fifth Amendments. We think we need only refer in this connection to *Adams* v. *New York*, 192 U. S. 585, 597, and *Hale* v. *Henkel*, 201 U. S. 43.

Finding no error in the judgment of the Circuit Court of Appeals, the same is

Affirmed.

CHUNN *v.* CITY AND SUBURBAN RAILWAY OF WASHINGTON.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 43. Argued November 8, 1907.—Decided December 2, 1907.

An intending passenger coming to a place where passengers habitually board the cars of a trolley company, and which, in itself, is safe unless made otherwise by the manner in which the cars are operated, is not a trespasser nor a mere traveller upon the highway, but one to whom the company owes an affirmative duty and it is for the jury to determine whether the car injuring such person was operated with the vigilance required by the circumstances.

Where a trolley car platform is so narrow that its width cannot fairly be considered without taking into consideration the dangers on both sides of it, one taking a car on one side of it has a right to assume that he will not be put in peril by a car running rapidly in the opposite direction, and

he cannot, as a matter of law, be held guilty of contributory negligence in taking the car at that place. That issue is for the jury.

Even if the plaintiff carelessly places himself in a position of danger, if the defendant discovers the danger in time to avoid the injury by using reasonable care, the failure so to do, and not the plaintiff's carelessness, may be the sole cause of the resulting injury.

THE facts are stated in the opinion.

Mr. Victor H. Wallace and *Mr. Percy Metzger* for plaintiff in error:

Plaintiff was standing upon the platform of the defendant, and by its implied invitation, it was therefore the duty of the defendant to see that she was not injured. It was urged below that there was no evidence that the defendant ever built this platform, but see *Betts* v. *Railroad Co.*, 191 Pa. St. 575.

It was the duty of a servant in charge of one of defendant's cars, on approaching this platform, to have it under such control that it could be stopped in time to avoid injury to a prospective passenger standing upon this platform. This was not done in the present instance, and serious injury causing the permanent impairment of the mental faculties of the plaintiff in error was the result.

The failure of the motorman in charge of the defendant's car to have that car under such control that this injury might have been prevented was the proximate cause of the accident, and this question should have been submitted to the jury for determination.

The jury should have decided such a case as this. *Warner* v. *B. and O. R. R.*, 168 U. S. 339; *R. R. Co.* v. *Lowell*, 151 U. S. 209, 219, 220; *Inland &c. Co.* v. *Tolson*, 139 U. S. 551, 558, 559; *R. R.* v. *Amato*, 144 U. S. 465; *R. R. Co.* v. *Ives*, 144 U. S. 408; *R. R. Co.* v. *Powers*, 149 U. S. 43; *Jones* v. *Railroad Co.*, 128 U. S. 443; *McDermott* v. *Severe*, 202 U. S. 604, 609.

Mr. Charles A. Douglas and *Mr. George P. Hoover* for defendant in error:

The principle of law, upon which the court directed a verdict

for the defendant in this case, is conclusively settled, and has been fully and unequivocally recognized by the Court of Appeals, as well as by this and other courts.

There is no evidence tending to show negligence on the part of the defendant in error, but the evidence does show that the plaintiff in error was guilty of contributory negligence.

The case falls within the principle of cases which hold that a person stepping in front of a moving car is guilty of contributory negligence which bars a recovery. *Harten* v. *R. R. Co.*, 18 App. D. C. 260; *Northern Pacific R. R. Co.* v. *Freeman*, 174 U. S. 379; *Barrett* v. *Ry. Co.*, 20 App. D. C. 381; *R. R. Co.* v. *Houston*, 95 U. S. 697; *Edgerton* v. *B. & O. R. R. Co.*, 6 App. D. C. 516; *Miller* v. *St. Paul Ry. Co.*, 42 Minnesota, 454; *Childs* v. *New Orleans City R. R. Co.*, 33 La. Ann. 154; *St. Louis &c. R. R. Co.* v. *Martin*, 61 Arkansas, 549; *Creamer* v. *West End Ry. Co.*, 156 Massachusetts, 320; *Halpin* v. *3d Ave. R. R. Co.*, 40 N. Y. Super. 175.

If the plaintiff was in a dangerous position as the car approached her, which does not appear by the evidence, the motorman was justified in presuming that she would withdraw therefrom in time to prevent a collision. Booth on Street Railways, § 305; Nellis on Street Surface Railroads, 301; *W. Chicago R. Co.* v. *Schwartz*, 93 Ill. App. 387; *Citizens' St. R. Co.* v. *Shepherd*, 64 S. W. Rep. 710; *Ry. Co.* v. *Armstrong*, 92 Maryland, 554; *Egner* v. *Ry. Co.*, 98 Maryland, 397.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error to the Court of Appeals of the District of Columbia. The plaintiff in error brought an action to recover damages for personal injuries which she alleged were suffered by her through the negligence of the defendant in error, a corporation operating an electric street railway. The defendant pleaded in abatement that the plaintiff was, at the time of bringing action, an infant, under the age of twenty-one years. Issue was joined on the plea. Thereafter the defend-

ant, on motion and payment of the costs, was permitted to withdraw this plea and file a plea in bar. When the case came for trial at a later term the plaintiff tendered back the costs and moved the court to reconsider its order that the plea in abatement might be withdrawn and the plea in bar filed, and that the trial proceed upon the issue joined on the plea in abatement. To the refusal to grant these motions the plaintiff excepted. This exception requires no further consideration than that given to it in the court below, and is overruled.

The plaintiff then introduced testimony in support of her declaration, and at the close of this testimony the judge presiding at the trial directed a verdict for the defendant. The plaintiff excepted to the order of the court and her exception was overruled by the Court of Appeals, and is now here for our consideration. The question is, whether there was evidence which, with the inferences reasonably to be drawn from it, tended to prove all the essential elements of the plaintiff's cause of action.

Without reciting all the testimony, which is set forth in full in the opinion of the Court of Appeals, the facts disclosed by it may be stated in narrative form. The plaintiff, a young woman, had lived and worked in Riverdale, Maryland, for about a year before the accident. During that time she had frequently travelled to Washington on the defendant's cars. It was the custom of persons who travelled from Riverdale to Washington on the defendant's railway to board the cars from what was called the platform near the station of the Baltimore and Ohio Railroad. At that point there are two tracks of the defendant running north and south. The distance between the inner rails of the two tracks was seven feet ten inches. The steps of the cars projected two feet two inches beyond the tracks, leaving, when two cars passed each other at this point, a clear space between them of three feet six inches, so that, as one of the plaintiff's witnesses said, "there was ample room to stand if you were thinking what you were doing." The platform extended thirty feet lengthwise along the tracks.

It consisted of boards laid on the ground and sleepers and parallel with the tracks. It covered the space between the tracks and the rails of the tracks and the width of two boards beyond the outside tracks. A road ran west of and near the tracks. West of the tracks there was "a kind of sink," and those boarding the cars for Washington from that side had "to stand out in the mud or in that hole to get on the car." The cars to Washington ran on the west and the cars from Washington ran on the east track. It was the custom of persons taking the Washington car to board it from the east side, standing on the platform between the tracks, and the doors of the cars were opened to receive them from that side; sometimes, however, such passengers entered from the west side. The purpose for which the platform was originally constructed was not shown, but it was used in the manner stated and for the passage of persons and vehicles. One standing on the platform at this point could see or be seen for a distance of at least a quarter of a mile north or south. On the evening of September 29, 1900, the plaintiff came to this place to take the car for Washington. The hour was not stated, but it was light enough to recognize a person a hundred yards away. The plaintiff testified that she remembered nothing from the time she left her house until she recovered consciousness in the hospital; but from other testimony it appears that as the car for Washington approached from the north she went to the platform and stood between the tracks. There were other persons intending to take the car, one of whom stood near her and also between the tracks. As the car for Washington came from the north another of defendant's cars came from the south. The Washington car slowed down and came to a stop just as the latter car, without stopping, ran by "at a rapid rate of speed," as one witness said, or "twelve to fifteen miles an hour," as another witness said. No one saw exactly what happened to the plaintiff, who was standing near the north end of the platform, but the sound of "a shock" was heard, and the plaintiff was found unconscious between the tracks, ten or fifteen

feet north of the north end of the platform. It may be inferred that she was struck by the rapidly passing car bound north, which did not come to a stop, as one witness said, for one or two hundred feet beyond the platform.

If upon these facts reasonable men might fairly reach the conclusion that the plaintiff, while herself in the exercise of due care, was injured by the negligence of the defendant, the case should have been submitted to the jury. *Warner* v. *Balt. & Ohio Railroad*, 168 U. S. 339. That the plaintiff was injured by being hit by the car running north does not admit of doubt. We need not delay at that point, but may proceed at once to the other aspects of the case. The plaintiff had come to a place where passengers had habitually boarded the defendant's cars. The defendant had encouraged and invited persons to enter its cars going south from the space between the tracks, by opening the doors and receiving them from that side. It was a place which, in itself, was perfectly safe, unless made otherwise by the manner in which the defendant used the east track for the passage of cars. The plaintiff, therefore, was not a trespasser nor a mere traveller upon the highway. It is not important to determine whether she had become a passenger. Intending to become a passenger she had come to a place recognized by the practice of the defendant as a convenient and suitable one from which to enter the car, and the car stopped to receive her. The defendant owed her an affirmative duty. It was bound to use that care for her protection, which was reasonably required in view of the situation in which she had at the defendant's invitation placed herself, of the purpose for which she was there, of the approach of the car which she was intending to enter, and of the dangers to be apprehended from contact with a rapidly moving car propelled by mechanical power. A jury might well say that under such circumstances reasonable care demanded the exercise of the utmost vigilance, foresight and precaution. The motorman of the north-bound car could see plainly that the car for Washington was about to stop, and that passengers were standing upon the space be-

tween the tracks intending to enter it. He might readily have understood that the noise of the transit of the two cars would be commingled, and that those who intended to enter the other car would naturally direct their attention to it, and might fail to notice the approach of his own car. In point of fact, the motorman took no precaution whatever; he assumed that those who were standing on the platform would take care of themselves, and ran his car by them at full speed as if oblivious of their existence. We think, as the Court of Appeals held, that from the evidence the jury might have found that the defendant was negligent. The question whether the plaintiff herself was guilty of contributory negligence presents somewhat greater difficulty. There was room to stand between the two cars and escape contact with either. But the margin of safety was narrow and left little allowance for the infirmities of mankind. In the confusion of two cars approaching from opposite directions it is too much to expect nice calculations of distances. It is not to be wondered at that in the attempt to escape the one the plaintiff fell foul of the other. The same witness (himself standing on the platform between the tracks) who said that "there was ample room to stand if you were thinking about what you were doing" also said: "I realized that I would have to hold myself strictly in the center of the two tracks." We think that the plaintiff, if she was rightly where she was, was not as a matter of law guilty of negligence in failing to appreciate accurately the boundaries of the narrow zone of safety which the defendant's conduct had left to her. The three feet six inches width of the clear platform cannot fairly be considered without taking into account the dangers which infested the borders upon each side. A platform which would be wide enough for a child to walk in safety from the base of the Washington Monument to the steps of the Capitol, if elevated to extend from the summit of one to the dome of the other, would imperil the passage of the man of steadiest nerve. Nor was the plaintiff necessarily wanting in due care by taking her place between the tracks. It was the usual place

from which entrance to the Washington car was made. It was safe enough under ordinary circumstances. It was made unsafe only by reason of the defendant's negligent act in running another car rapidly by. The plaintiff had the right to assume that the defendant would not commit such an act of negligence, and that when it stopped one car and thereby invited her to enter it, it would not run another rapidly by the place of her entrance and put her in peril. We think that it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence. That issue with the others in the case should have been submitted to the jury with appropriate instructions. Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury. *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551; *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 429; *Washington & Georgetown Railroad* v. *Harmon*, 147 U. S. 571, 583; *Tuff* v. *Warman*, 5 C. B. N. S. 573; *Radley* v. *London & North Western Railway Co.*, 1 App. Cas. 754; Thompson on Negligence (2d ed.), §§ 238, 239; Pollock on Torts (6th ed.), pp. 441 to 447 inclusive.

The judgment is reversed and the case remanded to the Court of Appeals, with directions to reverse the judgment of the Supreme Court of the District of Columbia, and remand the cause to that court with a direction to set aside the verdict and award a new trial.

POLK *v.* MUTUAL RESERVE FUND LIFE ASSOCIATION OF NEW YORK.

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

No. 45. Argued November 11, 1907.—Decided December 2, 1907.

Where there is a reserved power in the legislature to alter, amend or repeal charters, a law permitting mutual life associations to reincorporate as regular life insurance companies is not unconstitutional as impairing the obligation of the contracts existing between such associations and their policyholders, or as depriving such policyholders of their property without due process of law. *Wright* v. *Minnesota Mutual Life Insurance Co.*, 193 U. S. 657.

The legislative power to alter, amend and repeal charters is equally effectual whether it be reserved in the original act of incorporation, the articles of association under a general law, or in the constitution of the State in force when the incorporation under a general law is made.

Under the power to alter, amend and repeal charters reserved in the Constitution of 1846 of New York, Chapter 722 of the Laws of 1901 does not impair the obligation of contracts existing between mutual life associations and their policyholders, nor in this case did the reincorporation of such an association as a regular life insurance company deprive its policyholders of their property without due process of law.

In this case the Circuit Court of Appeals for the Second Circuit certified certain questions of law upon which it desired instruction. Such part of the statement accompanying the questions as we find material and the questions themselves follow:

"The above-named appellants filed their bill in equity in the United States Circuit Court for the Southern District of New York, praying for the appointment of a receiver of both defendants, the winding up of both defendants, an accounting to ascertain the interests of complainants and all other policyholders of Mutual Reserve Fund Life Association in the assets of Mutual Reserve Life Insurance Company and the marshaling

and distribution of said assets. A final decree was entered by the Circuit Court sustaining a demurrer of the defendant to the amended bill of complaint and dismissing the bill. From that decree the complainants have appealed to this court.

"The amended bill of complaint alleges the existence of the following facts:

"The complainants became members and policyholders of the said association respectively on various dates from 1886 to 1900. The policy of each complainant is made a part of the bill and also the application for insurance of two of the complainants. The material provisions of the policies and applications are hereto annexed as Exhibits 1 and 2. Said association became a corporation organized and existing under the laws of the State of New York. It was originally organized in 1881 under the corporate name of Mutual Reserve Fund Life Association of New York, under Chapter 267, Laws of 1875, entitled 'An Act for the incorporation of societies and clubs for certain lawful purposes.' The original certificate of incorporation stated the objects and business of the company to be 'The mutual benefit of ourselves and all others who may become members of the society by providing benefits for families and others dependent upon such members by means of voluntary contributions to meet exigencies occurring from time to time, and to provide a fund for the common and exclusive benefit of all members.' In 1883 the association reincorporated under Chapter 175, Laws of 1883, entitled 'An Act to provide for the incorporation and regulation of coöperative or assessment life and casualty insurance associations and societies.' Its amended charter or certificate of incorporation, filed in 1883, after reciting the desire of the corporation to reincorporate under said act of 1883, provided:

"'First. We do hereby express our intention to form an organization for the transaction of life insurance upon the cooperative or assessment plan.

* * * * * * * *

"'Fourth. The mode and manner in which the corporate

powers granted are to be exercised are by issuing certificate of membership, policy or other evidence of interest to, and promise an agreement with its members, whereby upon the decease of a member, money or other benefit, charity, relief, or aid is to be paid, provided or rendered by said corporation or association to the legal representative of such member, or to the beneficiary designated by such member, which money, benefit, charity, relief or aid are derived from voluntary donations, or from admission fees, dues and assessments, or some of them, collected or to be collected from the members thereof, or members of a class therein and interest and accretions thereon, or rebates from amounts payable to beneficiaries, or heirs, and wherein the paying, providing or rendering of such money or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid; and wherein the money or other benefit, charity, relief or aid so realized is applied to the uses and purposes of said corporation or association, and the expenses of the management and prosecution of its said business.'

"The existence and corporate powers of the association under the name of Mutual Reserve Fund Life Association of New York continued from that time unchanged until April 17th, 1902. On that date a declaration and amended charter of the said association was filed under and pursuant to the provisions of Chapter 722, Laws of 1901, which act was an amendment of Section 52 of Chapter 690, Laws of 1892, known as the Insurance Law of the State of New York. This amended charter of 1902 was adopted and filed pursuant to a resolution of the board of directors of the said association, adopted by more than a majority of said board. The declaration and amended charter were duly certified by the Attorney-General of the State to be in accordance with the requirements of law, and the State Superintendent of Insurance issued his certificate of the filing of such declaration and amended charter and consented to the transaction of the business of insurance by the said Mutual Reserve Fund Life Insurance Company as

in said amended charter provided. The material provisions of said declaration and amended charter are as follows:

"'This is to certify that the Mutual Reserve Fund Life Association, a corporation originally organized under and by virtue of Chapter 267 of the Laws of 1875, and reincorporated and transacting business under Chapter 175 of the Laws of 1883 of the State of New York, and the laws amendatory thereof and supplementary thereto, has duly accepted the provisions of the act of the legislature of the State of New York, being Chapter 690 of the Laws of 1892, known as "The Insurance Law," and the amendments thereto, and in conformity with the same has duly adopted the following amended charter:

"'Article I.

"'The name of the corporation shall be "Mutual Reserve Life Insurance Company."

* * * * * * * *

"'Article III.

"'The business of the company shall be insurance upon the lives or the health of persons, and all and every insurance appertaining thereto, the making of endowments, and the granting, purchasing and dispensing of annuities, such kind of insurance being authorized under subdivision one of section 70 of "The Insurance Law."

"'Article IV.

* * * * * * * *

"'SEC. 4. The present by-laws of the corporation, which form part of its contracts with its members, shall continue to be the by-laws of the company unless or until the same shall be revised or amended in the manner therein provided.

* * * * * * * *

"'Article VI.

"'SEC. 1. The company shall have no capital stock, but shall be a mutual company.

* * * * * * * *

"'Article VIII.

"'The company shall be entitled to have and enjoy all the

rights, privileges, and provisions of existing laws which might be included in the charter and enjoyed by it, if it were originally incorporated under "The Insurance Law" of this State.'

"The consent of the policyholders to this amendment of the defendant's charter was not obtained, and no meeting of policyholders was called for that purpose. The complainants had no notice of said amendment until June 2nd, 1902, on which date complainants received the following notice:

"'*Note Change of Name.*

"'Make checks and money orders payable to

"'Mutual Reserve Life Insurance Company.

"'On April 17, 1902, Mutual Reserve Fund Life Association reincorporated as a mutual level premium company, under the title of *Mutual Reserve Life Insurance Company.* Attention is called to this change of name and to the accompanying report of the recent examination of the corporation by the Superintendent of Insurance of the State of New York, which shows a surplus over liabilities of $466,885.48.

"'This reincorporation, while insuring the stability of the company, makes no change in your policy.

"'CHARLES W. CAMP, *Secretary.*'

"The bill suggests no irregularity or defect in the procedure by which the amendment of the charter in 1902 was effected, other than that the consent of the policyholders was not obtained.

"It is further alleged that said company was organized about the 17th of April, 1902, by the then officers and directors of the respondent Mutual Reserve Fund Life Association, without authority from and without the knowledge or consent of complainants or the other members and policyholders of said association and without corporate action by said members and policyholders, and that complainants and the other members of the association were not advised of the organization of the company until on or about June 2, 1902, when they received a printed slip notifying them that the said association

had reincorporated under the name 'Mutual Reserve Life Insurance Company.'

"The amended bill then alleges that at the time of the organization of said company the association was, and for a considerable time had been insolvent, its liabilities being in excess of the value of its assets by a large amount, and that the insolvency of the association was known to the officers and directors thereof, and that the officers and directors, headed by Frederick A. Burnham, president of the association, well knowing the insolvency of the association, devised the scheme for the incorporation of the respondent Mutual Reserve Life Insurance Company and procured legislation intended to authorize the same, with the object and for the purpose of secretly and fraudulently 'depriving complainants and the other members and policyholders of respondent association of their membership rights and privileges and of abridging the same, and that by their said course in the premises said officers and directors sought and intended to defraud the complainants and the members and policyholders of said association generally and sought and intended to deprive them of their rights as members and policyholders or to cause a forfeiture of the same.

"Complainants in their amended bill allege 'that said law, Chapter 722 of the Laws of New York of 1901, if its effect and meaning be such as to authorize the pretended reorganization and reincorporation of the respondent association by the officers and directors thereof without due notice to and without the knowledge and consent of complainants or any of the members and policyholders of respondent association . . . is in contravention and violation of section 10, Article I, of the Constitution of the United States, which prohibits any State from enacting a law 'impairing the obligation of contracts,' and complainants invoke and rely upon said provision of the Constitution of the United States and say that under said provision of the Constitution of the United States said law is unconstitutional, invalid and void.' And 'complainants fur-

ther allege that said law of the State of New York, if given the construction, meaning and effect aforesaid, is in contravention and violation of those provisions of the Constitution of the United States and of the State of New York, which provide that "no person shall be deprived of his property without due process of law," in this, that they deprive the complainants and the other members and policyholders of respondent association of their vested rights and privileges and of their property rights under their contracts and agreements with respondent association without due process of law, and complainants, as citizens and residents of the State of Tennessee and non-residents of the State of New York, invoke the provisions of Article XIV of the Amendments to the Constitution of the United States, and, upon advice of counsel, allege and charge that said law of the State of New York, if given the force, meaning and effect aforesaid, is in violation of those clauses of the Fourteenth Amendment to the Constitution of the United States, which provide that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." ' "

The Circuit Court of Appeals desires instruction upon the following:

Questions.

"1. Does the amended bill of complaint disclose that any contract obligations between complainants and the defendant Mutual Reserve Fund Life Association were impaired by the incorporation of the Mutual Reserve Life Insurance Company in 1902, pursuant to the provisions of Chapter 722, Laws 1901, of the State of New York, and the transfer to said company of the assets, properties and membership of the Mutual Reserve Fund Life Association?

"2. Does the amended bill of complaint disclose and show that Chapter 722, Laws of 1901, of the State of New York, was

in violation of Article I, section 10, of the Constitution of the United States, as impairing the obligations of a contract between the defendant Mutual Reserve Fund Life Association and complainants, in so far as it authorized the reincorporation of said association as the Mutual Reserve Life Insurance Company?

"3. Does the amended bill of complaint disclose that Chapter 722, Laws of 1901, of the State of New York, is in violation of the provisions of Article XIV of the Amendments to the Constitution of the United States, in this, that the reincorporation of the Mutual Reserve Fund Life Association as the Mutual Reserve Life Insurance Company, and the changes in the charter powers and franchises of the corporation have the effect of depriving complainants of their property without due process of law, and of their vested contract rights and privileges and of their property rights under their contracts and agreements with respondent association?

"4. Does the amended bill of complaint disclose that Chapter 722, Laws of 1901, of the State of New York, was in violation of those provisions of Article XIV of the Amendments to the Constitution of the United States, which provide that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws?"

Mr. William Hepburn Russell, with whom *Mr. D. L. Snodgrass, Mr. R. F. Jackson, Mr. William Beverly Winslow, Mr. Caruthers Ewing* and *Mr. Daniel M. Miers* were on the brief, for Polk *et al.:*

The organization of the insurance company by action of the directors and officers of the Mutual Reserve Fund Association, acting without the knowledge or consent of the members and policyholders of the latter, when it was insolvent, and under a law the passage of which they procured in fraud of such mem-

bers and policyholders, had the effect of depriving the complainants and other members and policyholders of their property without due process of law, of impairing the obligation of their contracts of membership and of denying to them the equal protection of the laws. *Huber* v. *Martin*, 127 Wisconsin, 412; *S. C.*, 115 Am. St. Rep. 1023; *Zabriskie* v. *Hackensack &c. R. Co.*, 18 N. J. Eq. 174; *Railway Co.* v. *Allerton*, 18 Wall. 233; *Baker's Appeal*, 109 Pa. St. 461; *Hartford & New Haven R. Co.* v. *Croswell*, 5 Hill (N. Y.), 383, 386; *Schwarzwaelder* v. *German Mut. Fire Ins. Co.*, 59 N. J. Eq. 589; *People* v. *Ballard*, 134 N. Y. 269, 294; 1 Morawetz on Corp. (2d ed.), §§ 295, 395, 404, 512.

Wright v. *Minnesota Mutual Life Insurance Co.*, 193 U. S. 657, is a controlling authority against the right of the directors of the Mutual Reserve Fund Life Association to (*a*), procure legislation authorizing a mutual life insurance society, organized upon the assessment plan, to change to a level premium, old line company upon the application of the directors alone; and (*b*), to make the change under such law, without the knowledge or consent of the members, at a time when the association was already insolvent.

Directors of a mutual membership corporation have no power without the authority and consent of the members, to alter, amend and change the corporate charter either by their own acts, or pursuant to legislation, procured upon their initiative, for such purpose. *Marlborough Mfg. Co.* v. *Smith*, 2 Connecticut, 579, 583, 584; 1 Morawetz on Corp. (2d ed.), §§ 295, 297, 395, 397, 512–514; *Railway Co.* v. *Allerton*, 18 Wall. 233; *Baker's Appeal*, 109 Pa. St. 461; *So. Pennsylvania Iron & R. Co.* v. *Stevens*, 87 Pa. St. 190, 196; *Edwards* v. *Mercantile Trust Co.*, 124 Fed. Rep. 382, 392. Nor does the reserved power of the legislature to "amend, alter or repeal" authorize those directors to procure general legislation under which they can apply for and obtain such a reincorporation of the company without the knowledge and consent of its members. Taylor on Corporations (5th ed.), §§ 499, 500; *Railway Co.* v. *Allerton*,

18 Wall. 233, 235, 236; *Baker's Appeal*, 109 Pa. St. 461, 471, 472; *Zabriskie* v. *Hackensack &c. R. Co.*, 18 N. J. Eq. 178; *Botts* v. *Simpsonville &c. Co.*, 88 Kentucky, 54; *Huber* v. *Martin*, 115 Am. St. Rep. 1023; *Black* v. *Delaware &c. Canal Co.*, 24 N. J. Eq. 455, 466; *Mills* v. *Central R. Co.*, 41 N. J. Eq. 1.

Chapter 722, Laws of New York of 1901, is unconstitutional and void and the pretended reincorporation of the Mutual Reserve Fund Life Association under its provisions is invalid, because it impairs the obligation of contracts between a mutual coöperative assessment life insurance society and its members by conferring power upon the directors of the corporation, without the action, knowledge or consent of the members, to change the corporation into an insurance company of a different class, with different burdens resting upon it and through it upon its members. 3 Thompson on Corp., §§ 3979, 3980; *Railway Co.* v. *Allerton*, 18 Wall. 233; *Baker's Appeal*, 109 Pa. St. 461; *Marlborough Mfg. Co.* v. *Smith*, 2 Connecticut, 579, 583, 584; *Venner* v. *Atchison, Topeka & Santa Fe R. Co.*, 28 Fed. Rep. 581, per Brewer, C. J.; *Mayor &c.* v. *Knoxville & O. R. Co.*, 22 Fed. Rep. 758, per Baxter, C. J.

The change made in the nature and business of the Mutual Reserve Fund Life Association by its pretended reincorporation as the Mutual Reserve Life Insurance Company, whereby it was transformed from an assessment company to an old line, level premium company, its policies "valued" and a "legal reserve" created, was fundamental, and no power of amendment by the directors being reserved in its charter, the pretended reincorporation under Chap. 722 by the action of the directors alone, is unconstitutional and invalid and has the effect of impairing the obligation of contracts with its members and depriving them of their property without due process of law. *Bedford* v. *Eastern B. & L. Ass'n*, 181 U. S. 227, 240–241; Chap. 175, Laws of N. Y. of 1883, § 16; Chap. 690, Laws of N. Y. of 1892, § 209; Chap. 690, Laws of N. Y. of 1893, §§ 1 and 2; *Lord* v. *Equitable Assurance Soc.*, 109 App. Div. N. Y. 252.

Mr. Frank H. Platt, with whom *Mr. Sewell T. Tyng* was on the brief, for the insurance company:

The record negatives the fact, apparently assumed in the first question certified, that the Mutual Reserve Life Insurance Company is a separate and distinct corporation to which the assets of the Mutual Reserve Fund Life Association have been transferred.

The amendment of the charter in April, 1902, was duly and regularly effected pursuant to Chap. 722, Laws of 1901. The consent of policyholders or members to the amendment was not required by that statute.

The record does not disclose that any contract obligations or property rights of the appellants have been impaired or affected by the amendment of the corporation's charter. No change was made or attempted in the outstanding contracts or policies.

Chapter 722 of the Laws of 1901 of the State of New York, under which the defendant amended its charter, does not violate the contract or due process provisions of the Federal Constitution. Appellants as policyholders of an assessment insurance company have no vested or contract right to insist that the business of the company shall always be conducted exclusively upon the assessment plan. *Wright* v. *Minnesota Mutual Life Insurance Company*, 193 U. S. 657, affirming *Iverson* v. *Minn. Mutual Life Ins. Co.*, 137 Fed. Rep. 268. See also *Miller* v. *State of New York*, 15 Wall. 478; *C. H. Jenner Co.* v. *U. S. Steel Corporation*, 116 Fed. Rep. 1012; *McKee* v. *Chautauqua Assembly*, 130 Fed. Rep. 536; *Grobe* v. *Ins. Co.*, 169 N. Y. 613.

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

The Mutual Reserve Fund Association of New York (hereinafter called the Association) was originally incorporated under Chap. 267 of the Laws of New York of 1875. The certificate

of incorporation stated the purposes of the Association to be to provide "benefits for families and others dependent . . . by means of voluntary contributions . . . and to provide a fund for the common and exclusive benefit of all members." In 1883 the Association reincorporated under Chap. 175, Laws of 1883, and while this charter was in existence the complainants became members and policyholders. That law provided for the incorporation and regulation of coöperative and assessment life and casualty insurance associations, and the charter of the Association stated the business to be conducted as "the transaction of life insurance upon the coöperative or assessment plan." The law, as will presently be shown, was subject to alteration or repeal. In 1892 an act known as the Insurance Law (Chap. 38 of the General Laws, Laws 1892 p. 1930) was passed, repealing previous laws upon the subject of insurance, and expressed to be "applicable to all corporations authorized by law to make insurances." Section 52 of this act, as amended by Chap. 722 of the Laws of 1901, is as follows:

"SEC. 52. Reorganizations of existing corporations and amendment of certificates.—Any domestic corporation existing or doing business at the time this chapter takes effect, may, by a vote of a majority of its directors or trustees, accept provisions of this chapter and amend its charter to conform with the same, upon obtaining the consent of the Superintendent of Insurance thereto in writing; and thereafter it shall be deemed to have been incorporated under this chapter, and every such corporation in reincorporating under this provision may for that purpose so adopt in whole or in part a new charter, in conformity herewith, and include therein any or all provisions of its existing charter, and any or all changes from its existing charter, to cover and enjoy any or all the privileges and provisions of existing laws which might be so included and enjoyed if it were originally incorporated thereunder, and it shall, upon such adoption of and after obtaining the consent, as in this section before provided, to such charter, and filing the same and the record of adoption and consent in the office of the Super-

intendent of Insurance, perpetually enjoy the same as and be such corporation, and which is declared to be a continuation of such corporation which existed prior to such reincorporation; and the offices therein, which shall be continued shall be filled by the respective incumbents for the periods for which they were elected, and all others shall be filled in the same manner as by such amended charter provided. Every domestic insurance corporation may amend its charter or certificate of incorporation by inserting therein any statement or matter which might have been originally inserted therein; and the same proceedings shall be taken upon the presentation of such amended charter or certificate to the Superintendent of Insurance, as are required by this chapter to be taken with respect to an original charter or certificate, and if approved by the Superintendent of Insurance, and his certificate of authority to do business thereunder is granted, the corporation shall thereafter be deemed to possess the same powers and be subject to the same liabilities as if such amended charter or certificate had been its original charter or certificate of incorporation, but without prejudice to any pending action or proceeding or any rights previously accrued. This section shall apply to insurance corporations organized under or subject to article six of the insurance law as well as to insurance corporations organized under special charters or articles two and ten of the insurance law; all contracts, policies and certificates issued by such corporations prior to accepting the provisions of this chapter shall be valued as one year term insurance at the ages attained, excepting when such contracts, policies or certificates shall provide for a limited number of specified premiums or for specified surrender values, in which case they shall be valued as provided in article two, section eighty-four, of the insurance law."

Following strictly the provisions of this section, the Association accepted the provisions of the insurance law, amended its charter, and became entitled to all the privileges of the law as if it had been originally incorporated thereunder. In the amendments to the charter the name of the Association was

changed to "Mutual Reserve Life Insurance Company" (hereinafter called the Company), and the business of the Company was stated to be "insurance upon the lives or the health of persons, and all and every insurance appertaining thereto, the making of endowments, and the granting, purchasing and dispensing of annuities." The effect of this was to broaden the business from that of merely coöperative and assessment life insurance to life insurance of every kind. It is conceded that what was done was within the authority conferred by the statute, and the subject for our consideration is whether any of the rights, secured to the complainants by the Constitution of the United States, have been impaired.

The first question certified is, whether the incorporation of the Company and the transfer to it of the assets, property and membership of the Association impaired any contract obligations between the Association and the complainants. This question possibly implies that by the reincorporation an entirely new corporation was created, to which the property of the old corporation was transferred. But the question must be interpreted with the aid of the statement of facts which accompanies it. An examination of the facts and of the statute shows that there was simply a reorganization of an existing corporation and not the creation of a new one. The title of the section is, "Reorganizations of existing corporations and amendment of certificates." It authorizes an existing corporation by vote of its directors to accept the provisions of the chapter and amend its charter. It provides expressly that the corporation, with its added powers and revised charter, shall be a "continuation of such corporation which existed prior to such reincorporation." This, perhaps, makes superfluous the saving of "pending actions or proceeding or any rights previously accrued" which the section cautiously insures. The declaration filed by the directors, and certified by the Attorney General to be in conformity with law, recites that the Association "has duly accepted the provisions" of the insurance law, and "duly adopted the following amended charter." The corporation

was not changed to a stock, but continued as a mutual company. The change of name cannot control the significance of these facts. We answer this and the other questions upon the assumption, therefore, that the old corporation was still in existence, under a new name, and with added powers, but with unchanged membership, and bound to perform all its existing obligations. Upon this view it is impossible to say that any of the contract obligations of the Association to the complainants have been impaired by the reorganization. This was the view apparently accepted by the Company, who, in its notice to its members, said: "This reincorporation, while insuring the stability of the Company, makes no change in your policy." It is contended, however, that the last clause of the section, which is applicable to associations for insurance under the coöperative or assessment plan, affects the contracts of the old members, by converting them into one-year term insurances at the ages attained. But as we understand this clause it has no effect upon the contracts of insurance, but is designed for a totally different purpose. It simply prescribes a standard by which the liabilities on the assessment contracts must be appraised. The Superintendent of Insurance is charged with the duty of deciding whether the assets of insurance companies bear such a relation to their liabilities that it is safe to allow them to continue in business. A very large part of the liabilities of any insurance company is upon outstanding contracts of insurance, not due and therefore not capable of exact measurement. Such liabilities can only be estimated or "valued." Section 84 of the insurance law provides for the method of estimating or valuing the liability on ordinary life policies, but that method seems inapplicable to assessment policies. In any event, the legislature determined that, when an assessment company was allowed to engage in other kinds of life insurance, its outstanding policies should be appraised as liabilities as if they were "one-year term insurance at the ages attained." This does not make them such in fact, or authorize the Company, in its dealings with the policyholder, to

treat them as such. The statutory appraisement of the policies for bookkeeping purposes no more affects the rights of the members under their contracts than the account of stock of a merchant would affect the rights of his creditors. The first question must be answered in the negative.

The second question certified is, whether the law of 1901, so far as it authorized the reincorporation of the Association, was in violation of the clause of the Constitution forbidding a State from passing a law impairing the obligation of contracts. A similar question was before the court in *Wright* v. *Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, where it was held that a law of Minnesota, authorizing an assessment insurance company to change its business to that of insurance upon a regular premium basis, was not in violation of this provision of the Constitution. The reasoning of the court in that case need not be repeated. It is conclusive upon this question, unless the case at bar can be distinguished from it. The complainants seek to distinguish the case in several respects, which must be noticed. First, it is said that in the *Wright case* the power of amendment of the articles of association was reserved in the articles of association, while no such reservation exists here. But the constitution of New York, in force since 1846, contains this provision: "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. *All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*" A constitutional provision of the State of Michigan in substantially the same words was held to authorize important changes in the articles of association of an insurance company incorporated under a general law. *Looker* v. *Maynard*, 179 U. S. 46. There it was said, page 52: "The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted is, at the least, to reserve to the legislature the power

to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." This case shows that it is immaterial whether the power to alter the charter is reserved in the original act of incorporation, or in the articles of association under a general law, or in a constitution in force when the incorporation under a general law is made, as in the case at bar. Second, it is said that in the *Wright case* the change was made by the majority of the members of the association, while in the case at bar it was made by a majority of the directors without the consent of the members. But in each case the change was made in conformity with the provisions of the law authorizing it, and if the legislature has the constitutional power to authorize the change by the vote of a majority of the members it has the power to authorize the change by a vote of a majority of the directors. The rights of a protesting member are no more impaired in one case than in the other. Next, it is said that distinctions may be based upon the allegations in this case that the Association was insolvent, and that knowing this, its officers devised the scheme of reincorporation and procured legislation authorizing it, with the intent to defraud the members. That the corporation was solvent was emphasized by the court in the *Wright case*, but nothing in the decision of the constitutional question turned upon that. It would introduce a new uncertainty into the law if the constitutionality of statutes were to be judged by the motives and purposes of those who persuaded the legislature to enact them. We are unable to conceive of any possible bearing that these allegations, if accepted as true, could have on the constitutional questions certified to us, or to regard them as creating any real and substantial distinction between the case before us and the *Wright case*. On the authority of that case,

therefore, the second question must be answered in the negative.

The other two questions certified inquire whether the law under which the reincorporation was made, or the reincorporation and changes in power made under its provisions, are in violation of the Fourteenth Amendment to the Constitution of the United States. These questions do not require separate or detailed consideration. As applied to the facts of this case, they are practically dealt with in the discussion which has preceded. It is not suggested that any rights secured to the complainants by the Fourteenth Amendment were violated in any other manner than by the reincorporation of the Association without the consent of its members, the change in and addition to its powers, and the consequent effect upon the contract rights of the complainants and upon their relation to the corporation. But it has been shown that the contract rights of the complainant have not been affected by the reincorporation, and the same reasoning that leads to the conclusion that the changes in the charter powers, made under the reserved powers of the State, do not violate the contract clause of the Constitution are apt to show that they do not violate the Fourteenth Amendment. In fact, the only suggestion of a violation of the Fourteenth Amendment made to us is that the reincorporation, under the circumstances of this case, deprived the complainants of their vested rights and privileges and property rights under their contracts, without due process of law. Since the incorporation has deprived the complainants of no vested rights, privileges or property, the contention fails.

The whole argument of the complainants upon these constitutional questions, though enveloped in many words and presented in divers forms, rests upon a single proposition. That proposition is that they, having become members of an association insuring lives upon the coöperative and assessment plan, and being therefore, in a sense, both insurers and insured, have a vested right that the Association shall not, without their consent, engage in other kinds of insurance, which may and

probably will indirectly affect, for better or worse, their relations to it. The trouble with this proposition is that it was made and denied in the *Wright case.*

We have confined our consideration strictly to the constitutional questions certified. It may be that the complainants' rights under their contracts have not been observed by the Company or that they have otherwise been unlawfully injured. These questions are not before us.

The questions are severally answered in the negative.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* WHARTON *et al.*, RAILROAD COMMISSIONERS OF THE STATE OF SOUTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 36. Argued November 5, 1907.—Decided December 9, 1907.

Any exercise of state authority, whether made directly or through the instrumentality of a commission, which directly regulates interstate commerce is repugnant to the commerce clause of the Federal Constitution; and so held as to the stopping of interstate trains at stations within the State already adequately supplied with transportation facilities.

Whether an order stopping interstate trains at specified stations is a direct regulation of interstate commerce depends on the local facilities at those stations, and while the sufficiency of such facilities is not in itself a Federal question, it may be considered by this court for the purpose of determining whether the order does or does not regulate interstate commerce, and if, as in this case, the local facilities are adequate, the order is void.

Inability of fast interstate trains to make schedule, loss of patronage and compensation for carrying the mails, and the inability of such trains to pay expenses if additional stops are required are all matters to be considered in determining whether adequate facilities have been furnished to the stations at which the company is ordered by state authorities to stop such trains.

74 S. Car. 80, reversed.

THE railroad company, plaintiff in error, brings the case here to review a judgment of the Supreme Court of the State of

South Carolina, which granted a mandamus to compel the company to stop certain of its through trains running between Jersey City, New Jersey, and Tampa, Florida, at a station on its road called Latta, in the State of South Carolina, near the boundary line between that State and the State of North Carolina.

Upon a request filed with him by the Railroad Commission of South Carolina, the Attorney General of that State commenced these proceedings by filing a petition to obtain a mandamus directed to the company compelling it to stop trains 32 and 35 at the station mentioned, pursuant to the order made by the Railroad Commission, after a hearing had been had before it.

The company demurred to the petition, the demurrer was overruled and the company given leave to answer, which it did, setting up several defenses, among others averring that sufficient accommodations were already furnished to the citizens of Latta, and those residing along the Latta Branch Railroad; that the trains mentioned, 32 and 35, were interstate commerce trains, running between New York and Tampa, Florida, and intermediate cities, and the southbound trains were compelled to run at a high rate of speed in order to make connections with the steamers to Havana from Tampa, and so as to make the through trip as fast as possible; that the northbound trains were companion or return trains, making an equally fast schedule time; that to stop them at stations like Latta would result in rendering it impossible for them to make schedule time and they would have to be abandoned as through fast trains; that they carried the United States mail and their trains were made up very largely of through passengers; that there were two competitors for this through travel, and that it would be impossible to keep up the trains in competition with these other railroads if stops were to be made other than those absolutely necessary. The answer also averred that in addition to a number of passenger trains of local character daily, there was also furnished the citizens of Latta the con-

venience of a daily passenger train each way for through travel north and south other than trains 32 and 35, and it was averred that the order of the Railroad Commission of South Carolina was unreasonable and unnecessary, a direct burden upon interstate commerce, and therefore a violation of and in conflict with § 8 of Art. I of the Constitution of the United States, giving Congress the power to regulate commerce.

On the coming in of this answer an order was made referring all issues involved to a referee to take testimony thereon and report back as soon as convenient. Pursuant to such order evidence was taken before a referee and report made thereon to the Supreme Court, which decided that sufficient accommodations were not furnished to the citizens of Latta and along the Latta Branch Railroad by the plaintiff in error at its station in Latta; and the court thereupon made an order that the passenger trains 32 and 35 should stop when flagged at the Latta station, for the purpose of receiving and delivering passengers at that station, "with the alternative right on your part to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag."

The testimony upon which this order was made is in the record and is substantially uncontradicted. It appears from that testimony that Latta is a small station in the State of South Carolina, near the northern boundary of the State, and on the road of the plaintiff in error, having a population, according to the last United States Census, of 453. Clio is another small settlement in the same State, about twenty miles northwest of Latta, on what is termed the Latta Branch Railroad, having a population of 508, by the same census. Dunbar is a station between Latta and Clio, with a population according to the same census, of 115. The country back of these stations is said to be a somewhat thickly settled agricultural country. It is also said by witnesses for Latta that these places have increased somewhat in population since the last census.

In addition to several local trains passing through Latta

for stations along this road, or to and from Clio, there was one daily through train each way (Nos. 39 and 40), stopping at this station, and which carried passengers through to New York or Florida and intermediate stations, and they were equipped with first and second class cars, through Pullman sleepers, mail, express and baggage cars. The only objection to them was their want of speed; that they stopped so frequently they did not arrive at their destination as swiftly as trains 32 and 35. In addition, trains 32 and 35 could be boarded at Florence, a station on the same road, distant about 15 or 20 miles south from Latta, or at Dillon, a station about 7 miles from Latta. The objection made by the people of Latta to this mode of getting these trains was that if they were going north they rode south from Latta to Florence, and then boarded the train and went directly back over the same road from Florence to Latta, which they would not have to do if the train stopped at Latta. It also involved an additional cost of $1.42 above the price of a ticket from Latta to New York. If they preferred to take the train northbound at Dillon instead of Florence, then they had to drive from Latta to Dillon over what was described by a witness to be in winter "one of the worst roads that ever was made a road." It was also averred that by stopping the southbound train (No. 35) at Latta it could be there taken at 3 o'clock in the morning instead of going to Florence the night before and taking the train there at 4 o'clock A. M. the next day, and a close connection could also be made at Florence with Columbia (on a branch road), by taking train 35 at Latta at 3 A. M., so that a citizen could go to Columbia and return to Latta the same day, thus saving a hotel bill, which now had to be paid, as connections were so made that the journey could not be accomplished in one day. The people at Clio, and the other stations on the Latta Branch Railroad, were accommodated so that they could ride to Latta in time to have substantially the same conveniences in getting away from that station that the people living there had. The distance from Jersey City to Tampa is about twelve hundred miles, and the trains

32 and 35 are among the fastest and longest continuous trains in the whole country, exceeding the distance from New York to Chicago. These trains rank with the very best trains run anywhere. They are placed on the road for the convenience of through travel, and could not be profitably run if they were slower trains.

Mr. P. A. Willcox and *Mr. Frederic D. McKenney*, with whom *Mr. Alexander Hamilton*, *Mr. George B. Elliott*, *Mr. F. L. Willcox* and *Mr. Henry E. Davis* were on the brief, for plaintiff in error:

The State has no power or authority to interfere in other than police matters with fast mail and passenger trains engaged wholly in interstate commerce. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Hannibal &c. R. R. Co.* v. *Husen*, 95 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Walling* v. *Michigan*, 116 U. S. 446; *Robbins* v. *Shelby County*, 120 U. S. 489.

Even if adequate local railroad facilities are not furnished, a State has no power and authority to compel the furnishing of such facilities by requiring fast mail and passenger trains engaged wholly in interstate commerce to make the stops, but it can only compel additional local trains to be furnished. *Tiernan* v. *Rinker*, 102 U. S. 123; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Wabash Railroad Co.* v. *Illinois*, 118 U. S. 557; *State Freight Tax Case*, 15 Wall. 232; *Welton* v. *Missouri*, 91 U. S. 275; *Brown* v. *Houston*, 114 U. S. 622; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Mississippi Railroad Commission* v. *Illinois Central Railroad Co.*, 203 U. S. 335; *Hall* v. *DeCuir*, 95 U. S. 485. See also *Crandal* v. *Nevada*, 6 Wall. 35; *Hannibal &c. R. Co.* v. *Husen*, 95 U. S. 465; *Mobile County* v. *Kimball*, 102 U. S. 691; *Webber* v. *Virginia*, 103 U. S. 344; *Walling* v. *Michigan*, 116 U. S. 446; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 23; *Wabash Railroad Co.* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Bowman* v. *Chicago & Northwestern Railroad Co.*, 125 U. S. 465; *Covington & Cincinnati Bridge Co.*

v. *Kentucky*, 154 U. S. 204; *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

The facilities provided were adequate and it would be unreasonable to require the company to convert these two fast interstate trains into local trains and to compel plaintiff in error to stop these two trains at Latta.

Mr. M. C. Woods, with whom *Mr. J. Fraser Lyon*, Attorney General of the State of South Carolina, was on the brief, for defendants in error:

The regulation of the accommodations afforded the traveling public is a police regulation. *Gladson* v. *Minnesota*, 193 U. S. 53; *Mississippi R. R. Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335.

The Supreme Court of South Carolina was warranted in deducing from the holdings of this court that the primary duty of even an interstate railroad is to its local territory, and the secondary duty is to interstate traffic. *Mississippi R. R. Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335; *Lake Shore Co.* v. *Ohio*, 173 U. S. 285; *C. C. C. & St. L. R. R. Co.* v. *Illinois*, 177 U. S. 514. *Illinois Central R. R.* v. *Illinois*, 163 U. S. 142, discussed and distinguished.

The fact at issue having been determined by a tribunal of competent jurisdiction from which no appeal was taken, the Supreme Court of South Carolina would have been warranted in granting a peremptory writ of mandamus, as prayed for in the complaint, this being one of the instances in which this court has held that state authority may stop interstate trains.

The Supreme Court of South Carolina having granted to the railroad company the alternative of providing facilities substantially the same as those which would result from the stopping of trains 32 and 35 at Latta, the fault is with the plaintiff in error for failure to avail itself of this privilege, and therefore there has been no burden, direct or indirect, placed, by the court's action, upon interstate commerce.

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

The questions of the validity of state statutes and orders of state railroad commissions, directing the stoppage of through interstate trains, have frequently, within late years, been before this court. The last case is that of *Mississippi Railroad Commission* v. *Illinois Central Railroad Company*, 203 U. S. 335, where the prior cases are referred to. See also *Atlantic Coast &c.* v. *North Carolina Commission*, 206 U. S. 1.

That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious. It hence arises that any command of a State, whether made directly or through the instrumentality of a railroad commission which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void.

It has been decided, however, that some orders which may cause the stoppage of interstate trains made by state authority may be valid if they do not directly regulate such commerce. *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285. When, therefore, an order made under state authority to stop an interstate train is assailed because of its repugnancy to the interstate commerce clause, the question whether such order is void as a direct regulation of such commerce may be tested by considering the nature of the order, the character of the interstate commerce train to which it applies, and its necessary and direct effect upon the operation of such train. But the effect of the order as a direct regulation of interstate commerce may also be tested by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. True, inherently considered, whether there be adequate local facilities is not a Federal question, but in so far as the existence of such adequate local facilities is involved in the determination of the Federal

question of whether the order concerning an interstate train does or does not directly regulate interstate commerce, that question for such purpose is open and may be considered by us. 203 U. S., *supra*.

Without stopping to consider whether, in view of the character of the trains to which the order before us related, it would not result that the order complained of was a direct regulation of interstate commerce, and testing the subject by the local facilities at the station at which the trains were ordered to stop, we think the railroad company in this case has furnished such reasonable accommodations to the people at Latta as it can be fairly and properly called upon to give, and the order to stop these trains is, therefore, not a valid one.

The term "adequate or reasonable facilities" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost. In this case the company furnishes eleven different trains a day by which the people of Latta can leave that place, and among them are the daily through trains 39 and 40 for the South and North, respectively. That the inhabitants of a place demand greater facilities than they have is not at all conclusive as to the reasonableness of their demand for something more. Fault is found here with the character of some of the local trains, in that the appointments thereof are not up to a sufficiently high standard. It is true that included in these eleven trains were some which were a combination of freight and passenger, and others which only ran between Latta and Clio, and those are described as dirty and without proper closets and drinking tanks. These deficiencies are remediable by other means than the stoppage of the two trains in question. It is to be remembered that these two places, Latta and Clio, had together a population, by the

last census, of about a thousand. Two ordinary modern trains of the usual passenger coaches would comfortably transport the total population of these places. The number of people who are inconvenienced by the non-stoppage of these trains is, of course, comparatively quite small. One witness, who was in the hotel and general merchandise business at Latta, said that he sent a man or two every week to meet the fast train at Dillon, because they could not take it at Latta. Other witnesses said that the demand for those particular trains, 32 and 35, was quite frequent, as many as four people a week, while others said that the inconvenience of the through trains, 39 and 40, was on account of their not being fast trains, and hence were not so pleasant as the others, 32 and 35, and did not get them in to their destination as early as the latter trains did. The demand at Latta by people desiring to go to the termination of the road, either at New York or Tampa, would naturally be small. Some of the plaintiff's witnesses said that the demand for transportation at Latta was large, or quite large, and the inconvenience great, but a further examination of these witnesses showed that in specific details there was much lacking, and instances of inconvenience were really somewhat limited. But assuming that the number actually inconvenienced by the want of fast trains was "*quite large*," as said by some witnesses, it is perfectly evident the number would be small compared with the inconvenience of the much larger number of through passengers resulting from the stoppage of these trains at Latta and other similar stations in the State.

To stop these trains at Latta, and other stations like it, which could bring equally strong reasons for the stoppage of the trains at their stations, would wholly change the character of the trains, rendering them no better in regard to speed than the other trains, 39 and 40, and would result in the inability of what had been fast trains to make their schedule time, and a consequent loss of patronage, also the loss of compensation for carrying the mails, which would be withdrawn from them, and the end would be the withdrawal of the trains, because of

their inability to pay expenses. All these are matters entitled to consideration when the question of convenience and adequate facilities arises. There is no contradiction in the testimony that the company desires, so far as is fairly possible, to pay as much attention to the local demands as to the "through" claims.

Of course, it is not reasonable to suppose that the same facilities can be given to places of very small population that are supplied to their neighbors who live in much larger communities, and the defendants in error, it may be conceded, make no such demand. No one would assert that one daily train each way between New York and Philadelphia would furnish adequate facilities for the transportation of passengers. Twenty times that number of trains would be necessary, and yet one through train a day, each way, through so small a place as Latta to New York or Tampa would in all probability easily transport all the passengers desiring transportation between these places. Nevertheless, the fair needs of the locality for transportation to other local points must be considered and provided for. This, as we think, has been done.

Taking all the circumstances into consideration, as shown by uncontradicted evidence, we are of opinion that the judgment of the Supreme Court, directing a mandamus, was erroneous, and it is therefore reversed, and the case remanded to the Supreme Court of South Carolina for further proceedings therein not inconsistent with this opinion.

Reversed.

HEATH & MILLIGAN MANUFACTURING COMPANY *v.* WORST.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 41. Argued November 7, 8, 1907.—Decided December 9, 1907.

It is within the power of the State to prevent the adulteration of articles and to provide for the publication of their composition.

Legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection provisions of the Fourteenth Amendment to the Federal Constitution. See *Ozan Lumber Co.* v. *Union County Bank*, *ante*, p. 251.

This court will not limit the power of the State by declaring that because the judgment exercised by the legislature is unwise it amounts to a denial of the equal protection of the laws or deprivation of property or liberty without due process of law.

The statute of North Dakota requiring the manufacturers and vendors of mixed paints to label the ingredients composing them is not unconstitutional as depriving such manufacturers of their property or liberty without due process of law or as denying them the equal protection of the law because the requirements of the statute may not apply to paste paints.

THIS is a direct appeal from the Circuit Court for the District of North Dakota, sustaining the constitutionality of a statute of that State, requiring the manufacturers of mixed paints to label the ingredients composing them.

The statute is as follows:

"An Act to prevent the adulteration of and deception in the sale of white lead and mixed paints.

"*Be it enacted by the Legislative Assembly of the State of North Dakota:* 1. Every person, firm or corporation who manufactures for sale or exposes for sale, or sells, within this State any white lead, paint or compound intended for use as such, shall label

the same in clear and distinct open gothic letters upon a white background and show the true per cent of each mineral constituent contained in said paint, or if other than linseed oil is used in its preparation, the names of such oils or substitutes shall be shown together with the percentage thereof, and every person, firm or corporation who manufactures for sale, or exposes for sale or sells within this State any mixed paint or compound intended for use as such, which contains any ingredient other than pure linseed oil, pure carbonate of lead, oxide of zinc, turpentine, Japan dryer and pure colors, shall be deemed guilty of a misdemeanor and upon conviction thereof shall, for each offense, be punished by a fine of not less than twenty-five and not more than one hundred dollars and costs, or by imprisonment in the county jail not exceeding sixty days; provided, that any such person, firm or corporation who shall manufacture for sale or expose for sale, or sell within this State any white lead, paint or mixed paint containing ingredients other than those as above enumerated, shall not be deemed guilty of a violation of this act in case the same be properly labeled showing the quantity or amount of each and every ingredient used therein and not specified above, and the name and residence of the manufacturer or person for whom it is manufactured."

It is made the duty of the appellee in his official capacity to enforce the statute. A few days before the statute took effect (January 1, 1906) the appellants filed a bill to restrain its enforcement, and prayed a preliminary as well as a permanent injunction. A preliminary injunction was granted. It was dissolved on final hearing, and a decree was entered dismissing the bill for want of equity.

The grounds of attack upon the statute are that it offends against the Fourteenth Amendment of the Constitution of the United States, in that it deprives appellants of their property and liberty without due process of law, and denies them the equal protection of the laws. How it is contended the statute produces these effects will be pointed out hereafter.

The stress of the case is upon paragraph 17 of the bill and the special paragraphs "A" and "B". To these paragraphs an answer was filed. The legal effect of the others was submitted upon demurrer. Upon the issue of fact formed by the answer to paragraph 17 and the special paragraphs, testimony was taken, and upon it and the demurrer to the other allegations, and the affidavit of one Professor Ladd, the case was submitted.

The bill is voluminous. It alleges that the plaintiffs are manufacturers of mixed paints and sell their respective products in North Dakota, and that each "had established an enviable reputation for its goods;" that each sold in North Dakota mixed paints containing ingredients other than those specified in the statute, which is set out. It is alleged that mixed paint has an absolutely defined meaning in the trade, and means a paint so thinned, "by admixture of the proper liquid vehicles, as to reduce it to a consistency which makes it ready for use." The term "mixed paint," it is alleged, is used in contradistinction to "a paste paint," which paint has also a well defined meaning, meaning a paint ready for use, except that it requires thinning material to give it the necessary consistency. White lead, it is alleged, is a commercial, not a scientific term, and is commonly understood to be a dry powder consisting of commercial carbonate of lead. When ground in oil to a paste consistency it is commonly called in the trade white lead in oil, colloquially referred to frequently as "white lead." In the statute these terms are used interchangeably, and are intended to denote white lead in oil, as above defined. That various compounds containing no carbonate of lead or other ingredients in addition to carbonate of lead are frequently sold in the market labeled as "white lead." And that the words "any white lead paint, or compound intended for use as such," in the act "are intended to denote a paste paint, intended as a substitute for white lead and labelled or sold as 'white lead' or 'white lead in oil,' but which does not contain any carbonate of lead or contains other ingredients in addition thereto."

Paragraph 17 is as follows:

"Your orators further show unto your honors that the manufacture of paint, and more particularly of mixed paint, involves many practical problems, the proper solution of which demands the application of a variety of scientific principles and is the result of a great variety of practical tests and experiments; that the means, methods and processes employed in said manufacture have changed materially in the course of years to conform to the discovery of new scientific facts and the results of practical experiments; that the technology of paint manufacturing has made gradual and constant progress during the last fifty years, during which time it has undergone an evolutionary process which is still far from completed; that until about twenty-five years ago carbonate of lead was the only material which was universally conceded by manufacturers and users of paint to be a proper pigment to be used in paints requiring or admitting of the use of a white pigment; that since said time, and within the last twenty-five years, oxide of zinc gradually gained recognition among manufacturers and users of paint as being equally appropriate for the purposes for which theretofore carbonate of lead had alone been recognized as appropriate, and has come to be universally conceded as possessing important useful qualities as a white pigment not possessed by carbonate of lead; that within the last fifteen years practical experiments and tests, made with a view to widening the range of white pigments properly usable in the manufacture of paint, have demonstrated the following facts, which are now conceded by the most advanced and most successful paint manufacturers of the world, viz:

"*a.* That there are materials other than carbonate of lead and oxide of zinc which in some cases may be used in connection therewith and in other cases may be used instead thereof, and which, either without carbonate of lead or oxide of zinc, or in connection with one or both of these, according to circumstances, are as efficient as, and in some respects more efficient than, carbonate of lead or oxide of zinc, or a combination of

the two for the purposes for which the latter are used in paint; that among said materials are (*a*) sublimed lead (which is an artificial product consisting of sulphate of lead and oxy-sulphate of lead), (*b*) standard zinc lead white (which is commonly called zinc lead and is an artificial product made by the United States Smelting Company and sold in large quantities, and consists of a combination of sulphate of lead and oxide of zinc united by a furnace process), (*c*) zinc made from Western ores, which carries in its natural composition varying proportions of sulphate of lead and oxide of zinc, and (*d*) an artificial opaque white pigment, consisting essentially of zinc sulphide, zinc oxide and barium sulphate, which is known to the paint manufacturing trade under various trade names, such as lithopone, ponolith, lithophone, charlton white, becton white and Orr's white.

"*b*. That there are certain white pigments other than carbonate of lead and oxide of zinc which constitute proper and useful ingredients of paints, and which, if so used in connection with carbonate of lead or oxide of zinc, or a combination of the same, or in connection with one or more of said other materials described in the last preceding paragraph as proper substitutes for carbonate of lead and oxide of zinc, furnish to the paint wherein used important useful qualities not possessed by either carbonate of lead or oxide of zinc, or any of said substitutes therefor; that among said other pigments are sulphate of barium, silica, silicate of magnesia, calcium carbonate, hydrated sulphate of lime, and others; that the proportionate amount of the pigments last named which may properly and usefully be made an ingredient of paint, and whether any of them may be properly used as such ingredient depends upon a great variety of conditions and circumstances, but all of said pigments may, under proper conditions, serve a highly useful purpose and where properly used do essentially increase the durability and density of the paint."

It is further alleged that the statute in condemning inferentially the use of the materials mentioned in paragraph 17, and

its sub-paragraphs, "as ingredients of mixed paint and branding them as adulterants, ignores the fact that all said substances constitute proper, useful and necessary ingredients of paint, is based upon antiquated, obsolete and quite generally discarded prejudices regarding the ingredients proper, useful and necessary to be used in paint, and is therefore unreasonable and void."

That complainants and most of the successful paint manufacturers of the United States have for many years maintained and continue to maintain, in connection with their factories, chemical laboratories, wherein are able, accomplished chemical experts, who are constantly conducting experiments in the qualities and properties of new ingredients to produce the best results regarding the purposes of paint, the materials upon which it is used and the various conditions to which it may be exposed. And that the business success of such manufacturers largely depends upon the efficiency of said laboratories and experiments, "and their readiness and ability to conform their methods of manufacturing to the truths discovered by said investigations and tests." That such experiments have led to the adoption of improved methods of manufacture and the use of a widening range of ingredients and a constantly increasing degree of efficiency in the paint produced, and if continued "is sure to bring about a still higher and gradually increasing degree of merit and efficiency in the paint of the future."

Other allegations of the bill set forth the virtues and usefulness of varnish as a vehicle or thinning material of mixed paint in connection with or in place of one or other of the ingredients of the statute for some purposes and situations, and that the statute by excluding it brands it as an adulterant, and is hence void. The bill also charges the statute with inaccuracy in its designation of pure carbonate of lead as one of the ingredients of mixed paint specified, and alleges that it cannot be used for the purpose of manufacturing paint, and that the carbonate of lead, which is commonly used and has been used from time immemorial, even in paints of the higher grade, contains

approximately twenty to thirty per cent of other ingredients. It is hence charged that the statute, by specifying "pure" carbonate of lead, and prohibiting as a crime the use of commercial carbonate of lead, "without specifying on a label quantity or amount of each of its ingredients is unreasonable and void." The bill also attacks with much detail the term "pure colors" in the enumeration of the ingredients by the statute, alleges that such term neither has a definite meaning among the manufacturers of such coloring material nor among manufacturers of paint, nor is it capable of an exact or even an approximately exact definition; that there is no line of demarkation between pure and impure colors; that while some dry colors are regarded as "pure" and others "impure" by some manufacturers, there is nothing approaching a consensus of opinion upon the subject, and no rational classification has been attempted; that the standard universally applied to dry colors is not purity but efficiency; that, with the exception of a very few dry colors of limited use in mixed paints, even the very highest and most expensive grades made or imported contain large and widely varying percentages of elements which have no coloring properties. Illustrations are given, and the bill charges "that said act, in specifying 'pure colors' among the ingredients of mixed paint, and making the use of any but 'pure colors' as such ingredient a crime, unless the manufacturer or dealer stigmatizes the paint by a label as required in said act, is so uncertain and unreasonable as to be void."

It is also alleged that the only purposes for which paint is used is to preserve and beautify, and that that paint is most efficient which accomplishes those purposes for the longest time, and that any ingredient which tends to such ends is a proper ingredient; that there is no natural standard of the purity of paint, nor a widely accepted standard; that any enumeration of allowable ingredients, short of an exhaustive enumeration of ingredients, which may under particular circumstances and conditions give to paint a useful quality, is necessarily unjust and unreasonable, and even such enumera-

tion, though just to-day, by discoveries may be unjust to-morrow; that to produce an efficient paint not the ingredients alone must be considered, but the manner and the proportion of every combination and the purpose and conditions of the use of the paint; that it is, therefore, impossible to speak of a standard of purity as applied to paint, "nor is it reasonable for any statute to attempt to set up a standard of efficiency of paint by an enumeration of allowable ingredients, the only test of the efficiency of paint being its ability to serve the purposes for which it is intended."

It is further alleged that the requirement of the statute "is intended and calculated to create in the minds of the mixed paint dealers and consumers in the State of North Dakota the erroneous belief that all ingredients of mixed paint other than those specified in said act are adulterants used for the purpose of cheapening the product, and add no quality of usefulness or efficiency to the mixed paint wherein they are used; that said act in requiring mixed paint containing any ingredients other than those specified in said act as aforesaid, to be labelled as aforesaid, is a requirement that the manufacturer of and dealer in such paint shall brand the same in such a way as to hold it up to the suspicion and prejudice of the users of mixed paint, and thereby make the sale thereof in said State, if not impossible, at least more difficult and expensive."

That the excluded ingredients (they are enumerated in the bill) will have no tendency by their use to render "mixed paint by those applying the same harmful to health in any sense or degree." That while such act was intended as a police regulation for the prevention of fraud, its provisions are such that it has no tendency to accomplish such end; that the act, by failing to specify the maximum and minimum of the proportionate amount of the ingredients specified, permits the manufacture and sale of mixed paint containing those ingredients in such proportions as to make it absolutely inefficient and useless and a fraud upon the purchaser; that by holding up to the prejudice of dealers in and users of other mixed paint has the ten-

dency, in many instances, to give inferior brands a preference over superior brands of mixed paint. And that such act has no tendency to accomplish the prevention of fraud, because it does not prevent the manufacture and sale "of any imaginable paint concoction in paste form," or impure linseed oil, or any spurious article, as "white lead," or "white lead in oil," or as "white lead paint," because a paint ready for use may be lawfully made of such concoctions and substitutes; "that the manufacture and sale of paste paint is a substantial part of the paint manufacturing and selling business of the United States; that millions of dollars worth of white lead in oil and compounds intended as substitutes therefor are annually manufactured and sold in the United States; that tinting colors for use as an ingredient of paint are manufactured in large quantities and sold in cans, in paste form, throughout the United States; that linseed oil, as such, is an article of commerce throughout the United States;" and that the statute, by failing to place restriction on the manufacture or sale of such paint and material, but imposing penalties and restrictions on the manufacturers of mixed paint, unjustly discriminates against the latter, and, for the same reason and "the other facts and circumstances" stated in the bill, they will be deprived of their property without due process of law.

It was also alleged that each of the complainants manufactures "scores of different kinds and shades of mixed paints, differing from each other in chemical composition; that even the same kind and shade of mixed paint manufactured by any one of your orators has no fixed chemical composition, but varies in such composition from time to time and practically with each lot manufactured, by reason of the wide variations in the chemical composition of the constituent ingredients, more especially the chemical composition of the dry colors used; that in order to properly label the cans of mixed paint manufactured by your orators and sold in North Dakota showing 'the quantity or amount of each and every ingredient used therein, and not specified' in said act, each of your orators

would have to have a chemical analysis made of each lot of mixed paint before putting the same up in cans or other containers." It is alleged that this would add materially to the cost of manufacture of mixed paints, cast a burden upon them, from which the manufacturers of other paints are free, and would deprive them of their property without due process of law.

It is further alleged that there are dealers in North Dakota who have on hand stock of mixed paint subject to the act and who will be subject to criminal prosecution unless the cans containing the same be opened and analyzed and labelled, which opening would make the paint unsalable; that dealers who in the future shall purchase from any of the complainants, and the distributing agents and salesmen of complainants, will be subject to criminal prosecution, that thereby a multiplicity of criminal prosecutions will ensue and suits to enforce payments for paints sold or to be sold. And if the complainants should label the mixed paints manufactured by them as required by the act they would not only be subject to the expense thereof, but that their products will be held up to suspicion and prejudice of the dealers in and users of the same, which will make it either impossible or more difficult and expensive to sell their products in said State, all of which will produce incalculable and irreparable injury to complainants; that the dealers in paints who are now subject or may be subject to prosecution under such act will not have sufficient interest to or can successfully raise the defense of the invalidity of the act, "inasmuch as such defense involves the consideration of the complex state of facts hereinbefore set forth."

Fear is expressed that most of such prosecutions will result in conviction, and that by such the brands of mixed paints involved therein will be branded as adulterated and illegal products, and will thereby be rendered unsalable, all of which will produce incalculable and irreparable injury to complainants, and will constitute the taking of their property without due process of law and the denial to them of the equal protection of the laws.

It is difficult to separate the admissions and denials of the answer to paragraph 17. It admits that practical problems are involved in the manufacture of paints, particularly of mixed paints, the solution of which is the result of a variety of practical tests and experiments; "that the technology of paint manufacture has made gradual and constant progress during the past fifty years, during which time it has undergone an evolutionary process." It admits that formerly carbonate of lead was the only material which was universally used as the proper pigment used in paints requiring or admitting of the use of a white pigment, and that oxide of zinc has gained recognition as in many cases appropriate as a white pigment, but denies that such recognition has come within the last twenty-five years; on the contrary, asserts it has been recognized and used for a period of thirty years. Admits that there are materials other than carbonate of lead and oxide of zinc used in connection with the latter or instead of them, but denies their equal efficiency; on the contrary, alleges that tests and experiments have not determined or demonstrated the value and usefulness of such materials, and further alleges that their use and value have not progressed beyond the experimental stage. That about one-half of the leading manufacturers entirely reject them, or reject them because upon test they have proved to be unsatisfactory and inefficient, and others that time has not yet demonstrated their value. Admits that zinc made from Western ores is valuable and efficient as a pigment, provided sulphate of lead incidental to its production does not exceed in quantity 5 per cent of its constituent elements, and alleges that the percentages of the sulphate of lead are widely different.

The answer to sub-paragraph "b" of paragraph 17 admits that in making the colored paints there mentioned it is necessary to employ some of the articles mentioned in connection with some pigment other than carbonate of lead, and that the latter would change or modify the exact shades sought to be produced. But it is alleged on information and belief that the aggregate of all mixed paints produced, sold and consumed in

North Dakota, in the preparation of which it is necessary to exclude carbonate of lead and to include one or more of the substituted materials mentioned in the bill, does not exceed 25 per cent of the aggregate of all mixed paints which may be prepared and produced by the use alone of carbonate of lead and oxide of zinc as pigments. Save as to those admitted, the answer denies the efficiency of the materials mentioned, and avers that the general use of them is "to cheapen and adulterate the paints wherein they are employed," and of all substances known they are best adapted and lend themselves most readily and are commonly used as adulterants to cheapen mixed paints. It is further averred that 70 to 75 per cent of the paints used in the State are mixed paints, and that their adulteration has become and is a great evil. "That no other substances have been discovered or known, which, by their inherent qualities, lend themselves so readily to or are so commonly employed for such purpose of fraud and deception as those described in said sub-paragraph 'b.' "

Mr. Sigmund Zeisler, with whom *Mr. Henry L. Stern* was on the brief, for appellants:

Corporations are persons within the provisions of the Fourteenth Amendment. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154.

The classification, though ostensibly between paints, is in reality between paint manufacturers. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The exercise of the police power must be reasonable. The question of the reasonableness of a state statute ostensibly passed in the exercise of the police power is a judicial question. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 301; *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 301; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 235; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Holden* v. *Hardy*, 169 U. S. 366, 395; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Lochner* v. *New York*, 198 U. S. 45; *Chicago, B. & Q.*

R. Co. v. *Illinois*, 200 U. S. 561, 592; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684; *Long* v. *Maryland*, 74 Maryland, 565.

While every intendment is to be made in favor of the lawfulness of the exercise of this power, the courts will not imagine the existence of some undisclosed and unknown reason for its exercise. The simple decision of the legislature cannot be held to constitute such reason. *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 699; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 237; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154; *Lochner* v. *New York*, 198 U. S. 45, 56.

A statute ostensibly passed in the exercise of the police power must be judged by its natural effect and not by its proclaimed purpose.

A statute which restrains the liberty or property rights of individuals, though ostensibly passed in the exercise of the police power, cannot be held valid, unless it has a real or substantial relation to some legitimate object of the police power which its provisions reasonably tend to accomplish. *Lochner* v. *New York*, 198 U. S. 45, 64; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *C., B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 593; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150.

Even if a statute is fairly referable to the police power of the State, still if it impairs or destroys a right secured by the Federal Constitution, it is invalid. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558.

In making regulations, providing penalties or imposing liabilities in the exercise of the police power, the legislature has the right to make classifications. But classification must have some reasonable basis. The differences which will support class legislation must be such as in the nature of things furnish a reason for separate laws. The differences must bear a reasonable relation to the purpose of the statute. Arbitrary designation or selection is not classification. When burdens are placed upon some and not upon others similarly situated with respect to the purpose for which such burdens are imposed, the classi-

fication is arbitrary and illegal. Cases *supra* and *Soon Hing* v. *Crowley*, 113 U. S. 703, 709; *Barbier* v. *Connolly*, 113 U. S. 27; *Cotting* v. *Kansas City St. Yds. Co.*, 183 U. S. 79; *Luman* v. *Hitchins Bros. Co.*, 90 Maryland, 14; *Missouri* v. *Ashbrook*, 154 Missouri, 375; *State* v. *Julow*, 129 Missouri, 163; *Bailey* v. *The People*, 190 Illinois, 28.

The liberty guaranteed by the Fourteenth Amendment embraces the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways. *Allgeyer* v. *Louisiana*, 165 U. S. 578.

To enjoy the privilege of pursuing an ordinary calling or trade upon terms of equality with all others in similar circumstances, is an essential part of the rights of liberty and property as guaranteed by the Fourteenth Amendment. *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *People* v. *Hawkins*, 157 N. Y. 1; *Bailey* v. *People*, 190 Illinois, 28, 35.

Any law which, without a valid reason, annihilates the value of property, restricts its use or takes away any of its essential attributes by imposing onerous conditions upon the right to hold or sell it, deprives its owner of property without due process of law. To require a label upon some mixed paints while exempting others, is not only to burden them with peculiar expense, but also to require them to bear a badge of inferiority which diminishes their value and impairs their selling qualities. *People* v. *Hawkins*, 157 N. Y. 1.

To restrict one's freedom of competition upon equal terms with others in the same business is prohibition. *Brimmer* v. *Rebmann*, 138 U. S. 78.

The Fourteenth Amendment forbids that any impediment be interposed by a state statute to the pursuits of any one except as applied to the same pursuits by others standing in the same relation to the purpose of the statute. *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City St. Yds. Co.*, 183 U. S. 79.

Mr. John S. Watson, with whom *Mr. T. F. McCue*, Attorney General of the State of North Dakota, was on the brief, for appellee:

Assuming that the act sets up a standard of purity or efficiency and puts the paint containing substituted pigments at a disadvantage by requiring a label, it is yet constitutional, because the classification is warranted by the situation disclosed in the record.

The act, the validity of which is drawn in question, in fact makes no discrimination for or against complainants. It establishes no standard of purity or efficiency. It deals with carbonate of lead and oxide of zinc, with which all are familiar, by saying that all persons, firms and corporations employing them as pigments in the preparation of mixed paints may do so without labeling the product.

If the act does not include paste paint (which we do not admit) such omission goes only to the completeness of the law, to its failure to deal with the whole subject. It does not render it unconstitutional. Complainants may, like all others, sell unlabeled paste paint of whatever ingredients composed.

It is enough if the law has some tendency to accomplish the desired end. *Powell* v. *Pennsylvania*, 127 U. S. 678.

The act in question is well calculated to prevent the perpetration of fraud. It enables intending purchasers to know what they are buying. It prevents dishonest manufacturers from palming off upon the public cheaper substances for more expensive ones. It puts every substance used as an ingredient upon its own distinctive merits or lack of them, and prevents the inferior article from being sold for what it is not. The class "B" pigments are the substitutes most extensively used for, and which by their inherent character lend themselves most readily to, the adulteration of mixed paints. The record abundantly substantiates the foregoing statements.

The police power of the State embraces its whole system of internal regulation and is as broad and plenary in its effect as the taxing power itself. It embraces all regulations designed

to promote the public convenience or the general prosperity as well as those intended to promote the public health or the public morals or the public safety. Cooley's Const. Lim., p. 829 (7th ed.); *Kidd* v. *Pearson,* 128 U. S. 1; *R. R.* v. *People,* 200 U. S. 561; *Crossman* v. *Lurman,* 171 N. Y. 329; *Schollenberger* v. *Pennsylvania,* 171 U. S. 1; *Lawton* v. *Steele,* 152 U. S. 133.

The police power will be upheld for the prevention of fraud or deception upon the public and to promote fair dealings. *Schollenberger* v. *Pennsylvania, supra; Plumley* v. *Massachusetts,* 155 U. S. 461; *State* v. *Snow,* 81 Iowa, 642; *State* v. *Aslesen,* 50 Minnesota, 5; *State* v. *Hanson,* 84 Minnesota, 42. See also *Capital City Drug Co.* v. *Ohio,* 183 U. S. 238.

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

It appears from the evidence that the statute which is assailed by appellants was one, among others, passed to prevent the adulteration of articles or to provide for the publication of their composition. That both purposes are within the competency of the State can hardly be denied. A discrimination is, however, asserted to have been made in the exercise of the power, with the following results: (1) The imposition of the burden of analyzing and labelling the ingredients of mixed paints, from which burden the manufacturers of paste paint and manufacturers of mixed paints containing only the ingredient specified in the act are to be free. (2) Holding up to the prejudice of dealers in and users of mixed paints containing ingredients other than those specified, branding them as suspicious or adulterated, and rendering them unsalable or less salable than mixed paints containing the statutory ingredients, though more efficient than the latter for certain purposes. We can see that expense will be cast on the manufacturers of mixed paint not containing ingredients enumerated in the statute, but that such paint will be branded as adulterated is not easy to accept, and seems to be opposed by other allegations in the

bill. It is averred that the complainants have a yearly increasing trade in the State of North Dakota which has attained to many thousands of dollars per annum, and that by the high quality of their goods and by advertising they have attained an enviable reputation for them. How the firmness and profit of that trade, how the excellence and degree of that reputation, can be affected by revealing the composition of the goods, is not by us discernible. Manufacturers who use inferior materials because they are so or from a mistaken opinion of their quality, though they have statutory sanction, would be more affected than complainants. Consumers of paint, we may assume, like the consumers of other kinds of goods, seek excellence in them, and where excellence is demonstrated by use will care little of what pigments it is composed. This, however, is anticipating somewhat, and we will pass to the statute, consider its purpose and see whether its classification is justified by that purpose.

We will omit from citation the cases in which this court has passed upon the power of the States to classify objects for the purpose of government. A review of them is not necessary in this case. Counsel have collected and analyzed them, applied or rejected them as they have thought they supported or opposed their respective contentions. We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in "ill-advised, unequal and oppressive legislation." *Mobile Co.* v. *Kimball*, 102 U. S. 691. And this necessarily on account of the complex problems which are presented to government. Evils must be met as they arise and according to the manner in which they arise. The right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, exact wisdom and nice adaptation of remedies are not required by

the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it.

Keeping these principles in mind, let us examine the North Dakota statute. Its purpose, as expressed in the title, is "to prevent the adulteration of and deception in the sale of white lead and mixed paints." It attempts to accomplish this purpose by the following requirements: (1) All white lead and compounds intended for use as a substitute therefor must be labelled to clearly show the per cent of each mineral therein. (2) All mixed paints must show their true composition, unless made of pure linseed oil, carbonate of lead or oxide of zinc, turpentine, Japan dryer and pure colors. (3) All substitutes for linseed oil in the preparation of paints must be clearly shown on the label.

The second and third divisions we are concerned with in this case, and it is insisted their requirements work a discrimination between mixed paints which contain and those which do not contain any ingredients other than those specified. It will be observed that the manufacture for sale and the selling of the first kind is made a misdemeanor unless the paint be labelled as required by the statute. The manufacture or sale of the other kind is free from such consequence or condition. It is also charged that the statute discriminates between mixed paints and paste paints, it being asserted that the latter, no matter what their ingredients, need not be labelled. To this charge we may immediately answer that it is open to contest whether the act exempts paste paint from its requirements, and the executive officers of the State have construed it as not exempting them. But be this as it may, there is a distinction between the paints, and the evils to which the statute was addressed may not exist or be as flagrant in one as in the other. There, indeed, may be a degree of competition between them, but other circumstances and conditions may have directed the legislative discretion. This record certainly does not present any data to make it certain that the discretion was arbitrarily exercised. Legislation which regulates business

may well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable. *Ozan Lumber Co.* v. *Union County National Bank et al., ante,* page 251.

2. The argument which attacks the discrimination between mixed paints is an elaboration of paragraph 17 of the bill. It is able, circumstantial and variously illustrated. It has been given careful consideration, but it would extend this opinion too much to answer it in detail or review its specifications. It is ultimately grounded on the contention that the pigments enumerated in the statute, and hence denominated statutory pigments, are not more efficient—maybe not as efficient to the manufacture of paint, either in themselves or as depending upon the particular use to which paint may be put, the proportion of ingredients varying with such use, or even with the fancy or taste of the user, or the atmospheric conditions to which paint may be exposed, as the pigments mentioned in sub-paragraphs "A" and "B" of paragraph 17, and hence called class "A" and class "B" pigments. And, it is contended, that there is "neither a standard of purity nor a general or widely accepted standard of purity," and that the statute, by making a standard of some ingredients and excluding others "useful, efficient, harmless and in some cases most essential," is an arbitrary discrimination and an improper exercise of the police power of the State, not justified by the comparative newness of the excluded ingredients, or because they are not used by unprogressive manufacturers, or used by unscrupulous ones in excessive proportions to cheapen their products. And this, it is urged, is all that is established against such ingredients. Besides, it is further urged, the charge that they are used to cheapen paint is true of one of the statutory ingredients.

The claims for class "A" and "B" pigments are controverted, and if they are sustained at all are sustained upon the balancing of and the judgment between the testimony of experts, certain publications and exhibits. But a problem of a different kind was presented to the legislature of North Dakota. It was not what scientific men might find out by chemical and laboratory

tests, or progressive men might discover by practical experiments, but what the people of the State could find out or be justified in accepting as established. It was the experience of the people, not the acts of some progressive manufacturers, which directed the legislation, and it was to protect the people, when following the opinions formed from that experience, from deception, that the statute was enacted. It may be that the purpose could have been accomplished better in some other way. It may be that it would have been more entirely adequate, let us say, even more entirely just, to have required that all paint should be labelled, the statute nevertheless cannot be brought under the condemnation of the Fourteenth Amendment. Legislatures, as we have seen, have the constitutional power to make unwise classifications. But we may be going too far in concession to the argument of appellants. The legislature of North Dakota may have met the evils which exist as best it could, and there is a strong presumption that it did. At any rate, a fair question was presented, whether to take as a standard the ingredients that years of use had demonstrated as excellent or make regulation universal. We think it would be limiting the power of the State too much to say that a judgment exercised under such circumstances must be condemned as denying the equal protection of the laws or that the liberty assured by the Constitution of the United States in the Fourteenth Amendment gives a right to either progressive or conservative tendencies in legislation.

Appellants not only attack the standard adopted by the statute, but attack the use made of it. They assert that the standard is of "purely negative character," in that it fails to "require all allowable ingredients essential for efficiency to be used and its failure to prescribe maximum and minimum percentages," and, therefore, it is insisted, "permits of the manufacture and sale under the special sanction of the law of that which is inefficient, useless and a fraud upon the purchaser." It is besides asserted that the statute enumerates among the allowable ingredients a material which cannot be used, to wit,

pure carbonate of lead, and it is asked whether a statute having these effects can be a valid exercise of the police power of the State. The answer is ready enough. The enumeration of "pure carbonate of lead" may be corrected into commercial carbonate by a perfectly allowable exercise of construction; and as to the other charge, the inefficiency of the statutory ingredients on account of the failure to define the proportions in which they must be used, goes to the defect or incompleteness of the legislation, not to its legality. Were the proportions ever so exactly defined, the relation of mixed paints to the resultant product or its liberty of sale or power of competition would not be lessened.

There is a special and earnest criticism of the provision of the statute requiring varnish when used as a thinning material to be specified, and a like criticism of the term "pure colors" to designate one of the statutory ingredients. "The exclusion of varnish," it is said, "from the list of allowable ingredients is indefensible and undefended." The bill alleges, and it is not denied, that there is very large demand for certain mixed paints, which are enumerated, that are capable of producing a high gloss for decorative purposes and have high resisting power to moisture, and that varnish is the "only thinning material now known which may appropriately be used as an ingredient of mixed paint to produce said effects." "Notwithstanding these admitted facts," counsel's comment is, "varnish is branded as an adulterant by the statute."

The term "pure colors," it is alleged, is intended to refer to coloring material used by paint manufacturers in powdered form, and is known in the trade as "dry colors;" that the term "pure colors" neither has a definite meaning nor is "it capable of an exact or even approximately exact definition;" that some dry colors are regarded as "pure" and others "impure" by individual manufacturers, but there is "nothing approaching a consensus of opinion," and "no rational classification on the subject has ever been attempted." The standard "applied to dry colors is not purity but efficiency."

We regard these criticisms answered by our general discussion, and we have specially noticed them that it may not be thought we have overlooked them. They may emphasize what we have already said as to the possible imperfection of the classification of the statute. It must not be forgotten, however, that inaccuracies of definition may be removed in the administration of the law. And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used—a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition.

Decree affirmed.

VANDALIA RAILROAD COMPANY *v.* INDIANA *ex rel.* THE CITY OF SOUTH BEND.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 26. Argued October 18, 1907.—Decided December 16, 1907.

The construction of a pleading, the meaning to be given to its various allegations, the determination of the validity of a contract in reference to real estate within the State, and whether the form of remedy sought is proper, are, as a general rule, local questions.

If the judgment of the state court is based on a decision placed upon a sufficient non-Federal ground this court has no jurisdiction to review it.

While this court is not concluded by the judgment of the state court and must determine for itself whether a Federal question is really involved, and may take jurisdiction if the state court has in an unreasonable manner avoided the Federal issue, the writ of error will be dismissed where no intent to so avoid the Federal question is apparent.

Writ of error to review 166 Indiana, 219, dismissed.

THE facts are stated in the opinion.

Mr. Samuel Parker, with whom *Mr. John G. Williams* was on the brief, for plaintiff in error:

There was a denial by the state Supreme Court of an authority exercised under the United States, in that such court refused to consider and thereby, in effect, decided against the title and right of plaintiff in error, specially set up and claimed under such authority. That court refused to consider, and by so doing decided against, the title and right of the plaintiff in error to the free and unincumbered use of that part of its right of way and railroad over which it is claimed said Calvert street exists, its title and right to said right of way and railroad having been acquired under and by force of the judgment and decree of the Circuit Court of the United States, all as specially set up and claimed. Sec. 709, Rev. Stat.; *Dupasseur* v. *Rochereau,* 21 Wall. 130; *Crescent City &c. Association* v. *Butcher's Union &c. Co.,* 120 U. S. 141; *Pittsburg &c. Ry. Co.* v. *Long Island &c. Co.,* 172 U. S. 493.

The return of the railway company to the alternative writ of mandamus, after averring the facts constituting the first ground for the assertion that this court has jurisdiction, makes the direct and positive allegation of the existence of a Federal right in the following words: "And this defendant says that in this action it is sought to appropriate its property acquired by virtue of the decree aforesaid rendered in the Circuit Court of the United States, for the District of Indiana, without due process of law and without compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant now claims immunity under said Fourteenth Amendment from having its property taken from it by means of this action without compensation and without due process of law." This would seem to meet even the stringent requirements of the earlier cases in this court, of which *Maxwell* v. *Newbold,* 18 How. 511, is an example. Upon this ground, viz.: That the state court decided against the immunity claimed under the constitution, the return leaves nothing to inference but the averments are so

distinct and positive as to place it beyond question that the party bringing the case here . . . intended to assert a Federal right. *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648; *Green Bay & M. C. Co.* v. *Patten Paper Co.,* 172 U. S. 58.

The state Supreme Court declared that the return to the alternative writ was based upon the theory that the contract between the railway company and the city of South Bend, relator, was a bar to the action for the mandate, and, having so declared, held that the conclusion reached forbade a discussion of the legality of the various steps taken in the proceedings to establish Elmira street, as well as the constitutional question raised. This amounts to, and, in effect, is a decision against the Federal right and immunity claimed. *Minneapolis &c. Ry. Co.* v. *Gardner,* 177 U. S. 332; *Covington & L. Turnpike Road Co.* v. *Sandford,* 164 U. S. 576; *Mitchell* v. *Clark,* 110 U. S. 633, 645; *Kaukauna Water Power Co.* v. *Green Bay &c. Canal Co.,* 142 U. S. 254; *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Grimwood,* 200 U. S. 561.

Mr. Harry R. Wair and *Mr. L. T. Michener,* with whom *Mr. Frank H. Dunnahoo* and *Mr. W. W. Dudley* were on the brief, for defendant in error:

The decision of the state court was placed upon an independent ground not involving in any way a Federal question and that ground is sufficient to sustain the judgment. The Federal question, if any, lay behind the determination of the question of the character and theory of the pleading. Plaintiff in error could not complain that because of the construction of the pleading the real issue was held to be the validity of the contract and not the Federal question now asserted. *Chapman* v. *Crane,* 123 U. S. 540; *Brooks* v. *Missouri,* 124 U. S. 394; *Johnson* v. *Risk,* 137 U. S. 300.

Whether the construction of the pleading as made by the state Supreme Court, or its finding upon the validity of the contract, were sound or not, is not for inquiry here. The basis of the decision is broad enough in itself to support the final

judgment without reference to the alleged Federal question. *Beaupre* v. *Noyes*, 158 U. S. 397, 401; also *Klinger* v. *Missouri*, 13 Wall. 257, 263.

All causes of action originating in the state courts and in the inferior Federal courts are, and necessarily must be, subject to the rules of pleading obtaining in the particular jurisdiction, and it is for the state court to say whether the particular defense has been sufficiently alleged as measured by the rules applicable to the pleading obtaining in the State.

If the defense is founded upon a Federal question it must have been presented, not only in the Supreme Court of the State, but before the trial court. *Chappel* v. *Bradshaw*, 128 U. S. 132.

All allegations in the pleading which go beyond the statement of a good defense upon the theory adopted are mere surplusage and when the statements of the defense, tested by the rules of good pleading do not disclose that a Federal question is involved, the Federal court has no jurisdiction. *City of Fergus Falls* v. *Fergus Falls Water Co.*, 72 Fed. Rep. 873. See also *Hovey* v. *Elliott*, 167 U. S. 409; *Chouteau* v. *Gibson*, 111 U. S. 200; *T. & P. Ry. Co.* v. *Southern Ry. Co.*, 137 U. S. 48; *Speed* v. *McCarthy*, 181 U. S. 613; *Union Pac. Ry.* v. *Pain*, 119 U. S. 561; *Sayward* v. *Denny*, 158 U. S. 180.

If the question of the sufficiency of the pleading should be held to be subject of review by this court, the reasons assigned by the state court for holding the pleading insufficient to present Federal questions are sufficient, treating the matter as an original question here, to impel the same finding by this court.

Mr. Justice Brewer delivered the opinion of the court.

This action was commenced by the defendant in error in the Circuit Court of St. Joseph County, Indiana, to compel the Terre Haute and Logansport Railway Company to open its tracks and yards within Calvert street in South Bend, to

make the roadbed conform to the street grade, to plank the crossing of the same, and to make that crossing safe and convenient for the passage of persons and vehicles. While the action was pending in the state courts the Terre Haute company and certain other companies consolidated and formed a new corporation under the name of the Vandalia Railroad Company, which succeeded to all the rights and duties of the original defendant, carried on the further litigation, and is the plaintiff in error.

Upon the complaint an alternative writ of mandamus was issued. To this writ and the complaint the railroad company demurred, and the demurrer was overruled. The company then filed its return to the alternative writ, and a demurrer of the plaintiff thereto was sustained. The railway company refusing to plead further, a peremptory writ of mandamus was issued as prayed for. On appeal to the Supreme Court of the State the decision of the Circuit Court was affirmed. 166 Indiana, 219. Thereupon this writ of error was sued out.

To fully understand the questions presented a statement of the matters set forth in the complaint and return is necessary.

The complaint alleges that on November 10, 1884, the city granted a franchise to the railway company to cross the streets and alleys of the city on the express condition that when it did so the roadbed should be made to conform strictly to the grade of the street or alley it crossed, and that the defendant should so construct and maintain its road at such crossing as to cause the least possible obstruction to the passage of persons and vehicles over it; that the railway company accepted said franchise and had ever since acted under it.

It further described that portion of the street whose grade had been established and which was occupied by the defendant, and which it had been notified to plank and improve.

The demurrer to the writ raised the question whether the action was not founded alone upon the contract created by the franchise, and asserted that the duties of a corporation springing wholly out of contract cannot be enforced by writs

of mandamus; also whether the plaintiff could not of itself have constructed the crossing and brought an action for the cost thereof and the penalty as provided in the ordinance, and thereby secured adequate redress without resorting to the extraordinary remedy of mandamus. But obviously these matters are of a local nature and present no question under the Federal Constitution.

The return of the defendant alleged that at the time the original franchise was granted the place at which the improvement of the crossing was sought to be compelled by this action was outside the limits of the city of South Bend; that in 1887 it was taken into the corporate limits of the town of Myler, and thereafter, in 1892, said town of Myler was annexed to and became a part of the city of South Bend; that before this annexation and while the town of Myler existed certain parties filed with the board of trustees of that town a petition for the establishment of a street, at first called Elmira, but afterwards Calvert street, over the ground where the plaintiff now claims said street is located; that the Terre Haute and Logansport Railroad Company, then the owner of the real estate, had no notice of the proceedings had for the establishment of said street and took no part therein; neither did it receive any compensation on account thereof; that prior thereto that company had placed a trust deed on the property, which, after the attempted establishment of the street, was foreclosed by suit in the United States Circuit Court for the State and District of Indiana, and the property purchased by one Joshua T. Brooks, who directed a conveyance to the Terre Haute and Logansport Railway Company, the defendant herein; that neither the trustee in said trust deed nor any holder of bonds secured by it was a party to the proceedings for the establishment of said street, nor was any notice of said proceedings given to said trustee or any bondholder, nor did either have any knowledge thereof; that no damages for the opening of the street were assessed or tendered to either, and that at the time of the purchase of the property and the payment of the

purchase price neither the purchaser nor the railroad company nor the defendant had any knowledge of the proceedings to locate and open the said street. A violation of the Fourteenth Amendment was in terms claimed in that an appropriation of its property acquired by the proceedings in the Federal court was sought to be made without compensation. The return further set forth that, springing out of these facts, there was a dispute between the railroad company and the city of South Bend as to the validity of the proceedings for the opening of said street, and that "on January 17, 1902, for the purpose of adjusting and settling the said conflicting claims of the relator and settling the said conflicting claims of the relator and the defendant, the relator, acting by its then board of public works, made and entered into a contract whereby the defendant agreed to construct a steel viaduct, above and across its tracks at said Elmira street where claimed by the relator, and the relator agreed to construct the approaches thereto and each agreed to perform the other agreements set forth in said contract, which is in writing and which was reported to the common council of said city of South Bend, which, by ordinance duly passed and enacted, ratified and approved said contract. Said ordinance and said contract are in the following words and figures, to wit: 'Ordinance. An ordinance ratifying a contract between the Department of Public Works and the Terre Haute and Logansport Railway. Be it ordained by the Common Council of the City of South Bend, that the within contract, made on the 17th day of January, 1902, between the Department of Public Works and the Terre Haute and Logansport Railway Company is hereby ratified and approved. This agreement made this 17th day of January, 1902, between the City of South Bend, by and through its Board of Public Works, and the Terre Haute and Logansport Railway Company. Witnesseth,'" etc. The return further averred that the defendant was ready at all times to construct the said viaduct according to said contract and ordinance, but the city had not performed any of the agreements contained

in said contract to be performed by it, and that it had not given to the defendant any written or other notice to construct the viaduct according to the provisions of said contract.

In reference to this return the Supreme Court in its opinion made this statement of the contention of the parties (p. 229):

"Appellant's counsel assert and argue an insufficiency of the notice and return of service in the special proceedings of the board of trustees of the town of Myler for the establishment of Elmira street, a want of notice to the mortgagee of the property to be appropriated, and, in consequence, a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

"Appellee's counsel insist that the only question presented to and considered by the Circuit Court upon the demurrer to the return was the validity of the agreement therein pleaded."

It declared that the appellee's view was the correct one, and that the only question to be considered was the validity of the agreement therein pleaded. It then proceeded to discuss its validity, holding that it was beyond the power of the city, saying: "The agreement entered into between the relator and the railway company was on the part of the city an unwarranted surrender of legislative power and control over the crossing, and an unauthorized assumption of the burdens of another, and is invalid and void."

It is now contended on the part of the defendant in error that no Federal question was passed upon by the Supreme Court of the State and that, therefore, the writ of error should be dismissed, while the plaintiff in error insists that there are two Federal questions; first, whether the state court gave due effect to the proceedings of the Federal court in the foreclosure and sale of the property under the trust deed; and second, whether the proceedings for the opening of the street were had without notice to the defendant and its predecessor, and so operated to take private property without compensation. This involves a consideration of the meaning and scope

of the return. It is true that in that return it is alleged that no notice was given to the railroad company or its predecessor or the trustee in the trust deed or any bondholder, and that therefore there was no valid appropriation of the property of the railroad company to street purposes. It is also stated that by the foreclosure proceedings in the Federal court the full title to the property passed to the defendant, a title which in its origin antedated the attempt to open the street. But the Supreme Court held that these were merely matters of inducement leading up to the making of the contract for a viaduct; that they were only presented for the purpose of showing the state of the controversy, which was settled between the parties by the making of this alleged contract. In other words, it did not pass upon the Federal questions, but held that they were put entirely out of the case by facts set forth in the return presenting a question obviously not of a Federal character.

Now, the construction of a pleading, the meaning to be given to its various allegations and the determination of the validity of a contract made by parties in reference to real estate in the State are, as a rule, local questions. Doubtless this court is not concluded by the ruling of the state court, and must determine for itself whether there is really involved any Federal question which will entitle it to review the judgment. *Newport Light Company* v. *Newport*, 151 U. S. 527, 536, and cases cited in the opinion. A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings, but that is not this case. Even if it be conceded that the conclusion of the Supreme Court of the State is not free from doubt, there is nothing to justify a suspicion that there was any intent to avoid the Federal questions. The construction placed by that court upon the pleading was a reasonable one. It said in reference to the matter (166 Indiana, 229):

"The manifest theory of the pleader was to show that a reasonable and *bona fide* controversy existed as to the validity

of the proceedings for the establishment of Elmira street by the board of trustees of the town of Myler, as an inducement to and consideration for entering into the compromise agreement pleaded, and that said contract having been legally executed and not rescinded, the railway company was thereby absolved from the duty declared upon, to construct and maintain a grade crossing at the point in controversy. 'A single paragraph of answer cannot perform the double function of denying the cause of action, and confessing and avoiding it. It must be one thing or the other, but it cannot be both; and its character, in this respect, must be determined from the general scope of its averments.' *Kimble* v. *Christie,* 55 Indiana, 140, 144. The return under consideration was intended to confess and avoid the duty sought to be enforced, and its sufficiency must be determined upon that theory. This conclusion forbids a discussion of the legality of the various steps taken in the proceedings to establish Elmira street, as well as the constitutional question raised."

We think it must be held that the decision by the Supreme Court of the State was placed upon a sufficient non-Federal ground, and therefore the writ of error is

Dismissed.

PARAISO *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 23. Submitted December 2, 1907.—Decided December 16, 1907.

Where a case is brought up from the Circuit Court on the ground that the construction or application of the Constitution of the United States is involved, the record must show that the question was raised for the consideration of the court below; and, under § 10 of the act of July 1, 1902, 32 Stat. 695, this rule applies to writs of error to review judgments of the Supreme Court of the Philippine Islands.

A complaint, sufficiently clear to the mind of a person of rudimentary intelligence as to what it charges the defendant with, informs the accused of the nature and cause of the accusation against him, and a conviction

thereunder is not in that respect without due process of law under the Philippine bill of rights.

A motion for rehearing in the lower court on grounds set out in the assignment of error, but which was denied, cannot be relied on as properly raising the Federal question necessary to give this court jurisdiction. *McMillan* v. *Ferrum Mining Co.*, 197 U. S. 343.

This court is not called upon to consider errors argued but not assigned. *O'Neil* v. *Vermont*, 144 U. S. 323.

5 Philippine, 149, affirmed.

THE facts are stated in the opinion.

Mr. Aldis B. Browne and *Mr. Alexander Britton*, for plaintiff in error.

The Solicitor General and *Mr. Assistant Attorney General Russell*, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted of falsification of documents, under Article 300, clauses 4, 7 of the Philippine Penal Code. He brings the case here as one in which a statute of the United States is involved, under the act of July 1, 1902, c. 1369, § 10, 32 Stat. 695. By the article mentioned a public official is subjected to imprisonment and fine if he commits a falsification, clause 4, "By perverting the truth in the narration of facts," or, clause 7, "By giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original." It is assigned as error that the plaintiff in error was required to answer without being advised of the nature and cause of the accusation against him, and that he was convicted without due process of law. It is argued further, although not assigned as error, that the sentence inflicted a cruel and unusual punishment, by reason of the amount of the fine and the length of the term of imprisonment, and still further, that the fine was greater than that which the statute imposed, all contrary to the Philippine bill of rights. Act of July 1, 1902, c. 1369, § 5, 32 Stat. 691, 692.

There is no suggestion in the record that any of these ques-

tions were raised at any stage below, except in an agreement of counsel that the full record showed that before any evidence was received the plaintiff in error asked leave to withdraw his plea of not guilty and substitute the statement that he did not know how to plead, which was denied, and that he objected to the reception of any evidence in support of the complaint, because it was incapable of being sustained by evidence, which objection was overruled. There was a motion for rehearing, on the grounds set out in the assignment of error, but as the motion was denied, that cannot be relied upon here. See *McMillen* v. *Ferrum Mining Co.*, 197 U. S. 343. It would be going far in allowance for different habits of thought and action, to treat what was done as equivalent to a demurrer. The court below does not so interpret it, but says that no exception was taken to the sufficiency of the complaint. It would be going farther to treat it as setting up the Philippine bill of rights in analogy to a claim of constitutional rights in a Circuit Court of the United States. If a case is brought up from the Circuit Court on the ground that it involves the construction or application of the Constitution of the United States, the record must show that the question was raised for the consideration of the court below. *Carey* v. *Houston & Texas Central Ry. Co.*, 150 U. S. 170, 181; *Ansbro* v. *United States*, 159 U. S. 695; *Cornell* v. *Green*, 163 U. S. 75, 78; *Cincinnati, Hamilton & Dayton R. R. Co.* v. *Thiebaud*, 177 U. S. 615, 619, 620; *Arkansas* v. *Schlierholz*, 179 U. S. 598. The most that could be gathered from this record is that the plaintiff in error contended that the complaint was bad by the rules of criminal pleading. See *Cornell* v. *Green*, 163 U. S. 75, 79. There was no hint that he relied on the bill of rights or contended that the complaint would not satisfy that. The bill of rights, in all probability, was an afterthought when everything else had failed.

Our consideration of the case properly might stop here. But, as the rule laid down probably was not well known, we will add that we find nothing in the errors assigned. The com-

plaint, however open it might be to criticism on demurrer, supposing the strict rules of the old common law should be applied, would leave no doubt in the mind of any person of rudimentary intelligence that it meant to charge the defendant with falsely entering on the stubs of certain specified tax certificates smaller sums than those shown by the certificates and actually received by him, and with altering such stubs to lower sums, with intent of gain; (that is to say, with intent to settle his accounts as a public officer on the showing that less was due than was due in fact), contrary to Article 300, clauses 4, 6 and 7 of the Penal Code.[1] If the Philippine Code had sanc-

[1] The complaint is as follows, omitting the title, signature and verification:

The undersigned accuses José Paraiso of the crime of falsification, committed as follows: That the said José Paraiso, in his capacity as municipal treasurer of Lumbang, entered upon registration tax certificate No. 481,054, issued at Lumbang the 31st of May, 1904, to one Pedro Robie, the amount of $6.00, and erased from the stub thereof the figures written thereon, with the exception of the two-00, leaving traces of the figure thus erased, there appearing, however, upon the same stub, written in pencil by the accused, the figures 2.00, this being the amount shown on the abstract submitted to the provincial treasurer, all of this with intent of gain.

That on registration tax certificate No. 481,052, issued at Lumbang on the 31st day of May, 1904, to Francisco Guimoc, he entered the amount of $4 as the price of the said certificate, whereas on the stub thereof he only entered the amount of $2, thereby committing the crime of falsification of a document, provided for and penalized under paragraphs 4, 6 and 7 of section 300 of the Penal Code. It further appears from the abstract submitted by him that the amount received was $2.00, thus defrauding the government to his personal advantage and gain.

That at different times during the year 1904, in his capacity as municipal treasurer of the town of Lumbang, Laguna, he issued registration tax certificates to the following persons under the following numbers:

Eduardo Llantos, No. 481053; Damaso Garcia, No. 481044; Apolinario Almario, No. 339727; Cenon Labra, No. 339899; Pablo Cristobal, No. 339897; Luis Abi, No. 339877; Leon Mondes, No. 339852; Luis Valdomora, No. 339848; Gregorio Mulingbayan, No. 339846; Filemon Mercado, No. 339840; Pablo Samonte, No. 339795; Mariano Magano, No. 339785; Vicente Valdeavella, No. 339783; Juan Wadis, No. 339763; Mateo Laguartilla, No. 339744; Faustino Rosales, No. 339707; Deogracias Babia, No. 339701; Dionisio Abad, No. 339694; Eduardo Ramillosa, No. 339673; Monico Abad, No. 339660; Conrado Lagunda, No. 339632; Juan Tablico, No. 339605; Ubaldo Mercado, No. 339541; Juan Puhauan, No. 339510; Antonio Eborda, No. 339379; Cirilia del Castillo, No. 339375; Valeriano de Ramos, No. 339341; Mateo

tioned this form, it is extravagant to contend that the enactment would have been void under the laws of the United States. Yet that is a test. See *Missouri* v. *Dockery*, 191 U. S. 165, 171. The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert.

We do not feel called upon to consider errors not assigned. See *O'Neil* v. *Vermont*, 144 U. S. 323, 331.

Writ of error dismissed.

MR. JUSTICE HARLAN dissents.

FLEMISTER *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 70. Submitted December 5, 1907.—Decided December 16, 1907.

Trono v. *United States*, 199 U. S. 521, followed as to the power of the Supreme Court of the Philippine Islands to increase the sentence of one convicted in the court of first instance and appealing to the Supreme Court.

One is not placed in second jeopardy within the meaning of the Philippine bill of rights by being tried for an assault on an officer because he has already been convicted for a breach of the peace and assault upon another

Pacoma, No. 339313; Mariano Valdeavella, No. 339491; Benedicto Valdeavella, No. 339490; Juan Mercado, No. 339477; Epifanio Vellestro, No. 339445; Marcelino Cabalsa, No. 339499; Marcelo Tabirao, No. 339905; Placido Macadagay, No. 339837; Juan Valeavella, No. 339604; Bernabe Yamballa, No. 339558; Léon Abi, No. 339540; upon which said certificates there appear to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer; and that the said stubs, or most of them, contain erasures, changes and alterations, all of which said acts are punishable under paragraphs 4, 6 and 7 of section 300 of the Penal Code, relating to the crime of falsification, for the purpose of gain.

person at the same time and place, and where it appears that the assault on the officer was not relied on or proved as part of the offence for which he was first convicted.

5 Philippine, 650, affirmed.

THE facts are stated in the opinion.

Mr. E. J. Bowers, for plaintiff in error:

By appeal from the judgment of the court of first instance of the city of Manila the accused did not waive his immunity from second jeopardy on the charge of the commission of the offense embraced in Art. 249 of the Penal Code. *Hopt* v. *Utah,* 110 U. S. 574; *Thompson* v. *Utah,* 170 U. S. 343; *People* v. *Dowling,* 84 N. Y. 478; *Guenther* v. *People,* 24 N. Y. 100; *People* v. *Cignarable,* 110 N. Y. 23, 30; *Stuart* v. *Commonwealth,* 28 Gratt. 950; *State* v. *Martin,* 30 Wisconsin, 216; *State* v. *Hills,* 30 Wisconsin, 416; *State* v. *Belden,* 33 Wisconsin, 120; *Stanghler* v. *State,* 6 Humph. 410; *Brennan* v. *People,* 15 Illinois, 511; *Bamett* v. *People,* 54 Illinois, 325; *Sipple* v. *People,* 10 Bradwell, 144; *Morris* v. *State,* 8 S. & M. (Miss.) 762; *Johnson* v. *State,* 29 Arkansas, 31; *State* v. *Tweidy,* 11 Iowa, 350; *State* v. *Ross,* 29 Missouri, 32; *State* v. *Kotteeman,* 35 Missouri, 105; *Johnson* v. *State,* 27 Florida, 245; *Golding* v. *State,* 31 Florida, 262; *Dennison* v. *State,* 31 La. Ann. 847; *State* v. *Murphy,* 13 Washington, 229; *Bell* v. *State,* 48 Alabama, 684; *Berry* v. *State,* 65 Alabama, 163; *Brown* v. *United States,* 52 S. W. Rep. 56; *Jones* v. *State,* 13 Texas, 168; *State* v. *Stevens,* 29 Oregon, 85; *People* v. *Knapp,* 26 Michigan, 112, 113; *People* v. *Comstock,* 55 Michigan, 405, 407; *State* v. *Ketter,* 2 Tyler (Utah), 472.

The Solicitor General and *Mr. Assistant Attorney General Russell,* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted of a criminal attempt against an agent of the authorities by striking one Feliciano

Celimin, a policeman, who was trying to arrest him, and by using vile, abusive and threatening language to the same officer, contrary to Article 249, clause 2, of the Penal Code of the Philippines. He was sentenced under Article 250, which provides the punishment for such attempts. He was convicted in the court of first instance of the same facts, but was sentenced under Article 252, which punishes those, who, without being included in Article 249, should resist the authorities or their agents. He then appealed, whereupon the Supreme Court decided that the offense fell within Article 249, and increased the sentence. The errors assigned are that the Supreme Court had no jurisdiction to increase the sentence, this being stated in various forms, and that "The decision of the court places the accused in jeopardy for the same offense according to the corresponding provisions of Section 5 of the Act of Congress of July 1, 1902." There is also the usual averment that the decision deprives the accused of his liberty without due process of law, but that may be passed over, as there is nothing in the record to justify it. It is not necessary to consider what would amount to denial of due process of law. The plaintiff in error was convicted after a full trial, with all the usual forms, upon a specific and definite complaint and evidence warranting the result.

The objection to the power of the Supreme Court to increase the sentence is disposed of by the recent decision in *Trono* v. *United States*, 199 U. S. 521. The only assignment of error that needs a word is that which was intended to rely upon a previous conviction that was pleaded and put in evidence. This was a conviction by a municipal court of a violation of ordinances of the city of Manila by disorderly conduct, a breach of the peace, and the assault upon one Domingo Salvador at the same time and place as the assault alleged in the complaint before us. Perhaps it should be added that a second complaint under the ordinances for slanderous, threatening and abusive language to Captain José Crame of the Manila Police Department was dismissed by the municipal judge on the

ground that the offense could not be split up. None of the acts alleged in these complaints was the assault upon Celimin, relied upon in the present case, and it does not appear that the assault upon Celimin was relied on or proved as part of the disorderly conduct for which the plaintiff in error was punished in the municipal court. It is unnecessary to consider whether the same conduct could be punished at the same time on the same grounds by both a superior and subordinate authority in the same jurisdiction. There is nothing in the Philippine bill of rights that forbids assaults on two individuals being treated as two offenses, even if they occur very near each other in one continuing attempt to defy the law. We cannot revise the finding of the courts below that the two offenses were distinct.

Judgment affirmed.

MR. JUSTICE HARLAN dissents.

WERCKMEISTER *v.* AMERICAN TOBACCO COMPANY.

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

No. 29. Argued October 30, 1907.—Decided December 16, 1907.

Section 4965, Rev. Stat., as amended by the act of March 2, 1895, 28 Stat. 965, is penal in nature and cannot be extended by construction; it contemplates a single action for the recovery of plates and copies infringing a copyright, and for the money penalty for the copies found. Such an action is wholly statutory and all the remedies given by the statutes must be exhausted therein, and after the owner of the copyright has recovered judgment for possession of the plates and copies he cannot maintain a separate action to recover the money penalty.

There is no requirement in § 4965, Rev. Stat., that the United States shall be a party to the action provided for the recovery of plates and copies found

and for penalties; the evident purpose of that section is that the proprietor of the copyright shall account to the United States for one-half the money penalty recovered.

148 Fed. Rep. 1022, affirmed.

THE facts, which involve the construction of § 4965, Rev. Stats., as amended by the act of March 2, 1895, 28 Stat. 965, and the nature of the action to recover penalties thereunder for violation of copyright, are stated in the opinion.

Mr. Antonio Knauth for plaintiff in error:

The words used in the statute admit of no other construction than that the two remedies, the recovery of the unlawful sheets and the recovery of the money penalty, are cumulative remedies to which the plaintiff is entitled, and it has been uniformly so held.

Previous to the decision in this case by the Circuit Court there was no decision by any court that the two remedies must be sought in one action. Whenever the money penalty is sought to be recovered for sheets which have been found in the defendant's possession, there must be a previous action for the recovery of the sheets and the finding of the sheets therein by means of proper process. *Thornton* v. *Schreiber*, 124 U. S. 612; *Falk* v. *Curtis Pub. Co.*, 107 Fed. Rep. 126, 128.

There are intrinsic differences in the actions for the forfeiture of the property and for the payment of the money penalty. The action for the recovery of the forfeited articles is an action *in rem*. The property in the articles remains in the owner until it is seized, and then by the seizure the title relates back to the time of the forfeiture. *Clark* v. *Protection Ins. Co.*, 1 Story, 134; *United States* v. *1,960 Bags of Coffee*, 8 Cranch, 398; *Gelston* v. *Hoyt*, 3 Wheat. 246, 311; *United States* v. *Baker*, 5 Ben. 28; *Fontaine* v. *Phœnix Ins. Co.*, 11 Johns. (N. Y.) 292; *Amory* v. *McGregor*, 15 Johns. 23; *Henderson's Distilled Spirits*, 14 Wall. 44, 56; *Thacher's Distilled Spirits*, 103 U. S. 679; *The Mary Celeste*, 2 Lowell, 356.

The action for the recovery of forfeited articles is always regarded as an action *in rem*. *United States* v. *Spring Valley Distillery*, 11 Blatch. 267. As the action for the recovery of the forfeited articles is an action *in rem*, the court has jurisdiction over the forfeited articles, whenever they are within the territorial jurisdiction of the court, and personal service of process upon the defendant in the action is not an essential prerequisite to the maintenance of the action. The court would have power to call in the defendant by publication or service of the summons outside of the State. Act of March 3, 1875, § 8 (18 Stat. at L. 470, 472), amending Rev. Stat., § 738; also 25 Stat. 434; *Jellenik* v. *Huron Copper Min. Co.*, 177 U. S. 1; *Mellen* v. *Moline*, 131 U. S. 352.

The defendant American Tobacco Company being a New Jersey corporation, this court had undoubtedly jurisdiction to proceed in the replevin action without personal service, but no jurisdiction to proceed to a decree in the personal action unless the defendant appeared or could be found in this jurisdiction. *Scott* v. *McNeal*, 154 U. S. 34, 46.

On the other hand, the action to be brought for the recovery of the money penalty is a personal action, and can be maintained only when the defendant is personally found within the jurisdiction of the court. The term "forfeit" as applied to a money penalty, means only that the offender shall be made to pay the amount. It means a fine, a mulct. *In re Levy*, 30 Ch. Div. 119; *Merchants' Bank* v. *Bliss*, 21 How. Pr. (N. Y.) 370; *Ex parte Alexander*, 39 Mo. App. 108; *People* v. *Nedrow*, 122 Illinois, 367; *Commonwealth* v. *Avery*, 14 Bush (Ky.), 638; *Taylor* v. *Steamer Marcella*, 1 Woods, 304.

The fiction that the title to forfeited property dates back to the time of the commission of the wrong is applied because convenience and justice require its application. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208.

It is quite different with the money penalty, which cannot be dated back any further than to the day of finding the sheets in defendant's possession, because that very finding

is a condition precedent to the accruing of the money penalty.

As to the sheets, the plaintiff has an inchoate title, which exists as soon as they are wrongfully made, and this inchoate title ripens into a complete title upon condemnation. As to the recovery of the money penalty he can have no such inchoate right; it is a mere claim for payment which arises only after the finding.

It follows from the different nature of the two remedies which are required to enforce the two distinct forfeitures under the statute, that there will be frequently cases where they cannot be combined.

If the property is found in one State, in the hands of an agent or employé, while the offender resides in another State, he could not be sued in the State of his residence, because the property could not be found therein. Neither could he be sued in the State where the property was found, because for the purposes of a personal action the court will have no jurisdiction over him. If the rule should be established that one suit only can be brought, the plaintiff would lose the money penalty in such a case, if the two remedies must be combined.

Mr. William A. Jenner for defendant in error:

A second and separate action will not lie for penalties after a judgment in a former distinct action for forfeiture of sheets.

There cannot be two actions, one for the forfeiture of sheets, the other for the money penalty.

There is only one offense committed by doing one or other or all the things mentioned in § 4965. *Bolles* v. *Outing Co.*, 77 Fed. Rep. 966; *S. C.*, 175 U. S. 266.

The solution of the matter seems to be to permit in one action a forfeiture of sheets found in possession when it is commenced and in the same action to adjudge the penalties for the sheets so found.

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued and submitted with *American Tobacco Company* v. *Werckmeister*, decided December 2, 1907, *ante*, p. 284.

The present action was brought to recover, under § 4965, Revised Statutes, relating to copyright (3 U. S. Compiled Stat. 3414), the penalties of $10 each, for 1,196 sheets of the alleged infringing publications claimed to have been found in the defendant's possession and seized by the United States marshals, under the two writs of replevin described in that suit.

Plaintiff in error, Werckmeister, offered in evidence the judgment roll in the former suit, with the pleadings and judgment, and also offered in evidence the writs and returns of the marshals for the Southern and Western Districts of New York, respectively, showing seizures of 203 copies and 993 copies; the court excluded these writs as immaterial. No other evidence being offered, the court instructed the jury to render a verdict for the defendant, and judgment was afterwards rendered accordingly upon the verdict. 138 Fed. Rep. 162. On writ of error to the Circuit Court of Appeals the judgment below was affirmed, 148 Fed. Rep. 1022, and this writ of error is prosecuted to reverse the judgment of the Circuit Court of Appeals.

This action requires the construction of § 4965, Rev. Stat., as amended March 2, 1895, 28 Stat. 965 (U. S. Compiled Stat., vol. 3, p. 3414), which is as follows:

"SEC. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch,

work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale: Provided, however, That in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, And: Provided further, That in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

As with the sections of the copyright act under consideration in *Tobacco Company* v. *Werckmeister*, *ante*, this section has been the subject of consideration in the Federal courts, with different conclusions as to its purport and meaning. While the statute provides for the forfeiture of the plates and sheets and for the sum of $10 in case of a painting, for every copy found in the offending person's possession or sold by him, it is silent as to the kind of action to be brought, and we are left to discover the meaning of the act in this respect from a consideration of the

language used, read in the light of the objects and purposes to be effected.

Obviously the statute does not provide a proceeding *in rem*, as is sometimes done in the revenue laws, for the act is levelled against *any person* who shall, contrary to its provisions, without consent, etc., engrave, work, copy, print, etc., forfeit to the proprietor the plates and sheets and a sum of money for each sheet, etc., found in his possession. This section of the statute is penal, and there should be especial care to work no extension of its provisions by construction. Statutory provisions similar to those above cited have been the subject of consideration in a number of cases in this court. In *Backus* v. *Gould*, 7 How. 798, it was held that there could be no recovery for publishing sheets, copyright matter, etc., unless the same were found in the possession of the defendant. In *Stevens* v. *Cady*, 2 Curtis, 200; *S. C.*, Fed. Cases No. 13,395, Mr. Justice Curtis, sitting at the circuit, held there could be no accounting for the penalties in an action in equity, and that the proprietor of the copyright was left by the act to his remedy at law by trover or replevin. In *Thornton* v. *Schreiber*, 124 U. S. 612, it was held that action would not lie against Thornton, who was the business manager of Sharpless & Son, of Philadelphia, in whose store the prints in question in that case were found, and in speaking for the court Mr. Justice Miller, who delivered the opinion in that case, said (p. 620):

"Counsel for defendants in error, Schreiber & Sons, insist that the words 'found in his possession' are to be construed as referring to the finding of the jury; that the expression means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit one dollar for each sheet so ascertained to have been in his possession. We, however, think that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant."

This language was held in *Falk* v. *Curtis Pub. Co.*, 102 Fed.

Rep. 967, 971, affirmed by the Circuit Court of Appeals for the Third Circuit in *Falk* v. *Curtis Pub. Co.*, 107 Fed. Rep. 126, to mean that before the action for the penalty would lie there must be a finding of the articles in the possession of the defendant by means of a proceeding instituted for the express purpose of condemnation and forfeiture, and that an action of assumpsit brought at the same time with the action of replevin was premature.

In the case of *Bolles* v. *The Outing Co.*, 77 Fed. Rep. 966, Judge Wallace, who spoke for the Court of Appeals in that case, said (p. 968):

"The statute is apparently framed to give the party whose copyright has been invaded complete relief by an action in which he can procure a condemnation of the infringing sheets, and at the same time recover, by way of compensation, a penalty for every sheet which he is entitled to condemn. The words 'found in his possession' aptly refer to a finding for the purposes of forfeiture and condemnation. The remedy by condemnation and forfeiture is only appropriate in a case where the property can be seized upon process; and where, as here, the forfeiture declared is against property of the 'offender,' it is only appropriate when it can be seized in his hands. The section contemplates two remedies, enforceable in a single suit, each of which depends upon the same state of facts. The aggrieved party may, at his election, pursue either one or both remedies. But it does not contemplate a recovery of penalties, except in respect to the sheets which can be condemned."

And in *Bolles* v. *The Outing Co.*, 175 U. S. 262, 266, this court, speaking by Mr. Justice Brown, observed:

"No remedy is provided by the act, although by section 4970 a bill in equity will lie for an injunction, but the provision for a forfeiture of the plates and of the copies seems to contemplate an action in the nature of replevin for their seizure, and in addition to the confiscation of the copies, for a recovery of one dollar for every copy so seized or found in the possession of the defendant."

And in that case the view expressed by the Circuit Court of Appeals for the Second Circuit was approved (175 U. S. 268), and while the point was not necessarily involved, we think the indication in *Bolles* v. *The Outing Company*, that a single action in the nature of replevin for the recovery of plates and copies and a penalty for copies found, is correct.

We agree with the Circuit Court of Appeals for the Second Circuit that the language in *Thornton* v. *Schreiber*, above quoted, was not intended to indicate that an action declaring the forfeiture was required by the statute before the adjudication of the articles to the plaintiff, as is generally necessary in actions of forfeiture (Cooley's Constitutional Limitations, 518), but that the true construction of the statute, and the one intended to be indicated by Mr. Justice Miller, is that before the penalty can be recovered it is necessary that the sheets be actually found in the possession of the defendant. As we have said, this section of the statute is highly penal (*Bolles* v. *The Outing Co.*, *supra*), and there is nothing in its terms to indicate that the offender is to be subjected to more than one action; on the contrary, the provisions of the section seem to point clearly to the conclusion that when the offender is brought into court, under this section, he shall forfeit to the proprietor the plates on which the articles shall be copied and every sheet thereof, whether copied or printed, "and shall further forfeit one dollar for every sheet of the same found in his possession," etc., and in case of a painting, etc., "he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale."

There is nothing in this section which seems to contemplate the method of procedure pursued in this case, namely, a separate action for the money penalty, upon the theory that it arose only in case of actual finding and judgment of condemnation, but the statute contemplates the bringing of the offender into court in one suit, in which the plates and sheets shall be seized and forfeited and the penalty recovered.

If it had been the intention of Congress to provide two ac-

tions, one for the forfeiture of the plates, sheets, etc., and another for the recovery of the money penalty, it would have been easy to have said so. Likewise, had it been the intention of Congress to permit a recovery for the money penalty only after judgment of forfeiture had gone in favor of the plaintiff, it would have been equally as easy to have made such provision.

Until Congress shall provide otherwise, and this section might well be made more specific as to the nature and character of the remedy given, we think this section intended to provide, in a single action, all the remedy which is within its scope, and that to construe it as requiring two actions would be extending a penal act beyond the provisions incorporated in its terms.

In reaching this conclusion we have not overlooked the fact that one-half of the penalties go to the proprietors of the copyright and one-half to the United States. There is no requirement that the United States shall be a party to the action, and we think the purpose of the statute was to make the proprietor of the copyright accountable to the United States for one-half of the money penalty recovered.

Upon this construction of the statute the plaintiff in error had exhausted his remedy in the judgment rendered in the first suit, and as the action is wholly statutory and no second action is given as we construe the act, the court was without power to award the second judgment in the separate action for the money penalty, and the Circuit Court properly directed the verdict for the defendant below.

The judgment of the United States Circuit Court of Appeals for the Second Circuit is

Affirmed.

WATER, LIGHT AND GAS COMPANY OF HUTCHINSON *v.* THE CITY OF HUTCHINSON, KANSAS.

SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Nos. 53, 54. Argued October 24, 1907.—Decided December 23, 1907.

A grant conferring a privilege is not necessarily a grant making that privilege exclusive.

Grants by the State to municipal corporations, like grants to private corporations, are to be strictly construed, and the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable, and not merely convenient, to them. *Citizens' Street Railway* v. *Detroit*, 171 U. S. 48.

The Kansas statutes for the government of cities, as construed by the highest court of that State, do not confer on cities of the second class the power to grant exclusive franchises and, in the absence of such power expressly conferred, the exclusive features of an ordinance of such a city granting an exclusive franchise are invalid. *Vicksburg* v. *Waterworks Co.*, 206 U. S. 496, distinguished.

144 Fed. Rep. 256, affirmed.

THE ultimate question in these cases is the validity of Ordinance No. 402 of the city of Hutchinson, which took effect March 17, 1897, and by which the Water, Light and Gas Company claims to have, for the period of twenty years from such date, the exclusive right and privilege of supplying the city and its inhabitants with water, and with light, heat and power by means of electricity and gas.

On the nineteenth of December, 1905, the city enacted and published Ordinance No. 651, granting permits to Emerson Carey and others, their successors and assigns, to construct and operate a street railway in and along the streets of the city, and to construct and operate electric and gas plants for the purposes for which electricity may be used.

These suits were brought to command the city and those claiming under Ordinance No. 651, to "desist from doing any

acts or exercising any pretenses of right to act" under the ordinance which will in anywise affect the exclusive right of the Water, Light and Gas Company "to furnish the city and its inhabitants with electric or gas light for lighting and heating purposes or power, except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants" until the expiration of the "franchises and contracts" of that company.

The cases went off on demurrers to the bills. The Circuit Court, assuming that Ordinance No. 402 was exclusive in its terms and was intended to be so by the city, held that the city did not possess the power, either inherent or under the law of its creation, to make a contract binding and exclusive of all others, and entered decrees dismissing the bills. 144 Fed. Rep. 256.

The facts are: In 1885 the city granted to the Holly Manufacturing Company, its successors and assigns, an exclusive right to build and operate waterworks for twenty years. The company erected and operated the works until the subsequent assignment of its rights.

In the same year the city granted to the Interstate Gas Company the right to erect and maintain gas works for the period of twenty-one years; and in 1886 granted to Drake and Orton the right for the period of twenty years to construct and operate an electric light plant. The latter right, and those granted to the two companies, passed by successive assignments, with the knowledge and consent of the city, to the Water, Light and Power Company, and existed in that company at the time of the passage of Ordinance No. 402.

The various companies expended in the aggregate on the construction of their plants and equipment $400,000, to secure which the Hutchinson Water, Light and Power Company executed a mortgage upon all the water, light and gas rights and franchises and properties.

Subsequently, the city became financially embarrassed, so

that before the year 1897 it had become indebted for hydrant rentals in the sum of $12,800 in excess of its ability to pay.

On account of this default of the city the company became embarrassed and hindered in the payment of interest on its mortgage, and its mortgage bondholders took possession of its property, and operated the plant during the year 1896 and until the readjustment of its affairs in the spring of 1897, resulting in the passage of Ordinance No. 402.

By reason of its embarrassment the company found it expedient to scale down its bonded indebtedness and secure a new franchise from the city, and in consideration of securing the same, and the readjustment of the contract obligations between the company and the city, the bondholders agreed to reduce and scale down their mortgage indebtedness from $400,000 to $212,500.

On March 5, 1897, at the earnest and repeated solicitation of the city, and in consideration of its inability to discharge its past indebtedness to the company and to pay the current indebtedness thereafter, the company agreed with the city to remit one-half of the indebtedness then due; that is, to scale it down to $6,400, and to reduce the sum thereafter annually payable for hydrant rental from $12,800 to $6,000 for the years of the contract, and to reduce the rental for hydrants thereafter located from $60 to $36, and reduce the number of hydrants from twelve to ten per mile. These concessions and abatements were made on the condition of a renewal and extension of the franchise and contract rights of the company. And the city was to have, what it did not have before, the right to purchase or otherwise acquire the light and gas properties at any time after ten years from the date of the renewal and adjustment. In view of these considerations and in pursuance of them the city passed Ordinance No. 402, to take effect March 17, 1897, and by that ordinance "granted to the company, its successors and assigns, for the period of twenty years from said date the exclusive privilege of supplying the city and its inhabitants with the public utilities of

water, light, heat and power by means of electric current and gas." But it was agreed that the right for furnishing electric current or power should not be exclusive as to or for the operation of street railways, nor exclusive as to any person residing in the city, or any company doing business therein manufacturing gas or electricity for his or its own use for light or fuel. A copy of the ordinance was attached to and made part of the bill. The concessions and abatements would not have been made by the company except for the consideration of the exclusive rights and privileges granted; and the total of the reductions of monetary demands made for what was due and to become due for the period the water franchise had to run amounted to $65,240, which the company remitted from its contract rights and demands against the city. The mortgage bondholders of the Water, Light and Power Company, for the purpose of effectuating the promises and agreements between the company and the city contained in Ordinance No. 402, scaled down their indebtedness from $400,000 to $212,500 and cancelled their mortgage and accepted a substitute mortgage on the property, franchise and contracts and on its income of $212,500.

The Water, Light and Power Company, on the fourth of October, 1902, sold and transferred to the Water, Light and Gas Company, the complainant, all of its property rights and franchise, and complainant has since that date been in possession of the same, and in the fulfillment of the duties and obligations imposed on it by its purchase and said ordinance liabilities with the consent of the city, and the city has ratified and approved the same and contracted and dealt with the complainant as the successor of the Water, Light and Power Company. The Water, Light and Gas Company has since its purchase expended large sums of money in the improvement and enlargement of its properties and the service rendered by it, and has, under the direction and order of the city, extended its water mains and placed hydrants upon such extensions, and, as agreed by it, has reduced the number of hydrants on

its extended mains from twelve to ten per mile, and generally has complied with the orders and requests of the city, whether or not under the Ordinance No. 402 it was required to comply with such orders, all of which was done in reliance on the obligations of the city and its good faith in carrying out all the terms and conditions and provisions of Ordinance No. 402, but the city, notwithstanding, through its mayor and councilmen, on or about the nineteenth of December, 1905, enacted and published Ordinance No. 651, by which it assumed to grant to Emerson Carey and others the right and privilege for the term of twenty years thereafter of establishing and operating in the city a plant and appliances for the manufacture and sale to the city and its inhabitants of electric light and power and manufactured and natural gas, with the right and privilege to lay and construct gas mains and pipes and erect poles, and wires and all other things necessary to the maintenance of said public service in the streets, alleys and public places of the city in opposition to the business of complainant.

It is alleged that Ordinance No. 402 constitutes a contract between the city and the complainant in respect to all the rights secured, and in particular in respect to the exclusive rights and privileges thereby conferred, and that the city, by and through Ordinance No. 651, illegally and inequitably impairs the same, in violation of the provisions of the Constitution of the United States, which forbids the impairment of the obligation of contracts by the several States of the Union.

Neither the city nor any of the grantees in Ordinance No. 651 have paid or tendered complainant the monetary abatement, or the reductions and concessions paid or secured to the city in consideration of the enactment of Ordinance No. 402, or to secure complainant from loss from the competition of the rival public service association or company. At the time the public service enterprises were undertaken by the grantors of complainant the city of Hutchinson had about 5,000 inhabitants, and at the time complainant succeeded to their rights about 10,000, and at both of said times it would have been

impossible, and is now impossible, to maintain rival or competing companies in the city so as to enable either to earn a fair and reasonable income on the cost of their respective properties, and at none of the times when the complainant or its grantors undertook the work of furnishing said public necessities would it or they have done so without being secured in the enforcement thereof for a reasonable time against the competition of rival companies, nor could the large sums of money have been obtained therefor except under like security. The company has not up to this time, and will not for many years to come, have secured the repayment of the purchase price of said public service and the cost of the betterments, extensions and improvements.

The company alleges that it does not seek to prevent the granting by the city of a franchise or contract for the erection and maintenance of an electric railway in the city or elsewhere.

An injunction was prayed against the doing or exercising any pretenses of right under Ordinance No. 651 which would in any way affect the exclusive rights of the company to furnish electricity and gas for lighting and heating purposes.

Mr. John F. Dillon and *Mr. Frank Doster*, with whom *Mr. Harry Hubbard*, *Mr. Houston Whiteside* and *Mr. Howard S. Lewis* were on the brief, for appellant:

Statutes delegating to municipalities the police power to furnish light or to procure it to be furnished are to be liberally construed to effectuate their object, and are liberally construed in Kansas. *Port Huron* v. *McCall*, 46 Michigan, 565; *State* v. *City of Topeka*, 68 Kansas, 177, 182; *Andrews* v. *National Foundry & Pipe Works*, 61 Fed. Rep. 782.

Under the statutes of Kansas authorizing cities of the second class "to provide for and regulate the lighting of the streets, and to make contracts with any person, company or association for such purpose, and to give such person, company or association the privilege of furnishing light for the streets of said city for any length of time not exceeding twenty-

one years," power was given to make an exclusive contract, such as Ordinance No. 402, for a limited and reasonable period to light the streets. General Statutes of Kansas, 1889, §§ 759, 787, 816, 817, 824, 1401 and 1402; *Manley* v. *Emlen*, 46 Kansas, 655; *Wood* v. *Waterworks Co.*, 33 Kansas, 590, 597; *Waterworks Co.* v. *City of Burlington*, 43 Kansas, 725, 728; *The Columbus Waterworks Co.* v. *The City of Columbus*, 46 Kansas, 666; *The Columbus Waterworks Co.* v. *The City of Columbus*, 48 Kansas, 99; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453; *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *State* v. *City of Topeka*, 68 Kansas, 177; *City of Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517; *Omaha Waterworks Co.* v. *City of Omaha*, 147 Fed. Rep. 1; *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306.

Under the general power "to make all contracts and to do all other acts in relation to the property and affairs of the city necessary to the exercise of its corporate or administrative powers," and under the general welfare clauses and cognate provisions of the statutes of Kansas governing cities of the second class, such cities have power to make an exclusive contract for twenty years, such as Ordinance No. 402, subject to police control, to furnish the city and its inhabitants with light. *Eureka Light & Ice Co.* v. *City of Eureka*, 5 Kans. App. 669, 676; *S. C.*, 48 Pac. Rep. 935; *Cherryvale Water Co.* v. *City of Cherryvale*, 65 Kansas, 219, 228; *Crawfordsville* v. *Braden*, 130 Indiana, 149; *Manley* v. *Emlen*, 46 Kansas, 655; *Wood* v. *Waterworks Co.*, 33 Kansas, 590, 597; *Waterworks Co.* v. *City of Burlington*, 43 Kansas, 725, 728; *The Columbus Waterworks Co.* v. *The City of Columbus*, 46 Kansas, 666; *S. C.*, 48 Kansas, 99; *Ellinwood* v. *Reedsbury*, 91 Wisconsin, 131; *Greenville* v. *Greenville Waterworks Co.*, 125 Alabama, 625; *Grace* v. *Hawkinsville*, 101 Georgia, 553; *Webb City Waterworks Co.* v. *Webb City*, 78 Mo. App. 422; *Aurora Water Co.* v. *Aurora*, 129 Missouri, 540; *Rome* v. *Cabot*, 28 Georgia, 50; *Heilbron* v. *Cuthbert*, 96 Georgia, 312. See also *City of Newport* v. *Newport Light Co.*, 84 Kentucky, 166.

Mr. Max Pam, Mr. C. M. Williams and *Mr. A. C. Malloy,* with whom *Mr. F. F. Prigg* was on the brief, for appellees:

The city of Hutchinson in the State of Kansas, being a city of the second class in said State, had no power to grant an exclusive privilege or franchise to the complainant. *Citizens' Street Ry.* v. *Detroit Railway,* 171 U. S. 48, and cases cited; *Jackson County Horse R. Co.* v. *Interstate Rapid Transit Ry. Co.,* 24 Fed. Rep. 307; *Illinois Trust & Savings Bank* v. *City of Arkansas City,* 22 C. C. A. 179; *Saginaw Gas Light Co.* v. *City of Saginaw,* 28 Fed. Rep. 529; *Vicksburg* v. *Vicksburg Water Co.,* 202 U. S. 453, discussed and distinguished.

Even admitting that under the constitution of Kansas the legislature of the State had power to grant exclusive franchises, yet it did not have the right to delegate such power. See Constitution of Kansas, § 2 of the Bill of Rights; *In re Lowe,* 54 Kansas, 57.

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

The Circuit Court assumed that Ordinance No. 402 was in terms exclusive and was intended to be made so by the city. We shall assume the same thing. Indeed, it would be impossible to decide otherwise. It recites that the Hutchinson Water, Light and Power Company "is the owner of certain exclusive franchises and contracts with the city of Hutchinson," under which it has expended large sums of money, and that the city "is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson, without cancelling or *abridging* any of the *rights* or *privileges* vested in said company," and that, therefore, in consideration of the surrender of all existing contracts and franchises, except as therein specified, "there is hereby given and granted" to the company, "its successors or assigns, the *exclusive rights and privileges* for the term of twenty years from the date of the passage and approval of this ordinance, of

supplying the city of Hutchinson, Reno County, Kansas, and the inhabitants thereof, by a system of waterworks with water . . . with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways. . . ." The city, it is clear, in express terms and for consideration received granted exclusive rights. The power of the city to do this is denied, and this makes the question in the case. The Circuit Court ruled against the existence of the power applying to the statutes conferring power upon the municipalities of the State the rule of strict construction. The ruling is challenged by appellants, and it is contended, that the general welfare clause and "the municipal power to furnish light carries with it the obligation to enter into all contracts and to exercise all subsidiary powers which the circumstances of the case require." And it is further contended that in Kansas statutes delegating to cities the power to furnish light and water have been liberally construed by the Supreme Court of the State.

That grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction was announced by this court in *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, following and applying the doctrine of previous cases. It was said that the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable to them, and that this principle was firmly fixed by authority. See also Dillon on Municipal Corporations, § 80, fourth edition. The case was concerned with a grant to a street railway, and in the argument of the cases at bar a distinction is asserted between an exclusive privilege to occupy the surface of streets and interfere with "a matter of common right," and a privilege to use the streets below the surface "as incidental only and subsidiary to the performance of a contract pertaining to another matter," and on this distinction, it is argued, the "first must show an express grant of authority" to make the right exclusive,

but that the second is not limited by such requirement. The distinction is only one of degree and has not been considered as varying the application of the rule of construction announced. In *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, a statute of Illinois was considered which gave power to cities and villages to provide for the supply of water at such rates as might be fixed by ordinance and for a period not exceeding thirty years. And passing upon these provisions as constituting a contract precluding a change of rates from time to time, we said (page 598): "The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them." See also *Rogers Park Water Company* v. *Fergus*, 180 U. S. 624; *Joplin* v. *Light Co.*, 191 U. S. 150, and cases cited; *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358. The doctrine was recognized as existing in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, and in *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453. In the two latter cases the power of the respective cities to make a contract, precluding them from building waterworks and operating their own water systems, was declared. In the *Vicksburg case* it was pointed out that the power of the city to exclude itself from building waterworks of its own was recognized to exist by the Supreme Court of Mississippi.

In *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496, a contract of the city, fixing a maximum rate, was sustained upon the authority of the decisions of the Supreme Court of the State, holding that under a broad grant of power conferring without restriction or limitation upon the city, the right to make a contract for a supply of the water, it was within the right of the city council, in the exercise of that power, to make a binding contract fixing the maximum rate at which the water

should be supplied to the inhabitants of the city for a limited term of years.

This case is especially relied on by appellant as establishing a right in the city of Hutchinson to grant an exclusive franchise under the statutes of the State, both from their letter and as construed by the Supreme Court of the State. A consideration of the statutes and decisions, therefore, becomes necessary. Those quoted by the Circuit Court in its opinion are inserted in the margin.[1] They confer power to provide for the general welfare and enable a city to construct water and lighting plants of its own or "to make contracts with any person or company for such purposes," and give such person or company "the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years."

In addition to these sections, appellant cites others, which give to the city the power to make all contracts in relation to its property and affairs necessary to the exercise of its corporate

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[1] SEC. 35. The mayor and council of each city governed by this act shall have the care, management and control of the city and its finances, and shall have power to enact, ordain, alter or repeal any and all ordinances not repugnant to the constitution and laws of this State, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect. General Laws of 1901, § 971, p. 225.

SEC. 65. The council may provide for and regulate the lighting of the streets and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes, and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years. General Laws of 1901, § 1000, p. 232.

SEC. 83. That cities of the second class of the State of Kansas are hereby granted full power and authority, on behalf of said cities, to purchase, procure, provide and contract for the construction of and construct waterworks, electric light and gas plants for the purpose of supplying such cities and the inhabitants thereof with water, light and gas for domestic use and any and all other purposes. General Laws of 1901, § 1017, p. 237.

or administrative powers, the power to open and improve streets, purchase or condemn land for hospital and waterworks, to make regulations to secure the general health of the city, to enact ordinances for any of the above-mentioned purposes, and "for maintaining the peace, good government and welfare of the city and its trade and commerce." Also a section which gives to gas and water companies the power to manufacture and furnish gas and water and to lay down pipes and mains in the streets "with the consent of the municipal authorities thereof and under such regulations as may be prescribed," and a section giving power to such authorities "to contract with any such corporation for the lighting or supplying with water the streets, lots, lanes, squares and public places in any such city, town or village."

It is from these provisions that the water company deduces the power of the city to make the privileges granted exclusive, and special stress is put upon the provision of § 65, which we have quoted. Counsel say: "Language more explicitly expressing an absolute measure of power could hardly be framed. The power is given to light the streets, to make contracts for the lighting of the streets and to confer the privilege of lighting the streets for a specific term of years." And, further, counsel say: "It will be observed that the grant of power is to confer 'the privilege of furnishing light.' The definite article 'the' is used. Power to confer the privilege implies *ex vi termini*, the exclusive privilege, not a fractional or communal privilege. The privilege conferred exists as a concrete and integral whole, and therefore when conferred must pass in its entirety. The city possessed the privilege of lighting its own streets as a function of its municipal authority. It was that privilege in its integral and exclusive form which the legislature authorized the city to confer." We cannot concur. The kind of privilege is defined, not the extent of it. It is exclusive of some persons, but not of all. It is exclusive of those who have not a grant from proper authority. There are privileges which may exist in their full entirety in more than one person, and the privilege

or franchise or right to supply the inhabitants of a city with light or water is of this kind. A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impugn the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit—explicit in the letter of the grant—or, if inferred from other powers or purposes, to be not only convenient to them, but indispensable to them. And these conditions are imperative—too firm of authority to be disregarded upon the petition of equities, however strong.

It is, however, contended that the statutes of Kansas fulfill the rule by the construction put upon them by the Supreme Court of the State, and the case is therefore brought, it is further contended, within the rule of *Vicksburg* v. *Vicksburg Waterworks Company*, 206 U. S. 496. The Kansas cases relied on are *Eureka Light & Gas Company* v. *City of Eureka*, 5 Kan. App. 669; *State* v. *The City of Topeka*, 68 Kansas, 177; *Cherryvale Water Company* v. *The City of Cherryvale*, 65 Kansas, 219. In those cases the court did say, in determining what duties were imposed or powers conferred upon the city, that the statute should be liberally construed to effectuate the general purpose of the legislature, but the powers under consideration were different from the powers herein involved, otherwise those cases would not be reconcilable with *Payne* v. *Spratley*, 5 Kansas, 525, 545, and *Mining Gas Company* v. *Gas Mining Company*, 55 Kansas, 175, 178. In *Payne* v. *Spratley* the general principles respecting the power of municipal corporations were said to be those which we have expressed. In *Mining Gas Company* v. *Gas Mining Company*, one of the companies, claiming an exclusive right, sought to test the validity of two city ordinances, granting the other the use of the streets and to restrict it from using the privileges granted. For this purpose the court said the plaintiff company clearly had no standing in court, because the city authorities alone were charged with the duty of preventing encroachment on the

streets, and they, alone, could test the validity of the ordinance. The court said further: "The city did not, in terms, attempt to give the plaintiff company a right to the exclusive use of the streets and lanes for the purpose of laying down its pipes. If it had attempted to do so it could not, for want of power."

The conclusion from these cases is reinforced by a change in the statutes conferring power upon the cities of the State. Section 65, *supra*, was § 30 of the statutes of 1868 (subds. 10 and 18, p. 162), and as such gave to a city the power to make the contracts therein expressed, and give "the exclusive privilege of furnishing gas to light the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years." This provision was repeated in § 59 of the statutes of 1872, Kansas Laws, 1892, p. 211. But in 1885 that section was amended, so as to omit the words "the exclusive privilege." Section 7, chapter 99, Statutes of 1885, p. 147. And as thus amended it was reënacted in 1901. Section 1000, General Statutes of 1901.

Decrees affirmed.

THE HAMILTON.[1]

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

No. 71. Argued October 24, 1907.—Decided December 23, 1907.

Until Congress acts on the subject, a State may legislate in regard to the duties and liabilities of its citizens and corporations while on the high seas and not within the territory of any other sovereign.

Where a fund is being distributed in a proceeding to limit the liability of the owners of a vessel, all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not.

The statute of Delaware giving damages for death caused by tort is a valid exercise of the legislative power of the State, and extends to the case of a citizen of that State wrongfully killed while on the high seas in a vessel

[1] Docket title, Old Dominion Steamship Company, owner of the Steamship Hamilton, *v.* Gilmore.

belonging to a Delaware corporation by the negligence of another vessel also belonging to a Delaware corporation. A claim against the owner of one of the vessels in fault can be enforced in a proceeding in admiralty brought by such owner to limit its liability.

When both vessels in collision are in fault the representatives of a seaman on one of the vessels, killed without contributory negligence on his part, may, in a proceeding to limit liability, where an action is given by the state statute against the owner of the other vessel, recover full damages, and are not limited to damages recoverable under the maritime law against the seaman's own vessel for death or injury caused by negligence of the master thereof or his fellow servants thereon. Neither the seaman's contract with the owners of the vessel he is on, nor the negligence of his own vessel, nor any provision of the Harter Act affects the claim against the other vessel.

146 Fed. Rep. 724, affirmed.

THE facts are stated in the opinion.

Mr. Harrington Putnam, with whom *Mr. Henry E. Mattison* was on the brief, for petitioner:

The Delaware statute does not apply to a claim for death on the high seas arising from tort, in proceedings in admiralty.

In the relation which springs out of tort, there is no basis for saying that the parties have impliedly consented to be bound by the law of any particular State. As a consequence their rights and liabilities are to be determined by the general principles of maritime law as administered in our admiralty courts. If the Hamilton had belonged in one State, the Saginaw in another and the deceased in still another State, the law of any particular State could not more than another have precedence and a controlling influence. On the contrary, there is no presumption that the relations of the parties are to be fixed by the laws of any one State when an injury accrues on the high seas through a pure marine tort. *Rundell* v. *Compagnie Générale*, 94 Fed. Rep. 366; aff'd 100 Fed. Rep. 655.

The origin of the fiction that a merchant ship may be regarded as a floating portion of a country, or, as the doctrine is sometimes expressed, that it is a continuation or prolongation of the National territory, is as recent as 1752. Modern writers treat this fiction as having only a limited application. Hall on International Law, Oxford, 1904, pp. 249, 250.

The doctrine of "territoriality" is rather a limit on rights of search and protection against aggression than one that confers new rights of action for tort. Walker, Science of International Law, pp. 130, 131.

Independent of precedent, it is plain that the liability for wrongs, and especially for causing death, is to be determined in admiralty by the court administering the law of the forum. No State can extend its laws over the ocean. The Federal laws alone, and the maritime jurisprudence administered by the Federal courts must decide the liability for wrongs committed outside of territorial waters.

The doctrine that merchant ships are part of the territory, if applicable to collisions, would also govern salvage on the high seas. Such attempts to impose foreign laws have often been made, but have never been successful in the United States courts. *The Edam*, 13 Fed. Rep. 135, 139.

The territorial fiction depends on contracts, because publicists recognize that it is only when the crew are on board that the doctrine of territoriality applies. Once the contracting members of the ship's company leave the vessel the fiction vanishes. Woolsey, International Law (6th ed.), p. 72.

Statutes providing for the survivorship of rights of action, and recovery in case of loss of life, have been enacted in varying forms, not only by the States of the Union, but also by foreign countries, with which the United States has intimate relations—especially by England and the Canadian provinces. The system of law on the continent of Europe in some form also gives a recovery for loss of life. Yet in no case have the courts of Great Britain or the United States regarded the law of the flag upon the high seas as authorizing such a recovery in the admiralty courts. Even in Canada the admiralty has no jurisdiction for loss of life. *Monaghan* v. *Horn*, 7 Du Val (Supreme Court, Canada), 409.

The same rule was reached in England (notwithstanding Lord Campbell's Act) that admiralty has no jurisdiction for loss of life. *The Vera Cruz*, 10 App. Cas. 59 (1884).

Cases of tort arising upon the high seas, in the admiralty courts of the United States, will be governed by the law of the forum, which is the general maritime law as administered in these courts. *The Scotland*, 105 U. S. 24; *The Belgenland*, 114 U. S. 355; *The Brantford City*, 29 Fed. Rep. 373.

Next to the natural justice of its principles, the highest value of maritime law consists in its uniformity and general acceptance. We are not dealing with municipal law nor with general commercial law not maritime, both of which are prescribed and administered concurrently by the state and Federal legislatures and courts, but we have to deal with that which relates exclusively to the maritime law and the admiralty jurisdiction. That law is not subject to the change or modification of state legislatures.

Indeed, one of the controlling reasons for conferring on the general government the exclusive jurisdiction of all admiralty and maritime causes was to secure the great benefits which must inevitably result from uniformity in the maritime law.

A State cannot, therefore, destroy the symmetry of that law by creating maritime rights or conferring jurisdiction in any particular upon an admiralty court. *The Manhasset*, 18 Fed. Rep. 918, 923; *Welsh* v. *The North Cambria*, 40 Fed. Rep. 655, 656; *The Lyndhurst*, 48 Fed. Rep. 839, 841; *Workman* v. *The Mayor &c.*, 179 U. S. 552, 558.

The surviving members of the crew of the Saginaw cannot maintain their claim for its full face, but the Hamilton remains answerable for only half of all such losses. *The Osceola*, 189 U. S. 158, 175; *The City of New York*, 25 Fed. Rep. 151; *The Queen*, 40 Fed. Rep. 694; *Stahl* v. *The Niagara*, 77 Fed. Rep. 329, 336.

Mr. J. Parker Kirlin and *Mr. George Whitefield Betts*, with whom *Mr. John M. Woolsey* and *Mr. Howard M. Long* were on the brief, for respondents:

Since Congress has not legislated with reference to the subject, the statute of the State of Delaware, as a sovereign State,

allowing damages for death is binding and effective on its vessels when on the high seas. *The Lottowanna*, 21 Wall. 558, 580; *The Glide*, 167 U. S. 606; *Ex parte McNiel*, 13 Wall. 236; *Cooley* v. *Board of Wardens*, 12 How. 299; *Steamboat Co.* v. *Chase*, 16 Wall. 522; *Sherlock* v. *Alling*, 93 U. S. 99.

The Hamilton and Saginaw, for the purposes of this proceeding, were parts of the territory of the State of Delaware, and subject to its laws. *Wilson* v. *McNamee*, 102 U. S. 572; *Crapo* v. *Kelly*, 16 Wall. 610; *The Lamington*, 87 Fed. Rep. 752.

There has been no negligence shown on the part of the members of the crew of the Saginaw. It was proper, therefore, to allow the full amount of their claims. *The Atlas*, 93 U. S. 302; *The Albert Dumois*, 177 U. S. 240, 243, 260. See also *The Juniata*, 93 U. S. 337; *The North Star*, 106 U. S. 17, 22; *The Chattahoochee*, 173 U. S. 540, 549; *The New York*, 175 U. S. 187; *Ex parte Union Steamboat Co.*, 178 U. S. 317; *The Conemaugh*, 189 U. S. 363.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding for the limitation of liability of the steamship Hamilton in respect of a collision on the high seas with the steamship Saginaw, in which the Saginaw was sunk and her chief mate and some of her crew and passengers were drowned. It is found, and not disputed, that both vessels were to blame. Both vessels belonged to corporations of the State of Delaware. A statute of that State, after enacting that actions for injuries to the person shall not abate by reason of the plaintiff's death, provides that "whenever death shall be occasioned by unlawful violence or negligence, and no suit be brought by the party injured to recover damages during his or her life, the widow or widower of any such deceased person, or if there be no widow or widower, the personal representatives may maintain an action for and recover damages for the death and loss thus occasioned." Act of January 26, 1866, chap. 31, p. 28, vol. 13, Part 1, Delaware Laws, as amended

by act of March 9, 1901, chap. 210, p. 500, vol. 22, Delaware Laws. On the strength of this statute the representatives of a passenger and of three of the crew filed claims, and the claims were allowed by the District Court (see 134 Fed. Rep. 95; 139 Fed. Rep. 906), and afterwards by the Circuit Court of Appeals; 146 Fed. Rep. 724; 77 C. C. A. 150. A certiorari was granted by this court to settle the question, as stated by the petitioner, whether the Delaware statute applies to a claim for death on the high seas, arising purely from tort, in proceedings in admiralty. Incidentally the right of representatives of the crew of the Saginaw to recover their claims in full against the Hamilton also has been discussed.

Apart from the subordination of the State of Delaware to the Constitution of the United States there is no doubt that it would have had power to make its statute applicable to this case. When so applied, the statute governs the reciprocal liabilities of two corporations, existing only by virtue of the laws of Delaware, and permanently within its jurisdiction, for the consequences of conduct set in motion by them there, operating outside the territory of the State, it is true, but within no other territorial jurisdiction. If confined to corporations, the State would have power to enforce its law to the extent of their property in every case. But the same authority would exist as to citizens domiciled within the State, even when personally on the high seas, and not only could be enforced by the State in case of their return, which their domicil by its very meaning promised, but in proper cases would be recognized in other jurisdictions by the courts of other States. In short, the bare fact of the parties being outside the territory in a place belonging to no other sovereign would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas.

The first question, then, is narrowed to whether there is anything in the structure of the National Government and under the Constitution of the United States that takes away

or qualifies the authority that otherwise Delaware would possess—a question that seems to have been considered doubtful in *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 558. It has two branches: First, whether the state law is valid for any purpose, and, next, whether, if valid, it will be applied in the admiralty. We will take them up in order.

The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to "all cases of admiralty and maritime jurisdiction." Art. 3, § 2; 130 U. S. 557. The doubt in this case arises as to the power of the States where Congress has remained silent.

That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," Rev. Stats. § 563, cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. *Martin* v. *Hunter*, 1 Wheat. 304, 337; *The Hine* v. *Trevor*, 4 Wall. 555, 571; *Leon* v. *Galceran*, 11 Wall. 185; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the National courts, tends to establish the legislative power of the State where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American Steamboat Co.* v. *Chase*, 16 Wall. 522. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt. The same conclusion was reached in *Mc-*

Donald v. *Mallory*, 77 N. Y. 546, where the death occurred on the high seas. *Sherlock* v. *Alling*, 93 U. S. 99, reinforces *Chase's case*, and answers any argument based on the power of Congress over commerce, as to which we hardly need refer also to *Cooley* v. *Board of Wardens*, 12 How. 299, *Ex parte McNiel*, 13 Wall. 236; *Wilson* v. *McNamee*, 102 U. S. 572, and *Homer Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406, concerning state pilotage laws.

The jurisdiction commonly expressed in the formula that a vessel at sea is regarded as part of the territory of the State, was held, upon much consideration, to belong to Massachusetts, so far as to give preference to a judicial assignment in insolvency of such a vessel over an attachment levied immediately upon her arrival at New York, in *Crapo* v. *Kelly*, 16 Wall. 610. That decision was regarded as necessitating the conclusion reached in *McDonald* v. *Mallory*, *supra*. Other instances of state regulation are mentioned in *The City of Norwalk*, 55 Fed. Rep. 98, 106; but without further recapitulation of the authorities, we are of opinion that the statute is valid. See *Workman* v. *New York*, 179 U. S. 552, 563. We should add, what has been assumed thus far, as it had to be assumed in order to raise the question discussed, that we construe the statute as intended to govern all cases which it is competent to govern, or at least not to be confined to deaths occasioned on land. *McDonald* v. *Mallory*, 77 N. Y. 546. If it touches any case at sea, it controls this. See *The Belgenland*, 114 U. S. 355, 370. Whether it is to be taken to offer a similar liability of Delaware owners to foreign subjects, *Mulhall* v. *Fallon*, 176 Massachusetts, 266, need not be determined now.

We pass to the other branch of the first question: whether the state law, being valid, will be applied in the admiralty. Being valid, it created an *obligatio*, a personal liability of the owner of the Hamilton to the claimants. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. *Ex parte Mc-*

Niel, 13 Wall. 236, 243. It might not give a proceeding *in rem*, since the statute does not purport to create a lien. It might give a proceeding *in personam*. *The Corsair*, 145 U. S. 335, 347. If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit. But we are not concerned with these considerations. In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle, *Andrews* v. *Wall*, 3 How. 568, 573; *The J. E. Rumbell*, 148 U. S. 1, 15; Admiralty Rule, 43; *Cargo Ex Galam*, 2 Moore P. C. (N. S.) 216, 236, but is the result of the statute, which provides for, as well as limits the liability, and allows it to be proved against the fund. *The Albert Dumois*, 177 U. S. 240, 260. See *Workman* v. *New York*, 179 U. S. 552, 563.

The second question concerns the right of the representatives of the crew to recover their claims in full. There is a faint suggestion that the mate of the Saginaw was negligent, but on this point we shall not go behind the findings below. The main objection is that the statute allows a recovery beyond the maintenance and support which were declared in *The Osceola*, 189 U. S. 158, 175, to be the limit of a seaman's rights against his own vessel when injured by the negligence of the master or a fellow-servant on his ship. But the question here regards the liability of the Hamilton, another vessel. The contract between the seaman and the owners of the Saginaw does not affect the case. *Erie R. R. Co.* v. *Erie Transportation Co.*, 204 U. S. 220, 226. Neither does the Harter Act, even if its terms could be extended to personal injuries and loss of life. *The Chatta-*

hoochee, 173 U. S. 540. Neither does the negligence of the Saginaw. *The Atlas,* 93 U. S. 302.

We are of opinion that all the claimants are entitled to the full benefits of a statute "granting the right to relief where otherwise it could not be administered by a maritime court." *Workman* v. *New York,* 179 U. S. 552, 563.

Decree affirmed.

HOLT *v.* MURPHY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 61. Argued December 6, 1907.—Decided January 6, 1908.

Under the general rule of law that an entry segregates the tract entered from the public domain subject to be entered until that entry is disposed of, this court sustains the rule of the Land Department that no subsequent entry can be received after the Land Commissioner has held the entry for cancellation until the time allowed for appeal has expired or the rights of the original entryman have been finally determined.

Where the successful party in a land contest does not enforce his preference rights or take any action looking to an entry within the prescribed period, but files a waiver of his right of entry, in the absence of any findings sustaining charges of fraud as to the delivery of the waiver, this court will not, in an action commenced four years thereafter, set aside a patent issued to one who had entered the land and in whose favor the waiver was filed.

15 Oklahoma, 12, affirmed.

THIS was a suit commenced in the District Court of Oklahoma County, Oklahoma, by appellant, praying that the appellees, the holders of the legal title to a tract of land in Oklahoma County, be decreed to hold that title in trust for her benefit. The District Court entered a decree in favor of the defendants, which was affirmed by the Supreme Court of the

Territory, 15 Oklahoma, 12, from whose decision this appeal was taken.

These facts are undisputed: On April 23, 1889, Ewers White made a homestead entry of the land. Subsequently two other parties, C. J. Blanchard and Vestal S. Cook, attempted to enter the same land. On July 16, 1889, in a contest before the local land officers, they held that all the claimants were disqualified because of entering the Territory in violation of the President's proclamation. On appeal the Commissioner of the General Land Office, on March 7, 1890, affirmed their ruling, dismissed the contests of both Blanchard and Cook, and held the entry of White for cancellation. From this decision White prosecuted an appeal to the Secretary of the Interior, who, on July 21, 1891, affirmed the decision of the Commissioner. 13 L. D. 66. During the time allowed for appeal to the Secretary from the Commissioner, and on March 11, 1890, Levi Holt, by his attorney in fact, filed a soldier's declaratory statement for the land, which was suspended by the register and receiver pending final action on the appeal. Thereafter and on November 29, 1890, before the decision by the Secretary of his appeal, White filed a relinquishment of his entry and all rights thereunder, and the defendant Samuel Murphy immediately thereafter made a homestead entry thereon.

In addition it was charged by plaintiff that after a decision by the Secretary of the Interior, in a contest between Murphy and Holt in favor of Holt, or rather in favor of his widow (as he had died in the meantime), a contract was entered into between plaintiff's attorney and the defendant Samuel Murphy, by which her attorney should deceive her as to her right in the land, and, for a pecuniary consideration received from Murphy, should file a waiver of her right of entry, and thus permit him to acquire a patent, all of which was done; that Anton H. Classen (the present holder of the legal title) and the other defendants were fully aware of what was thus wrongfully done; that the entry of Murphy appearing on the record as being unchallenged, a patent was, on January 19, 1898, issued

to him. Subsequently the title to most of the land passed to defendant Classen, who at the time of the filing of the waiver by plaintiff's attorney was receiver of the land office of the district in which the tract in controversy is situated, and who claimed in his answer among other things that he was a *bona fide* purchaser and without notice of any equities of the plaintiff.

Sections 2304 and 2309, Rev. Stat., provide for homestead entries by soldiers and officers who served in the army of the United States. By § 2309 the declaratory statement of such soldier or officer may be made by an agent as well as personally, and he is allowed six months thereafter to begin settlement and improvement, whereas in ordinary cases the entryman must make affidavit of his right to enter before the register or receiver, and must commence his residence and cultivation of the land immediately after the filing of the affidavit.

Mr. John S. Jenkins and *Mr. William Frye White*, with whom *Mr. John B. Cotton* was on the brief, for appellant:

The filing of Levi Holt's soldier's declaration, statement and application to enter after the entry of record in the records of the local land office of a judgment of the Commissioner of the General Land Office holding the prior entry of White invalid, did create a preference right of entry in Holt, although his filing had been received by the local land office and suspended, pending the right of appeal of White and his contestant in accordance with the settled practice and rule of the General Land Office in force at the time and for a long time thereafter. *McMichael* v. *Murphy et al.*, 20 L. D. 147, 535.

By the promulgation of the rule laid down in *McMichael* v. *Murphy*, *supra*, and its recognition and application through adjudged cases, a rule of property had become established, and inchoate property rights resulted, which are subject to protection by the courts, where the conditions called for by the rule were present. This being so, the courts ought to recognize the principle of *stare decisis* in respect to such a

rule and ought not to disregard rights attaching while it was the law of the tribunal which had jurisdiction to determine them.

Upon White's relinquishment of his entry, pending his appeal from the judgment of the Commissioner of the General Land Office holding his entry void and for cancellation, the suspended application of Levi Holt became a subsisting entry.

Mr. J. H. Everest for appellees:

The plaintiff has not shown herself entitled to a patent to the land and her bill, therefore, lacks equity. *Baldwin* v. *Keith*, 75 Pac. Rep. 1124; *Bohall* v. *Dilla*, 114 U. S. 51; *Sparks* v. *Pierce*, 115 U. S. 408; *Lee* v. *Johnson*, 115 U. S. 48; *Emblen* v. *Lincoln Land Co.*, 184 U. S. 661, 663.

The plaintiff never in fact acquired any right or equity in the land involved because the decision of the Secretary of the Interior awarding the heirs of Levi Holt the right to enter said land was erroneous and contrary to law. See *Patrick* v. *Kelley*, 11 L. D. 326; *Goodale* v. *Olney* (on review), 13 L. D. 498; *Re Maggie Laird*, 13 L. D. 502; *Holmes* v. *Hockett*, 14 L. D. 127; *Swanson* v. *Simmons*, 16 L. D. 44; *Mills* v. *Daly*, 17 L. D. 395; *Cook* v. *Villa* (on review), 19 L. D. 442; *Walker* v. *Snider* (on review), 19 L. D. 467; *Gallagher* v. *Jackson*, 20 L. D. 389; *McMichael* v. *Murphy et al.* (on review), 20 L. D. 535; *McCreary* v. *Wert et al.*, 21 L. D. 145.

As to the defendant, Anton H. Classen, and the one hundred and twenty acres of land claimed by him, the record shows that he was an innocent purchaser after patent without notice of any of the pretended equities of the plaintiff. *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307; *United States* v. *Marshall Silver Mining Company*, 129 U. S. 579.

The plaintiff was guilty of laches in the prosecution of her suit and should, therefore, be barred of relief in a court of equity. *Wagner* v. *Baird*, 7 How. 234; *Galliher* v. *Cadwell*, 145 U. S. 368; *Johnson* v. *Standard Mining Co.*, 148 U. S. 360.

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

The plaintiff alleges in her petition that the land is worth $100,000. It appears that she has never been in Oklahoma; that neither she nor her husband ever entered upon or cultivated the land, and yet she asks the court to give her this valuable property, taking it away from those who, at least by their presence and occupation of the tract, have assisted in building up a State having more than a million inhabitants.

Another matter is worthy of notice. According to a report of the register of the local land office to the General Land Office at Washington, on May 12, 1897, the attorney for the plaintiff was notified of the decision in her favor by the Commissioner of the General Land Office, and on June 16 of that year that attorney filed the waiver of the preference rights thus awarded to her. The patent to Murphy was issued on January 19, 1898, and recorded in the office of the register of deeds in Oklahoma County on January 25, 1898. This suit was commenced on September 16, 1901. It, therefore, appears that the plaintiff took no action until more than four years after the waiver by her attorney of her preference rights and three and a half years after the issue of the patent and its record in the county in which the land is situate. It is true that she claims to have been ignorant of the decision in her favor, and that she relied upon her attorney, whom she charges was engaged in a conspiracy to defraud her. Although this reliance, so far as it was reasonable and in fact controlled her, may, to some extent, at least, have excused her inaction, yet it must also be remembered that not improbably her inaction may have influenced some of the defendants to deal with the land in reliance upon the title passing by the patent to Murphy.

The decree in the District Court finds that the plaintiff "has failed to sustain the material allegations of her petition," and holds that neither she nor any of the heirs of Levi Holt "have any right, equity or interest in and to said tract of land above

described or any part thereof," and quiets the title of defendants against all their claims, while the Supreme Court, in its opinion, says that the District Court was warranted in finding that the "allegations of fraud in the petition were not sustained by the evidence."

The Supreme Court, however, rested its decision largely upon this rule of law: That whenever an entry has been made of a tract of land that tract is segregated from the mass of public land subject to entry until the existing entry is disposed of.

Counsel for appellant do not question the general rule as to the effect of an entry regular upon its face, and concede that it is no longer open to doubt, in view of the many rulings of the Land Department and the decisions of this court, *Hodges* v. *Colcord*, 193 U. S. 192; *McMichael* v. *Murphy*, 197 U. S. 304, the latter, involving the land in controversy, but they seek to distinguish this case in that the local land officers had held all the claimants disqualified, and that on appeal the Commissioner of the General Land Office, on March 7, 1890, had affirmed their ruling, dismissed the contests of Blanchard and Cook, and held the entry of White for cancellation; that the application of Holt to enter was made on March 11, 1890, before any appeal had been, in fact, taken from the decision of the Commissioner to the Secretary of the Interior. In other words, at the time that Holt applied to make his entry there was no pending entry. It could not have been foretold whether White would appeal from the decision of the Commissioner of the General Land Office, and if he did not, there would be no entry to conflict with Holt's application. They contend that the application of Holt should have been recognized as an application to enter the land, to take effect if White should not appeal from the decision of the Commissioner, or if, on appeal, that decision should be sustained. In that way Holt would have been given priority over all subsequent entries. Counsel further say that such was then the ruling of the Department, citing especially *McMichael*

v. *Murphy*, 20 L. D. 147, and that although that decision has been overruled, yet that it was the law of the Land Department, as then established by its practice, and should be recognized as controlling the rights of the parties. The case in which, as they concede, the doctrine of *McMichael* v. *Murphy* was overruled is *Cowles* v. *Huff*, 24 L. D. 81, decided in January, 1897, a year before the issue of the patent in this case.

The difference in the ruling is disclosed by the two cases of *Henry Gauger*, 10 L. D. 221, and *Allen* v. *Price*, 15 L. D. 424. In the former it was held:

"An application to enter may be received during the time allowed for appeal from a judgment of cancellation, subject to such appeal, but should not be made of record until the rights of the former entryman are finally determined."

In the latter the Secretary said (p. 426):

"The act of May 14, 1880, 21 Stat. 140, granting to a successful contestant the preference right of entry, and the act of July 26, 1892, 27 Stat. 270, granting to his heirs the same rights, it must be admitted, conferred a right upon such party, and when we consider that this right must be exercised within the limited period of thirty days, and that it can only be exercised upon a specified and limited tract of land, is it not reasonable to assume that it was the intention of such legislation to reserve from other appropriation, for the period specified, the designated tract of land, and thus enable the party intended to be benefited, to reap the reward of his diligence in procuring the cancellation of the prior entry?

"Upon mature reflection, I am convinced that, to hold otherwise, is, by implication at least, to assume that Congress holds out inducements to a party to take certain action, but fails to protect him in the rights such action secures. To reserve the land for the time specified will certainly be in the line of protecting the contestant's rights, and no other party can be seriously prejudiced thereby."

In *McMichael* v. *Murphy*, 20 L. D. 147, he held that (p. 152): "One of the rules of this Department, established by a num-

ber of decisions, is, that a judgment of your office, holding an entry for cancellation, is final so far as that tribunal is concerned, and at once throws the land involved open to entry. That an application to enter made after the date of said judgment and within the time allowed for appeal, should be received, but not placed on record until the time for appeal has expired, or the rights of the entryman on appeal have been determined by this Department. In other words, that such an application shall be received subject to the rights of the entryman on appeal;" while in *Cowles* v. *Huff*, *supra*, it was decided that "An application to enter should not be received during the time allowed for appeal from a judgment canceling a prior entry of the land applied for; nor the land so involved held subject to entry, or application to enter, until the rights of the entryman have been finally determined."

In the course of his opinion the Secretary, after noticing the difference between the cases of *Henry Gauger* and *Allen* v. *Price*, said, 24 L. D. 86:

"This summary shows beyond any question that there is, in some particulars, at least, an irreconcilable conflict between these cases. To the extent of such conflict one or the other of them must be overruled. From a careful examination of the subject I am convinced that the doctrine announced in *Allen* v. *Price* furnishes the better practice, and it will be followed. The case of *Henry Gauger*, 10 L. D. 221, is therefore overruled. All other cases following it, in so far as they may be in conflict with the views herein expressed, are also hereby overruled."

See, also, *Stewart* v. *Peterson*, 28 L. D. 515, in which the Secretary held that (p. 519): "In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office." To fully appreciate the scope of this ruling it must be remembered that the local land officers

do not, except in the case of a relinquishment by the entryman, on their own judgment cancel an entry of record in their office, and that it remains until the Commissioner of the General Land Office sends directions to the local land officers to cancel it; and, further, that the Commissioner, even after his decision against the validity of the entry, sends down no order for its cancellation until after the time has expired for appeal from his decision, or until an appeal, if had, is finally disposed of by the Secretary (p. 517). Hence, by this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims.

But, further, it appears that a waiver in proper form of appellant's right of entry was filed in the Land Department after the decision in the contest case in her favor, and before the patent was issued to Murphy. Indeed, after that decision and after notice to her attorney she failed to take any action looking to an entry within the prescribed time.

As by the findings of both the trial and Supreme Court of the Territory all charges of fraud and misconduct may be put one side, there was nothing to prevent the waiver receiving operative force, and that, together with the delay on her part in attempting to enforce her preference rights, left the land free for Murphy's entry and the patent thereon.

The decision of the Oklahoma courts was right, and it is

Affirmed.

SULLIVAN *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 91. Argued December 20, 1907.—Decided January 6, 1908.

Where the highest court of the State dismisses an application for writ of error for want of jurisdiction, the judgment of the lower court becomes the judgment of the highest court of the State to which the case can be taken, and the writ of error will properly run to it from this court.

If the constitutional question is distinctly presented to the state court on motion for rehearing, and is considered and decided adversely, it is properly presented in time and this court has jurisdiction to review the judgment under § 709, Rev. Stat.

This court determines for itself whether an act of the legislature of a State amounts to a contract within the impairment of obligation clause of the Federal Constitution.

A state statute confirming a grant of the former sovereign and specifying the area and providing for a survey to ascertain metes and bounds and for filing the field notes does not amount to a contract within the impairment clause of the Constitution that the State will abide by the survey even though it includes more than the original grant.

The act of February 10, 1852, of Texas, confirming Mexican grants, did not amount to a legislative contract to abide by the surveys to be made of such grants; nor is the act of September 3, 1901, directing actions to be brought to recover land wrongfully in possession of grantees in excess of the amount of the original Mexican grant, but included in the survey made under the act of 1852, unconstitutional as impairing the obligation of a contract.

95 S. W. Rep. 645, affirmed.

THIS case comes to us from a state court and our jurisdiction is invoked on the ground of a law of the State charged to work an impairment of the obligation of a contract. The facts are that in 1834 the Mexican State of Tamaulipas granted to Pedro de la Garza a tract of land. The grant, signed by the governor, recited that the grantee had paid the appraised value, $204; that the grant contained "six and a half leagues of pasture land for large cattle, comprehended in the boundaries, angles and demarkations which appear in the attached map, countersigned with the seal of this government, signed with a rubric by my secretary, which, for greater distinctness,

are set out in the present title in the following mode: El Alcatraz and San Antonio of the waterfall, east to west on the north side; San Antonio and the Sacramento, north to south on the west; Sacramento and San Francisco, west to east on the south; San Francisco, San Pedro and El Alcatraz, south to north on the east. The pasture land is bounded on the north by Los Olmos Creek and on the rest of the sides by vacant lands."

Accompanying the grant was a plat showing an irregular hexagon and a survey made by Antonio Canales, as follows:

"The inclination to the southeast of the Olmos Creek figured in the survey of the irregular hexagon, which appears depicted, which contains six leagues of pasture land for large cattle and 20,782,500 square varas according to the units fixed by the law of the State for agrarian measures. The angular boundaries and most notable places which were defined were the following: A, boundary of the Alcatraz; B, boundary of San Antonio of the waterfall; C, boundary of Sacramento; D, boundary of San Francisco; r, lateral boundary of this pasture and angular of the Santa Rosa de Abajo, called San Pedro; e, lake of the sheep pen; m, n, ponds and heights of the waterfall; o, the little pond. The rectangle h, i, g, l, was ceded to this pasture by citizen Pedro Villareal, of which it was defined in the terms which appear in the file of this survey, A. M. B., the Olmos Creek. The survey was made with the greatest exactness, remeasuring the cord every half league and correcting the ten leagues of declination to the northeast, which the compass needle has in these lands. This pasture is bounded on the north by the creek, on the east by the pasture of Paistle and on the rest by vacant lands.

"Carmargo, Dec. 5th, 1832. ANTONIO CANALES."

Thereafter Tamaulipas became a part of Texas, and that State, on February 10, 1852, passed an act confirming this among other grants. Laws, General, Fourth Legislature, ch. 71, p. 63. The act of confirmation, so far as is material, provided by § 1 "that the State of Texas hereby relinquishes

all her right and interest in the following-described lands to the original grantees thereof, their heirs and legal assigns, to wit: County of Starr . . . (103) Pedro de la Garza, six and one-half leagues, called 'Santa Rosa,' . . ." Section 2 of the act is as follows (p. 71):

"SEC. 2. That it shall be the duty of those claiming any of the lands named in this act, to have the same surveyed by the district or county surveyor of the county in which the same may be situated, and upon the return of the field notes thereof to the General Land Office, the Commissioner is hereby authorized and required to have the same plotted on the maps of his office, and issue patents for the same in accordance with existing laws; provided, that no patent shall issue for a less amount than the original grant. That the owners of said lands shall be required to pay the taxes due on the same, from the date of the organization of the respective counties herein mentioned; which taxes shall be paid, and legal vouchers for the same exhibited to the Commissioner of the General Land Office before the patent to the same shall issue."

In May, 1859, Felix A. Blucher, a deputy district surveyor of the district, made a survey, the field notes and a plat of which were in August, 1869, filed in the General Land Office. The field notes commenced with the statement:

"Field notes of a survey of Eight leagues and twelve labores of land made for Wm. G. Hale and F. J. Parker the assignees of Pedro de la Garza this being the quantity of land to which they are entitled by virtue of a grant from the State of Tamaulipas dated on the 3rd day of July A. D. 1834. Surveyed in accordance with an act of the legislature of the State of Texas, approved Feb'y 10th, 1852, and entitled 'An act to relinquish the right of the State to certain lands therein named this being part of confirmation numbered 103 for the County of Starr in said Act.' "

This survey was not approved, and the field notes were indorsed by the Commissioner of the General Land Office in these words: "Closes partly all but the approximate area

found with apportioning errors is 267,552,959 sq. vrs.—10 Leagues 17½ Labores or 55,252,959 sq. vrs. too much. Aug. 21, '69, Richardson, $2.00."

No patent was ever issued for the land or any part of it. On September 3, 1901, the legislature of the State of Texas passed an act, § 11 of which is as follows:

"SEC. 11. The attorney general of this State is hereby directed and required to institute and prosecute, in the name of the State of Texas, such suits as may be necessary to recover from the person or persons in possession thereof or claiming title thereto, all lands which are held or claimed under titles emanating from the Spanish or Mexican governments where no valid evidence of such grants are to be found in the records or among the files of the General Land Office; and also such suits as may be necessary to determine the exact location and boundaries of such lands, where the evidence on file in the General Land Office does not sufficiently identify the land claimed; and such suits shall be brought, prosecuted and tried in the District Court of Travis County, Texas."

In pursuance of this section this suit was brought, the original petition having been filed September 24, 1902.

The defendant holds title under the original grantee of the State of Tamaulipas, and was and had been for many years in possession of the entire tract of over ten leagues surveyed by Blucher, claiming title to all in his possession. The State, conceding his title to six and one-half leagues, contended that all in excess was still its property. The case was tried before the court without a jury and a judgment entered in behalf of the State for three tracts, which the court found to be outside the boundaries of the original Mexican grant. The Court of Civil Appeals in and for the Third Supreme Judicial District of the State affirmed this judgment. 95 S. W. Rep. 645. A petition for rehearing was filed, in which the protection of the contract clause of the Constitution of the United States was specially invoked. In denying the motion for a rehearing the court considered this constitutional question and decided it

adversely to the plaintiff in error. Thereupon a petition was presented to the Supreme Court of the State for a writ of error to review the judgment of the Court of Civil Appeals, but that court dismissed the application for want of jurisdiction.

Mr. Charles W. Ogden, with whom *Mr. J. C. Sullivan* was on the brief, for plaintiff in error:

This court will ascertain and determine for itself, in a case of this character, whether or not a contract existed, and, if so, its import, and whether it has been impaired by state legislation. *Muhlker* v. *Harlem Railroad Co.,* 197 U. S. 571; *Kies* v. *Lowrey,* 199 U. S. 239; *H. & T. C. Ry.* v. *Texas,* 177 U. S. 76; *St. Paul Gas Light Co.* v. *St. Paul,* 181 U. S. 147.

The act of February 10, 1852, confirming the grant in controversy and providing for a settlement of its boundaries by an official survey, was a proposition made by the State to the landowner, which, upon acceptance, as evidenced by the survey at the request of the owner and the return of the field notes to the General Land Office, ripened into a valid contract, which was binding upon both parties thereto.

When the survey is made and the field notes thereof are returned as required by law, it is conclusive evidence against both the Government and the claimant that the land granted by the confirmation of Congress was the same described and bounded by the survey. This consideration depends on the fact that the claimant and the United States were parties to the selection, and mutually bound and respectively estopped by it.

In such a case the patent is not necessary to perfect, nor does it add anything to, the title, but only serves as an evidence thereof.

In such a case the binding force and effect of the resurvey and the act of confirmation is not dependent upon, nor can it in any manner be affected by, an inquiry into the question as to whether or not the boundaries of the grant are correct.

Langdeau v. *Hanes*, 21 Wall. 521; *Clark* v. *Hills*, 67 Texas, 141; *Menard Heirs* v. *Massey*, 8 How. 293; *Guitard* v. *Stoddard*, 16 How. 494; *West* v. *Cochran*, 17 How. 403; *Ryan* v. *Carter*, 93 U. S. 78; *Morrow* v. *Whitney*, 95 U. S. 551; *United States* v. *Roselius*, 15 How. 34; *Arguello* v. *United States*, 18 How. 539; *Forbes* v. *Withers*, 71 Texas, 472; *Commonwealth* v. *Pejepscut, Prop.*, 10 Massachusetts, 156; *Rutherford* v. *Grienes Heirs*, 2 Wheat. 196; *Howard* v. *Perry*, 71 Texas, 266; *Hamilton* v. *Avery*, 20 Texas, 635; *Wright* v. *Hawkins*, 28 Texas Supp. 408.

In such a case the official survey can only be avoided by the sovereign by timely allegations and proof of fraud, to which the claimant is a party. *White et al.* v. *Burnley*, 20 How. 247; *Maxey* v. *O'Connor*, 23 Texas, 234; *Smith* v. *Hughes*, 23 Texas, 249; *Elliott* v. *Mitchell*, 28 Texas, 111; *Railway* v. *State*, 81 Texas, 602; *Howard* v. *Colquhoun*, 28 Texas, 134; *Land Company* v. *State*, 1 Texas Civ. App. 621.

Section 11, of the act of September 23, 1901, when construed and enforced, as it was in this case, by the Court of Civil Appeals, as authorizing the institution by the Attorney General of this suit and the recovery herein of land to which the title of plaintiff in error and his predecessors had been perfected under the contract, as evidenced by the act of confirmation of 1852 and the resurvey thereunder and the return of the field notes to the General Land Office, impairs the obligation of said contract and is, therefore, in violation of, and contrary to, the provision of paragraph 1, of section 10, Article I, of the Constitution of the United States. *Houston & Texas Central R. R.* v. *Texas*, 177 U. S. 76; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 147.

It is not too late to raise a Federal question on motion for rehearing, if the question is considered and passed upon by the state court. *Leigh* v. *Green*, 193 U. S. 85; *Mallett* v. *North Carolina*, 181 U. S. 589.

Mr. William E. Hawkins, with whom *Mr. Robert Vance*

Davidson, Attorney General of the State of Texas, was on the brief, for defendant in error:

The confirmation shown by the act of February 10, 1852, applied to the land embraced in the original grant to Pedro de la Garza, and not to the land awarded to the State of Texas by the judgment in this cause.

None of the three tracts awarded by the judgment in this case to the State of Texas was within the lines of the original grant as surveyed by Canales. *Ryan* v. *Carter,* 93 U. S. 82; *Langdeau* v. *Hanes,* 21 Wall. 529; *Clark* v. *Hills,* 67 Texas, 145; *Corrigan* v. *State of Texas,* 94 S. W. Rep. 95; *Love* v. *Barber,* 17 Texas, 320; *Welder* v. *Carroll,* 29 Texas, 333.

Whether considered by itself alone or in connection with the Blucher resurvey of the Santa Rosa de Arriba grant, the act of confirmation of February 10, 1852, by the legislature of the State of Texas, did not constitute a contract between the owners of said grant and said State concerning the lands which were awarded by the state courts to the defendant in error, the State of Texas.

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

By the action of the Supreme Court of the State the judgment of the Court of Civil Appeals became the judgment of the highest court in the State to which the case could be taken, and hence the writ of error properly ran to that court. The constitutional question, although not raised theretofore, was distinctly presented in the petition to the Court of Civil Appeals for a rehearing, was considered by that court and decided adversely to the plaintiff in error. This court, therefore, has jurisdiction. *Mallett* v. *North Carolina,* 181 U. S. 589, 592; *Leigh* v. *Green,* 193 U. S. 79; *French* v. *Taylor,* 199 U. S. 274.

Coming to the merits, it is obvious that the act of 1852 was simply a confirmation of grants made by the Mexican States.

There is nothing in it which suggests the thought of new grants or of addition to old ones. The first section declares that the State "relinquishes all her right and interest in the following-described lands to the original grantees thereof," and names the amount of land included in this grant so relinquished, six and one-half leagues. The second section makes it the duty of claimants to have surveys made of their existing grants. The third section makes provision in case of the loss of the "original title papers of lands claimed by this act," while § 5 speaks of "the confirmation herein extended to the lands mentioned in this act."

But it is contended that there was an existing Mexican land grant binding upon the State of Texas as the successor of the former government; that the act of 1852 not only confirmed the grant, but also by the second section provided for a settlement of its boundaries through an official survey; that this was a proposition made by the State to the claimant of the grant which upon acceptance, as evidenced by the survey at the request of the owner and the return of the field notes to the land office, ripened into a valid contract; that when the survey was made and the field notes returned, as required by law, it became conclusive evidence against both the State and the claimant that the land surveyed was that granted by the Mexican State and confirmed by the legislature of Texas. This argument makes the survey the pivotal fact upon which the question of contract turns. Of course, whether there was or was not a contract is a question which, in a case like the present, this court must determine for itself. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443; *McCullough* v. *Virginia*, 172 U. S. 102, 109; *H. & T. C. Railway* v. *Texas*, 177 U. S. 66, 77; *St. Paul Gas Light Company* v. *St. Paul*, 181 U. S. 142, 147; *Muhlker* v. *Harlem Railroad Company*, 197 U. S. 544, 570.

It will be perceived that § 2 does not name the individual to act for the State, but only designates certain officials, any one of whom may make the survey, and imposes a duty upon the claimant of causing the survey to be made. It does not

prescribe the time within which the survey must be made. In fact, it was not made until seven years after the passage of the act, and the field notes were not filed until ten years after that. The purpose of the act was to enable the claimant to acquire a patent as better evidence of title, with a more accurate description of boundaries. The surveyor is not named as an agent of the State. On the contrary, an official act, that of survey, was authorized to be made at the instance of the claimant, but a mere surveyor is not by virtue of his office empowered to change boundaries. Those were given in the original Mexican grant, and his function was simply to resurvey, making the description more definite and certain. It could not have been within the contemplation of the legislature that this surveyor, picked out by the claimant, should have power to bind the State, by the mere matter of survey, to a grant nearly double the size of that which it confirmed by this statute of relinquishment. It must be borne in mind that the original grant was not a float—that is, a grant of so many acres to be located inside of a larger tract, in which the surveyor might have a discretion in selecting the particular tract—but it was a grant by metes and bounds, and the sole function of the surveyor was ministerial, to locate the tract and more fully describe those metes and bounds.

In all these proceedings the substantial elements of a contract are lacking. The State of Texas, succeeding to the sovereignty of the former government, recognized all that might, under any circumstances, be considered its international obligation and confirmed the title which had been made. It made no grant of additional land. It simply relinquished all claims to that which had been granted by the former sovereign and confirmed the title made by that grant. It received no consideration. As the description in the original survey was defective, it provided means for perfecting that description and authorized a patent, which is the highest evidence of title. On the other hand, the grantee, holding a grant from the State of Tamaulipas, received from the State of Texas no grant or

promise of additional land, but simply a declaration of its willingness to recognize and confirm the Mexican grant. He paid nothing to the State, but was only accorded by it the means of making his title definite and certain and the boundaries of his grant beyond question. In short, it was simply a proceeding established by the law of the State for making clear and certain the boundaries of grants which the State was willing to recognize, and in that proceeding a certain official of the State was charged with the ministerial duty of making a survey. He was given no authority to enlarge or diminish the grant, but only to ascertain what the real boundaries were. Further, the State has never given a patent, although this suit was not commenced for fifty years after the act of relinquishment, forty-three years after the survey and thirty-three years after the filing of the field notes in the state land office.

The decision of the Court of Civil Appeals was right, and its judgment is

Affirmed.

WILLIAMSON *v.* UNITED STATES.

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

No. 96. Argued December 5, 6, 1907.—Decided January 6, 1908.

Where the writ of error is prosecuted directly from this court on constitutional grounds, but there are errors assigned as to other subjects, this court has jurisdiction to review the whole case if any constitutional question is adequate to the exercise of jurisdiction. *Burton* v. *United States*, 196 U. S. 283.

An objection taken by a member of Congress that he cannot be sentenced during his term of office on the ground that it would interfere with his constitutional privilege from arrest is not frivolous even though taken during recess of Congress, and such a claim involves a constitutional question sufficient to give this court jurisdiction to review the judgment by writ of error. *Burton* v. *United States*, 196 U. S. 283.

The jurisdiction of this court to review on direct writ of error depends on the existence of a constitutional question at the time when the writ of error is sued out, and even if that question subsequently and before the

case is reached becomes an abstract one, jurisdiction remains and this court must review the whole case.

If a sentence on a member of Congress is illegal when pronounced because in conflict with his constitutional privilege it does not become valid by the expiration of the term for which he was elected.

The words "treason, felony and breach of the peace" were used by the framers of the Constitution in § 6, Art. I, and should be construed, in the same sense as those words were commonly used and understood in England as applied to the parliamentary privilege, and as excluding from the privilege all arrests and prosecutions for criminal offenses, and confining the privilege alone to arrests in civil cases.

Under § 5440, Rev. Stat., the conspiracy to commit a crime against the United States is itself the offense without reference to whether the crime which the conspirators have conspired to commit is consummated, or agreed upon by the conspirators in all its details. And an indictment charging the accused with a conspiracy to commit the crime of subornation of perjury in proceedings for the purchase of public lands was held in this case to be sufficient, although the precise persons to be suborned, and the time and place of such suborning were not particularized.

On the trial of one charged with conspiracy to commit a crime against the United States in connection with the purchase of public lands, testimony showing the character of the lands and an attempt by the accused to acquire state lands is competent as tending to establish guilty intent, purpose, design or knowledge, and is admissible if the trial judge so limits its application as to prevent it from improperly prejudicing the accused by showing the commission of other crimes. *Holmes* v. *Goldsmith*, 147 U. S. 164.

The rule that where it plainly appears in a criminal case that there is no evidence justifying conviction this court will so hold, despite a failure to request an instruction for acquittal, does not apply to a case where it is not certified, and this court is not otherwise satisfied, that the bill of exceptions contains the entire evidence, or where the bill of exceptions recites that the plaintiff offered evidence to go to the jury on every material allegation in the indictment.

While one honestly following advice of counsel, which he believes to be correct, cannot be convicted of crime which involves willful and unlawful intent even if such advice were an inaccurate construction of the law, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed advice of counsel.

In a criminal case doubt must be resolved in favor of the accused and in this case, *held*, that an indictment for conspiracy to suborn perjury related to statements under § 2 of the Timber and Stone Act and not in respect to making of final proofs.

Under the Timber and Stone Act of June 3, 1878, 20 Stat. 89, an applicant is not required, after he has made his preliminary sworn statement concerning the *bona fides* of his application and the absence of any contract

or agreement in respect to the title, to additionally swear to such facts on final proof, and a regulation of the Land Commissioner exacting such additional statement at the time of final hearing is invalid.

While Congress has given the Land Commissioner power to prescribe regulations to give effect to the Timber and Stone Act, the rules prescribed must be for the enforcement of the statute and not destructive of the rights which Congress has conferred by the statute.

THE facts are stated in the opinion.

Mr. Charles A. Keigwin and *Mr. Charles A. Douglas*, with whom *Mr. W. B. Matthews* and *Mr. E. B. Sherrill* were on the brief, for plaintiff in error:

Plaintiff in error, being at the time of the trial a member of the House of Representatives of the United States, was not subject to arrest except for treason, felony or breach of the peace. Constitution U. S., Art. I, § 6.

Felonies, in the sense of the Constitution and of Federal statutes, are only such offenses as were felonies at common law or so declared by statute. *Reagan* v. *United States*, 157 U. S. 301; *Bannon* v. *United States*, 156 U. S. 464. So as to conspiracy, which is not a felony simply because it is an infamous offense. *Bannon* v. *United States*, *supra*; *Mackin* v. *United States*, 117 U. S. 348; *Ex parte Wilson*, 114 U. S. 417.

The phrase "breach of the peace" means only actual breaches of the peace, offenses involving violence or public disturbance. As to other misdemeanors, the parliamentary privilege applies, as in libel. *Rex* v. *Wilkes*, 2 Wilson, 151; *Ware* v. *Circuit Judge*, 75 Michigan, 488; *Estes* v. *State*, 2 Humphrey, 496.

The constitutional immunity from arrest includes immunity from imprisonment, save in the cases excepted. The arrest is prohibited, not because a mere arrest is likely to impair the discharge of legislative duty, but because it implies and leads to imprisonment which does have that effect.

An indictment which charges a conspiracy between two or more persons to solicit or attempt to suborn other persons, not parties to the conspiracy, to commit perjury, does not charge a conspiracy to commit an offense against the United

States. It is not an offense against the United States to solicit or attempt to suborn another person to commit perjury.

There are no common law offenses against the United States; an offense, to be indictable in the Federal courts, must be one created and defined by act of Congress. *United States* v. *Hudson*, 7 Cranch, 32; *State* v. *Wheeling Bridge Co.*, 13 How. 563; *United States* v. *Britton*, 108 U. S. 193. An indictment under cl. 1 of § 5440, Rev. Stat., must allege, as the object of the conspiracy, a statutory offense against the United States. *United States* v. *Payne*, 22 Fed. Rep. 426; *Re Wolf*, 27 Fed. Rep. 611; *United States* v. *Adler*, 49 Fed. Rep. 736; *United States* v. *Taffe*, 86 Fed. Rep. 113; *United States* v. *Melfi*, 118 Fed. Rep. 899; *United States* v. *Britton*, 108 U. S. 193.

At common law, subornation of perjury is the offense of procuring a man to take a false oath, amounting to perjury, who actually takes such oath. 1 Hawkins P. C., Curw. ed., 435; 2 Bishop on Criminal Law, § 1197.

By § 5393, Rev. Stat., it is provided that "Every person who procures another to commit any perjury is guilty of subornation of perjury." The offense against the United States constituted by this section is identical with the common law crime of subornation of perjury. It is essential, under this section, as at the common law, that perjury shall in fact have been committed. *United States* v. *Dennee*, 3 Woods, 39; *United States* v. *Wilcox*, 3 Blatchf. 393; *United States* v. *Evans*, 19 Fed. Rep. 912; *United States* v. *Howard*, 132 Fed. Rep. 325; *United States* v. *Cobban*, 134 Fed. Rep. 290.

If an actual attempt to suborn the commission of perjury does not constitute an offense against the United States, a conspiracy by two or more persons to solicit or to attempt to suborn other persons to commit perjury is not a conspiracy to commit an offense against the United States, and is not punishable under § 5440, Rev. Stat.

The ruling of the court that perjury at the final proof was within the averments of the indictment was prejudicial error.

The charge is limited to alleged perjury in the preliminary

written statements. The introduction of evidence showing perjury in the final proofs was an attempt to prove the commission of another crime than that set out in the indictment. This independent offense, if committed at all, was committed by strangers to the conspiracy.

An officer, having by statute power to prescribe regulations for the conduct of his official business, may enforce the same by his official authority; but he cannot make the disregard of his requirements a criminal offense. *United States* v. *Eaton,* 144 U. S. 677; *United States* v. *Manion,* 44 Fed. Rep. 800; *United States* v. *Bedgood,* 49 Fed. Rep. 54; *United States* v. *Blasingame,* 116 Fed. Rep. 654; *United States* v. *Maid,* 116 Fed. Rep. 650; *United States* v. *Howard,* 37 Fed. Rep. 666.

The applicants had the right to sell, or to contract to sell, the lands at any time after application made, whether before or after final proof. The assumption to the contrary, upon which the whole theory of the possibility of perjury in the final proof is made to rest, is wholly unfounded upon any provision of the statute, contrary to the clear implication of the act of 1878, to the general principles of public-land law on the subject, and the decisions of this court.

In the absence of some express statutory inhibition, any right or claim under the public-land laws is assignable at any stage of its development. *Thredgill* v. *Pintard,* 12 How. 24; *Sparrow* v. *Strong,* 3 Wall. 97; *Lamb* v. *Davenport,* 18 Wall. 307.

A prohibition against such assignment will not be extended by construction to apply at a later stage of the proceeding than is made necessary by the words of the statute. *Myers* v. *Croft,* 13 Wall. 291. Nor can such a prohibition in another act in *pari materia* be read into an act in which no such prohibition is inserted by the legislature. *French* v. *Spencer,* 21 How. 228; *Maxwell* v. *Moore,* 22 How. 185.

The right to make a soldier's additional homestead entry is assignable, although an original homestead is not. *Webster* v. *Luther,* 163 U. S. 331; *Barnes* v. *Poirier,* 27 U. S. App. 500. See also *Adams* v. *Church,* 193 U. S. 510.

The Attorney General and *Mr. William R. Harr*, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for defendant in error:

The writ of error should be dismissed for want of jurisdiction. There is not now and never has been, properly speaking, a constitutional question involved in this case.

The mere assertion of a constitutional privilege, without color of ground to support it, is not sufficient to confer jurisdiction on this court to review the judgment of the Circuit Court. *Lampasas* v. *Bell*, 180 U. S. 282. See also *Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Railroad Co.* v. *Castro*, 204 U. S. 453, 455; *Kent* v. *Porto Rico*, *ante*, p. 113.

Even if the offense is not included within the exception to the privilege, and the imposition of sentence would amount to an arrest, color for the assertion of such privilege exists only when a Senator or Representative is threatened with arrest while in attendance at the session of their respective Houses or in going to and returning from the same. The contention that the privilege extends to freedom from arrest two months before Congress will meet, is frivolous, and could have been made for jurisdictional purposes only.

Sentence is not an arrest. At most it is but an order for arrest, although generally followed in this country by a warrant of commitment. Bishop's New Crim. Pro., 4th ed., § 1337. An unexecuted order for arrest is not in itself an arrest, and in this case the sentence, even treating it as such an order, was suspended during the entire time that plaintiff in error was a member of Congress.

The privilege of immunity extends to civil arrests only, and does not apply to any indictable offense. 1 Hartsell's Precedents of Proceedings in House of Commons, 2, 40, 65, 66; *Wilkinson* v. *Boulton*, 1 Levinz, 163; *Mr. Long Wellesley's Case*, 2 Rus. & Myl. 639, 664, 665; *Rawlins* v. *Ellis*, 10 Jurist, pt. 1, p. 1039; Bowyer's Com. on Const. Law of Eng., 2d ed., p. 84; May's Law of Parliament, 145.

Actual personal violence is not an essential element of breach

of the peace, but any conduct destructive of peace and good morals is sufficient to establish the offense. *People* v. *Rounds*, 35 N. W. Rep. 77, 79; *S. C.*, 67 Michigan, 482; *Davis* v. *Burgess*, 20 N. W. Rep. 540, 542; *S. C.*, 54 Michigan, 514; Bishop's Crim. Law, 7th ed., § 945; *Dunn* v. *The Queen*, 12 Ad. & Ellis, N. S. 1031, 1039, note; *O'Connell* v. *The Queen*, 11 Clark & Fin. 155, 251.

Conspiracy to commit subornation of perjury is an offense against the United States. *Clune* v. *United States*, 159 U. S. 595; *Callan* v. *Wilson*, 127 U. S. 540, 555.

The indictment is sufficient; it states the object of the conspiracy with all the precision and detail as to time, place, and other details that are necessary in indictments for the commission of such offense. *Ching* v. *United States*, 118 Fed. Rep. 540; *United States* v. *Stevens*, 44 Fed. Rep. 141; *United States* v. *Wilson*, 60 Fed. Rep. 890.

When the object of the conspiracy is an act in itself unlawful, the means by which it was to be accomplished need not be set out in the indictment. *Rex* v. *Eccles*, 1 Leach's Crown Cases, 274; *Thomas* v. *People*, 113 Illinois, 531; *People* v. *Clark*, 10 Michigan, 310; *People* v. *Bird*, 126 Michigan, 631; *People* v. *Arnold*, 46 Michigan, 268, 271. See also *Pettibone* v. *United States*, 148 U. S. 197, 203.

While not provided by the express words of the statute, the Timber and Stone Act, in purpose and intent, prohibits an applicant, at any time before the completion of his entry, from making any contract or agreement by which the title he may acquire shall inure to the benefit of any other person, otherwise the expressed intention of the statute that the lands applied for should not inure to the benefit of any other person, and that it should not be sold in quantities exceeding one hundred and sixty acres to any one person, would be defeated. *United States* v. *Budd*, 144 U. S. 163.

As it is the policy of the Timber and Stone Act to withhold the power of alienation from the person desiring to purchase the land until he has completed his entry, the Land Commis-

sioner must not only possess authority to make rules to that effect, but it is his duty to make and enforce them for the protection of the Government, and the courts of the United States will take judicial notice of such rules. *Caha* v. *United States*, 152 U. S. 221; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 309.

The regulations made by the Commissioner of the General Land Office for the purpose of carrying into effect the Timber and Stone Act in its true intent and purpose merely provided a place and an occasion and opportunity where perjury might be committed. *United States* v. *Bailey*, 9 Pet. 238; *Adams* v. *Church*, 193 U. S. 510, discussed and distinguished.

MR. JUSTICE WHITE delivered the opinion of the court.

This writ of error to review a criminal conviction is prosecuted directly from this court upon the assumption that rights under the Constitution are involved. The errors assigned, however, relate not only to such question but also to many other subjects. If there be a constitutional question adequate to the exercise of jurisdiction, the duty exists to review the whole case. *Burton* v. *United States*, 196 U. S. 283.

The constitutional question relied on thus arose:

On February 11, 1905, Williamson, plaintiff in error, while a member of the House of Representatives of the United States, was indicted with two other persons for alleged violations of Rev. Stat. § 5440, in conspiring to commit the crime of subornation of perjury in proceedings for the purchase of public land under the authority of the law commonly known as the Timber and Stone Act. The defendants were found guilty in the month of September, 1905. On October 14, 1905, when the court was about to pronounce sentence, Williamson—whose term of office as a member of the House of Representatives did not expire until March 4, 1907—protested against the court passing sentence upon him, and especially to any sentence of imprisonment, on the ground that thereby

he would be deprived of his constitutional right to go to, attend at and return from the ensuing session of Congress. The objection was overruled and Williamson was sentenced to pay a fine and to imprisonment for ten months. Exceptions were taken both to the overruling of the preliminary objection and to the sentence of imprisonment. Upon these exceptions assignments of error are based, which it is asserted present a question as to the scope and meaning of that portion of Article I, section 6, clause 1, of the Constitution, relating to the privilege of Senators and Representatives from arrest during their attendance on the session of their respective Houses, and in going to and returning from the same.

At the threshold it is insisted by the Government that the writ of error should be dismissed for want of jurisdiction. This rests upon the proposition that the constitutional question urged is of such a frivolous character as not to furnish a basis for jurisdiction, or if not frivolous at the time when the sentence was imposed, it is now so. The first proposition assumes that it is so clear that the constitutional privilege does not extend to the trial and punishment during his term of office of a Congressman for crime that any assertion to the contrary affords no basis for jurisdiction. It is not asserted that it has ever been finally settled by this court that the constitutional privilege does not prohibit the arrest and punishment of a member of Congress for the commission of any criminal offense. The contention must rest therefore upon the assumption that the text of the Constitution so plainly excludes all criminal prosecutions from the privilege which that instrument accords a Congressman as to cause the contrary assertion to be frivolous. But this conflicts with *Burton* v. *United States*, *supra*, where, although the scope of the privilege was not passed upon, it was declared that a claim interposed by a Senator of the United States of immunity from arrest in consequence of a prosecution and conviction for a misdemeanor involved a constitutional question of such a character as to give jurisdiction to this court by direct writ

of error. It is said, however, that this case differs from the *Burton case*, because there the trial and conviction was had during a session of the Senate, while here, at the time of the trial, conviction and sentence Congress was not in session, and therefore to assert the protection of the constitutional provision is to reduce the claim "to the point of frivolousness." This, however, but assumes that, even if the constitutional privilege embraces the arrest and sentence of a member of Congress for a crime like the one here involved, it is frivolous to assert that the privilege could possibly apply to an arrest and sentence at any other time than during a session of Congress, even although the inevitable result of such arrest and sentence might be an imprisonment which would preclude the possibility of the member attending an approaching session. We cannot give our assent to the proposition. Indeed, we think, if it be conceded that the privilege which the Constitution creates extends to an arrest for any criminal offense, such privilege would embrace exemption from any exertion of power by way of arrest and prosecution for the commission of crime, the effect of which exertion of power would be to prevent a Congressman from attending a future as well as a pending session of Congress. The contention that although there may have been merit in the claim of privilege when asserted it is now frivolous because of a change in the situation, is based upon the fact that at this time the Congress of which the accused was a member has ceased to exist, and, therefore, even if the sentence was illegal when imposed, such illegality has been cured by the cessation of the constitutional privilege. But, even if the proposition be conceded, it affords no ground for dismissing the writ of error, since our jurisdiction depends upon the existence of a constitutional question at the time when the writ of error was sued out, and such jurisdiction, as we have previously said, carries with it the duty of reviewing any errors material to the determination of the validity of the conviction. It hence follows that, even if the constitutional question as asserted is now "a mere abstraction," that

fact would not avail to relieve us of the duty of reviewing the whole case, and hence disposing of the assignments of error which are addressed to other than the constitutional question. Besides, we do not consider the proposition well founded, for, if at the time the sentence was imposed it was illegal because in conflict with the constitutional privilege of the accused, we fail to perceive how the mere expiration of the term of Congress for which the member was elected has operated to render that valid which was void because repugnant to the Constitution.

We come, then, to consider the clause of the Constitution relied upon in order to determine whether the accused, because he was a member of Congress, was privileged from arrest and trial for the crime in question, or, upon conviction, was in any event privileged from sentence, which would prevent his attendance at an existing or approaching session of Congress.

The full text of the first clause of section 6, Article I, of the Constitution is this:

"SEC. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

If the words extending the privilege to all cases were unqualified, and therefore embraced the arrest of a member of Congress for the commission of any crime, we think, as we have previously said, they would not only include such an arrest as operated to prevent the member from going to and returning from a pending session, but would also extend to prohibiting a court during an interim of a session of Congress from imposing a sentence of imprisonment which would prevent him from attending a session of Congress in the future. But the question is not what would be the scope of the words

"all cases" if those words embraced all crimes, but is, what is the scope of the qualifying clause—that is, the exception from the privilege of "treason, felony and breach of the peace." The conflicting contentions are substantially these: It is insisted by the plaintiff in error that the privilege applied because the offense in question is confessedly not technically the crime of treason or felony and is not embraced within the words "breach of the peace," as found in the exception, because "the phrase 'breach of the peace' means only actual breaches of the peace, offenses involving violence or public disturbance." This restricted meaning, it is said, is necessary in order to give effect to the whole of the excepting clause, since, if the words "breach of the peace" be broadly interpreted so as to cause them to embrace all crimes, then the words treason and felony will become superfluous. On the other hand, the Government insists that the words "breach of the peace" should not be narrowly construed, but should be held to embrace substantially all crimes, and therefore, as in effect, confining the parliamentary privilege exclusively to arrest in civil cases. And this is based not merely upon the ordinary acceptation of the meaning of the words, but upon the contention that the words "treason, felony and breach of the peace," as applied to parliamentary privilege, were commonly used in England prior to the Revolution and were there well understood as excluding from the parliamentary privilege all arrests and prosecutions for criminal offenses; in other words, as confining the privilege alone to arrests in civil cases, the deduction being that when the framers of the Constitution adopted the phrase in question they necessarily must be held to have intended that it should receive its well understood and accepted meaning. If the premise upon which this argument proceeds be well founded, we think there can be no doubt of the correctness of the conclusion based upon it. Before, therefore, coming to elucidate the text by the ordinary principles of interpretation we proceed to trace the origin of the phrase "treason, felony and breach of the peace," as applied to parliamentary privilege, and to fix the meaning

of those words as understood in this country and in England prior to and at the time of the adoption of the Constitution. In the Articles of Confederation (last clause of Article V) it was provided:

"Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrest and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace."

In article V of "Mr. Charles Pinckney's Draft of a Federal Government" it was provided as follows (Elliott's Deb., p. 146):

"In each house a majority shall constitute a quorum to do business. Freedom of speech and debate in the legislature shall not be impeached or questioned, in any place out of it; and the members of both houses shall, in all cases except for treason, felony, or breach of the peace, be free from arrest during their attendance on Congress, and in going to and returning from it. . . ."

The propositions offered to the convention by Mr. Pinckney with certain resolutions of the convention were submitted to a Committee of Detail for the purpose of reporting a constitution. Section 5 of Article VI of the draft of Constitution reported by this committee was as follows (Elliott's Debates, p. 227):

"SEC. 5. Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each house shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it."

The clause would seem not to have been the subject of debate. 3 Doc. Hist. of Constitution (Dept. of State, 1900), 500. In Elliott's Debates (p. 237) it is recited as follows:

"On the question to agree to the fifth section of the sixth article, as reported, it passed in the affirmative."

And, in the revised draft, the section was reported by the Committee of Revision exactly as it now appears (Elliott's Debates, p. 299).

The presence of the exact words of the exception as now found in the Constitution, in the Articles of Confederation, and the employment of the same words "treason, felony and breach of the peace," without discussion, in all the proceedings of the convention relating to the subject of the privileges of members of Congress, demonstrate that those words were then well known as applied to parliamentary privilege and had a general and well understood meaning, which it was intended that they should continue to have. This follows, because it is impossible to suppose that exactly like words without any change whatever would have been applied by all those engaged in dealing with the subject of legislative privilege, unless all had a knowledge of those words as applied to the question in hand and contemplated that they should continue to receive the meaning which it was understood they then had. A brief consideration of the subject of parliamentary privilege in England will, we think, show the source whence the expression "treason, felony and breach of the peace" was drawn, and leave no doubt that the words were used in England for the very purpose of excluding all crimes from the operation of the parliamentary privilege, and therefore to leave that privilege to apply only to prosecutions of a civil nature. We say this, although the King's Bench, in 1763 (*Rex* v. *Wilkes*, 2 Wils. 151), held that a member of Parliament was entitled to assert his privilege from arrest upon a charge of publishing a seditious libel, the court ruling that it was not a breach of the peace. But, as will hereafter appear, Parliament promptly disavowed any right to assert the privilege in such cases.

In Potter's Dwarris on Statutes, p. 601, reference is made to expressions of Lord Mansfield, advocating in 1770 the passage of a bill—which ultimately became a law—whose provisions greatly facilitated the prosecution of civil actions against members of Parliament, and restrained only arrests of their persons

in such actions. The remarks of Lord Mansfield having been made so shortly before the Revolution, and referring, as they undoubtedly did, to the decision in the *Wilkes case* (2 Wils. 151), are of special significance. Among other things he said:

"It may not be popular to take away any of the privileges of Parliament, for I very well remember, and many of your Lordships may remember, that not long ago the popular cry was for an extension of privileges, and so far did they carry it at that time that it was said that privilege protected members from criminal actions, and such was the power of popular prejudice over weak minds that the very decisions of some of the courts were tinctured with that doctrine. . . . The laws of this country allow no place or employment as a sanctuary for crime, and where I have the honor to sit as judge neither royal favor nor popular applause shall ever protect the guilty. . . . Members of both houses should be free in their persons in cases of civil suits, for there may come a time when the safety and welfare of this whole empire may depend upon their attendance in Parliament. God forbid that I should advise any measure that would in future endanger the state. But this bill has no such tendency. It expressly secures the persons of members from arrest in all civil suits."

Blackstone, in 1765, discussing the subject of the privileges of Parliament, says (Lewis's ed., *165):

"Neither can any member of either house be arrested and taken into custody, unless for some indictable offense, without a breach of the privilege of Parliament."

And, speaking of the writ of privilege which was employed to deliver the party out of custody when arrested in a civil suit, he said (p. 166):

"It is to be observed that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I, c. 13, and that of King William (which remedy some inconveniences arising from privilege of Parliament), speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable

crimes; or, as it has been frequently expressed, of treason, felony and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any *crime* whatsoever, for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of Parliament. To which may be added that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offense."

The first volume of Hatsell's Precedents, published in April, 1776, is entitled as "relating to privilege of Parliament; from the earliest records to the year 1628: with observations upon the reign of Car. I, from 1628 to 4 January, 1641." The material there collected has been frequently employed in support of the statement that the terms "treason, felony and breach of the peace" were employed by the Commons in a broad and not in a restricted sense. And in the concluding chapter (V), after stating (4th ed., 205) "the principal view, which the House of Commons seems always to have had in the several declarations of their privileges," the author says (p. 206):

"Beyond this, they seem never to have attempted; there is not a single instance of a member's claiming the privilege of Parliament, to withdraw himself from the criminal law of the land: for offenses against the public peace they always thought themselves amenable to the laws of their country: they were contented with being substantially secured from any violence from the Crown, or its ministers; but readily submitted themselves to the judicature of the King's Bench, the legal court of criminal jurisdiction; well knowing that 'Privilege which is allowed in case of public service for the Commonwealth, must not be used for the danger of the Commonwealth;' or, as it is

expressed in Mr. Glynn's Report of the sixth of January, 1641, 'They were far from any endeavor to protect any of their members, who should be, in due manner, prosecuted according to the Laws of the Realm, and the Rights and Privileges of Parliament, for treason, or any other misdemeanor; being sensible, that it equally imported them, as well to see justice done against them that are criminous, as to defend the just Rights and Liberties of the Subjects, and Parliament of England.' "

May, in his treatise on the Law, Privileges, Proceedings and Usage of Parliament, first published in 1844, says (10th ed., p. 112):

"The privilege of freedom from arrest has always been limited to civil causes, and has not been allowed to interfere with the administration of criminal justice. In *Larke's case*, in 1429, the privilege was claimed, 'except for treason, felony or breach of the peace;' and in *Thorpe's case* the judges made exceptions to such cases as be 'for treason, or felony, or surety of the peace.' The privilege was thus explained by a resolution of the Lords, 18th April, 1626: 'That the privilege of this house is, that no peer of Parliament, sitting the Parliament, is to be imprisoned or restrained without sentence or order of the house, unless it be for treason or felony, or for refusing to give surety of the peace;' and again, by a resolution of the Commons, 20th May, 1675, 'that by the laws and usage of Parliament, privilege of Parliament belongs to every member of the House of Commons, in all cases except treason, felony and breach of the peace.'

"On the 14th April, 1697, it was resolved, 'That no member of this house has any privilege in case of breach of the peace, or forcible entries, or forcible detainers;' and in *Wilkes' case*, 29th November, 1763, although the Court of Common Pleas had decided otherwise, it was resolved by both houses,

" 'That privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of laws in the speedy

and effectual prosecution of so heinous and dangerous an offence.'

" 'Since that time,' said the committee of privileges, in 1831, 'it has been considered as established generally, that privilege is not claimable for any indictable offence.'

"These being the general declarations of the law of Parliament, one case will be sufficient to show how little protection is practically afforded by privilege, in criminal offences. In 1815, Lord Cochrane, a member, having been indicted and convicted of a conspiracy, was committed by the Court of King's Bench to the King's Bench Prison. Lord Cochrane escaped, and was arrested by the marshal, whilst he was sitting on the privy councillor's bench, in the House of Commons, on the right hand of the chair, at which time there was no member present, prayers not having been read. The case was referred to the committee of privileges, who reported that it was 'entirely of a novel nature, and that the privileges of Parliament did not appear to have been violated, so as to call for the interposition of the house, by any proceedings against the marshal of the King's Bench.' "

See, also, Bowyer's Com. on Const. Law of England (2d ed.), p. 84.

In what is styled *Mr. Long Wellesley's Case*, decided in 1831, 2 Russ. and Mylne, 639, the party named had been taken into custody for clandestinely removing his infant daughter, a ward of the court, from the place where such ward was residing under authority of the court. The question for decision arose upon a motion to discharge the order for commitment "on the ground that, as a member of the House of Commons, he was protected from attachment by the privilege of Parliament." As stated in the report of the case, the committee of privileges of the House of Commons, which had the matter of the arrest of Mr. Wellesley under consideration, decided, p. 644, "that Mr. Long Wellesley's claim to be discharged from imprisonment by reason of privilege of Parliament ought not to be admitted." On the subject of the extent of the privilege, counsel,

who as *amicus curiæ* contended that the order of commitment was invalid, made an elaborate reference to authorities and pertinent statutes. Lord Chancellor Brougham, however, decided that privilege of Parliament was no protection against an attachment for what was in its nature a criminal contempt. Among other things he observed that upon principle members of Parliament could not be placed by privilege of Parliament above the law, and held (p. 665) "that he who has privilege of Parliament, in all civil matters, matters which whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege."

And by text-writers of authority in this country it has been recognized from the beginning that the convention which framed the Constitution, in adopting the words "treason, felony and breach of peace" as applicable to the privileges of a parliamentary body, used those words in the sense which the identical words had been settled to mean in England.

Story, in his treatise on the Constitution, speaking of the subject, says:

"SEC. 859. The next part of the clause regards the privilege of the members from arrest, except for crimes, during their attendance at the sessions of Congress, and their going to and returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange indeed if it were denied to the highest functionaries of the State in the discharge of their public duties. It belongs to Congress in common with all other legislative bodies which exist, or have existed in America since its first settlement, under every variety of government, and it has immemorially constituted a privilege of both houses of the British Parliament. It seems absolutely indispensable for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members.

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"SEC. 865. The exception to the privilege is, that it shall not extend to 'treason, felony, or breach of the peace.' These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source. Now, as all crimes are offenses against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. And so, in truth, it was decided in Parliament, in the case of a seditious libel published by a member (Mr. Wilkes) against the opinion of Lord Camden and the other judges of the court of common pleas, and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense and in furtherance of public justice. It would be monstrous that any member should protect himself from arrest or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest for the pettiest assault or the most insignificant breach of the peace."

Cushing, in his treatise—first published in 1856—on the elements of the law and practice of legislative assemblies in the United States, declared (9th ed., § 546) that the Commons never went "the length of claiming any exemption from the operation of the criminal laws;" and the author closed a discussion of the cases to which the privilege of Parliament was applicable (§§ 559–563) by expressing an opinion "in favor of the broad rule which withdraws the protection of parliamentary privilege from offenses and criminal proceedings of every description." And, considering the privilege as affected by the Constitution of the United States and of the several States, he said:

"567. In the greater number of the constitutions it is expressly provided, that members shall be privileged from arrest, during their attendance at the session of their respective houses, and in going to and returning from the same, in all cases, ex-

cept 'treason, felony, and breach of the peace.' This it will be recollected is the form in which the privilege is stated by Sir Edward Coke, and in which it is usually expressed by the English writers on parliamentary law; and it was undoubtedly adopted in the constitutions as correctly expressing the parliamentary rule on the subject. The inaccuracy of the language has already been pointed out, and it has been shown, that, in England, the exception embraces all criminal matters whatsoever, and, of course, includes many cases which do not fall within the denomination either of treason, felony, or breach of the peace. The question, therefore, arises, whether the exception of treason, felony, or breach of the peace, being stated in express terms, in these constitutions, it is to be understood strictly, and confined to cases coming within the technical definition of these offenses, or whether it is used as a compendious expression to denote all criminal cases of every description. In favor of the latter opinion, it may be said, first, there can be no doubt, that the framers of these constitutions intended to secure the privilege in question upon as reasonable and intelligible a foundation, as it existed by the parliamentary and common law of England; in short, that as in a multitude of other cases, they intended to adopt, with the words, the full meaning which had been given to them by usage and authoritative construction; and, second, that the word *felony*, which alone gives rise to any doubt, 'has derived so many meanings from so many parts of the common law, and so many statutes in England, and has got to be used in such a vast a number of different senses, that it is now impossible to know precisely in what sense we are to understand it;' and, consequently, that unless it is allowed to have such a signification, as with the other words of the exception, will cover the whole extent of criminal matters, it must be rejected altogether for uncertainty, or, at least, restricted to a very few cases. These reasons, alone, though others might be added, are sufficient to establish the point, that the terms 'treason, felony, and breach of the peace,' as used in our constitutions, embrace

all criminal cases and proceedings whatsoever. In the Federal Government, therefore, and in the States above referred to, the privilege of exemption from legal process may be considered the same as it is in England."

Since from the foregoing it follows that the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit, and we are thus brought to consider the other assignments of error relied upon. They are, all but one, based on exceptions challenging the sufficiency of the indictment, and alleging the commission of material error in admitting and rejecting evidence, in refusing requested instructions and in the instructions given. The only assignment not based upon an exception taken at the trial asserts that it is so clearly shown by the record that there is no proof tending to establish the commission of the offense charged that it should be now so decided, even although no request to instruct the jury on that subject was made at the trial.

1. *As to the sufficiency of the indictment.*

With great elaboration it is insisted in argument that the indictment charges no crime, since there can be no such thing as a conspiracy to commit the offense of subornation of perjury. While the statutes of the United States cause every person who procures another to commit perjury to be guilty of subornation of perjury, it is said there is no punishment by statute, as at common law, for a mere attempt by an individual to induce the commission of perjury. This being so, the argument is that a charge of conspiracy to suborn, etc., perjury is in the nature of things but a charge of an attempt to suborn perjury, which amounts only to the charge of a conspiracy to do an act which is not a criminal offense. But the proposition wholly fails to give effect to the provisions of the conspiracy statute (Rev. Stat., § 5440), which clearly renders it criminal for two or more persons to conspire to commit any offense against the Uni-

ted States, provided only that one or more of the parties to the conspiracy do an act towards effecting the object of the conspiracy. In other words, although it be conceded, merely for the sake of argument, that an attempt by one person to suborn another to commit perjury may not be punishable under the criminal laws of the United States, it does not follow that a conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is not a crime punishable as above stated. The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated. And this result of the conspiracy statute also disposes of an elaborate argument concerning the alleged impossibility of framing an indictment charging a conspiracy to suborn perjury, since it rests upon the assumption that as the conspirators could not, in advance, know when they entered into the conspiracy that the persons would willfully swear falsely to what they and the conspirators knew to be false, there could be no conspiracy to suborn.

But even on the supposition that a valid indictment may be framed charging a conspiracy to commit subornation of perjury, the indictment in question, it is urged, is fatally defective by reason of an omission to directly particularize various elements, claimed to be essential to constitute the offense of perjury and other elements necessary to be averred in respect of the alleged suborners.

This is based upon the assumption that an indictment alleging a conspiracy to suborn perjury must describe not only the conspiracy relied upon, but also must, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and perjury, which it is alleged is not done in the indictment under consideration. But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy. Looking at the indict-

ment, it in terms charges an unlawful conspiracy and combination to have been entered into on a date and at a place named within the district where the indictment was found, and the object of the conspiracy is stated to be the suborning of a large number of persons to go before a named person, stated to be a United States Commissioner of the District of Oregon, and in proceedings for the entry and purchase of land in such district under the timber and stone acts, make oath before the official that the lands "were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not directly or indirectly made any agreement, or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when, in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith, appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, then and before then engaged in the business of sheep raising in said county; the matters so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured, and the said John Newton Williamson, Van Gesner, and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States Commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law

of the said United States to administer the said oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered."

These allegations plainly import, and they are susceptible of no other construction, than that the unlawful agreement contemplated a future solicitation of individuals to enter lands, who in so doing would necessarily knowingly state and subscribe under oath material false statements as to their purpose in respect to entering the land, etc., and known to be such by the conspirators. There is no reason to infer that the details of the unlawful conspiracy and agreement are not fully stated in the indictment, and it may, therefore, be assumed that the persons who were to be suborned, and the time and place of such subornation, had not been determined at the time of the conspiracy, except as might be inferred from a purpose to procure the persons to be suborned to come before the United States Commissioner for the District of Oregon named in an indictment. It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon, and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment, we think, sufficiently set forth such purpose. The assignments of error which assailed the sufficiency of the indictment are, therefore, without merit.

2. Numerous exceptions were taken, *a*, to the admission of evidence as to the understanding of the applicants concerning their arrangement with Gesner, one of the accused, and the purpose of the applicants in applying for the land; *b*, to the admission of the final proofs, which embraced a sworn statement, made pursuant to the requirements of a regulation adopted by the Commissioner of the General Land Office declaring the *bona fides* of the applicant, and that at that period he had made no contract or agreement to dispose of the land;

and, *c*, to evidence respecting the character of the land and concerning an attempt to acquire, and the acquisition by like wrongful methods of state school lands located near the Government timber lands in question.

As we shall hereafter have occasion to consider the instructions of the court concerning the scope of the indictment as to the final proofs and the law applicable to that subject, we put out of view for the moment the objections just mentioned, under subdivision *b*, relating to the final proofs and the intention of the applicants in respect to the land, at the time such final proof was made, and therefore presently consider the objections in so far only as they concern the other subjects.

The issue being the existence of a conspiracy to suborn various persons to commit perjury in relation to declarations to be made under the timber and stone act as to the purpose for which they desired to acquire land, etc., and as it is conceded that no formal contracts were executed between the alleged conspirators and the proposed entrymen, and the alleged understandings were of an ambiguous nature, and proof of the conspiracy depended upon a variety of circumstances going to show motive or intent, we think it was proper to permit the interrogation of the entrymen concerning their understanding of the arrangement with Gesner and their intention at the time when they made their preliminary declarations, as the testimony was relevant to the question of the nature and character of the dealings of the entrymen with the alleged conspirators, and bore on the question of the purpose or motive which influenced the making of the sworn statement required by law as a condition precedent to the purchase of the land. As it was insisted that the motive which impelled the formation of the conspiracy was the desire to acquire a large tract of land for sheep-grazing purposes, which acquisition had become necessary by reason of the fact that a rival had obtained a leasehold interest in a considerable portion of the land which Gesner and Williamson had theretofore used in their sheep-

raising business, we think the testimony as to the character of the timber lands in respect to suitability for grazing purposes, etc., and an attempt to acquire and the acquisition of state school lands was, we think, also competent as tending to establish on the part of the conspirator guilty intent, purpose, design or knowledge.

The contention that the proof on the subjects just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof.

The conclusion above expressed as to the admissibility of the evidence objected to is elucidated by *Holmes* v. *Goldsmith*, 147 U. S. 150, 164, where it was said:

"As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.'

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

3. The remaining assignments relate to the refusal to give

requested instructions and to portions of the charge of the court. Many of the requested instructions, however, are so clearly without merit, because in effect covered by the charge as given that we do not deem it necessary to particularly notice them. The only subjects which we think are sufficiently important to require express notice are:

a. That, even although no request was made to instruct the jury on the whole evidence to render a verdict of not guilty, nevertheless it should now be held that the record establishes such an entire absence of proof tending to show guilt that it should be so declared.

b. That prejudicial error was committed by the trial court in refusing requested instructions to the effect that the jury should acquit if they found that the defendants acted in good faith under the advice of counsel and in the belief of the lawfulness of their conduct.

c. Exceptions in respect to the instruction given by the court that the indictment covered perjury in the matter of the final proofs, and in instructing the jury that they might convict if satisfied by the evidence, beyond a reasonable doubt, that the defendants intended that the persons who might be procured or induced to make entries of lands should willfully and deliberately commit perjury in particulars stated at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner, and in effect charging that a sworn statement made at the time of final proof concerning the purpose for which the land was sought to be purchased, etc., would constitute perjury if the oath so taken, although not expressly embraced in the statute, was required by a regulation of the Commissioner of the General Land Office, because such regulation had the force and effect of law. We shall consider the propositions *seriatim*.

a. Whilst it has been settled that in a criminal case where it plainly appeared that there was no evidence whatever justifying conviction, this court would so hold, despite the

failure to request an instruction of acquittal (*Wiborg* v. *United States,* 163 U. S. 632; *Clyatt* v. *United States,* 197 U. S. 207), this case affords no occasion for applying the rule, because it is not certified that the bill of exceptions contains the entire evidence, and we are not otherwise satisfied that it does, and further, because it is recited in the bill of exceptions that "the plaintiff offered evidence during said trial sufficient to go to the jury tending to prove each and every material allegation of the indictment."

b. Without attempting to review in detail the requested charges concerning motive and intent and the effect of advice of counsel, we think the trial judge in instructing the jury on the subject went as far in favor of the accused as it was possible for him to go consistently with right, and therefore there is no ground for complaint as to the failure to give the requested charges. The court, after having fully and carefully instructed the jury as to the operative effect of good faith in relieving the defendants from the charge made against them, in express terms noticed the question of the advice of counsel and said:

"Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel."

c. As the contentions under this head concern the instructions of the court in relation to the final proof and the effect of the regulations of the Commissioner of the General Land

Office relative to the subject, the exceptions taken to the charge in relation to the matter are in the margin.[1]

Further, as in order to dispose of these objections, it be-

[1] The defendants, each of them, also excepted to the giving of said instruction hereinbefore set forth, reading as follows: "Now, when the sworn statement is filed, the register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days and furnishes the applicant a copy of the same for publication in a newspaper published nearest the location of the premises, for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the land office satisfactory evidence, among other things, that notice of the application prepared by the register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the act; that the applicant has not sold or transferred his claim to the land since making his sworn statement, and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government may inure, in whole or in part, to the benefit of any person except himself, and that he makes his entry in good faith for the appropriation of the land exclusively for his own use and not for the use and benefit of any other person;" as not the law and misleading and directing the attention of the jury to a matter not charged in the indictment.

Defendants, each of them, also then and there excepted to the giving of said instruction as hereinbefore set forth, reading as follows: "But, as heretofore said, if he is not in good faith and has directly or indirectly made any agreement or contract in any way or manner with any persons by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any persons except himself, then he commits perjury in making his sworn statement, and in making a deposition that he has not done those things, and any person who knowingly and willfully procures and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury," and especially to the words in said paragraph, "and in making a deposition that he has not done those things," upon the ground that the same is not the law and misleading and directs the attention of the jury to a matter not charged in the indictment.

Defendants also except to the giving of the instruction hereinbefore set forth, which reads as follows: "The essential questions, then, for your determination are, does the evidence show, beyond a reasonable doubt, that Williamson, Gesner and Biggs, or two of them, knowingly and intentionally entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment, as lands subject to entry under the timber and stone act, after having first come to an agreement or under-

comes necessary to consider not only the scope of the indictment, but moreover to construe the Timber and Stone Act, and, it may be, to determine the validity of the regulation of the General Land Office heretofore referred to, the material portions of the act are in the margin,[1] as well as the regulation in question.

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standing with such persons that they would convey the title which they might acquire to Williamson and Gesner, or either of them, and, next, does the evidence satisfy you beyond a reasonable doubt that these defendants, so combining and agreeing, intended that the persons, or some of the persons, whom they might procure or induce to make such entries should willfully and deliberately, in making their sworn statements or applications to purchase such lands at the time of making the first paper called a sworn statement or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner on applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants, and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner by which the title to be acquired from the United States should inure in whole or in part to the benefit of any persons other than himself or herself," and especially to the words therein "or some of the persons," and also to the words "or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner," as misleading and not the law and applying to a matter not charged in the indictment and variant from said indictment.

[1] TIMBER AND STONE ACT.

(Approved June 3, 1878, 20 Stat. 89.)

CHAP. 151.—An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the

Contenting ourselves with referring to the quotation already made from the indictment, we are of opinion that the particular false swearing to which the indictment related was alone the

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improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have

verified written statement provided for in § 2 of the act to be made on applying to purchase the land, and therefore the indictment did not embrace a charge concerning a statement

been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

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Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands under the Homestead, Desert Land, and Other Laws, issued July 11, 1899, p. 46:

"11. The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the third section of the act, must be taken before the register and receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by the register and receiver upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. The accuracy of affiant's information and the *bona fides* of the entry must be tested by close and sufficient oral examination. The register and receiver will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure, in whole or in part, to the benefit of any person or persons except himself. They will certify to the fact of such oral examination, its sufficiency, and his satisfaction therewith."

or deposition under oath required to be made by any regulation of the Commissioner of the General Land Office, after the publication of the notice, and when the period had arrived for final action by the land office on the application to purchase. It seems to us clear that the indictment was thus restricted, since all the language in it speaks as of the time of the first statement, no reference is made to any regulation of the Commissioner supplementing the statute in any particular, and each of the nineteen overt acts charged to have been committed exclusively relates to the statement required by § 2, and to none other. We are of opinion that the elaborate argument made by the Government concerning the use in the indictment of the words, declarations and depositions can serve only to suggest ambiguity in the indictment, and possible doubt as to the meaning of the pleader. But, as of course, in a criminal case, doubt must be resolved in favor of the accused, we hold that the indictment does not charge a conspiracy to suborn perjury in respect of the making of the final proofs, and therefore that there was prejudicial error committed in the instructions to the jury on that subject which were excepted to.

As, however, the question which we have hitherto passed over concerning the admissibility of the final proof to show motive in making the original application may arise at a future trial, even although it be that the indictment charges only a conspiracy to suborn perjury as to the original application, we proceed to consider that subject. To do so it becomes necessary to determine whether the statute requires an applicant, after he has made his preliminary sworn statement concerning the *bona fides* of his application and the absence of any contract or agreement in respect to the title, to additionally swear to such facts after notice of his application has been published and the time has arrived for final action on the application. And this of course involves deciding whether the regulation of the Commissioner exacting such additional statement at the time of final hearing is valid. The inquiry concerns only the

second and third sections of the act. Turning to the second section, it will be seen that it requires the applicant to make a sworn statement, giving many particulars concerning the land—its unfitness for cultivation; its being uninhabited; the absence of mineral, etc.,—followed by the requirement that the applicant shall declare that he makes the application, not for the purpose of speculation, but in good faith, and that he intends to appropriate the land to his own exclusive use and benefit and that no agreement has been made, directly or indirectly, with any person or persons whatsoever by which the title to be acquired from the Government shall inure, in whole or in part, to any person except the applicant. And the section concludes by causing any false statement made in the sworn application to constitute the crime of perjury. Examining the third section, it will be seen that it provides that upon the filing of said statement, as provided in the second section, it shall be the duty of the local land officer to post a notice of the application in his office for sixty days, to furnish the applicant with a copy of such notice for publication, at the expense of the applicant, in the nearest newspaper for sixty days, and when such period has expired, on proof of the publication and of certain facts, which the statute expressly enumerates, the applicant shall, upon payment of the requisite charge, in the absence of a contest, be entitled to a patent for the land. Examining the items, which the statute requires the applicant to make proof of, after showing publication, it is apparent that while some of the things referred to in the prior section, and which are required to be stated in the preliminary proof are reiterated, all requirement is omitted of any statement regarding a speculative purpose on the part of the applicant, his *bona fides*, and his intention to acquire for himself alone. When the context of the statute is thus brought into view we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring

title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom. We say this, because as the third section reëxacts in the final application a reiteration of some of the requirements concerning the character of the land made necessary in the first application and omits the requirement as to the *bona fides*, etc., of the applicant, it follows under the elementary rule that the inclusion of one is the exclusion of the other, that the reexacting of a portion only of the requirements was equivalent to an express declaration by Congress that the remaining requirements should not be exacted at the final proof. And this becomes particularly cogent when the briefness of the act is considered, when the propinquity of the two provisions is borne in mind, a propinquity which excludes the conception that the legislative mind could possibly have overlooked in one section the provisions of a section immediately preceding, especially when in the last section some of the requirements of the prior section are reëxpressed and made applicable to the final statement. Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right. These conclusions are directly sustained by a recent ruling in *Adams* v. *Church*, 193 U. S. 510, construing the timber culture act. Under that law an applicant for entry was obliged, among other things, in making his application to swear to his good faith and to the absence of speculative purpose, in the exact words of the statute now under consideration. But in the timber culture act, as in the timber and stone act, the requirement was not reimposed in respect to the final proof. In the cited case the entryman who had complied with the statute in making his application had, between the date of the application and the making of final proof, disposed of his right, and the question was whether by so doing he had for-

feited his claim. In deciding adversely to the contention that he had the court said (p. 516):

"But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract, as was found to exist by the Supreme Court of Oregon, would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. *Myers* v. *Croft*, 13 Wall. 291."

It is elaborately insisted on behalf of the Government that there is a difference between the timber culture act and the timber and stone act, resulting from the fact that in the one case in the interim between the entry and the final proof a long time must elapse and much is required to be done by the applicant, while in the other a short time intervenes and substantially nothing is required to be done. But this reasoning, in effect, assails the wisdom of Congress in omitting the requirement in the act under consideration and affords no ground for inserting in the act requirements which Congress has, by express intendment, excluded therefrom. Besides, the weakness of the argument becomes apparent when it is borne in mind that the timber and stone act and the timber culture act were enacted by the same Congress and with only a few days' interval between the two.

It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled

to do that at the final hearing which the act of Congress must be considered as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in *Adams* v. *Church, supra,* at p. 517: "To sustain the contention . . . would be to incorporate . . . a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject." True it is that in the concluding portion of § 3 of the timber and stone act it is provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office." But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred. As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands.

Reversed and remanded.

Mr. Justice Harlan is of opinion that no substantial error was committed, and the judgment should be affirmed.

THE EMPLOYERS' LIABILITY CASES.[1]

IN ERROR TO THE CIRCUIT COURTS OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE AND THE WESTERN DISTRICT OF KENTUCKY.

Nos. 216, 222. Argued April 10, 11, 12, 1907.—Decided January 6, 1908.

In testing the constitutionality of an act of Congress this court confines itself to the power of Congress to pass the act and may not consider any real or imaginary evils arising from its execution.

Under the grant given by the Constitution to regulate interstate commerce and the authority given to use all means appropriate to the exercise of the powers conferred, Congress has power to regulate the relation of master and servant to the extent that such regulations are confined solely to interstate commerce.

An act addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employés, without qualification or restriction as to the nature of the business at the time of the injury, of necessity includes subjects wholly outside of the power of Congress under the commerce clause of the Constitution.

The legislative power of Congress over the District of Columbia and the Territories is plenary and does not depend upon the special grants of power, such as the commerce clause of the Constitution.

To restrict a general act of Congress relating to common carriers, by interpretation to interstate commerce so as to validate it as to the carriers in the several States, would unduly restrict it as to carriers in the District of Columbia and the Territories.

While it is the duty of this court to so construe an act of Congress as to render it constitutional if it can be lawfully done, an ambiguous statute cannot be rewritten to accomplish this result.

Where a statute contains some provisions that are constitutional and some that are not, effect may be given to the former by separating them from the latter, but this rule does not apply where the provisions of the statute are dependent upon each other and are indivisible, or where it does not plainly appear that Congress would have enacted the constitutional legislation without the unconstitutional provisions.

One engaging in interstate commerce does not thereby submit all his business to the regulating power of Congress.

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[1] Docket titles, No. 216, Damselle Howard, Administratrix of Will Howard, deceased, *v.* Illinois Central Railroad Company and The Yazoo and Mississippi Valley Railroad Company; No. 222, N. C. Brooks, Administratrix of Morris S. Brooks, deceased, *v.* Southern Pacific Company.

While the act of Congress of June 11, 1906, 34 Stat. 232, known as the Employers' Liability Act, embraces subjects within the authority of Congress to regulate commerce, it also includes subjects not within its constitutional power, and the two are so interblended in the statute that they are incapable of separation and the statute is therefore repugnant to the Constitution of the United States and non-enforcible.[1]

THE facts, which involve the constitutionality of the act of Congress of July 11, 1906, relating to the liability of common carriers in the District of Columbia and Territories and common carriers engaged in interstate commerce to their employés, are stated in the opinion.

Mr. William R. Harr for plaintiff in error in No. 216.

Mr. J. E. Torrance, with whom *Mr. S. C. Bloss*, *Mr. Geo.*

[1] MR. JUSTICE WHITE delivered the opinion of the court. See p. 489.

MR. JUSTICE DAY concurred with MR. JUSTICE WHITE. See p. 504.

MR. JUSTICE PECKHAM delivered a separate opinion, with which the CHIEF JUSTICE and MR. JUSTICE BREWER agreed, concurring in result and in the proposition that as to traffic or other matters within the State the act is unconstitutional and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce, but stating that he was not able to agree with all that is stated in the opinion of the court as to the power to legislate upon the subject of the relations between master and servant. See p. 504.

MR. JUSTICE MOODY delivered a separate opinion, agreeing with the opinion of the court in respect to the power of Congress to regulate the relation between common carriers engaged in interstate commerce and their employés, but dissenting from the result and conclusion that the act embraces subjects not within the constitutional power of Congress to regulate. See p. 504.

MR. JUSTICE HARLAN, with whom MR. JUSTICE MCKENNA concurred, delivered a separate opinion, agreeing with that part of the opinion of the court which held that it was within the power of Congress to prescribe, as between an interstate carrier and its employés, the rule of liability established by the act, but dissenting as to the result and as to the interpretation given to the act in the opinion of the court and concurring in the views expressed by MR. JUSTICE MOODY as to the scope and interpretation of the act. See p. 540.

MR. JUSTICE HOLMES delivered a separate dissenting opinion expressing the view that the words of the act could be read in such a way as to save its constitutionality by limiting its scope where necessary and that as so construed the act is valid in its main features under the Constitution. See p. 541.

Durelle and *Mr. W. M. Smith* were on the brief, for plaintiff in error in No. 222:

The act of June 11, 1906, is a regulation of interstate commerce. The Constitution is one of enumeration and not of definition; the power of Congress over interstate commerce is as extensive as that of the legislative body of any sovereign state over its commerce. *Gibbons* v. *Ogden*, 9 Wheat. 187.

The power of Congress to regulate commerce extends to all the means, appliances, facilities and instrumentalities of commerce. *Welton* v. *Missouri*, 91 U. S. 275, 280; *Northern Securities Company* v. *United States*, 193 U. S. 197, 344; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, 16. And this power extends to persons as well as property. *Linn Sing* v. *Washburn*, 20 California, 543; *"Head Money Cases,"* 18 Fed. Rep. 135; *Memphis & Little Rock Ry. Co.* v. *Nolan &c.*, 14 Fed. Rep. 532. This power also extends to those internal concerns which affect the States generally. See *Gibbons* v. *Ogden*, *supra*, 195.

A statute limiting a vessel owner's liability is valid. *The Lottawanna*, 21 Wall. 577; *Providence &c. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 589. See opinion of Harlan, J., sustaining an employers' liability act of the State of Ohio. *Peirce* v. *Van Dusen*, 78 Fed. Rep. 700.

State acts of this character have been held constitutional, as within the police powers of the State. *Missouri Pacific R. R. Co.* v. *Mackey*, 33 Kansas, 298; *S. C.*, 127 U. S. 205; *Chicago &c. R. R. Co.* v. *Zernecker*, 59 Nebraska, 689.

But the State may enact certain legislation for a purpose that is lawful, as police or quarantine legislation, while Congress may enact the same measures for the purpose of regulating commerce or as war regulation. *Gibbons* v. *Ogden*, *supra*. See *Chicago &c. Ry. Co.* v. *Solan*, 169 U. S. 133, 137, upholding a state statute denying to common carriers a right to limit their common law liability. Freund on Police Powers, 1904, p. 66, and also *Houston & T. C. R. R. Co.* v. *Mayes*, 201 U. S. 321.

Congress has the power to go beyond the general regulations

of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and as to whatever ground shall be covered by those directions, the exercise of the state power is excluded. Congress may establish police regulations, as well as the States; confining their operations to the subject over which it is given control by the Constitution. Cooley's Const. Lim. (7th ed.), 856 and see *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; *Champion* v. *Ames* (Lottery Cases), 188 U. S. 321. For the purpose of regulating commerce Congress can exercise the power of eminent domain. *Luxton* v. *Bridge Company*, 153 U. S. 525.

Congress by the act of June 11, 1906, has placed an additional burden on interstate common carriers and thus on interstate commerce and this brings the act clearly within the commerce clause of the Constitution. *Hall* v. *De Cuir*, 95 U. S. 485, 488. See message of President Roosevelt, December 5, 1906.

The Employers' Liability Act is a regulation of interstate commerce. It places the cost of certain classes of injuries to employés uniformly upon the interstate common carrier. If each State is allowed to say for itself whether or not the cost is to be borne by the interstate common carrier or by the family of the servant, it is apparent that common carriers passing through certain States with no liability acts will have an unnatural advantage over those not so situated. This uniformity is desirable. *Railroad Company* v. *Baugh*, 149 U. S. 368.

There should be no unnatural elements such as might be created by particular state laws or constructions by state courts placed upon the fellow-servant rule to vary the element of liability for injuries to employés in the general problem of the costs of interstate commerce.

The Federal liability act will secure better and safer service. The fellow-servant doctrine was based in part on a view that the best service was obtained by placing the cost of certain negligence on the servant. *Priestly* v. *Fowler*, 3 M. & W. 1; *Murray* v. *South Carolina R. R. Co.*, 1 McMull L. (S. Car.)

385; *S. C.*, 36 Am. Dec. 286; *Farwell* v. *Boston &c. R. R. Co.*, 38 Am. Dec. 339; *Sullivan* v. *Mississippi &c. R. Co.*, 11 Iowa, 421; *Union Pacific R. R. Co.* v. *Erickson*, 41 Nebraska, 1.

Congress now takes the view that better service will be secured by the rule of liability established by the act of June 11, which is similar in its scope to the Safety Appliance Act. 27 Stat. L. 531; *Chicago &c. R. R. Co.* v. *Ross*, 112 U. S. 377. That is constitutional. *Kansas City &c. R. R. Co.* v. *Flipps*, 138 Alabama, 487. It has been construed in *Johnson* v. *Southern Pac. Co.*, 117 Fed. Rep. 462; affirmed 196 U. S. 1, and in *Chicago &c. R. R. Co.* v. *Voelker*, 129 Fed. Rep. 526; *S. C.*, 116 Fed. Rep. 867.

The form of the rule or statute regulating interstate commerce is within the discretion of Congress. To effect this end of uniformity Congress may use such means as it may deem appropriate. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423.

An act of Congress to be within its power to regulate commerce need not upon its face, expressly prescribe a rule for carrying on commercial intercourse among the States. The rule may be prescribed by implication. A law which may reasonably be calculated to further the freedom, uniformity and safety of commerce, or its instrumentalities, prescribes a rule for carrying on commerce within the scope of the power to regulate commerce among the States.

The act shows by its title and in its body that it applies to interstate commerce, and it is not framed so that its provisions are applicable alike to all commerce.

The court will not broaden the statute by construction to include an employé of an interstate common carrier, who is concerned wholly in that part of the carrier's business which is intrastate, for the purpose of then holding the entire act unconstitutional. It will rather hold in a proper case that such an employé is not within the view of the act. *Kansas* v. *Smiley*, 65 Kansas, 240; *S. C.*, 196 U. S. 447.

State statutes relating to commerce which are in terms so general that interstate as well as intrastate commerce may be included are construed to include only what the legislature

might lawfully include in them. 17 Am. & Eng. Ency. of Law (2d ed.), 76; *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587.

An act will be so construed, if possible, as to avoid conflict with the Constitution although such a construction may not be the most obvious or natural one. The courts may resort to an implication to sustain a statute, but not to destroy it. *Atlantic City Water Works Co.* v. *Consumers' Water Co.*, 44 N. J. Eq. 427; 1 Sutherland, Stat. Const. (2d ed.), § 298, p. 584; *Opinion of the Justices*, 41 N. H. 555.

A statute will not be held unconstitutional merely because there may be persons to whom or cases in which, it cannot constitutionally apply; but it is deemed constitutional and to be construed not to apply to the latter persons or cases, on the grounds that courts are bound to presume that the legislature did not intend to violate the Constitution. And see *The Trade-Mark Cases*, 100 U. S. 82. The attempt to justify the act under the commerce clause was an afterthought; but in this case the phraseology of the act plainly indicates under what clause of the Constitution Congress assumed to act. *Illinois Central R. Co.* v. *McKendree* can also be distinguished.

The construction of the Liability Act now contended for here has been given the Safety Appliance Act in *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1. The wording of this act is open to all the objections that counsel urge against the act under consideration. If the car or engine in a particular case is not engaged as an instrumentality of interstate commerce, then the Safety Appliance Act will not be enforced.

But in the cases at bar, all the employés and trains concerned were engaged in interstate commerce, and the right of the plaintiff to recover is clearly within the terms of the act.

The "fellow-servant" rule as followed by the Federal courts is a rule of judicial decision and construction. The act of June 11, 1906, changes this rule of determining liability. The power to determine such rules as the Federal courts shall follow has always been exercised by Congress.

The Attorney General as *amicus curiæ* by leave of the court upon the constitutionality of the Employers' Liability Act, with whom *Mr. William R. Harr*, Special Assistant to the Attorney General, was on the brief:

The act was a natural and logical step from the Safety Appliance Act, which required interstate railroads to equip their cars with certain described appliances and abolished the doctrine of assumption of risk on the part of employés in the case of their failure to do so. The acts of March 3, 1901, 31 Stat. 1446; of June 30, 1906, 34 Stat. 838; of March 4, 1907, 34 Stat. 1415, all relating to the relation of employers and employés engaged in interstate commerce are all part of a general scheme by Congress to lessen the dangers of railroad transportation to those engaged in or connected therewith. If this statute is unconstitutional, it is difficult to see how, on principle, the other measures referred to can be sustained. See also the President's annual messages of December 6, 1904, 39 Cong. Rec. 11; of December 5, 1905, 40 Cong. Rec. 93; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1.

As to the question of public policy involved in maintaining the fellow-servant rule see McKinney on Fellow Servants, § 10; *Priestley* v. *Fowler*, 1837, 3 M. & W. 1; *Hutchinson* v. *York &c. Ry. Co.*, 1850, 5 Exch. 341; *McMurray* v. *So. Car. R. R. Co.*, 1838, 1 McMullan, *385; *Ryan* v. *Cumberland Valley R. R. Co.*, 1854, 23 Pa. St. 384; *Farwell* v. *Boston &c. R. R. Co.*, 1842, 4 Metc. 49, 57. But see also *Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 205 U. S. 1; 2 Labbatt on Master & Servant, chaps. 36–40, and the acts of Parliament of 1881, 1897 and 1902; Cooley on Torts, 542, 545.

The Parliament of England and many of the state legislatures of this country, however, have not acquiesced in the views as to the requirements of public policy entertained by the courts that have created and extended the fellow-servant doctrine, so far, at least, as the more hazardous employments, and particularly railroading, are concerned. It also appears that other European countries, including France, Germany

and Austria, are in accord with the more enlightened views on this subject.

Many States have legislated on the subject, modifying the common law rule. See the acts of Georgia of 1855; of Iowa in 1862; of Kansas in 1874.

The English Employers' Liability Act of 1880–1881 has been followed, more or less closely, by Alabama in 1884; Massachusetts in 1887; Colorado in 1893; Indiana in 1893; New York in 1902. The statutes of these States do not limit the amount of recovery.

The following States have also materially modified or abolished the fellow-servant doctrine: Ohio in 1890; Mississippi in 1890; Texas in 1891; Arkansas in 1893; South Carolina in 1895; North Carolina in 1897; Utah in 1875; Wisconsin in 1889.

And see sustaining this legislation: *Chicago &c. R. R. Co.* v. *Ross*, 112 U. S. 377, 382; Shearman & Redfield on Negligence (5th ed.), § 178. See also *Lovell* v. *Howell*, L. R. 1 C. P. D. 161, 167; *Ziegler* v. *Danbury &c. R. R. Co.*, 52 Connecticut, 543, 556; *Crispin* v. *Babbitt*, 81 N. Y. 516, 528.

As the enforcement or abrogation of the rule is a matter of public policy, and necessarily a matter for the consideration and control of the legislature under our governmental systems, to whom matters of public policy are primarily committed, Congress is the proper authority to determine what public policy requires with reference to common carriers engaged in interstate commerce.

State legislation modifying or abolishing the common law doctrine of common employment and assumption of risk has been uniformly sustained by the state and Federal courts, as a proper exercise of the police power. *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205, 208; *Minneapolis Ry. Co.* v. *Herrick*, 127 U. S. 210; *Chicago &c. R. R.* v. *Pontius*, 157 U. S. 209; *Baltimore & Ohio Railway* v. *Voight*, 176 U. S. 498; *McGuire* v. *C., B. & Q. Ry.*, 108 N. W. Rep. (Iowa) 902, 908; *Hancock* v. *Railway Co.*, 124 N. Car. 222, upholding fellow-servant law of

that State; *Pittsburgh &c. Railway* v. *Montgomery*, 152 Indiana, 1, sustaining act of that State. And see also *Baltimore &c. Railroad* v. *Little*, 149 Indiana, 167; *Baltimore &c. Railroad* v. *Peterson*, 156 Indiana, 1; *Indianapolis &c. Railroad* v. *Houlehan*, 157 Indiana, 494; and *Tullis* v. *Lake Erie & Western*, 175 U. S. 348. The Georgia fellow-servant act has been held to be constitutional. *Railroad Co.* v. *Thompson*, 54 Georgia, 509; *Georgia Railroad* v. *Ivey*, 73 Georgia, 499; *Georgia Railroad* v. *Brown*, 86 Georgia, 320; *Georgia Railroad* v. *Miller*, 90 Georgia, 574. As to labor statute of Missouri, see *St. Louis &c. Railway* v. *Matthews*, 165 U. S. 1, 25; of Utah, *Holden* v. *Hardy*, 169 U. S. 366, 391, 397; of Arkansas, *St. Louis & Iron Mountain R. R. Co.* v. *Paul*, 173 U. S. 404. See also *Atchison &c. Railroad* v. *Matthews*, 174 U. S. 96.

The liability of common carriers for injuries to their employés is a proper subject of governmental regulation, and a State in the exercise of its police powers may make such reasonable regulations on the subject with respect to all carriers operating within its limits as the legislature thereof may deem necessary. Being a proper subject of governmental regulation, Congress, in the exercise of its constitutional power to regulate interstate and foreign commerce, may regulate the liability of such common carriers as are engaged in that commerce.

See the definition of the power of Congress over interstate and foreign commerce given in *Gibbons* v. *Ogden*, 9 Wheat. 1 (p. 197). From the foundation of the Government the power of Congress to regulate interstate and foreign commerce has been construed to extend to the regulation of the instrumentalities by which such commerce is conducted, and the regulation of such instrumentalities to include control over the person operating the same. Concurring opinion in *Gibbons* v. *Ogden*, of Johnson, J., 9 Wheat. 229; *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; Pomeroy on Const. Law, §§ 379 *et seq.*; *Patterson* v. *Bark Eudora*, 190 U. S. 169, 179, upholding the power

of Congress to legislate for protection of seamen by act of December 21, 1898, 30 Stat. 755, 763. See also *Pensacola Telegraph Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1, 9; *Bowman* v. *Chicago &c. Railway*, 125 U. S. 465; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 577, 587; *Stockton* v. *Baltimore &c. Railroad*, 32 Fed. Rep. 9. In *California* v. *Pacific Railroad*, 127 U. S. 1, 39, the power of Congress to provide for interstate roads was sustained; as to the Panama Canal see *Wilson* v. *Shaw*, 204 U. S. 24; for a review of legislation in regard to interstate commerce and regulations see *In re Debs*, 158 U. S. 564, 578; *The Lottery Case*, 188 U. S. 321, 352; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 569.

As to the claim that if this commerce is subject to regulation at all it can only be by the States, the answer is that the regulation of interstate commerce has been committed by the Constitution to Congress; and while state legislation, passed in the exercise of its police power, may control the liability of common carriers within their limits, even though they be engaged in interstate commerce, yet such legislation must yield to the plenary and paramount authority of Congress over interstate commerce whenever it chooses to exercise it. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Cooley* v. *Board of Wardens*, 12 How. 299, 320; *Morgan* v. *Louisiana*, 118 U. S. 455, 463; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, Chattanooga & St. Louis Ry.* v. *Alabama*, 128 U. S. 96, 100; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 662; *Hennington* v. *Georgia*, 163 U. S. 299, 317; *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628, 631; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200; *Reid* v. *Colorado*, 187 U. S. 137.

The power of Congress to regulate the liability of common carriers and others engaged in interstate commerce for injuries to persons or property having been distinctly recognized, it is difficult to see why it may not regulate their liability to their

employés, the protection of interstate commerce being as much involved in the one case as in the other. *Mo. Pac. Railway* v. *Mackey, supra; Pierce* v. *Van Dusen*, 78 Fed. Rep. 693, 698.

The liability of common carriers engaged in interstate commerce for injuries to their employés occasioned by their negligence is a matter that vitally enters into and affects such commerce. *Baltimore and Ohio Railroad* v. *Baugh*, 149 U. S. 368.

No one can successfully question the correctness of the court's statement that the liability of a common carrier engaged in interstate commerce for injuries to its employés is a question in which the whole country is interested, and should be governed by a uniform rule. But simply holding that the question is one of general law, which a Federal court may determine for itself in the absence of a state statute on the subject, does not tend to secure the desired uniformity, but only causes greater complexity of decision. Besides, most of the States have legislated on the subject and their statutes are conflicting. Uniformity of decision, it is manifest, can only be secured by National legislation.

As to power of Congress to provide this uniformity see *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477; *Martin* v. *Pittsburg &c. Railroad*, 203 U. S. 284 and cases cited *supra*.

The acts of Congress limiting liability of shipowners, §§ 4283, 4289, Rev. Stat., rest on the power of Congress to regulate interstate and foreign commerce. *Lord* v. *Steamship Co.*, 102 U. S. 541; *The Katie*, 40 Fed. Rep. 480; *In re Garnett*, 141 U. S. 1; *The Lottawanna*, 21 Wall. 558, 576; *Butler* v. *Steamship Co.*, 130 U. S. 527. The Limited Liability Act was passed by Congress for the purpose of fostering and encouraging the American merchant marine and the American foreign carrying trade. Such also was undoubtedly the purpose of the Harter Act, approved February 13, 1893, 27 Stat. 445, which has been liberally construed and applied by this court in a number of cases. *Calderon* v. *Atlas Steamship Co.*, 170 U. S.

272; *The Carib Prince*, 170 U. S. 655; *The Silvia*, 171 U. S. 462; *Knott* v. *Botany Mills*, 179 U. S. 69; *International Nav. Co.* v. *Farr &c. Mfg. Co.*, 181 U. S. 218.

It is for Congress to determine what public policy requires with respect to common carriers engaged in interstate commerce by land or water. Possibly the rule established by Congress is unwise, possibly it is extreme, but neither of these considerations justifies the interference of the judiciary or is an argument against the existence of the power. *United States* v. *Joint Traffic Association*, 171 U. S. 569, 571, 573; *Gibbons* v. *Ogden*, 9 Wheat. 1; *The Lottery Case*, 188 U. S. 363; *McCray* v. *United States*, 195 U. S. 27, 55.

The power of Congress to regulate instrumentalities of interstate commerce is not dependent upon their mode of creation. It is not limited to corporations created by Congress itself.

While a corporation may get from a State its franchise to engage in interstate commerce, it can only exercise that franchise subject to the regulations which Congress may make for the protection of interstate commerce. *Hale* v. *Henkel*, 201 U. S. 43, 75; *Northern Securities Case*, 193 U. S. 197; *New York & New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361.

The situation is similar to that with respect to the power of Congress to regulate bridges across the navigable waters constructed under the authority of the States. The franchise granted by the State is held subject to the paramount authority of Congress to regulate interstate commerce. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *West Chicago Street Railroad Co.* v. *Chicago*, 201 U. S. 506, 524; *Union Bridge Co.* v. *United States*, 204 U. S. 364.

Congress by this act has established a rule of conduct and the statute imposes exactly the same rule of conduct upon carriers with respect to employés as is to be imposed by the common law with respect to passengers and strangers.

Congress has the same power to alter the common law rule as to non-survivorship in cases affecting interstate commerce of

actions *ex delicto* as a State has to change the rule of non-survivorship of such actions.

In this respect the act of Congress creates no innovation, as such statutes exist in most, if not all, of the States. And see *Sherlock* v. *Alling*, 93 U. S. 99, as to power of State.

So also Congress has power to alter rule as to effect of contributory negligence. While there is no question of contributory negligence in this case it is proper to refer to it in connection with the act.

The common law rule that contributory negligence bars a recovery, like the fellow-servant doctrine, is founded upon the supposed interests of public policy, and it is for Congress to determine in regulating this subject whether public policy requires the modification of both rules.

The rule which Congress has adopted in the present statute is, theoretically at least, ideal. If it should operate harshly or unjustly, the parties concerned must apply to Congress and not to the courts for relief.

The statute simply provides that contributory negligence on the part of an employé shall not bar a recovery where it was slight and that of the employer gross in comparison; but it also provides that the damages shall be diminished in proportion to the amount of negligence attributable to the employé.

The aim of Congress was to do exact justice. The wisdom of such a rule as applied to marine torts was recognized in *The Max Morris*, 137 U. S. 1.

The same doctrine was applied to *The Mystic*, 44 Fed. Rep. 399; *The Frank & Willie*, 45 Fed. Rep. 405, 497; *The Nathan Hale*, 48 Fed. Rep. 700; *The Julia Fowler*, 49 Fed. Rep. 279; *The Serapis*, 49 Fed. Rep. 396, 397; *The J. & J. McCarthy*, 55 Fed. Rep. 86; *The Cyprus*, 55 Fed. Rep. 333; *Wm. Johnson & Co.* v. *Johnson*, 86 Fed. Rep. 888. All except the first were cases in which an injured employé, himself at fault, was allowed to recover divided or partial damages for injuries received through the negligence of his employer.

For modifications of the strict rule of contributory negligence

see 2 Labbatt on Master and Servant, 782, citing statutes of Tennessee, Georgia and Ohio. See also H. R. Rep., No. 2335, 59th Cong., 1st Sess.

As to the construction of the act, it is limited to subjects within the control of Congress and does not affect any matters not within such control.

Whether a particular carrier is engaged in interstate or foreign commerce within the meaning of the act is a question to be determined as the occasion arises.

As the States, in the exercise of their police powers, may enact legislation of the kind here in question, although it may incidentally affect interstate commerce, by a parity of reasoning, Congress, in the exercise of its authority to regulate interstate commerce, may enact such legislation, although it incidentally affects state commerce.

There is an essential difference between the power of Congress over an article or commodity which ceases to be a subject of interstate commerce the moment its interstate transportation ceases, and the instrumentality by which such commodity may be transported. *Johnson* v. *Southern Pacific*, 196 U. S. 1; *Voelker* v. *Chicago &c. Railway*, 116 Fed. Rep. 867; *S. C.*, 129 Fed. Rep. 522, 528; *United States* v. *Great Northern Railway*, 145 Fed. Rep. 438.

It is not contended that Congress can regulate the exclusively local business in which a common carrier may be engaged. If a railroad company operating an interstate road were also operating a purely local line, this act would not apply to such line, because, in respect thereto, the railroad company would not be a common carrier engaged in interstate commerce. The act would no more apply to a purely local line of the company than to any other business—the mining of coal, for instance—in which it might be engaged. *The Trade-Mark Cases*, 100 U. S. 82, can be distinguished as the present statute discloses on its face that it is intended as a regulation of interstate and foreign commerce, being expressly confined to common carriers engaged in such commerce. The "main purpose"

of the act is not "to establish a regulation applicable to all trade, to commerce at all points," but simply to regulate an instrumentality of interstate commerce. It is not "designed to govern commerce wholly between citizens of the same State," but simply to protect interstate commerce. Local commerce, if affected at all, is affected only indirectly and incidentally. It has never been held that Congress was divested of control over the instrumentalities of interstate commerce simply because local commerce might incidentally be affected by its regulations. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; The *"Beef Trust Case," Swift* v. *United States*, 196 U. S. 375; *New York & New Haven* v. *Int. Com. Comm.*, 200 U. S. 361.

On its face this statute relates only to interstate commerce. It seeks only to regulate the liability of a common carrier engaged in such commerce to its employés—that is, the persons employed by it for the purpose of carrying on its business, and the only business referred to is trade and commerce between the several States. It is a remedial statute and should, therefore, be liberally construed so as to accomplish the end in view. If to construe the statute to extend to employés of such carrier not engaged in or connected with the interstate business of the carrier would render the statute unconstitutional, such construction manifestly ought to be rejected. The elementary rule that a statute should not be construed so as to render it unconstitutional when a constitutional construction is open to the court hardly needs to be argued. *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Harris*, 106 U. S. 629; *Baldwin* v. *Franks*, 120 U. S. 678; *James* v. *Bowman*, 190 U. S. 127; *The Trade-Mark Cases*, distinguished. The statutes there involved were, on their face, plain attempts to regulate matters beyond the control of Congress, and so also in *Illinois Central Railroad* v. *McKendree*, 203 U. S. 514.

This case falls under *McCullough* v. *Virginia*, 172 U. S. 102, 112; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Tiernan* v. *Rinker*, 102 U. S. 123; *In re Rahrer*, 140 U. S. 545, 563.

Nor does the fact that the act extends to all employés of common carriers engaged in interstate and foreign commerce, irrespective of the danger of their particular employments, vitiate it. The business of common carriers forms a proper basis of classification and special legislation. It is not necessary for the legislature to go further and differentiate between the different classes of employés of such carriers according to the degree of danger to which they may be subjected, although possibly it may do so. As is well known, there is every variety of risk in the conduct of such carriers and the power of the legislature to distinguish, select and classify objects of legislation necessarily has a wide range of discretion, and it is sufficient to satisfy the demands of the Constitution if the classification is practical and not palpably arbitrary. *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 352, 353, referring to *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557. The law is equitable, but were it otherwise, the injustice or harshness of the rule would be no just cause for declaring it invalid. In that case, as has been often held, the remedy lies not with the courts, but with the legislature. If necessary, under *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, the general language of the statute might be restricted to those employés of common carriers engaged in interstate commerce whose business is of a hazardous nature, as it was the dangers of transportation which were intended to be remedied. And see *Jones* v. *Guaranty and Indemnity Co.*, 101 U. S. 626.

These matters relate to the application of the statute to particular cases, and do not affect its constitutionality.

The act in question has recently been held to be constitutional by several Federal courts. *Plummer* v. *Northern Pacific Railway Co.*, Circuit Court, Western District of Washington, Hanford, J., decided March 2, 1907; *Spain* v. *St. Louis & San Francisco Railroad Co.*, District Court, Eastern District of Arkansas, Trieber, J., decided March 13, 1907; *Kelley* v. *Great Northern Railway Co.*, Circuit Court, District of Minnesota,

Morris, J., decided March, 1907; *Snead* v. *Central Georgia Railway Co.*, Circuit Court, Southern District of Georgia, Eastern Division, Speer, J., decided March 25, 1907.

Mr. J. M. Dickinson, with whom *Mr. Charles N. Burch* and *Mr. Blewett Lee* were on the brief, for defendants in error in No. 216:

The Employers' Liability Act is not a regulation of commerce and is, therefore, unconstitutional and void. The Government of the United States is one of enumerated powers, and unless authority can be found in the National Constitution for the enactment of any particular legislation, then such authority does not exist. The Constitution of the United States specifies what powers Congress has and it has those powers therein specified and none other, except such as are necessarily implied to carry into effect those which are granted. *Gibbons* v. *Ogden*, 9 Wheat. 1, 195; *Veazie & Young* v. *Moor*, 14 How. 568; *Railroad Co.* v. *Richmond*, 19 Wall. 584; Tucker on Const. of U. S., § 250; Cooley's Const. Lim. (7th ed.), 11; *Welton* v. *Missouri*, 91 U. S. 275; *The Lottery Cases*, 188 U. S. 321; *Williams* v. *Fears*, 179 U. S. 270, 278.

This power of Congress must be exercised in a constitutional way. It is not destructive of the rights and guaranties which are to be found in other sections of the Constitution and the amendments thereto. The power to regulate commerce cannot be so exercised as to deprive a citizen of property without due process of law, but must be exercised in subordination to the limitations and guaranties of the Constitution. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312.

The Employers' Liability Act prescribes no rule for the regulation of commerce, whether commerce be understood to be either traffic or intercourse. It defines the liability of an interstate carrier to his employés, creates new rights of action in favor of such employés, and takes away from the common carrier defenses heretofore available. Such legislation is not a regulation of commerce, and Congress has no more

power to define the liability of common carriers, engaged in interstate commerce, to their employés, than it has power to legislate on the domestic relations of merchants engaged in interstate commerce. The argument that this act is a constitutional regulation of interstate commerce proceeds upon the fundamentally erroneous theory that Congress has power to regulate persons engaged in interstate commerce in all the relations of life,—whereas, the power conferred by the Constitution is only the regulation of the commerce itself.

No argument to sustain the constitutionality of the act in question can draw any support from the Safety Appliance Acts of March 2, 1893, April 1, 1896 and March 2, 1903.

Those acts definitely apply to instrumentalities of interstate commerce.

While undoubtedly Congress has power to enact laws to carry into effect and to execute other laws, which it may constitutionally enact; but the laws to be carried into effect must be constitutionally enacted; the laws which carry into execution the constitutional powers of the Government, must be necessary and proper; that is they must be appropriate. *Hepburn* v. *Griswold*, 8 Wall. 603; *Martin* v. *Hunter*, 1 Wheat. 304; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 423.

It is a general rule, that what cannot be done directly from defect of power, cannot be done indirectly. *Wayman* v. *Southard*, 10 Wheat. 50.

The court will determine for itself whether or not merely giving a right of action against common carriers of interstate commerce to their employés is of itself a regulation of commerce. *Mugler* v. *Kansas*, 123 U. S. 623; *Minnesota* v. *Barber*, 136 U. S. 313; *Hennington* v. *Georgia*, 163 U. S. 299.

State statutes giving rights of action for torts against interstate carriers have been held not to be regulations of interstate commerce. *Sherlock* v. *Alling*, 93 U. S. 99, 103. A Federal statute, therefore, giving similar rights of action is not a regulation of interstate commerce.

Smith v. *Alabama*, 124 U. S. 465, does not hold that giving

a right of action for injury is a regulation of commerce, and references in *Peirce* v. *Van Dusen*, 78 Fed. Rep. 693, and other cases cited by plaintiff in error, as to the power of Congress to legislate in regard to that subject, are *obiter*.

The act embraces both interstate and intrastate commerce, proposes to exercise an unconstitutional power over intrastate commerce, the police power of the States, the power of the States to regulate the rights of their citizens *inter sese* in matters not directly affecting interstate commerce, is inseparable as to its interstate commerce features, and, therefore, must fail *in toto*.

As to what interstate commerce is, see Sutherland on U. S. Constr. 95; *Welton* v. *Missouri*, 91 U. S. 275; *Addyston Pipe Case*, 175 U. S. 211, 241; *License Cases*, 5 How. 504, 574, 620, 625; *Passenger Cases*, 7 How. 283, 400; *License Tax Cases*, 5 Wall. 462, 470; *The Daniel Ball*, 10 Wall. 557, 564. As to the coexistence of both interstate and intrastate commerce see *Freight Tax Case*, 15 Wall. 232, 277; *Hall* v. *DeCuir*, 95 U. S. 485; *Lord* v. *Steamship Co.*, 102 U. S. 541; *Wabash Railway* v. *Illinois*, 118 U. S. 557; *Sands* v. *Manistee River Imp't Co.*, 123 U. S. 288; *Covington Bridge Case*, 154 U. S. 204; *Greer* v. *Connecticut*, 161 U. S. 519; *Kidd* v. *Pearson*, 128 U. S. 1; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, in which this court said commerce succeeds to manufacture and is not a part of it. And see *Hopkins* v. *United States*, 171 U. S. 578; *Diamond Glue Co.* v. *U. S. Glue Co.*, 187 U. S. 611; *Northern Securities Case*, 193 U. S. 197, 350.

The act interferes with the police power of the State and while there is an intrastate commerce which Congress cannot regulate, there is also equally removed from the control of the United States the police power of the States which affects commerce and other relations in life, some related to commerce, and others entirely disassociated from it.

Although the limitations of the police power have never been fully defined, the police power of the States falls directly within the effect of this act and will, if the act is con-

stitutional, have limitations imposed upon it entirely inconsistent with the exercise of that power as hitherto recognized. The act seeks to control the relations between carriers of interstate commerce and their employés, not merely in matters that affect, but do not burden, interstate commerce, but also in matters which can have no direct bearing upon interstate commerce.

This court has ever been equally careful to preserve the rights and powers of the States as well as those of the National Government. *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Pennsylvania Railroad* v. *Knight*, 192 U. S. 21; *Louisville &c. Railway Co.* v. *Mississippi*, 133 U. S. 587, 591; *C. & O. Railway* v. *Kentucky*, 179 U. S. 388, 393.

So the police power of the State has been sustained where it operated upon articles of commerce after their interstate character had ceased. The States of the Union have the undoubted right to control their purely internal affairs, in doing which they exercise powers not surrendered to the National Government. *Leisy* v. *Hardin*, 135 U. S. 100, 123; *Mobile* v. *Kimball*, 102 U. S. 691; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Mugler* v. *Kansas*, 123 U. S. 623; *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31, 40; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*, 169 U. S. 133.

The statement in *Smith* v. *Alabama*, 124 U. S. 465, that Congress could legislate on the subject of engineers' examinations was said only in respect of interstate commerce, and can be no authority for the contention that because it was asserted that Congress could in the particular matter legislate in respect of interstate commerce, it could also regulate the carrier in its strictly intrastate commerce activities, and in those matters having no direct relation to commerce. So also *Western Union Telegraph Company* v. *James*, 162 U. S. 650; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 59; *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477, 489. In *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677, it was held that a state statute prohibiting consolidation of two railroads was not an inter-

ference with interstate commerce. As to reasonable exercise of state police power, see *Gladson* v. *Minnesota*, 166 U. S. 427; *Cleveland &c. Railway Co.* v. *Illinois*, 177 U. S. 514, 519; *Lake Shore Railway* v. *Ohio*, 173 U. S. 285, 303; *Lake Shore Railway* v. *Smith*, 173 U. S. 684, 689; *Northern Securities Case*, 193 U. S. 197, 382; *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, distinguished.

The act is bad in that it proposes not merely to give a right of action for injuries to employés, but determines who the beneficiaries shall be. The beneficiaries are different from those under the law of the State where the death occurred. Congress has no power to regulate the measure of damages or who the beneficiaries shall be. This is within the reserved power of the States.

The cases cited in the brief of the United States as to the rule of damages in the case of injuries on vessels fall under the admiralty and maritime jurisdiction and not under the commerce clause. They have no application to the rules established by this statute. The statute, if constitutional as to any part, is unconstitutional as to other parts and as it is inseparable it is entirely unconstitutional. *United States* v. *Reese*, 92 U. S. 214, 221; *Trade-Mark Cases*, 100 U. S. 82, 98; *United States* v. *Ju Toy*, 198 U. S. 253; *Illinois Central* v. *McKendree*, 203 U. S. 514; *Baldwin* v. *Franks*, 120 U. S. 678, 686; *Ballard* v. *Cotton Oil Co.*, 81 Mississippi, 507. The rule is the same whether the case be civil or criminal. *Conolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565. And on this point see also *Allen* v. *Louisiana*, 103 U. S. 80; *Sprague* v. *Thompson*, 118 U. S. 90, 94; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 635, from which it appears that an act of Congress covering legitimate as well as illegitimate fields of legislation in a single provision cannot be rendered effective by holding it invalid as to the field wherein Congress had no power to legislate. To reject the legislation so far as it is invalid and enforce the remainder would amount to substituting legislation by the court for that by Congress.

The act is unconstitutional in that it violates the Fifth Amendment to the Constitution of the United States.

Arbitrary and capricious classification, by which a class of persons is subjected to unusual burdens, is obnoxious either to the Fifth or to the Fourteenth Amendment. If a state statute, it is obnoxious to the Fourteenth Amendment; if a Federal statute, it is obnoxious to the Fifth Amendment. Both Amendments protect corporations, as well as natural persons, from being deprived of property without due process of law, and, therefore, protect against arbitrary classification. *County of San Mateo* v. *Southern Pacific Railroad,* 13 Fed. Rep. 145, 150.

The act violates the Fifth Amendment because: It subjects common carriers, engaged in interstate commerce, to different and greater liabilities than others engaged in interstate commerce; it takes away from common carriers defenses available to others engaged in interstate commerce; it limits the powers of contract of common carriers, when others engaged in interstate commerce are not so limited in their contracts with their employés; it subjects employés of such common carriers to a disability in contracting which does not attach to employés of others engaged in interstate commerce, who render a like service under similar conditions.

The right to contract is as well recognized as the right to property and the courts protect it against unlawful restriction. *Allgeyer* v. *Louisiana,* 165 U. S. 578; *State* v. *Julow,* 129 Missouri, 163; *Gillespie* v. *People,* 188 Illinois, 176; *State* v. *Kreutsberg,* 114 Wisconsin, 530; *People* v. *Marcus,* 185 N. Y. 257, holding state statutes limiting right to contract in regard to labor invalid. See also *Wallace* v. *Georgia &c. Railway Co.,* 22 S. E. Rep. 579; *Brewster* v. *Miller's Sons Co.,* 101 Kentucky, 368; *Hundley* v. *L. & N. R. Co.,* 105 Kentucky, 162; *State* v. *Bateman,* 7 Ohio N. P. R. 478; *Railroad Company* v. *Richmond,* 19 Wall. 584.

The burdens cast upon carriers by the act are cast upon all common carriers engaged in interstate commerce without distinction or discrimination. There are many classes of

common carriers, as by rail, by water, by telephone, by telegraph, by pipe line, by wagon and otherwise.

There are not the same reasons for the abolition of the fellow-servant rule as to clerks in the auditor's office as there are for its abolition as applied to train operatives.

By due process of law is meant, that if a particular class is to be given particular benefits or subjected to particular burdens or disabilities, there should be some good reason for such classification. *Stratton* v. *Morris*, 89 Tennessee, 497, 534.

There is no natural basis for the classification which has been made, but the basis is purely arbitrary and capricious. In order for a classification to be constitutional, it is not only necessary that all persons brought under its influence are treated alike under the same conditions, but it must bring within its influence all who are under the same conditions, and not bring within its influence those who are under different conditions. *Mo. Pac. Railway* v. *Mackey*, 127 U. S. 205; *Johnson* v. *St. Paul & Duluth R. R. Co.*, 8 L. R. A. 419; *Ballard* v. *Oil Co.*, 81 Mississippi, 507.

Some of the state courts have held employers' liability acts constitutional, even though couched in general language, and applicable to all characters of business, whether hazardous or not, this result being attained in most instances by construing such statutes, notwithstanding their general language, to apply only to hazardous occupations; but such construction is not countenanced by the Federal authorities. *Lochner* v. *New York*, 198 U. S. 45, 59.

This court, when not bound by a limiting state court construction,. will investigate for itself the reasonableness of a classification, made by a state legislature, and unless the classification is natural and reasonable, will hold the act void. It will undoubtedly exercise the same power when an act of Congress is before it. *Gulf, Colorado & Santa Fé R. R. Co.* v. *Ellis*, 165 U. S. 150; *Atchison &c. Railroad* v. *Matthews*, 174 U. S. 96.

The importance of this case cannot be overstated. The act raises constitutional questions of the utmost gravity. No one would question that a decision sustaining it must necessarily extend the power of the Federal Government over a field hitherto not contemplated as within its jurisdiction. A decision holding the act unconstitutional, would not destroy any generally prevailing understanding as to the relations between the several States and the United States; nor would such a decision open up any wide field for serious conjecture or apprehension.

No one, however versed in the science of government and the teachings of history, can forecast the changes that the establishment of the principle involved will work in our state and National life, or what kind of government we will have, when these principles thus sanctioned shall hereafter be invoked and applied.

From the account of the debates in Congress it appears that in both Houses it was understood that the act applied to all commerce. See Record, January 30, 1906, Vol. 40, Pt. 2, 1747; Pt. 5, 4602 *et seq.*

Mr. Alexander P. Humphrey, with whom *Mr. R. S. Lovett* and *Mr. Maxwell Evarts* were on the brief, for defendant in error in No. 222:

The Employers' Liability Act is unconstitutional. It is not competent for Congress to regulate all the commerce of a common carrier whether interstate or intrastate. If the line of a carrier is wholly within a State it carries on intrastate commerce, but may in connection with other carriers carry on interstate commerce. *C., N. O. & T. P. Railway* v. *Int. Com. Comm.*, 162 U. S. 191. The power which Congress has is to regulate commerce and there is a marked distinction between that power and a power to regulate the affairs of an individual or corporation engaged in interstate commerce. If Congress has power to pass this law it derives it from § 3 of Article VIII of the Constitution, the commerce clause. As to

the limit of this power, see *Gibbons* v. *Ogden*, 9 Wheat. 1, 194; *Trade-Mark Cases*, 100 U. S. 82, 96; *Wabash Railway* v. *Illinois*, 118 U. S. 565. And see the cases cited in the brief for defendant in error in No. 216, holding that a carrier engaged generally in interstate commerce is subject to state control as to its intrastate business. See also *Hall* v. *DeCuir*, 95 U. S. 485; *Louisville Railway* v. *Mississippi*, 133 U. S. 587; *Plessy* v. *Ferguson*, 163 U. S. 537; *Ches. & Ohio* v. *Kentucky*, 179 U. S. 388, holding that it is competent for a State to separate the races into separate compartments or cars so long as such state regulations are confined to intrastate points. As to power of the State to require railroad trains to stop at state stations, see *Gladson* v. *Minnesota*, 166 U. S. 427, 430; *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142; *Lake Shore Railway* v. *Ohio*, 173 U. S. 285; *C. C. C. & St. L. Railway* v. *Illinois*, 177 U. S. 514.

As to power of States over rates see *Louisville & Nashville* v. *Kentucky*, 183 U. S. 503; *Louisville & Nashville R. R. Co.* v. *Eubank*, 184 U. S. 27.

If determining the liability of a carrier to its employés is a regulation of commerce at all, Congress can only determine it so far as it relates to interstate commerce.

The Employers' Liability Act is not a regulation of commerce at all. It relates simply to one of the ordinary relations of life—and the legal rules affecting such relations are within the control of the States. Under the common law there is no remedy where an individual having been injured through the negligence of another dies after the hurt. *Insurance Co.* v. *Brame*, 95 U. S. 754; *The Harrisburg*, 119 U. S. 199, 204. Every State, however, has passed laws giving the personal representatives of the injured employé an action against the employer—and this has been done as a matter of purely domestic concern. The States have also, as they have the right to do, passed statutes as to the effect of negligence by fellow-servants; *Southern Pacific Ry. Co.* v. *Schoer*, 114 Fed. Rep. 466, 470; *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 206;

Minn. & St. Louis Ry. Co. v. *Herrick*, 127 U. S. 210; *Chicago &c. R. R. Co.* v. *Pontius*, 157 U. S. 210; *Tullis* v. *Lake Erie & Western Ry.*, 175 U. S. 348; also as to the fencing of tracks and prevention of fires by interstate carriers, all of which have been sustained by this court. *Mo. Pac. Ry.* v. *Humes*, 115 U. S. 513; *Minneapolis Railway* v. *Beckwith*, 129 U. S. 26; *M. & St. L. Ry.* v. *Emmons*, 149 U. S. 364; *St. Louis & San Francisco Ry.* v. *Matthews*, 165 U. S. 1.

When cases have come to this court involving the question whether a particular state law is a regulation of interstate commerce, the question has been: Does the state law put a burden on interstate traffic? Examples of these cases are found in *Brown* v. *Maryland*, 12 Wheat. 420; *Leisy* v. *Hardin*, 135 U. S. 100; *Robbins* v. *Taxing District of Shelby*, 120 U. S. 489. Or the question has been: Does the state law place a burden on interstate transportation? Examples of this class are found in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 196; *Crandall* v. *Nevada*, 6 Wall. 35; *Wabash R. R.* v. *Illinois*, 118 U. S. 557.

The act is simply a bold attempt to regulate one of the ordinary relations of life, that of master and servant, a relation hitherto supposed to be entirely within the control of the State. If Congress can thus take hold of the relation of master and servant, it can with equal power take hold of the relation of guardian and ward and other domestic relations.

This law is different from the Anti-trust Law, the Meat Inspection Law and the Pure Food Law, the Interstate Commerce Law, and the Safety Appliance Law, in that those laws regulate the instrumentalities of commerce and not domestic relations, and this act does not prescribe any rule by which it is to be governed or intercourse carried on.

Although some of the cases sustaining congressional legislation as to liability of shipowners have been based on the commerce clause the real basis of power in that respect is the admiralty and maritime clause of the Constitution. See *Ex parte Garnett*, 141 U. S. 1; *The Roanoke*, 189 U. S. 185; *The Belfast*, 7 Wall. 624, 640; *People* v. *Knight*, 171 N. Y. 354, 364;

S. C., affirmed 192 U. S. 21, and see cases in briefs of other counsel. *Robertson* v. *Baldwin*, 165 U. S. 275, distinguished.

The act embraces employés of all kinds, and it being separable was the evident intention of Congress not to confine the act to any class of employés, but to embrace all of the employés of a carrier within the terms of the act. This brings it under the rule that statutes partly constitutional and partly unconstitutional, are entirely void unless the unconstitutional can be plainly separated from the constitutional provision. *United States* v. *Reese*, 92 U. S. 214; *Baldwin* v. *Franks*, 120 U. S. 678; *Virginia Coupon Cases*, 114 U. S. 269, 304; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Illinois Central* v. *McKendree*, 203 U. S. 514; *Trade-mark Cases*, 100 U. S. 82.

Mr. Justice White delivered the opinion of the court.[1]

To dispose of these cases it is necessary to decide a fundamental question which is equally decisive as to both. They were argued at the bar together, and because of their unity have been considered at the same time.

As stated in the declarations as finally amended, recovery was sought in each case of damages occasioned by the death of the respective intestates while serving as a fireman on a locomotive actually engaged in moving an interstate commerce train. In each of the cases it was alleged that the intestate met his death through no fault of his, but solely through the fault of employés of the company, who were his fellow servants. In both the right of action was expressly based upon the act of Congress of July 11, 1906, entitled "An Act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employés." By demurrer in each of the cases the act relied upon was assailed as being repugnant to the Constitution of

[1] See note at foot of page 464, *ante*.

the United States. In both cases the Department of Justice, on behalf of the United States, asked to be allowed to intervene for the purpose of supporting the constitutionality of the act. In the first (the *Howard*) case this request was granted. In the second (the *Brooks*) case the court, while denying the request upon the ground that it knew of no law authorizing such an intervention simply because the validity of an act of Congress was drawn in question, nevertheless permitted the United States to be heard as a friend of the court. In both cases the act was held to be unconstitutional, the demurrer was sustained and the declarations dismissed. These direct writs of error were then prosecuted, and at bar the cases have been argued, by printed brief and orally, not only by the parties in interest, but on behalf of the United States through the Attorney General as a friend of the court.

As the issue to be decided is whether the courts below were right in holding that the act of Congress, which was the basis of the respective causes of action, was repugnant to the Constitution of the United States, we reproduce the text of that act in the margin.[1]

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[1] CHAPTER 3073. An act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employés. 32 Stat. 232.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employés, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employé, or where such

Before coming to consider the contentions concerning the constitutionality of the act, we notice certain suggestions which proceed upon the assumption that they may concern the issue for decision. It is said that the statute inordinately extends the power of Congress and unduly diminishes the legislative authority of the States, since it seeks to exert the power of Congress as to the relation of master and servant, a subject hitherto treated as being exclusively within the control of the States, and that in practice its execution will cripple the State and enlarge the Federal judicial power, since its effect will be to cause every action concerning an injury to a servant employed by a common carrier who may engage in interstate commerce to cease to be a matter of state jurisdiction and to be cognizable in the Federal courts. Moreover, it is said, the statute will create confusion and uncertainty as to the rights of those dwelling within the States, that it will operate injuriously upon all who choose to engage in interstate commerce

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injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of any employé, nor the acceptance of any such insurance, relief, benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employé: *Provided however*, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief, benefit, or indemnity that may have been paid to the injured employé, or in case of his death to his personal representative.

SEC. 4. That no action shall be maintained under this act unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employés under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved, June 11, 1906.

as a common carrier, since those who so do will become subject to the liability which the statute creates, to be tested by the rules of negligence which the statute embodies, although such rules be unknown to the laws of the several States. Besides, the statute, it is urged, discriminates against all who engage as common carriers in interstate commerce, since it makes them responsible without limit as to the amount to one servant for an injury suffered by the acts of a co-servant, even in a case where the negligence of the injured servant has contributed to the result, hence placing all employers who are common carriers in a disfavored and all their employés in a favored class. Indeed it is insisted the statute proceeds upon contradictory principles, since it imposes the increased responsibility just stated upon the master presumably in order to make him more careful in the selection of his servants, and yet minimizes the necessity for care on the part of the servant by allowing recovery, although he may have been negligent.

But, without even for the sake of argument conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act and not the power of Congress to enact it. We say this since, in testing the constitutionality of the act, we must confine ourselves to the power to pass it and may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary.

All the questions which arise concern the nature and extent of the power of Congress to regulate commerce. That subject has been so often here considered and has been so fully elaborated in recent decisions, two of which are noted in the margin,[1] that we content ourselves, for the purposes of this case, with repeating the broad definition of the commerce power as expounded by Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, where he said:

"We are now arrived at the inquiry, What is this power?

[1] *Lottery Case*, 188 U. S. 321, 345 *et seq.*; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 335, and cases cited.

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Accepting, as we now do and as has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicuous statement made in the same case (p. 194), of those matters of state control which are not embraced in the grant of authority to Congress to regulate commerce:

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The genius and character of the whole Government seem to be, that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government."

We think the orderly discussion of the question may best be met by disposing of the affirmative propositions relied on to establish that the statute conflicts with the Constitution.

In the first place, it is asserted that there is a total want of power in Congress in any conceivable aspect to regulate the subject with which the act deals. In the second place it is insisted the act is void, even although it be conceded, for the sake of argument, that some phases of the subject with which it is concerned may be within the power of Congress, because the act is confined not to such phases, but asserts control over many things not in any event within the power to regulate commerce.

While it may be, if we indulged, for the sake of argument, in the hypothesis of limited power upon which the second proposition rests, it would result that a consideration of the first proposition would be unnecessary because the act would be found to be repugnant to the Constitution, because embracing provisions beyond such assumed and restricted authority we do not think we are at liberty to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress. We say this, for if it be that from the nature of the subject no power whatever over the same can, under any conceivable circumstances, be possessed by Congress, we ought to so declare, and not by an attempt to conceive the inconceivable assume the existence of some authority, thus it may be, misleading Congress and giving rise to future contention.

1. The proposition that there is an absolute want of power in Congress to enact the statute is based on the assumption that as the statute is solely addressed to the regulation of the relations of the employer to those whom he employs and the relation of those employed by him among themselves, it deals with subjects which cannot under any circumstances come within the power conferred upon Congress to regulate commerce.

As it is patent that the act does regulate the relation of master and servant in the cases to which it applies, it must follow, that the act is beyond the authority of Congress if the proposition just stated be well founded. But we may not

test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. We think the unsoundness of the contention, that because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power would be but to concede the power and then to deny it, or at all events to recognize the power and yet to render it incomplete.

Because of the reasons just stated we might well pass from the consideration of the subject. We add, however, that we

think the error of the proposition is shown by previous decisions of this court. Thus the want of power in a State to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question. *Mississippi R. R. Co.* v. *Illinois Cent. R. R.*, 203 U. S. 335, 343, and cases cited; *Atlantic Coast Line R. R.* v. *Wharton et al., Railroad Commissioners*, 207 U. S. 328. And decisions cited in the margin,[1] holding that state statutes which regulated the relation of master and servant were applicable to those actually engaged in an operation of interstate commerce, because the state power existed until Congress acted, by necessary implication, refute the contention that a regulation of the subject, confined to interstate commerce, when adopted by Congress would be necessarily void because the regulation of the relation of master and servant was, however intimately connected with interstate commerce, beyond the power of Congress. And a like conclusion also persuasively results from previous rulings of this court concerning the act of Congress, known as the Safety Appliance Act. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1.

2. But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce, that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to things which are wholly interstate commerce, but em-

[1] *Sherlock* v. *Alling*, 93 U. S. 99; *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis &c. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Chicago &c. Ry. Co.* v. *Pontius*, 157 U. S. 209; *Tullis* v. *Lake Erie & W. R. R.*, 175 U. S. 348.

braces those relations as to matters and things domestic in their character and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the act.

From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a "common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States," etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the States, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the States, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce.

And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of the statute defining the servants to whom it relates.

Thus the liability of a common carrier is declared to be in favor of "any of its employés." As the word "any" is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employés of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from "the negligence of any of its officers, agents or employés."

The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employés, without qualification or restriction as to the business in which the carriers or their employés may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a State. Take again the same road having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line

moving wholly within a State as to a large part of its business and yet as to the remainder crossing the state line.

As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.

On the one hand, while conceding that the act deals with all common carriers who are engaged in interstate commerce because they so engage, and indeed, while moreover conceding that the act was originally drawn for the purpose of reaching all the employés of railroads engaged in interstate commerce to which it is said the act in its original form alone related, it is yet insisted that the act is within the power of Congress, because one who engages in interstate commerce thereby comes under the power of Congress as to all his business and may not complain of any regulation which Congress may choose to adopt. These contentions are thus summed up in the brief filed on behalf of the Government:

"It is the *carrier* and not its employés that the act seeks to regulate, and the carrier is subject to such regulations because it is engaged in interstate commerce.

* * * * * * * *

"By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations.

". . . It is submitted that Congress can make a common carrier engaged in interstate commerce liable to *any one* for its negligence who is affected by it; and if it can do that, necessarily it can make such carrier liable to all of its employés."

On the other hand, the same brief insists that these propositions are irrelevant, because the statute may be interpreted so as to confine its operation wholly to interstate commerce or to means appropriate to the regulation of that subject, and hence relieves from the necessity of deciding whether, if the statute could not be so construed, it would be constitutional.

In the oral discussion at bar this latter view was earnestly insisted upon by the Attorney General. Assuming, as we do, that the propositions are intended to be alternative, we disregard the order in which they are pressed in argument, and therefore pass for a moment the consideration of the proposition that the statute is constitutional, though it includes all the subjects which we have found it to embrace, in order to weigh the contention that it is susceptible on its face of a different meaning from that which we have given it, or that such result can be accomplished by the application of the rules of interpretation which are relied upon.

So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words "any employé" as found in the statute should be held to mean any employé when such employé is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to "every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States." It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are by the act made liable to "any" of their employés, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be ques-

tioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read "any employé when engaged in interstate commerce," we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy.

The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois Central Railroad* v. *McKendree*, 203 U. S. 514, and authorities there cited.

As the act before us by its terms relates to every common carrier engaged in interstate commerce and to any of the employés of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions

been restricted to the limited relations of that character which it was within the power of Congress to regulate. On this subject the opinion in the *Trade-mark Cases*, 100 U. S. 82, where an act of Congress concerning trade-marks was held to be unconstitutional, because too broad in its scope, is pertinent and instructive. The court said (p. 99):

"If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law. Cooley, Const. Lim. 178, 179; *Commonwealth* v. *Hitchings*, 5 Gray (Mass.), 482."

3. It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning

have been, and must continue to be, under their control so long as the Constitution endures.

4. Reference was made to the report of a committee submitted to the House of Representatives on the coming in of the bill which finally became the act in question. We content ourselves on this subject with saying that that report, we think, instead of adding force to the argument that the plain terms of the act should be disregarded, tends to the contrary. And the same observation is appropriate to the reference made to the text of the Safety Appliance Act of March 2, 1893, 27 Stat. 531, which, it is insisted, furnishes a guide which, if followed, would enable us to disregard the text of the act. We say this because the face of that act clearly refutes the argument based upon it. It is true that the act, like the one we are considering, is addressed to every common carrier engaged in interstate commerce, but this direction is followed by provisions expressly limiting the scope and effect of the act to interstate commerce, which are wholly superfluous if the argument here made concerning the statute before us be sound.

We deem it unnecessary to pass upon the merits of the contentions concerning the alleged repugnancy of the statute, if regarded as otherwise valid, to the due process clause of the Fifth Amendment to the Constitution, because the act classifies together all common carriers. Although we deem it unnecessary to consider that subject, it must not be implied that we question the correctness of previous decisions noted in the margin,[1] wherein state statutes were held not to be repugnant to the Fourteenth Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant. We further deem it unnecessary to express an opinion concerning the alleged repugnancy of the statute to the Seventh Amendment, because of the provision of the act as to the power of the jury. In saying this, however, we must not be considered as intimating that we think

[1] *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis &c. Ry. Co.* v. *Herrick*, 127 U. S. 210; *Chicago &c. R. R.* v. *Pontius*, 157 U. S. 209.

the provision in question is susceptible of the construction placed on it in argument, or that if it could be so construed it would be constitutional.

Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforcible; and the judgments below are, therefore,

Affirmed.

Mr. Justice Day concurs in this opinion.

Mr. Justice Peckham, concurring.

I concur in the result of the foregoing opinion, but I am not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant.

I concur in the proposition, that as to traffic or other matters within the State, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce. As that is all that it is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it.

I am authorized to state that the Chief Justice and Mr. Justice Brewer agree in this view.

Mr. Justice Moody, dissenting.

I am unable to agree in the judgment of the court. Under ordinary circumstances, where the judgment rests exclusively, as it does here, upon a mere interpretation of the words of a law, which may be readily changed by the lawmaking branches of the Government, if they be so minded, a difference of opin-

ion may well be left without expression. But where the judgment is a judicial condemnation of an act of a coördinate branch of our Government it is so grave a step that no member of the court can escape his own responsibility, or be justified in suppressing his own views, if unhappily they have not found expression in those of his associates. Moved by this consideration, and solicitous to maintain what seem to me the lawful powers of the Nation, I have no doubt of my duty to disclose fully the opinions which, to my regret, differ in some respects from those of some of my brethren.

The only question which these cases present is the constitutionality of the Employers' Liability Act, which, briefly stated, provides a remedy for the injury or death of the employés of territorial, interstate and foreign common carriers, caused by the negligence of the carrier. The defendants were both interstate carriers, and these actions were brought to recover for the deaths of their employés who, at the time, were engaged in interstate transportation. The judgment of the court does not deny that it is within the power of the Congress to provide a remedy for the injury or death of employés engaged in the conduct of territorial, interstate and foreign commerce. It rests upon the ground that this statute is unconstitutional, because it seeks to do more than that, and regulates the liability of employers while engaged in intrastate commerce or in manufacture. At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the States, and that I understand that to be the opinion of every member of the court.

The constitutionality of the act was attacked in the arguments before us upon three grounds. First, because it seeks to control by provisions so inseparable that they are incapable of resolution into their several parts, not only the territorial, foreign and interstate business of carriers, but also their intrastate business, which, by the Constitution, is reserved for the government of the States. Second, because, if the act should

be interpreted as not intruding upon the domain of the States by directly regulating commerce exclusively within the States, yet, that legislation fixing the obligation of employers engaged in interstate and foreign commerce to their employés in such commerce, for injuries suffered by the latter in the course of the employment, is not the regulation of commerce, and, therefore, is not within any power conferred by the Constitution upon Congress. Third, because, even if the act is concerned with a subject which is within the power of Congress, yet the specific changes made by it in the common law rules governing the relations of employer and employé exceed the legislative power or violate the constitutional prohibitions which restrict that power.

I am of opinion that the act is not open to any of the constitutional objections urged against it, and shall consider all of the objections in the order in which I have stated them.

In the consideration of the scope of the statute for the purpose of determining whether it seeks to control that part of commerce which is beyond the power of Congress and subject only to the government of the States, it is to be observed that the opening words of Congress are in recognition of the limitation of its authority and of the constitutional distinction between commerce among the States and with foreign nations on the one hand and commerce within the States on the other hand. The commands of the law are addressed only to "common carriers engaged in trade and commerce" in the Territories, with foreign nations, and among the States, and with respect to carriers engaged in commerce within the States the law is impressively silent. The expression and enumeration of the parts of commerce which are clearly within the control of Congress is equivalent to an exclusion of the part which is not within its control. In the careful selection of the language of this law the legislators may well have had in mind the words of Chief Justice Marshall which have received the constant approval of this court. He said (in *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 195):

"The subject to which the power is next applied is to 'commerce among the several States.' . . . Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole Government seem to be, that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government. The completely internal commerce of a State then, may be considered as reserved to the State itself."

These words of the Chief Justice have been regarded as delimiting accurately the constitutional boundaries of the respective powers over commerce of the Nation and the States. They have been frequently repeated, and, though differences have arisen in their application to the complicated affairs of mankind, never doubted, and universally approved. It is not

easy to believe that Congress intended to dispute their authority. The reasoning which was thought worthy for the interpretation of the Constitution will not be misapplied if it be employed in the interpretation of a law passed in pursuance of the powers conferred by the Constitution. Why should it not be said of the law as it was said of the Constitution, that "the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, . . . must be the exclusively internal commerce of the State." From the enumeration of territorial, interstate, and foreign commerce, and the omission of the internal commerce of the State, is it not clear that the commerce which is exclusively internal to the State, and does not affect any other character of commerce, was intended to be outside the purview of the law? Does not a proper respect for the acts of Congress and the strong presumption that it will not exceed its powers, so frequently declared by this court, require us to believe that when the kinds of commerce within its undoubted control are carefully enumerated all the words of the law, however general, are to be referred solely to that commerce and no other?

If carriers were separated by a clear line of division, so that one class were engaged exclusively in interstate and foreign commerce, and the other class were engaged exclusively in commerce within the States, it would not, of course, occur to any mind that this act had any reference whatever to the state carriers. But there is no such hard and fast line of division. Carriers often, and where they are railroads, usually are, as a matter of fact, engaged both in interstate and foreign commerce over which Congress has the control, and intrastate commerce over which the States have the control. Applying the law under consideration to the conditions as they actually exist, it is said that its words are so general and sweeping as

to comprehend within its benefits not only the employés of the interstate carrier engaged in the business of interstate carriage, but also the employés of the same carrier engaged in the business of intrastate carriage which it may and usually does conduct. Counsel illustrated their argument by suggesting that if a carrier doing an interstate business on the Pacific slope also conducted a local trolley line wholly along the Atlantic seaboard within a single State, an employé on the local trolley line would, by the terms of this act, be entitled to its benefits. If such be the necessary interpretation of the statute plainly it exceeds the power of Congress, for Congress certainly has no right to regulate the purely internal commerce of a State. Nor can the statute be saved by rejecting that part of it which is unconstitutional because its provisions are single and incapable of separation. The vicious part, if such exist, is so intermingled with that which is good that it cannot be eliminated without destroying the whole structure.

Which interpretation, then, should be adopted? That which regards the law as prescribing the liability of the carrier only to those employés who are engaged in the work of interstate and foreign commerce, or that which extends the benefits of the law also to those employés engaged in work which has no relation whatever to such commerce. In answering this question it must not be forgotten that, if the latter interpretation be adopted, in the opinion of the whole court the act is beyond the constitutional power of Congress. That is a consideration of vast importance, because the court has never exercised the mighty power of declaring the acts of a coordinate branch of the Government void except where there is no possible and sensible construction of the act which is consistent with the fundamental organic law. The presumption that other branches of the Government will restrain themselves within the scope of their authority, and the respect which is due to them and their acts, admits of no other attitude from this court. This is more than a canon of interpretation, it is a rule of conduct resting upon considerations of public

policy, and, in the exercise of the delicate function of condemning the acts of coördinate and equal branches of the Government, under the same obligation to respect the Constitution as ourselves, has been observed from the beginning. I regard the rule as so vital and fundamental in this and all other parts of the case that I select almost at random some expressions of it by different justices of this court. When the power to declare an act of Congress void was still undecided, Mr. Justice Chase said in *Hylton* v. *United States*, 3 Dall. 171, p. 175: "If the court have such power, I am free to declare that I will never exercise it, but in a very clear case." Mr. Justice Strong said in *The Legal Tender Cases*, 12 Wall. 457, p. 531: "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." In *The Trade-Mark Cases*, 100 U. S. 82, Mr. Justice Miller said, p. 96: "When this court is called on in the course of the administration of the law to consider whether an act of Congress, or any other department of the Government, is within the constitutional authority of that department, a due respect for a coördinate branch of the Government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty." In *Nicol* v. *Ames*, 173 U. S. 509, Mr. Justice Peckham said, p. 514: "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the Nation to be in violation of that fundamental instrument upon which all the powers of the Government rest." Mr. Justice White in *Buttfield* v. *Stranahan*, 192 U. S. 470, said, p. 492: "In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity.

It must be presumed to be constitutional, unless its repugnancy to the Constitution clearly appears." Mr. Chief Justice Waite in *The Sinking Fund Cases*, 99 U. S. 700, said, p. 718: "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Mr. Justice Story, in *United States* v. *Coombs*, 12 Pet. 72, said, p. 76: "If the section admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."

Citations of this character might be multiplied, but to no good purpose. There is no doubt that the rule exists, there is no doubt that it is wise, and promotes the mutual respect between the different branches of the Government which is so essential to the welfare of all, and that it requires us, if it is within our power, to give to the words of the statute before us a meaning which will confine its provisions to subjects within the control of Congress. If two interpretations are possible our plain duty is to adopt that which sustains the statute as a lawful exercise of authority and not that which condemns it as a usurpation.

The argument which supports a construction of the statute which would include within its provisions intrastate commerce is readily stated. It is said that "every common carrier" engaged in territorial, foreign, or interstate trade is made

"liable to any of its employés . . . for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect" in its instrumentalities, and that, as there is no qualification of or exception to the generality of the language descriptive of the employés or instrumentalities, it must be deemed to include those engaged and used solely in intrastate commerce, and even in manufacture, as well as those engaged and used in other commerce. But I venture to think that this argument rests upon too narrow ground. It contemplates merely the words of the statute; it shuts out the light which the Constitution sheds upon them; it overlooks the significance of the enumeration of the kinds of commerce clearly within the National control and the omission of the commerce beyond that control—an enumeration and omission which characterizes, colors and restrains every word of the statute—and it neglects the presumptions in favor of the validity of the law and of the obedience of Congress to the commands of the Constitution, which cannot with propriety be disregarded by this court. Taking into account these missing aids to construction, it becomes quite easy, quite reasonable, and, in my opinion, quite necessary, to construe the act as conferring its benefits only upon employés engaged in some fashion in the commerce which is enumerated in it and is undoubtedly under the control of Congress. Even without these guides for discovering the intent of Congress, which the uniform practice of the court compels us to use, it is natural to suppose that, when territorial, interstate, and foreign carriers only are mentioned and every such carrier is declared to be liable "to any of its employés," only its employés in such commerce are intended. With those guides the conclusion appears to me irresistible, for they show that if the words, "any of its employés," in the context where they are used, are capable of meaning all of the employés upon any kind of work, yet their generality should be restrained so as to include only those who are subject to the power of the lawmaking body. The case of *McCullough* v. *Virginia*, 172

U. S. 102, is precisely in point here. An act of the General Assembly of the State of Virginia provided for refunding the state debt by the issue of coupon bonds for two-thirds of the total amount of that debt. It was enacted that the coupons should "be receivable at and after maturity for all taxes, debts, dues, and demands due the State." There was at the time of the passage of the refunding act a provision of the constitution of Virginia requiring all school taxes to be paid in cash, and it had been held by this court that the constitutional provision disabled the Virginia legislature from providing that the coupons should be receivable for such taxes. *McGahey* v. *Virginia*, 135 U. S. 662. The argument was then made that as the statute providing for the receivability of the coupons for "all taxes, debts, dues, and demands due the State" was in part beyond the constitutional power of the legislature, the contract evidenced by that statute was entirely void. The court, speaking by Mr. Justice Brewer, answered this argument by saying, 172 U. S. 112: "It ignores the difference between the statute and the contract, and confuses the two entirely distinct matters of construction and validity. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes. It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues

which under the existing provisions of the state constitution could not be affected by legislative action, the statute is to be read as though it in terms excluded them from its operation." The language quoted was not *obiter*. The case turned upon the construction of the statute and reversed the construction by the highest court of the State of its own statute, as well as its judgment, that the statute thus construed was inconsistent with the state constitution, because "all taxes" included taxes beyond the power of the legislature. I am unable to reconcile the judgment in that case with the conclusion which is reached by the court in this. The reasoning which, in that case, led the court to construe a statute providing that the coupons should be receivable for "all taxes" to mean only for such taxes as the legislature had the constitutional power to declare payable in such a manner, is equally potent to lead the court, in the case at bar, to construe a statute providing for the liability of the interstate and foreign carrier to "any of its employés" to mean only to any of its employés for whom Congress has the constitutional power to make such a provision. In that case there were taxes within the legislative control, and taxes without the legislative control of the Virginia assembly; in this case there are employés within the legislative control and employés without the legislative control of Congress; in that case the statute provided for "all taxes;" in this case the statute provides for "any employés;" in that case, examining the statute "in the light of the Constitution," this court declared that "however broad and general its language, it cannot be interpreted as extending beyond those matters which it is within the constitutional power of the legislature to reach," and if it appears that there were taxes beyond the control of the legislature, that the statute should be read "as though it in terms excluded them from its operation;" I am unable to imagine any reason why, examining the statute in this case with the aid of the same light, the court should not make the same declaration of its meaning. Moreover, it should be remembered that a circumstance lead-

ing in the same direction is present in the case at bar which was absent in that case, for, to repeat what has already been said, here the general words are used in a context which suggests, if it does not require, the less extended meaning.

It should be observed that the *McCullough case* was simply a case of construction. The court made no judicial amendment of the statute or exception from its provisions of any subject which came within them according to their proper meaning, ascertained with the aid of the light of the constitutional limits of the legislative power. Mr. Justice Brewer pointed out the distinction between the construction of the statute and its validity, saying: "The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes." Thus the case is distinguished from some others, much relied upon in the argument, which establish the proposition, that a single statutory provision is void if it is expressed in general words so used as to manifest clearly the intention to include within those words subjects beyond the constitutional power of the lawmaking body. The courts have no power to read into such a provision an exception for the purpose of saving that which is left from condemnation. A law which cannot endure the test of the Constitution without judicial amendment must perish. *United States* v. *Reese*, 92 U. S. 214; *The Trade-Mark Cases*, 100 U. S. 82; *United States* v. *Harris*, 106 U. S. 629; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Ju Toy*, 198 U. S. 253. See *Illinois &c. Railroad* v. *McKendree*, 203 U. S. 514. But the rule derived from these cases is by no means decisive of the inquiry whether this statute must be construed as seeking to accomplish objects beyond the power of Congress. It can be made decisive only by begging the very question to be determined, and, in the words of Mr. Justice Brewer, confusing "the two entirely distinct matters of construction and validity." It merely expresses the judicial duty which arises after the question of construction is determined. A critical examination of the

cases shows that in each of them, in the opinion of the court, the language of the statute admitted of no possible interpretation, except that Congress intended to deal, by a single and inseparable provision, with subjects without as well as subjects within its control. As was said in one of them, *United States* v. *Reese*, 92 U. S. 214, 220, there was "no room for construction unless it be as to the effect of the Constitution." It would be unprofitable to dwell upon all these decisions, and I content myself with the analysis of one, and that the one deemed by counsel who rely upon it as the most important and conclusive. In *The Trade-mark cases* it appeared that in an act entitled "An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights," provision was made for the registration of trade-marks in the Patent Office. Some years later an act was passed providing for the punishment by fine and imprisonment of any person making fraudulent use of or counterfeiting trade-marks thus registered. The cases were indictments under this later act, and the question for decision was its constitutionality. The act was supported first upon the ground that it was authorized by that part of the Constitution which confers upon Congress the authority "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective rights and discoveries." The court, after saying, 100 U. S. 93, "that it is a reasonable inference that this part of the statute also was in the opinion of Congress an exercise of the power found in that clause of the Constitution," and that "it was mainly if not wholly to this clause that the advocates of the law looked for its support," held that this clause was not a sufficient source of authority for the act. The act was supported, second, upon the ground that the commerce clause of the Constitution supplied the requisite authority to Congress. But there was not a word in the act from which it could be inferred that Congress intended to exercise the power conferred by the commerce clause. The court, by Mr. Justice Miller, after pointing out that

commerce within a State was beyond the control of Congress, said, p. 96: "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian tribes." Words could not be more happily chosen than these, to describe what the statute in the case at bar is on its face and from its essential nature. The justice then proceeds to say: "If it is not so limited it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress." No words could be more happily chosen than these, to describe exactly what the statute in the case at bar is not. The court then taking the view, upon which there cannot be two opinions, that the act intended to establish a universal system of trade-mark legislation applicable to all commerce, held the statute void, saying, p. 98: "It is not within the judicial province to give to the words used by Congress a narrower meaning than that they are manifestly intended to bear, in order that crimes may be punished which are not described in language within the constitutional power of that body." The reasoning relied upon in this case to overthrow the statute, if applied to the statute before us, tends to support it.

I do not wish to be understood as saying that the group of cases I am now discussing does not furnish instances where the court has declined to limit the meaning of words in order to save the act. I only say, that in these cases it could not be done without violating the obvious intent of Congress as ascertained by the necessary meaning of the language it employed; in other words, that in these cases only one interpretation was possible and there was "no room for construction." They cannot be understood as deciding that general

words may not, in view of the context where they are found, and, with the aid of the light of the Constitution, be restrained in their meaning, with the purpose and effect of giving them such a construction that the act may be sustained as a legitimate exercise of the legislative power. If they should be so understood they would be in flat conflict with the *McCullough case*, and with the spirit of the interpretation that prevailed in *United States* v. *Palmer*, 3 Wheat. 610, and *Church of the Holy Trinity* v. *United States*, 143 U. S. 457. In the former case it was held that an act which punished certain offenses committed by "any person or persons" upon the high seas should not be construed as including persons who might commit such offenses on board a vessel belonging to the subjects of a foreign state; Marshall, C. J., saying, p. 631: "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the State, but also to those objects to which the legislature intended to apply them." In the latter case it was held that an act that forbade all persons from assisting the migration into the United States of "any alien or aliens, any foreigner or foreigners," under contract "to perform labor or services of any kind," did not include a minister of religion, though such a person was within the letter of the statute. These cases show that we may with propriety give to the words "any of its employés" the narrower meaning, and, because such meaning saves the act from condemnation, it is, I believe, our imperative duty to adopt it. No words need to be read into the act. It is required only that the words already there shall be applied to that commerce which Congress referred to, namely, territorial, foreign and interstate. Thus read, the whole statute is saved and no part of it is destroyed.

The natural meaning of the words of the statute considered together, each word receiving significance from those with which it is allied, the respect which is due to Congress, the

belief which I hold that it would not intentionally overstep the clearly defined limits of its authority, and the principles of construction heretofore acted upon by this court, lead my mind to the settled conviction that the statute can be interpreted, and ought to be interpreted, as affording the remedy therein prescribed only to the employés of foreign, interstate and territorial carriers, who are themselves engaged in some capacity in such commerce in some of its manifold aspects. If this meaning be attributed to the words of the law, it is apparent that in the opinion of a majority of the court the law, in its main features at least, would be constitutional.

Entertaining these views of the meaning of the statute, I am compelled to go further and consider the other objections to it. I agree entirely with all that was said in the opinion of Mr. Justice White in support of the power of the Congress to enact a law of this general character, but, as I think that the judgments in these cases ought to be reversed, I cannot escape dealing with specific objections to the statute which he has not deemed it necessary to discuss. I think it better, therefore, to deal with all the questions that are necessarily raised in these cases.

I come now to the question whether the statute, thus construed, is in the execution of any power conferred by the Constitution upon the Congress. It is apparent that there is no such power unless it be found in that clause of the Constitution which authorizes Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes." It hardly needs to be said that the inability of the National Government, created by the Articles of Confederation, to deal effectively with commerce was one of the efficient causes of the call for the constitutional convention. No doubt the most urgent need of that time was a central government with powers adequate to control foreign commerce, but interstate commerce was not overlooked, though its principal importance then consisted in its relation to foreign commerce. [Federalist, No. 42, by Mr. Madison.]

No one could then have foreseen the extent of the interstate commerce of our times, for no one could foretell the employment of the forces of steam and electricity which have so wonderfully aided its development. But the statesmen of that time, confident of the future and hopeful that they might devise a government which would endure, must have understood that the commerce which concerned more than one State, from its essential nature, was in part outside the territorial jurisdiction of any State, could not be governed efficiently by a single State, and, if left outside of the National control, would be subject to woeful embarrassment by the conflicting regulations of the several States into which it entered. It appears in the reports of the debates that these dangers were appreciated by the members of the convention, so far as they threatened that part of the commerce among the States which was conducted by water transportation, then the only part of such commerce of sufficient importance to attract public attention. But fortunately the spirit of the nation builder and not of the codemaker inspired and dominated the convention. Its members were not content to frame a system of laws sufficient for the present moment, which might in a few years become unsuited to or inadequate for the needs of the people. They undertook rather the task of devising a scheme of government and of allotting the powers usually exercised by governments between the existing States and the prospective Nation. Whenever such a power came under consideration its nature was examined, and it was then placed in the hands of that governmental agency which it was supposed could exercise it most advantageously. This very power furnishes a signal illustration of the method pursued. The convention did not determine how interstate commerce should be regulated but rather who should regulate it, and left, with certain limitations, the necessity, extent and nature of the regulation to the contemporaneous knowledge, wisdom and discretion of the body in whom the power was vested. We may well believe that, contemplating the subject with the enlarged vision of

those who are building for a future unknown or dimly discerned, and seeing clearly that interstate like foreign commerce was, in the words of the resolutions with which Randolph opened the deliberations of the convention, a matter "to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," the convention was constrained to associate the two together in every draft of the Constitution proposed, and place them with the Indian trade, under the control of the National legislature. Madison's Journal, Scott's edition, pp. 67, 161, 164, 185, 362, 453, 654, 656, 704, 753.

The different kinds of commerce described have the common qualities that they are more extensive than the jurisdiction of a single State and liable to injury from conflicting state laws, and thereby are all alike distinguished from the purely internal commerce of the States. There is nothing in the words of the grant that permits the belief that the power is not coextensive over foreign, interstate, and Indian trade, or is anything less than the whole power which any government may properly exercise over either, though it may well be that the restrictive parts of the Constitution, its prohibitions and reservations, may operate differently on different kinds of commerce, or even on different aspects of the same kind of commerce.

It is said that Congress has never before enacted legislation of this nature for the government of interstate commerce on land, though it has for the government of such commerce upon the water and for the government of foreign commerce; that on the contrary the relations affected have been controlled by the undoubted power of the States to govern men and things within their respective dominions; and that this omission of Congress is of controlling significance. The fundamental fallacy of this argument is that it misunderstands the nature of the Constitution, undervalues its usefulness, and forgets that its unchanging provisions are adaptable to the

infinite variety of the changing conditions of our National life. Surely there is no statute of limitations which bars Congress from the exercise of any of its granted powers, nor any authority, save that of the people whom it represents, which may with propriety challenge the wisdom of its choice of the time when remedies shall first be applied to what it deems wrong. It cannot be doubted that the exercise of a power for the first time may be called upon to justify itself. The fact that it is for the first time is a circumstance to be considered. But in this case it is a circumstance whose significance disappears in the light of history. Henry Adams, a writer of high authority, in the first chapter of his History of the United States, has drawn a vivid picture of the conditions of our National life at the beginning of the nineteenth century. The center of population was near Baltimore. The interior was almost impenetrable except by the waterways and two wagon roads from Philadelphia to Pittsburg and from the Potomac to the Monongahela. The scattered settlements of what was then the Western country were severed from the seaboard settlements by mountain ranges, and there was little connection between the two almost independent peoples. There was scarcely a possibility of trade between the States except along the seacoast and over the dangerous and uncertain rivers. "The experience of mankind," says the author, p. 7, "proved trade to be dependent on water communications, and as yet Americans did not dream that the experience of mankind was useless to them." We need not look beyond these conditions for an explanation why Congress, though it early and vigorously exercised its power of legislation over foreign commerce and interstate commerce by water, left it unused in respect to interstate commerce on the land. As population multiplied, bringing the isolated settlements nearer to each other, wealth increased, creating a wider demand for commodities, and roads and bridges came to be better and more numerous, doubtless overland commerce was somewhat stimulated. But the iron restrictions which nature had placed upon land transportation

remained constant until they were unloosed by the operation of the steam railroad. The system of steam transportation began modestly by the construction of short lines, often wholly within a single State. These lines were lengthened by extensions and consolidations, until at the present time the States of the Union are all bound together by a network of interstate railroads. Their operation, aided by the quick and cheap transmission of the mails, and the communication of intelligence by electricity, has transformed the commerce of the country. Interstate commerce by land, once so slight as to be unworthy of the attention of the National legislature, has come to be the most important part of all trade, and it is not too much to say that the daily needs of the factory and the household are no longer dependent upon the resources of the locality, but are largely supplied by the products of other States.

It was not reasonably to be expected that a phenomenon so contrary to the experience of mankind, so vast, so rapidly developing and changing, as the growth of land commerce among the States, would speedily be appreciated in all its aspects, or would at once call forth the exercise of all the unused power vested in Congress by the commerce clause of the Constitution. Such a phenomenon demands study and experience. The habit of our people, accentuated by our system of representative government, is not so much in legislation to anticipate problems as it is to deal with them after experience has shown them to exist. So Congress has exercised its power sparingly, step by step, and has acted only when experience seemed to it to require action. A description of its action in this respect was given in *In re Debs*, 158 U. S. 564, where it was said, p. 579: "Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by for the present all that legislation in respect to commerce by water, and considering only that which bears upon railroad interstate transportation (for this is the specific matter involved in this case), these acts

may be noticed: First. That of June 15, 1866, c. 124. 14 Stat. 66, carried into the Revised Statutes as § 5258, which provides: 'Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore, *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination.' Second. That of March 3, 1873, c. 252, 17 Stat. 584 (Rev. Stat. §§ 4386 to 4389), which regulates the transportation of live stock over interstate railroads. Third. That of May 29, 1884, c. 60, § 6, 23 Stat. 31, 32, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4, 1887, c. 104, 24 Stat. 379, with its amendments of March 2, 1889, c. 382, 25 Stat. 855, and February 10, 1891, c. 128, 26 Stat. 743, known as the 'Interstate Commerce Act,' by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the sixteenth section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1, 1888, c. 1063, 25 Stat. 501, providing for arbitration between railroad interstate companies and their employés; and, Sixth, the act of March 2, 1893, c. 196, 27 Stat. 531, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions."

Since this decision other laws more fully regulating interstate commerce on land have been enacted, which need not

here be stated. They show a constantly increasing tendency to exercise more fully and vigorously the power conferred by the commerce clause. It is well to notice, however, that Congress has assumed the duty of promoting the safety of public travel by enacting the Safety Appliance Law; an act to require reports of casualties to employés or passengers (31 Stat. 1446); a resolution directing the Interstate Commerce Commission to investigate and report on the necessity for block signals (34 Stat. 838); an act limiting the hours of service of employés, and the act under consideration. These acts, all relating to interstate transportation, demonstrate the belief of Congress that the safety of interstate travel is a matter of National concern, and its deliberate purpose to increase that safety by laws which it deems conducive to that end. I think, therefore, that we may consider whether this act finds authority in the commerce clause of the Constitution without embarrassment from any inferences which may be drawn from the inaction of Congress.

It is settled beyond the necessity of citing cases that the transportation of persons and property is commerce, in other words, that the business of carriers is commerce. Where, therefore, the business is foreign or interstate, Congress, it has frequently been decided, has the paramount, if not the sole, power to legislate for its direct control. An obstruction of such commerce by unlawful violence may be made punishable under the laws of the United States, suppressed by the armies of the United States, or, at the instance of the United States, enjoined in its courts. *In re Debs, ubi sup.* It is difficult to conceive how legislation may effectively control the business if it cannot regulate the conduct of those engaged in the business, while engaged in the business, in every act which is performed in the conduct of the business. The business of transportation is not an abstraction. It is the labor of men employed with the aid of instrumentalities, animal and mechanical, in carrying men and things from place to place. In every form of transportation, from the simplest to the most

complex, whether the man carries the burden on his back, or drives an animal which carries it, or a locomotive which draws a car which carries it, the one and only constant factor is the labor of mankind. I am quite unable to understand the contention made at the bar that the power of Congress is to regulate commerce among the States and not to regulate persons engaged in commerce among the States, for in the case of transportation at least the labor of those engaged in it is commerce itself. How poor and meagre the power would be if, whenever it was exercised, the legislator must pause to consider whether the action proposed regulated commerce or merely regulated the conduct of persons engaged in commerce. The contention derives some plausibility from its vagueness. Of course the power to regulate commerce does not authorize Congress to control the general conduct of persons engaged therein, but, unless it is an idle and useless power, it authorizes Congress to control the conduct of persons engaged in commerce in respect to everything which directly concerns commerce, for that is commerce itself. It would seem, therefore, that when persons are employed in interstate or foreign commerce, as the employment is an essential part of that commerce, its terms and conditions, and the rights and duties which grow out of it, are under the control of Congress subject only to the limits on the exercise of that control prescribed in the Constitution. This has been the view always expressed or implied by this court. In his concurring opinion in *Gibbons* v. *Ogden*, 9 Wheat. 1, Mr. Justice Johnson said, p. 229: "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange become commodities and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulations." In *Cooley* v. *Board of Wardens*, 12 How. 299, the court in holding, *inter alia*, that a regulation of pilots is a regulation of commerce within the meaning of the commerce clause

said (p. 316, by Justice Curtis) of the power: "It extends to the persons who conduct it, as well as to the instruments used." In the opinion of the court, delivered by Mr. Justice Field, in *Sherlock* v. *Alling*, 93 U. S. 99, it was said, p. 103: "It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it and the instruments by which it is carried on." In delivering the opinion of the court in *Smith* v. *Alabama*, 124 U. S. 465, where a state statute requiring interstate locomotive engineers to obtain a license after a qualifying examination, and imposing a penalty for operating without such license, was sustained, Mr. Justice Matthews said, p. 479: "It would, indeed, be competent for Congress to legislate upon its subject matter and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce." In sustaining a similar state statute, directed against color blindness, Mr. Justice Field said in *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96, 99: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the State to provide against accidents on the train." In *Chicago &c. Railway* v. *Solan*, 169 U. S. 133, a state statute forbidding a contract limiting liability for injury was sustained, the court, by Mr. Justice Gray, saying, p. 137: "The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, though they control, in some degree, the conduct and liability of those engaged in such commerce.

So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits." This statement was assumed to be true in *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477, and *Martin* v. *Pittsburg &c. Railroad*, 203 U. S. 284. The case of *Peirce* v. *Van Dusen*, 78 Fed. Rep. 693, was decided by the Court of Appeals of the Sixth Circuit by Mr. Justice Harlan and Judges Taft and Lurton. The opinion was delivered by Mr. Justice Harlan. After sustaining a state statute, which modified the common law rules with respect to the liability for injuries of a carrier to its employés, he said of it: "The Ohio statute is not applicable alone to railroad corporations of Ohio, engaged in the domestic commerce of this State. It is equally applicable to railroad corporations doing business in Ohio, and engaged in commerce among the States, although the statute, in its operation, may affect in some degree a subject over which Congress can exert full power. The States may do many things affecting commerce with foreign nations and among the several States until Congress covers the subject by National legislation. . . . Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by National legislation enacted by Congress under its power to regulate commerce among the States."

We may not trust implicitly to the accuracy of statements gathered from opinions where the precise question was not for decision. But where, as in these quotations, the statements were an essential part of the course of reasoning deemed appropriate for the disposition of the cases, where the same thought clothed in different words has been expressed at intervals from early times to the present day, and where no decision or judicial utterance has been found in opposition to them, they are entitled to profound respect, and furnish cogent evidence of what the law has always been supposed to

be by the members of this court. They cannot be regarded lightly, and if we follow them they lead us to the conclusion that the national power to regulate commerce is broad enough to regulate the employment, duties, obligations, liabilities and conduct of all persons engaged in commerce with respect to all which is comprehended in that commerce. Upon what principle except this could this court have twice enforced the Safety Appliance Act, undisturbed by a doubt of its constitutionality? *Johnson* v. *Railroad,* 196 U. S. 1; *Schlemmer* v. *Railroad,* 205 U. S. 1. That act (27 Stat. 531) compelled interstate railroads to equip all their trains with power brakes operated from the engine, and all their cars with automatic couplers, grab-irons, and hand holds, by enacting that the use of engines and cars not thus equipped should be unlawful. There was no express provision that an employé injured by the failure of a railroad to comply with the law should be entitled to damages, but without doubt the liability of the railroad is implied. The common law rule governing the liability was materially changed by § 8, which abolished in part the doctrine of the assumption of risk, by providing that the employé should "not be deemed to have assumed the risk" of the unlawful conditions, though he knew of them and continued in his employment. This section was enforced in most emphatic manner in the *Schlemmer case,* where Mr. Justice Holmes said, 205 U. S. 11: "An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow-servant of the injured man." If the statute now before us is beyond the constitutional power of Congress, surely the Safety Appliance Act is also void, for there can be no distinction in principle between them. If Congress can create a liability to an injured employé for the existence of conditions in certain mechanisms which he uses, by declaring those conditions unlawful, it may create the same liability for negligence of the agents and imperfections in the instruments used in the car-

rier's work; if it may change the common law rule of the assumption of the risk of imperfect appliances, it may change the rule of the assumption of the risk of a careless fellow servant. I can conceive of no principle of constitutional law which enables us to say that the commerce clause authorizes Congress to fix upon the carrier a liability for an insufficient brake but not for a defective rail, for the absence of automatic couplers, but not for the negligent order which brings trains into collision, for an insecure grab-iron, but not for a heedless switchman. If Congress has the right to control the liability in any way it may control it in every way, subject, as all powers are subject, to the express prohibitions of the Constitution. Unless the cases on the safety appliance acts are deemed to have been inadvertently decided, they seem to be conclusive of this branch of the case. This seems to have been feared by counsel for one of the defendants, who in his brief said "that the giving of a right of recovery to an injured employé is a proper and necessary method for making effective the Safety Appliance Act . . . we do not admit."

But if we put aside the authority of precedents, and examine the nature and extent of the grant to Congress of power over commerce in the light of the settled principles of interpretation fit to be applied to the exposition of a constitution, we shall arrive at the same result. One main purpose and effect of the Constitution was to devise a scheme of efficient government. In order to accomplish this all the powers usually exercised by governments were distributed between the States and the Nation, except those deemed unfit or unsafe to be entrusted to either and withheld from both. In the allotment of powers to the Nation they were enumerated rather than defined. In the enumeration words of the largest import were employed, comprehending within their meaning grand divisions of the powers of government. The nature of the Constitution, said Chief Justice Marshall (*McCulloch* v. *Maryland*, 4 Wheat. 316, p. 407), "requires that only its great outlines should be marked, its important objects designated, and

the minor ingredients which compose those objects be deduced from the nature of the objects themselves." The wide extent of the powers granted to Congress is expressed in a few simply worded provisions, all of which might be printed on a single page of its book of annual laws. Counsel have argued that the power to regulate commerce does not include the power to regulate the conduct of persons engaged in that commerce in respect of that commerce. This is what Mr. Justice Miller (110 U. S. 658) described as "the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it." Suppose that method of reasoning had been applied to the power "to establish post offices and post roads," under which Congress governs the postal system of the country as fully and freely in every detail as it is governed by any other nation. It could be said to Congress, you cannot carry the mail, you cannot issue money orders, you cannot determine what shall be excluded from the mail, you cannot regulate the conduct of those who are employed in the mail service, you cannot exempt them from militia duty, you cannot punish their theft or embezzlement, you cannot punish him who breaks and enters the post office or mail car—all these powers are reserved to the States. You can only establish post offices and post roads, and when that is done your power is exhausted. Yet Congress has done all these things and no one now doubts its power to do them, because the grant of power is of the whole governmental power over the subject. So, too, the power to regulate interstate and foreign commerce is the whole power which any government can exercise over that subject, it "is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Marshall, C. J., in *Gibbons* v. *Ogden*, *ubi sup.*, 197; *The Lottery case*, 188 U. S. 321. We are brought then directly to the

inquiry whether a power so extensive is a sufficient warrant for the enactment of the statute before us.

By what has been called the auxiliary power Congress may "make all laws which shall be necessary and proper for carrying into execution" its granted powers. It is settled that this provision authorizes the enactment of laws which, in the exercise of a wide discretion, Congress deems adapted to secure a legitimate end and calculated to effect any of the objects entrusted to it, and the exercise of that discretion, unless it violates some prohibition of the Constitution or is used as a pretext to accomplish some object not entrusted to the National Government, cannot be reviewed by the judicial branch of the Government without trespassing upon a domain which is peculiarly and exclusively the province of the legislative branch. If the statute under consideration be brought to the test of these principles there can be no doubt of its validity.

It cannot be denied that in that part of commerce which consists in transportation, the safety of those who are concerned in it as passengers or employés is of the first importance. As was said by Mr. Justice Gray, in *Chicago &c. Railway Co.* v. *Solan*, 169 U. S. 133, 135, "the fundamental principle on which the law of common carriers was established was the securing of the utmost care and diligence in the performance of their public duties." The Government having the relations which the National Government has to interstate commerce, pronounced by the court in the *Debs Case*, 158 U. S. 564, 578, to be "those of direct supervision, control, and management," which neglects to do what it is fitting for a government to do to insure the safety of public travel, fails in the performance of its highest duty. The lengthening list of casualties to employés and passengers on our railroads has arrested the public attention and created public alarm. Ought Congress alone to be indifferent? Or have we so weak a system of government that the only part of it which is clothed with direct authority over the commerce in which the casualties happen is powerless? What does the "direct supervision, control, and management" amount to if

it does not include the power to pass any laws really calculated to lessen the great dangers of public travel? Congress, recognizing its responsibility and believing in its power, has enacted the group of laws to which reference has been made. Of one (the Safety Appliance Act) the Chief Justice said, in the *Johnson Case*, 196 U. S. 17, what is true of all: "The primary object of the act was to promote the public welfare by securing the safety of employés and travellers." That act, like this, in terms simply safeguarded the employé, but his safety cannot be separated from the safety of the traveller; both may be affected by the same act of negligence and the same defect in appliances, and suffer injury in the same disaster. Any law which promotes the safety of either promotes the safety of both. Much of the law of common carriers, whether created by decisions of the courts or by acts of legislatures, has been upon or influenced by the theory that the nature of the liabilities imposed upon the carriers directly affects the care, diligence and safety with which they conduct their business. For instance, one consideration which has influenced the courts in the judicial development of the fellow-servant doctrine is, that, by imposing upon the employé the risk of the carelessness of the men with whom he works, a greater degree of care and therefore of safety would result. The truth of this theory has been often disputed (see *Chicago &c. Railroad* v. *Ross*, 112 U. S. 377), and it is almost universally disregarded in modern legislation. It is of no importance here whether it is right or wrong. The only significance is that the greater or less liability in damages is generally regarded as having some relation to the safety of operation. It follows that if Congress, in the exercise of its plenary power over interstate and foreign transportation, deems that the safety of that transportation would be increased by enacting that those employed in it shall have a different remedy for injuries sustained by its negligent conduct than that furnished by the laws of the States, this court cannot, without overstepping the boundary which separates the judicial from the legislative field, declare the enactment void.

The power of Congress to enact the law under consideration, which seems so clearly to result from a just interpretation of the commerce clause, might not have been disputed but for the fact that up to this time the subject has been left to be dealt with by the States. If a doubt ever existed that the States could lawfully deal with the subject under the general legislative authority to govern their territory, which was undisturbed by the Constitution, that doubt was dispelled by the decision in *Sherlock* v. *Alling*, *ubi sup.*, 93 U. S. 99, and it is now agreed that the State may, in the absence of action by Congress, fix and determine the liability of all carriers while operating within the State, to those whom they employ for the injuries which are suffered in the course of the employment. But such authority in the State is not inconsistent with a like authority in the Nation. Where, as in the case of our dual government, the same territories and the same individuals are subject to two governments, each supreme within its sphere, both governments by virtue of distinct powers may legislate for the same ends. The exercise of the rightful authority of the Nation and the State, though it proceeds from different governmental powers, may reach and control the same subject. This result arises from the different relations to the community the subject may sustain; a drove of cattle may be at once interstate freight and the vehicle by which infectious disease may be brought within the borders of a State; a bridge may at the same time interrupt the navigation of the river and serve as a continuation of the highways of the State; a man, while the agent through which the transaction of interstate commerce is conducted, is at the same time one of the population, permanent or transient, of a State and subject to its general laws. There is no conflict in powers, though there may be conflict in legislation, referable to different powers. In such a case under our system the law of the State enacted by virtue of its undoubted powers must yield to the national law enacted in pursuance of the powers conferred by the Constitution. There is no necessity in this case to disturb the troublesome question

when, if ever, even where Congress is silent, the States may exercise any direct power over interstate and foreign commerce. For the power hitherto exercised by the States over this particular subject has never been deemed to be a regulation of commerce, but rather an exercise of their authority to regulate generally the relations of men to each other, which may indirectly affect such commerce. "If a State," said Chief Justice Marshall (in *Gibbons* v. *Ogden*, *ubi sup.*, 204), "in passing laws on subjects acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State and may be executed by the same means. All experience shows that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical." That the States may by their laws fix the relative rights, duties, obligations and liabilities of all persons or corporations within their territorial jurisdictions, and thus control in that respect those who are engaged in interstate and foreign commerce; that such laws do not proceed from any power to regulate such commerce, though incidentally and indirectly they do regulate it, but are to be referred to their general power over persons and things within their territories, and that all such laws, so far as they affect such commerce, must yield to the superior authority of the laws of Congress, is, I think, conclusively shown by the following cases: *Sherlock* v. *Alling*, 93 U. S. 99; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville &c. Railway Co.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299; *New York &c. Railroad* v. *New York*, 165 U. S. 628; *Chicago &c. Railroad Co.* v. *Solan*, 169 U. S. 133; *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477; *Martin* v. *Pittsburg &c. Railroad*, 203 U. S. 284; *Peirce* v. *Van Dusen*, 78 Fed. Rep. 693. Upon principle and authority it, in my opinion, is clear that Congress had constitutional power over the subject with which it dealt in the statute before us.

There remains to be considered the objection that the specific provisions of the act exceed the legislative power over the subject. The powers of Congress are not only confined to those which may be inferred from the Constitution, but are also restrained by the express limits upon their exercise which are contained in that instrument. They are delegated and enumerated and then limited. Even when Congress enters upon a field in which it rightfully exercises the supreme governmental power, it is not supreme in the fullest sense. It does not enjoy complete sovereignty like that, for instance, of the British Parliament. All its legislation must obey the express commands of those parts of the Constitution which mark a limit beyond which legislation cannot go. The only limit upon the authority of Congress relevant to the discussion of this branch of the case is that which forbids Congress from depriving any person of his life, liberty or property without due process of law. Amendment VI. It is contended that, although the law deals with a subject under the control of Congress, it deals with it in such a manner as to violate that prohibition, and is therefore void. Before considering the contention it is desirable to state clearly the substantial provisions of the act. The remedy afforded by it is more generous to the employé than that given by the common law in several respects. The common law recognized no recovery of damages for death resulting from negligence; by the statute damages are recoverable for death as well as for injury. The common law allowed no recovery against the employer for the neglect of a fellow-servant engaged in a common employment; by the statute the employer is held responsible for the negligence of any of its officers, agents or employés, even though the guilty person is a fellow-servant of him who is injured or killed. The common law denied to one who by his negligence had contributed to his own injury the right to a remedy for the neglect of another which had been a concurring cause; by the statute the negligent sufferer may recover if his negligence be slight, and that of the employer gross in comparison, though the contributing

negligence must be taken into account in reduction of the damages. The common law, as adjudged by this court, permitted the employé to enter into a contract renouncing his right to damages in case he incurred injuries in the course of his employment; the statute forbids such a contract. Thus four doctrines of the common law restrictive of the employés' rights are supplanted by others more favorable to him.

There can be no doubt of the right of a legislative body, having jurisdiction over the subject, to modify the first three of these rules of the common law in the manner in which this act of Congress does it. They are simply rules of law, unprotected by the Constitution from change, and like all other such rules must yield to the superior authority of a statute. They have so generally been modified by statute that it may well be doubted if they exist in their integrity in any jurisdiction. The common law rules have taken form through the decisions of courts, whose judges in announcing them were controlled by their views of what justice and sound public policy demanded. This is nowhere more clearly stated than by Chief Justice Shaw in *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49, the leading American case establishing the doctrine that one cannot recover against the master for the negligence of a fellow-servant, where he said: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned." But the economic opinions of judges and their views of the requirements of justice and public policy, even when crystallized into well-settled doctrines of law, have no constitutional sanctity. They are binding upon succeeding judges, but while they may influence they cannot control legislators. Legislators have their own economic theories, their own views of justice and public policy, and their views when embodied in a written law must prevail. Whenever the legislative power to change any of these rules of the

common law has been drawn in question in this court it has been sustained. Various state statutes allowing a remedy against a railroad employer for the negligence of a fellow-servant have been held to be within the legislative power. *Missouri Pacific Railway Company* v. *Mackey*, 127 U. S. 205; *Minneapolis &c. Railway Company* v. *Herrick*, 127 U. S. 210; *Chicago, Kansas & Western Railroad Company* v. *Pontius*, 157 U. S. 209; *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348. State statutes, allowing a recovery for death, were sustained in *Steamboat Company* v. *Chase*, 16 Wall. 522, and *Sherlock* v. *Alling*, 93 U. S. 99, though the statute was attacked in the first case only on the ground that it intruded upon the admiralty jurisdiction exclusively vested in the courts of the United States, and in the second case because it interfered with interstate commerce, whose regulation was vested exclusively in Congress. Statutes of this kind have been in force in the States and doubtless in the Territories for many years, many cases have been tried under them, and in no case has it ever been claimed that anything in the Constitution removes them from the legislative power. The same observation may be made, though not so emphatically of statutes modifying the common law rule denying a recovery to one contributing to the injury by his own neglect. It is interesting to note that this court, acting upon the same reasons which doubtless influenced Congress in the enactment of this part of the statute, established a rule in principle the same, to govern the recovery in admiralty of damages by a person injured on a ship (*The Max Morris*, 137 U. S. 1, 14), holding that it promoted "the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good." It is enough to say here that the decisions of the court in the safety appliance cases, supporting a statute changing the analogous common law doctrine of assumption of risk, are in principle conclusive that the whole subject of contributory negligence is under the control of the legislative power, in this respect unrestrained by any constitutional provision. But it is earnestly urged upon us

that the statute under consideration, applying to all interstate common carriers and all their employés in that business, without distinguishing between that part of the business and employment which is dangerous and hazardous and that part which is not, and confined solely to the business of common carriage and its employers, is a deprivation of the employer's property without due process of law, in violation of the Fifth Amendment of the Constitution. The manner in which due process of law is said to be denied is by the denial of the equal protection of the laws by imposing unusual burdens upon a class of persons arbitrarily and capriciously selected. In support of this position cases from state courts interpreting state constitutions and cases from this court interpreting the restriction upon state action imposed by the Fourteenth Amendment, are indiscriminately cited. They furnish little aid.

It is not necessary in this case to determine how far, if at all, the requirement from the States of the equal protection of the laws made by the Fourteenth Amendment is included in the requirement from the Nation of due process of law made by the Fifth Amendment to the Constitution. It is enough to say that this statute complies with both. It is rather startling to hear that in enacting laws applicable to common carriers alone Congress has made a capricious and arbitrary classification. From time immemorial the common law has set apart those engaged in that business as a peculiar class, to be governed in many respects by laws peculiar to themselves. In separating carriers from those engaged in other interstate and foreign commerce, Congress has but followed the ancient classification of the common law, based upon reasons so obvious that they need no statement. Whether the law should be made to apply to all carriers or to carriers by railroad alone, or whether the employés should be classified according to the degree of danger which surrounds their employment, is a matter of legislative discretion with which we have no right to meddle. See *Union Pacific Railway Co.* v. *Mackey, ubi sup.*

I have confined my observations up to this point to the first

three changes in the common law made by the statute. The fourth change, that forbidding the employé to make a contract releasing his employer from the consequences of his negligence, is open to a possible objection not common to the others. It is asserted that this part of the act violates the right of free contract which in some cases this court has protected against the exercise of the legislative power. Without intimating any opinion on that subject, it is enough to say that that part of the statute is separable from and independent of the remainder, and may stand or fall by itself, and that no question concerning it is raised in these cases. I see nothing in the provision that "all questions of negligence or contributory negligence shall be for the jury" which affects the right of jury trial guaranteed by the Seventh Amendment. Such questions always have been for the jury, and I cannot see that this enactment makes any change whatever.

I am of opinion, therefore, that the act should be sustained as a legitimate exercise of the authority of Congress, and that orders in these cases should be made accordingly.

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE MCKENNA), dissenting.

Mr. Justice McKenna and myself are of opinion that it was within the power of Congress to prescribe, as between an interstate commerce carrier and its employés, the rule of liability established by the act of June 11, 1906. But we do not concur in the interpretation of that act as given in the opinion delivered by Mr. Justice White, but think that the act, reasonably and properly interpreted, applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce and to employés who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the State in which the wrong or injury occurred. We concur in the views expressed by Mr. Justice Moody as to the

scope and interpretation of the act. We think the act is constitutional, and, therefore, that the judgment should be reversed.

MR. JUSTICE HOLMES, dissenting.

I must admit that I think there are strong reasons in favor of the interpretation of the statute adopted by a majority of the court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense. The phrase "every common carrier engaged in trade or commerce" may be construed to mean "while engaged in trade or commerce" without violence to the habits of English speech, and to govern all that follows. The statute then will regulate all common carriers while so engaged in the District of Columbia or in any Territory, thus covering the whole ground as to them; and it will regulate carriers elsewhere while engaged in commerce between the States, etc., thus limiting its scope where it is necessary to limit it. So construed I think the act valid in its main features under the Constitution of the United States. In view of the circumstances I do not discuss details.

CONSOLIDATED RENDERING COMPANY *v.* THE STATE OF VERMONT, BY CLARKE C. FITTS, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 364. Argued December 3, 4, 1907.—Decided January 6, 1908.

Whether a notice to produce books and papers is broader than the state statute provides for is not a Federal question.

So long as an opportunity to be heard is given to the party objecting to a notice to produce books and papers, before the proceeding to enforce such production is closed, due process of law is afforded, and if the state court has construed the statute providing for such production to the effect

that objections raised before a grand jury must be reported to the court for action, there is opportunity to be heard.

It is within the power of the State, and due process of law is not denied thereby, to require a corporation doing business in the State to produce before tribunals of the State books and papers kept by it in the State, although at the time the books may be outside of the State.

Nothing in the Federal Constitution prohibits a State from conferring judicial functions upon non-judicial bodies.

A corporation required to produce books and papers cannot refuse to produce any of them on the ground that they might incriminate it. It is for the court, after an inspection, to determine the sufficiency of the objection and what portion, if any, of the books and papers produced should be excluded.

In this case, the notice, given under a state statute, to produce books and papers did not amount to an unreasonable search or seizure. *Adams* v. *New York*, 192 U. S. 585. *Quære* and not decided, whether the Fourteenth Amendment has made the provisions of the Fourth and Fifth Amendments immunities and privileges of citizens of the United States of which they cannot be deprived by state action.

An objection that a notice to produce books and papers is too broad cannot be urged against the validity of the order adjudging the party refusing to comply guilty of contempt. *Hale* v. *Henkel*, 201 U. S. 43. Nor is a notice to produce too broad if, as in this case, it is limited to books and papers relating to dealings with certain specified parties between certain specified dates.

If the person producing the books and papers is entitled, under the general law of the State, to compensation as a witness, the failure of the statute requiring the production of the books and papers of corporations to provide compensation to the corporation itself for the time, trouble and expense of such production does not amount to taking private property without compensation.

A state statute providing for the production of books and papers by corporations does not deny to corporations the equal protection of the laws; such a classification is a proper one.

The statute of Vermont of October 9, 1906, providing for the production of their books and papers by corporations before courts, grand juries and other tribunals, and punishing corporations failing to comply therewith as for contempt, is not unconstitutional as depriving corporations of their property without due process of law, or as denying them the equal protection of the laws, or as conferring judicial functions on non-judicial bodies, or as taking private property for public use without compensation, or as constituting unreasonable searches and seizures or requiring corporations to incriminate themselves.

66 Atl. Rep. 790, affirmed.

THIS writ of error brings up for review a judgment of the

Supreme Court of the State of Vermont, affirming a judgment of the County Court of the County of Chittenden, adjudging the plaintiff in error, a corporation, hereinafter called the company, in contempt and fining it $3,000, for the collection of which it was ordered that execution should issue.

The company in due form was served in Vermont with a notice to produce certain described books and papers before the grand jury sitting at Burlington, in that State. The notice was given pursuant to the provisions of a statute passed by the General Assembly of the State, October 9, 1906. No. 75 Laws, p. 79. That statute provided for the service upon a corporation doing business in the State, whether organized under its laws or those of another State or country, of a notice to produce books and documents before any court, grand jury, etc., which contained any account or information concerning the subject of inquiry before the tribunal, acting under the authority of the State, and which books, etc., have at any time been made or kept within the State of Vermont, and were within the custody or control of the corporation in that State or elsewhere at the time of the service of the notice upon it. Such corporation, when notice to the above effect is served upon it, is, by the statute, directed to produce the books and papers as required. The notice is to be issued from the court or tribunal before whom the papers are required to be produced, and a general description of what is required is to be given in the notice. If the corporation, without reasonable cause, neglects or refuses to comply, "it may be punished as for contempt by the court having jurisdiction of the premises to punish for the contempt. Execution may issue for the collection of such fine as may be imposed for such contempt."

This company was doing business at Burlington, Vermont, under a certificate from the Secretary of State, certifying that it had complied with all the requirements of the law authorizing it to do business in the State. On the seventeenth of October, 1906, the grand jury was in session at Burlington,

and had been investigating a complaint which had been made against certain individuals who were members of the Vermont Cattle Commission, the complaint being that such persons, or one of them, had unlawfully sold diseased meat for food purposes at Burlington. In order to continue the investigation the grand jury had caused a notice, under the above statute, to be served upon the company, directing it to produce certain books and papers, described in such notice, before the grand jury on the seventeenth of October, 1906. On the day named a person, representing the company, appeared before the grand jury and produced some books of account and other data, but failed to produce others which were described in the notice, and which it was therein directed to produce. The grand jury reported the facts to the County Court, stating in the report that the company had kept books which would have shown material facts for the purpose of the investigation, but had not produced them, as required in and by the notice, and that they were necessary for the further pursuit of the inquiry. The Attorney General at the same time filed a petition to the court containing, in substance, the same facts, and asked that the company should be proceeded against for contempt. The County Court thereupon, on the nineteenth of October, 1906, made an order to show cause why the company should not be punished as for a contempt in failing to produce such books and papers. Upon the return of the order the company appeared by counsel and made a motion to dismiss the proceeding on the ground that the memoranda and papers called for in the notice were not legal and material evidence before the grand jury, and also because it was sought by the notice to produce, and by the other proceedings to compel the company to bring into the State of Vermont, before the grand jury, papers which might tend to criminate the company and render it liable to criminal prosecution, contrary to the provisions of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. Accompanying this motion to dismiss was the affidavit of counsel, in which he stated that

the papers and memoranda which the company had failed to produce before the grand jury would, if produced in evidence before the jury, tend to criminate the company and render it liable to criminal prosecution. The company also answered and admitted that it had kept at Burlington, in Vermont, such papers as were described in the notice to produce, but that on August 20, 1906, all such books and papers were sent to the main office of the company at Boston, Massachusetts, for the purpose of examination and verification, and that after it was made, and long before the service of the notice, such papers or memoranda as were not produced before the grand jury had been destroyed at Boston. The State took issue upon the averments of the answer.

Upon the hearing before the court one of the company's agents testified that the papers had been destroyed in Boston because they were of no consequence, and there was nothing in them to incriminate anybody.

The court, for reasons which it stated, found that the papers wanted were material to the inquiry which the grand jury was making, and that without their presence it was impossible to proceed to any effect with the investigation. It further found, upon all the evidence before it, that the books and papers had been in possession of the company at the time they were taken away from the State, and the court said that it failed to find that the papers were destroyed, and that it also failed to find that they were not then in the custody and control of the company so that it could produce them, and that "thus failing to find, we find them guilty of contempt." This judgment was affirmed by the Supreme Court of Vermont. 66 Atl. Rep. 790.

Mr. Freedom Hutchinson and *Mr. Albert S. Hutchinson* for plaintiff in error:

The notice to produce was in excess of the authority granted by the statute, and was invalid.

Inflicting a fine upon the plaintiff in error for failure to obey

an invalid and unauthorized order deprived it of property without due process of law.

The statute is a highly penal one. A corporation failing to comply with a proper and lawful notice is subject to punishment for contempt and may also be enjoined from longer doing business in Vermont. The whole proceeding was a summary one, and the jurisdiction of the court to act depended upon a strict compliance with the statute.

Since the statute was not complied with, all the proceedings here taken were null and void, and the plaintiff in error was adjudged in contempt without due process of law. *Thatcher* v. *Powell*, 6 Wheat. 119. See also *Ex parte Fisk*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Ayers*, 123 U. S. 443; *Ex parte Sawyer*, 124 U. S. 200; *Ex parte Burrus*, 136 U. S. 586; *Re Bonner*, 151 U. S. 242.

Neither statute nor notice to produce afforded the plaintiff in error an opportunity to present in court reasons why the writings demanded should not be produced.

The notice to produce which could be issued under the statute by a non-judicial body in effect pronounced an *ex parte* judgment on the plaintiff in error without hearing or notice and denied due process of law. *Hovey* v. *Elliott*, 167 U. S. 409; *Holden* v. *Hardy*, 169 U. S. 366, 389, 390; *Roller* v. *Holley*, 176 U. S. 398.

Where the *subpœna duces tecum* requires appearance and the production of documents in a place other than open court, the witness has a right to have the question whether he shall answer or produce passed upon by the court, with opportunity for defense, and an order of the court to produce before he is in contempt. *Hale* v. *Henkel*, 201 U. S. 43, 80; *Interstate Commerce Com.* v. *Brimson*, 154 U. S. 447, 479. See also *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Ballman* v. *Fagin*, 200 U. S. 186; *Nelson* v. *United States*, 201 U. S. 92.

This statute is an attempt by the State to limit a corporation

in the complete dominion and control of its property situated in another State, although the corporation is not organized under her laws and is not personally within her jurisdiction. The sovereign powers of a State cannot be exercised beyond her borders. *Union Refrigerator Co.* v. *Kentucky,* 199 U. S. 194; *Buck* v. *Beach,* 206 U. S. 392; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 592; *N. Y., L. E. & W. R. R. Co.* v. *Pennsylvania,* 153 U. S. 628; *Mississippi &c. Co.* v. *Pennsylvania,* 2 Black, 485.

The statute attempts to confer judicial functions upon non-judicial bodies, in violation of the Fourteenth Amendment.

The powers bestowed are judicial in their character which cannot be exercised by the legislature itself, much less delegated to a non-judicial body. *Kilbourn* v. *Thompson,* 103 U. S. 168. See also *In re Pacific Railway Comm.,* 32 Fed. Rep. 241, 253.

The statute and notice required the plaintiff in error to produce writings which tended to incriminate it, without extending immunity against criminal prosecution. *Counselman* v. *Hitchcock,* 142 U. S. 547; *Ballman* v. *Fagin,* 200 U. S. 186.

Even if the notice had contained an order for the plaintiff in error to appear before the grand jury, no question of law in reference to self-incrimination could properly have been raised before that body. *Ballman* v. *Fagin,* 200 U. S. 186; *Ex parte Wilson,* 39 Tex. Crim. Rep. 630.

The statute, since it contains no immunity clause, is in plain contravention of article X of the Vermont constitution, which is substantially the same as the Fifth Amendment to the United States Constitution. *Counselman* v. *Hitchcock,* 142 U. S. 547; *Emery's Case,* 107 Massachusetts, 172; *State ex rel. Attorney General* v. *Simmons & Co.,* 109 Missouri, 118; *In re Cullinan,* 82 App. Div. (N. Y.) 445. See also *Ex parte Clarke,* 103 California, 352; *Ex parte Cohen,* 104 California, 524; *Lamson* v. *Boyden,* 160 Illinois, 613; *Ex parte Carter,* 166 Missouri, 604; *Smith* v. *Smith,* 116 N. Car. 386; *People* v. *Forbes,* 143 N. Y. 219; *People* v. *O'Brien,* 176 N. Y. 351; *Logan* v. *Railroad Co.,* 132 Pa. St. 403, 408; *United States* v. *Lead Co.,* 75 Fed. Rep. 94.

For the same reason, the statute is in conflict with the Fourteenth Amendment which prohibits the infringement of fundamental rights by state action, whether legislative, executive or judicial. The right to be protected against self-incrimination is a fundamental right so protected. *Boyd* v. *United States*, 116 U. S. 605, 631.

The statute and notice to produce authorized an unreasonable search and seizure of the private books and documents of the plaintiff in error. *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43. See also *In re Pacific Railway Comm.*, 32 Fed. Rep. 241; *Ex parte Clarke*, 103 California, 352; *Lester* v. *People*, 150 Illinois, 408; *Ex parte Brown*, 72 Missouri, 143; *State* v. *Davis*, 117 Missouri, 614; *Corson* v. *Hawley*, 82 Minnesota, 204, 214; *Newberry* v. *Carpenter*, 107 Michigan, 567.

The statute provides no compensation for the time, trouble and expense imposed upon a corporation in a foreign State or country of collecting and sending the documents demanded to the State of Vermont. Such a requirement is, in substance, a taking of property without just compensation, and, furthermore, the taking is not in Vermont, but outside her limits, where the expense is incurred and the labor performed. *Chicago &c. Ry. Co.* v. *Illinois*, 200 U. S. 561; *Mo. Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Chicago Ry. Co.* v. *Chicago*, 166 U. S. 226.

The statute is confined in its operation to corporations. An arbitrary classification is thus established, and the plaintiff in error is deprived of the equal protection of the law secured by the Fourteenth Amendment. The classification created by this statute is a purely arbitrary one and in conflict with the principles laid down by this court in *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150.

Where evils sought to be remedied are incident to individuals as well as corporations, laws applicable only to corporations are clearly unconstitutional. *Johnson* v. *Goodyear Mining Co.*, 127 California, 4; *Quarries Co.* v. *Bough*, 80 N. E. Rep. 529 (Ind. 1907); *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Mississippi,

507, 569. See also *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Mr. Clarke C. Fitts, Attorney General of the State of Vermont, for defendant in error:

Where a witness is within the jurisdiction of the court issuing the subpœna, he may be compelled to produce books and papers, if they are within his control, though the physical location thereof may at the time be without the jurisdiction. *Bank* v. *State Bank*, 3 Cliff. 201; Wigmore on Evidence, 2200.

The plaintiff in error resided in Maine, but it was doing business in Vermont, and was present in Vermont. *Railroad Co.* v. *Koontz*, 104 U. S. 11, 12; *Blake* v. *McClung*, 172 U. S. 258, 261; *Insurance Case* v. *Francis*, 11 Wall. 210.

The question whether the notice in its scope goes beyond the statute and as to whether the books and papers called for would be legally admissible is one for the state court alone.

It is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government. *Adams* v. *New York*, 192 U. S. 599; *Fong Ting* v. *United States*, 149 U. S. 698, 729.

The requirement of the production of books and papers did not compel the company to incriminate itself. *Adams* v. *New York*, 192 U. S. 597.

Law in its regular course of administration through courts is due process, and when secured by a law of the State, the constitutional requirement is satisfied, and due process is so secured by laws operating on all alike. *Leeper* v. *Texas*, 139 U. S. 462; Kent's Commentaries, vol. 2, p. 13; *Marchant* v. *Railroad Co.*, 153 U. S. 390.

A corporation may be punished for contempt as well as an individual person. *People* v. *Railroad Co.*, 20 How. Pr. (N. Y.) 358.

Where a foreign corporation is doing business in another State, it is proper to punish a contempt by a fine as well against the corporation itself as the subordinate agents found within

its jurisdiction. *United States* v. *Railroad Co.*, 6 Fed. Rep. 237.

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

We take the findings of fact by the state court as conclusive upon us. It therein appears that the company was duly served with a notice (which was in substance a substitute for a *subpœna duces tecum*) to produce books and papers required, and that they had not been destroyed, but were then under its control and custody; that the papers were material evidence upon the subject of inquiry before the grand jury, and that the company had (with some minor exceptions) omitted and refused to produce them before that body. The company had a hearing before the court, and an opportunity was given it, under the statute, to set up any reasonable cause for its failure to comply with the requirements of the notice. The court, after this hearing, found the company guilty of the contempt charged and fined it accordingly.

The company insists that the proceedings were in violation of the Constitution of the United States. The objections made before us were: (1) That the notice to produce was in excess of the authority granted by the statute, and was therefore invalid; (2) that neither the statute nor the notice afforded the company an opportunity to present in court reasons why the writings demanded should not be produced; (3) that the effect of the statute is to limit a corporation in the complete dominion and control of its property situated in another State, although the corporation is not organized under the laws of the State of Vermont, and is not personally within her jurisdiction; (4) that the statute attempts to confer judicial functions upon non-judicial bodies, in violation of the Fourteenth Amendment to the Constitution of the United States; (5) that the statute and notice required the company to produce writings which tend to incriminate it, without extending im-

munity against criminal prosecution; (6) that the statute and notice authorized an unreasonable search and seizure of the private books and documents of the company; (7) that the statute provided no compensation for the time, trouble and expense imposed upon a corporation in a foreign State or country of collecting and sending the documents demanded to the State of Vermont; and lastly (8) that the statute is confined in its operation to corporations, thus making an arbitrary classification, by which the company is deprived of the equal protection of the law secured by the Fourteenth Amendment.

The first objection made by counsel for the company is not of a Federal nature. Whether the notice to produce was broader than the statute provided for is a question of the construction of the state statute, and of the notice, and the decision of the state court is final on that question.

Counsel insisted before us in discussing the second objection that the failure to give an opportunity to be heard why the books should not be produced deprived it of due process of law guaranteed under the Fourteenth Amendment. Without discussing the question whether this matter comes within the meaning of due process of law, we may say that the objection to the statute is not borne out by its text. The company had under its provisions, and by the fourth section, full opportunity to show cause before the court why it did not produce the papers, and the Supreme Court of Vermont has held in this case that any objection to the production of the papers made before the grand jury would have raised the question before that body, which it would have been its duty to report to the court for its action. Upon such question the company would have been entitled to be heard, and it was in fact heard before the court previous to any decision by the court regarding the right of the company to withhold the papers. So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. *Simon* v. *Craft*, 182 U. S. 427; *Wilson* v. *Standefer*, 184 U. S.

399, 415; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 349.

The third objection is without force. It is argued that the statute in this particular denies due process of law to the company, because it authorized the infliction of a fine by the court for failure to perform an act outside the State, ordered by a non-judicial body, and without notice and opportunity for hearing. The last reason has already been answered by showing that a hearing is provided for before any punishment of the company for disobedience to the requirements of the notice to produce can be enforced. There can surely be no illegality in providing that a corporation doing business in the State and protected by its power may be compelled to produce before a tribunal of the State material evidence in the shape of books or papers kept by it in the State, and which are in its custody and control, although for the moment outside the borders of the State. The statute is in no sense a provision as to how the company shall perform its duties and obligations in other States. It directs the company doing business in the State and present therein, by its officers or some of them, to do something which it is entirely competent to do, the purpose of which is to enable the tribunal making the investigation under a state statute to perform its duty.

Fourth. There is no provision in the Federal Constitution which directly or impliedly prohibits a State, under its own laws, from conferring upon non-judicial bodies certain functions that may be called judicial. It is said that the statute, in providing for the production of books and papers, includes not only the court and grand jury, but any tribunal or commission authorized by the State. There is nothing, as we have said, in the Federal Constitution which prevents it.

The fifth objection is also without merit, even upon the assumption that in such a case as this the company could take the objection through the witness. The court simply held that it could not determine whether the objection as to incrimination was valid until the books were produced for in-

spection by the court, though before they were to be used in evidence. If, after that inspection, any portion were found of that character, the court held that such portion would be excluded. As, however, the company failed and refused absolutely to produce any of the books, with some unimportant exceptions, it was adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice, and it was fined for the contempt. Obviously the company could not by its refusal to produce the books thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such nonproduction. Otherwise the company could disobey at its pleasure and so prevent any inquiry into the merits of the excuses. The statute might as well not exist if this were to be permitted.

Sixth. The objection that the notice authorized by the statute amounted to an unreasonable search and seizure of the private books and documents of the company is also not well founded. In *Adams* v. *New York*, 192 U. S. 585, where the question was raised, the court refused to discuss the contention that the Fourteenth Amendment made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, so far as they related to the right of the people to be secure against unreasonable searches and seizures, and to be protected against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they could not be deprived by the action of the State, because on an examination of the record the court concluded that there had been no violation of this restriction, either in the unreasonable search and seizure or in compelling plaintiff in error to testify against himself. We are of opinion that there was no violation of such rights in the case before us, and we think it equally unnecessary to decide the question which was left undecided in the *Adams case.*

The objection is also made that the documents were not

described with the particularity required in the description of documents necessary to a search warrant or subpœna, and that it was not a valid paper and created no obligation to obey the notice, which could form no justification for any proceeding for contempt, and was not due process of law. An examination of the notice to produce shows that the requirements of the notice, while quite broad, yet were limited to such books or papers as related to, or concerned, any dealings or business between January 1, 1904, and the date of the notice, October, 1906, with the parties named therein, who were cattle commissioners of the State of Vermont, and which papers were to be used relative to the matter of complaint pending, and then and there to be investigated by the grand jury, in which the persons named in the notice were charged with having unlawfully sold diseased meat for food purposes at Burlington. The notice also gave in detail the dates and amounts of checks and vouchers which the company was required to produce. The company refused to produce the books (with the exceptions stated), and even if the notice had been too broad, the objection cannot be urged as to the validity of the order adjudging the company guilty of contempt. *Hale* v. *Henkel*, 201 U. S. 43. But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have. The notice is not nearly so sweeping in its reach as in the case of *Hale* v. *Henkel*, *supra*.

Seventh. The next objection relates to the claim that the

statute provides no compensation for the time, trouble and expense imposed upon a corporation in a foreign State or country in collecting and sending the documents demanded to the State of Vermont, and that it thereby takes, if enforced, private property for public use without compensation. The prohibition to that effect is found in the Fifth Amendment to the Federal Constitution. Here again we meet the question whether that amendment, because of the subsequent adoption of the Fourteenth Amendment, applies to a state proceeding, but for the reasons already stated we do not find it expedient to discuss it here. We do not say that in any event a witness is entitled to compensation in order to avoid the above constitutional provision, but the Supreme Court in this case has held that the general law of the State in reference to the compensation of witnesses applied to this statute. The answer which the counsel for the company makes is that neither the statute nor the notice required the attendance of any one as a witness, but was merely an order for production for which no compensation was provided, either by the statute or under the general law. But the papers cannot walk into court of themselves, and when they are brought there by virtue of the notice to produce served on the company, and they are given to some person by the company for the purpose of such production, he has a right to be sworn as to the papers which he produces for the purpose of identification, if nothing else, and the state court has held that he is entitled as a witness to compensation.

Lastly, the objection is urged that there is an arbitrary classification in the statute, which is confined to corporations alone, and the company is thereby deprived of the equal protection of the laws secured by the Fourteenth Amendment. There is no improper classification in this regard. It is stated by the state court that prior to the passage of this act there was no adequate provision for compelling the production of books and papers by a corporation, and it was held that the statute was designed for requiring the corporation itself, as

the responsible owner and custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers or other servants who may, or may not, in fact, have custody or control thereof at the time notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. There is ample justification for the classification made by the statute.

The judgment of the Supreme Court of the State of Vermont is

Affirmed.

ANHEUSER-BUSCH BREWING ASSOCIATION *v.* THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 60. Argued December 9, 1907.—Decided January 6, 1908.

To entitle a manufacturer to drawbacks under § 25 of the Tariff Act of October 1, 1890, 26 Stat. 567, 617, on imported raw material used in the manufacture or production of articles in the United States, there must be some transformation, so that a new and different article emerges having a distinctive name, character and use. The mere subjection of imported articles, such as corks, to a cleansing and coating process to adapt them to a special use does not amount to manufacturing them within the meaning of the statute, and the exporter is not entitled to drawback thereon. *Jos. Schlitz Brewing Co.* v. *United States*, 181 U. S. 584. *Semble:* an exportation of bottled beer is an exportation of the beer and not of the corks in the bottles, and therefore such corks are not exported articles within the meaning of § 25 of the Tariff Act of October 1, 1890.

41 C. Cl. 389, affirmed.

THE facts are stated in the opinion.

Mr. L. T. Michener, with whom *Mr. W. W. Dudley* was on the brief, for appellant:

This court has sanctioned the use of dictionary definitions

in determining the meaning of words in tariff laws. *Marvel* v. *Merritt*, 116 U. S. 11, 12; *Nix* v. *Hedden*, 149 U. S. 304.

The definitions of the word "manufacture" found in various standard dictionaries plainly bring the processes to which these corks were subjected within the meaning of the word as ordinarily used. Brande's Ency., tit. "Manufacture;" *Evening Journal Assn.* v. *State Board of Assessors*, 47 N. J. Law (18 Vroom), 36, 38. "Manufacture" is defined by Worcester to be "the process of making anything by art, or of reducing materials into forms fit for use by hand or by machinery, as an establishment for the manufacture of cloth; anything made or manufactured by hand, or manual dexterity, or by machinery." As a verb it is defined to mean, to form by manufacture or workmanship by hand or by machinery; to make by art or labor. Approved and applied in *Attorney General* v. *Lorman*, 59 Michigan, 157; *Louisville & N. R. Co.* v. *Fulghan*, 91 Alabama, 555; *Beggs* v. *Edison Elec. Ill. Co.*, 96 Alabama, 295; *Lamborn* v. *Bell*, 18 Colorado, 346. See also *Murphy* v. *Arnson*, 96 U. S. 131, 134; *Carlin* v. *Western Assurance Co.*, 57 Maryland, 515, 526; *S. C.*, 40 Am. Rep. 440; *Norris* v. *Commonwealth*, 27 Pa. St. (3 Casey) 494, 496; *Landgraf* v. *Kuh*, 188 Illinois, 484.

A "manufacturer" is defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations, to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms.

He makes to sell, and stands between the original producer and the dealer and first consumer, depending for his profit on the labor which he bestows on the raw materials. *State* v. *Dupre*, 42 La. Ann. 561; *City of New Orleans* v. *La Blanc*, 34 La. Ann. 596, 597; *City of New Orleans* v. *Ernst*, 35 La. Ann. 746, 747; *State* v. *American Sugar Refining Co.*, 108 Louisiana, 603.

The things done to, by and with the corks were a manu-

facture of corks within the acts of Congress; the corks were imported materials used in the manufacture of articles in the United States, on which duties had been paid, and then were exported to foreign countries; and the appellant is a manufacturer and exporter within those acts of Congress and is entitled to a refund of the duties so paid. *Schriefer* v. *Wood*, 21 Fed. Cas. 737; *Commonwealth* v. *Juniata Coke Co.*, 157 Pa. St. 507; *Burke* v. *Mead*, 64 N. E. Rep. 880, 883; *S. C.*, 159 Indiana, 252; *People* v. *Wemple*, 129 N. Y. 543; *People* v. *Morgan*, 63 N. Y. Supp. 76, 79; *Nassau Gas Co.* v. *Brooklyn*, 89 N. Y. 409; *Attorney General* v. *Lorman*, 59 Michigan, 157; *S. C.*, 60 Am. Rep. 287; *Southern Chem. Co.* v. *Board of Assessors*, 48 La. Ann. 1475; *Louisville & N. Railroad Co.* v. *Fulgham*, 91 Alabama, 555; *Engle* v. *Sohn*, 41 Ohio St. 691. *Hartranft* v. *Wiegmann*, 121 U. S. 609, and *Schlitz Brewing Co.* v. *United States*, discussed and distinguished.

Mr. Assistant Attorney General Van Orsdel for appellee:

The corks in question were not a part or ingredient of the beer exported, and were not, therefore, in contemplation of law, exported at all. *Schlitz Brewing Co.* v. *United States*, 181 U. S. 584.

The process of cleansing and preparation adopted and applied by the appellant to the corks in question did not constitute a manufacture of corks within the purview of the statute providing for a rebate or drawback on exported manufactured articles. *Frazee* v. *Moffitt*, 20 Blatchf. 267; *United States* v. *Potts*, 5 Cranch, 284; *Tidewater Oil Co.* v. *United States*, 171 U. S. 210.

Mr. Justice McKenna delivered the opinion of the court.

This is an action for $27,000 for drawbacks on corks imported from Spain and used by claimant in bottling its beer, and entered for the benefit of drawback upon exportation under § 25 of the act of Congress, entitled "An act to reduce the revenue and equalize duties on imports and for other purposes,"

approved October 1, 1890. 26 Stat. 567, 617. The section reads as follows:

"That where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties. *Provided*, That when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials shall so appear in the completed articles that the quantity or measure thereof may be ascertained. *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of custom duties when exported shall in all cases where drawback of duties paid on such material is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

The corks in question were, after their importation, subjected to a special treatment, which, it is contended, caused them to be articles manufactured in the United States of "imported materials" within the meaning of § 25. The Court of Claims decided against the contention and dismissed the petition. 41 C. Cl. 389.

The treatment to which the corks were subjected is detailed in finding III, inserted in the margin.[1]

[1] III. That while said acts of October 1, 1890, August 28, 1894, and July 24, 1897, were in force and operation the claimant herein, being en-

In opposition to the judgment of the Court of Claims counsel have submitted many definitions of "manufacture," both

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gaged in the regular, ordinary and usual course of its business aforesaid, exported from the United States a large quantity of beer brewed and manufactured by it, which exportation thereof was in bottles duly corked by it with corks so as to preserve the beer; that such corks so used by it in the bottles in which such beer was exported were imported from Spain, a foreign country (and on which corks duty had been paid to the United States, according to law, at the rate of 15 cents per pound, under the provisions of paragraph 416 of the act of Congress approved July 24, 1897), they being corks over three-fourths of an inch in diameter, measured at the larger end. The corks so imported from Spain were subjected to treatment by claimant.

The corks so used by the claimant in the making and shipment of its export beer were corks imported into this country from Spain, where they were cut by hand, without steaming. After these corks were received by claimant in its brewery in St. Louis, and while in the same state in which they were imported from Spain, they were carefully examined and all that were not fit for use in the export trade were rejected. The good ones were then selected and assorted according to sizes, and were branded with the date, the name of the brewer, and the name of the beer, and a special private mark to show what firm the cork came from. All this was done by unskilled labor.

The selected corks were put into a machine, or air fan, the unpatented invention of a man in the employ of the claimant, and all dust, meal, bugs, and worms were removed therefrom. They were then thoroughly cleansed by washing and steaming, removing the tannin and germs and making the cork soft and elastic, and they were next exposed to blasts of air in a machine, the unpatented invention of the same employé, until they were absolutely dry.

Following this, they were put for a few seconds into a bath of glycerine and alcohol, the proportions of which are a trade secret which the claimant has the right to use, and then they were dried by a special system. This bath closed up all the seams, holes and crevices, and gave the corks a coating which prevented the beer from acquiring a cork taste. The corks were then dried by absorption of the chemicals that had covered them. If the corks had been used without the application of this chemical bath, the beer would have acquired a taste of cork which would have injured the market for it.

The whole process took from one day to three days, the longest part of it being the drying after the chemical bath.

The bath made it easier to put the cork into the bottle and take it out. The pores and apertures of the cork were thoroughly closed by the bath, and thus the escape of the gases contained in the beer was prevented.

The steaming of the corks, or pasteurizing them, destroyed all the germs

as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far

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in them that would damage or spoil the beer, if they were not pasteurized. This pasteurizing also destroyed the yeast that might have been in the beer.

If the corks had but little or no elasticity, and did not fit the bottles perfectly, the gas would escape while the beer was yet in the brewery, or in transportation, or in the place of market, and the beer would be flat, stale, worthless and unmarketable.

When the corks had been dried, they were soft, elastic and pliable, free from all foreign substances and germs, perfectly airtight, and fitted for use in bottling beer for export. They were next taken to the building in claimant's brewery which was used for bottling purposes, where they were again soaked or wetted by steaming them for a short time, so they would fit snugly and easily in the bottles.

The bathing, or treatment by the bath, and the washing and steaming of the corks were all done by skilled labor.

After the beer had been put in the bottles and they had been corked, the filled bottles were put in a large vat, where they were pasteurized by heating to the right temperature for a sufficient length of time and cooled again. If the corks had not been treated as above described, the carbonic-acid gas would have escaped in the heating or pasteurizing process, because there was a powerful gas pressure toward the cork during all that process. If that gas had escaped, the beer would have become flat.

The corks, so treated by this process and put in the bottles of beer, could only be removed therefrom by means of a corkscrew or other instrument of force, which removal would damage or destroy the cork so it could not be used afterwards for the same purpose.

The hand-cut corks which come from Spain have all been cut out of the wood without steaming it beforehand. The corks that are cut in the United States are cut from the wood that has been steamed first, thus depriving them of much of their elasticity. Because the Spanish hand-cut corks are cut without having been steamed in the first instance, they are far safer and better corks to be made for and used in bottling export beer than corks cut in the United States after being steamed.

Without the careful selection and thorough treatment of corks, beer cannot with safety be exported from the United States to foreign countries.

When the corkwood reaches the United States it is steamed in order to get an increased volume out of it. The steaming of the corkwood makes it open something like a sponge. The steaming swells the cork, and those who do the steaming get more corks out of it, but how much more does not appear. But the steaming takes away its elasticity, and the cork cut after steaming is not so good or so perfect as one cut from the dry wood in the first place.

Corks cut after steaming will shrink, and that fact makes them inferior

if made to cover the treatment detailed in finding III or to the corks after the treatment. The words of the statute are indeed so familiar in use and of meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation we are involved in refinements, and in impracticable niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft* v. *Wiegmann*, 121 U. S. 609. There must be transformation; a new and different article must emerge, "having a distinctive name, character or use." This cannot be said of the corks in question. A cork put through the claimant's process is still a cork. The process is the preparation of the encasement of the beer, and assimilates this case to *Jos. Schlitz Brewing Co.* v. *United States*, 181 U. S. 584. There it was contended that bottles and corks in which beer is bottled and exported were "imported materials used in the manu-

corks. Cork dealers in the United States also put it through various treatments, such as polishing it and using chemicals to make it look bright and have a good color. They do not attempt to close up the pores in the cork, nor run it through machinery to shake or wash the dust or impurities out of it. They put the cork on the market as the machine cuts it after it has been steamed. Corks so cut and treated in the United States would not be fit for use in the exportation of beer, for they would damage the beer through contact, and much stale beer would result from the escape of the carbonic-acid gas by reason of the imperfect corking, and the beer would not be marketable.

In the manufacture of beer for export to other countries it was necessary to destroy the yeast in the beer to prevent second fermentation and the consequent ruin of the beer. In order to destroy the germs of yeast the finished beer was steamed to the degree necessary to destroy the germs, and for that purpose the beer was inclosed securely in a vessel to prevent the escape of the carbonic-acid gas, and of all such vessels a bottle made of glass was and is the one best adapted to the purpose aforesaid. And such steaming was also necessary to the perfect manufacture of beer for bottling, and to the perfect corking thereof it was essential and necessary that the cork as treated should be used as herein described.

facture" of such beer, within the meaning of § 25. And it was pointed out—found by the Court of Claims—that the process of manufacturing beer for exportation was different from the process of manufacturing beer for domestic use and the materials were selected with greater care, in order that the bottled product might preserve purity under the conditions of transportation and change of climate. The process was detailed at length. It was decided, however, that such special process and treatment did not make the bottles and corks component parts of the beer when exported, as it was insisted they were. It is true, that it was not contended in that case, as is in this, that the corks or the bottles were articles manufactured in the United States of imported materials by reason of the special treatment to which they had been subjected, making them better or necessary for their purpose. That such a contention was possible under the statute did not occur to the brewing company. It does not appear in the statement of the case that the corks were subjected to any treatment, and appellant denies the application of the case by saying that "The corks were not put through any process of manufacture whatever." And yet it must have been necessary then, as the Court of Claims has found it to be, that "without the careful selection and thorough treatment of corks beer cannot with safety be exported from the United States to foreign countries." Of course the views of a litigant of his rights under a statute are not an absolute test of the views of a litigant in another case, but the *Schlitz Brewing case* was one which may be supposed to have brought to consideration every practicable and legal problem under the statute, and if a cork by special treatment ceases to be a cork and becomes an article manufactured of cork, the change and the legal effect of it would have thrust themselves upon the notice of somebody. But passing this, there is force in the contention of the United States that the exportations were not of corks or bottles, but of beer, and therefore not articles, exported within the meaning of § 25, entitled to a drawback. This phase of the case—indeed all

phases of it—are ably dealt with in the opinion of the Court of Claims, and it would be unnecessary repetition to go over the argument or to review the cases.

Judgment affirmed.

WINTERS *v.* THE UNITED STATES.

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

No. 158. Argued October 24, 1907.—Decided January 6, 1908.

The rule that all the parties must join in an appeal or writ of error unless properly detached from the right so to do applies only to joint judgments and decrees. This court has jurisdiction of an appeal taken or writ of error sued out by one of several defendants if his interest is separate from that of the other defendants.

In a suit against several defendants as trespassers in which some of them defaulted and others answered, *held*, that each defendant was a separate trespasser and that while those who defaulted were precluded from questioning the correctness of the decree entered against them, the answering defendants had nothing in common with the others and could maintain an appeal without them.

In a conflict of implications, the instruments must be construed according to the implication having the greater force; and, in the interpretation of agreements and treaties with Indians, ambiguities should be resolved from the standpoint of the Indians.

In view of all the circumstances of the transaction this court holds that there was an implied reservation in the agreement of May 1, 1888, 25 Stat. 124, with the Gros Ventre and other Indians establishing the Fort Belknap Reservation, of a sufficient amount of water from the Milk River for irrigation purposes, which was not affected by the subsequent act of February 22, 1889, 25 Stat. 676, admitting Montana to the Union, and that the water of that river cannot be diverted, so as to prejudice this right of the Indians, by settlers on the public lands or those claiming riparian rights on that river.

The Government of the United States has the power to reserve waters of a river flowing through a Territory and exempt them from appropriation under the laws of the State which that Territory afterwards becomes.

148 Fed. Rep. 684, affirmed.

THIS suit was brought by the United States to restrain appellants and others from constructing or maintaining dams or reservoirs on the Milk River in the State of Montana, or in any manner preventing the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation.

An interlocutory order was granted, enjoining the defendants in the suit from interfering in any manner with the use by the reservation of 5,000 inches of the water of the river. The order was affirmed by the Circuit Court of Appeals. 143 Fed. Rep. 740. Upon the return of the case to the Circuit Court, an order was taken *pro confesso* against five of the defendants. The appellants filed a joint and several answer, upon which and the bill a decree was entered making the preliminary injunction permanent. The decree was affirmed by the Circuit Court of Appeals. 148 Fed. Rep. 684.

The allegations of the bill, so far as necessary to state them, are as follows: On the first day of May, 1888, a tract of land, the property of the United States, was reserved and set apart "as an Indian reservation as and for a permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation." The tract has ever since been used as an Indian reservation and as the home and abiding place of the Indians. Its boundaries were fixed and defined as follows (25 Stat. 124):

"Beginning at a point in the middle of the main channel of Milk River, opposite the mouth of Snake Creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk River opposite the mouth of People's Creek; thence up Milk River, in the middle of the main channel thereof, to the place of beginning."

Milk River, designated as the northern boundary of the

reservation, is a non-navigable stream. Large portions of the lands embraced within the reservation are well fitted and adapted for pasturage and the feeding and grazing of stock, and since the establishment of the reservation the United States and the Indians have had and have large herds of cattle and large numbers of horses grazing upon the land within the reservation, "being and situate along and bordering upon said Milk River." Other portions of the reservation are "adapted for and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of grass, grain and vegetables," but such portions are of dry and arid character, and in order to make them productive require large quantities of water for the purpose of irrigating them. In 1889 the United States constructed houses and buildings upon the reservation for the occupancy and residence of the officers in charge of it, and such officers depend entirely for their domestic, culinary and irrigation purposes upon the water of the river. In the year 1889, and long prior to the acts of the defendants complained of, the United States, through its officers and agents at the reservation, appropriated and took from the river a flow of 1,000 miners' inches, and conducted it to the buildings and premises, used the same for domestic purposes and also for the irrigation of land adjacent to the buildings and premises, and by the use thereof raised crops of grain, grass and vegetables. Afterwards, but long prior to the acts of the defendants complained of, to wit, on the fifth of July, 1898, the Indians residing on the reservation diverted from the river for the purpose of irrigation a flow of 10,000 miners' inches of water to and upon divers and extensive tracts of land, aggregating in amount about 30,000 acres, and raised upon said lands crops of grain, grass and vegetables. And ever since 1889 and July, 1898, the United States and the Indians have diverted and used the waters of the river in the manner and for the purposes mentioned, and the United States "has been enabled by means thereof to train, encourage and accustom large numbers of Indians residing upon the said reserva-

tion to habits of industry and to promote their civilization and improvement." It is alleged with detail that all of the waters of the river are necessary for all those purposes and the purposes for which the reservation was created, and that in furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them, it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and undeteriorated in quality.

It is alleged that "notwithstanding the riparian and other rights" of the United States and the Indians to the uninterrupted flow of the waters of the river the defendants, in the year 1900, wrongfully entered upon the river and its tributaries above the points of the diversion of the waters of the river by the United States and the Indians, built large and substantial dams and reservoirs, and by means of canals and ditches and waterways have diverted the waters of the river from its channel, and have deprived the United States and the Indians of the use thereof. And this diversion of the water, it is alleged, has continued until the present time, to the irreparable injury of the United States, for which there is no adequate remedy at law.

The allegations of the answer, so far as material to the present controversy, are as follows: That the lands of the Fort Belknap Reservation were a part of a much larger area in the State of Montana, which by an act of Congress, approved April 15, 1874, c. 96, 18 Stat. 28, was set apart and reserved for the occupation of the Gros Ventre, Piegan, Blood, Blackfoot and River Crow Indians, but that the right of the Indians therein "was the bare right of the use and occupation thereof at the will and sufferance of the Government of the United States." That the United States, for the purpose of opening for settlement a large portion of such area, entered into an agreement with the Indians composing said tribes, by which the Indians "ceded, sold, transferred and conveyed" to the United States all of the lands embraced in said area, except Fort Belknap Indian Reservation,

described in the bill. This agreement was ratified by an act of Congress of May 1, 1888, c. 213, 25 Stat. 113, and thereby the lands to which the Indians' title was thus extinguished became a part of the public domain of the United States and subject to disposal under the various land laws, "and it was the purpose and intention of the Government that the said land should be thus thrown open to settlement, to the end that the same might be settled upon, inhabited, reclaimed and cultivated and communities of civilized persons be established thereon."

That the individual defendants and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company were qualified to become settlers upon the public land and to acquire title thereto under the homestead and desert land laws of the United States. And that said corporations were organized and exist under the laws of Montana for the purpose of supplying to their said stockholders the water of Milk River and its tributaries, to be used by them in the irrigation of their lands.

That the defendant, the Empire Cattle Company, is a corporation under the laws of Montana, was legally entitled to purchase, and did purchase, from those who were qualified to acquire them under the desert and homestead land laws of the United States, lands on the Milk River and its tributaries, and is now the owner and holder thereof.

That the defendants, prior to the fifth day of July, 1898, and before any appropriation, diversion or use of the waters of the river or its tributaries was made by the United States or the Indians on the Fort Belknap Reservation, except a pumping plant of the capacity of about 250 miners' inches, without having notice of any claim made by the United States or the Indians that there was any reservation made of the waters of the river or its tributaries for use on said reservation, and believing that all the waters on the lands open for settlement as aforesaid were subject to appropriation under the laws of the United States and the laws, decisions, rulings and customs

of the State of Montana, in like manner as water on other portions of the public domain, entered upon the public lands in the vicinity of the river, made entry thereof at the United States land office, and thereafter settled upon, improved, reclaimed and cultivated the same and performed all things required to acquire a title under the homestead and desert land laws, made due proof thereof, and received patents conveying to them, respectively, the lands in fee simple.

That all of said lands are situated within the watershed of the river, are riparian upon the river and its tributaries, but are arid and must be irrigated by artificial means to make them inhabitable and capable of growing crops.

That for the purpose of reclaiming the lands, and acting under the laws of the United States and the laws of Montana, the defendants, respectively, posted upon the river and its tributaries, at the points of intended diversion, notices of appropriation, stating the means of diversion and place of use, and thereafter filed in the office of the clerk and recorder of the county wherein the lands were situated a copy of the notices, duly verified, and within forty days thereafter commenced the construction of ditches and other instrumentalities, and completed them with diligence and diverted, appropriated and applied to a beneficial use more than 5,000 miners' inches of the waters of the river and its tributaries, or 120 cubic feet per second, irrigating their lands and producing hay, grain and other crops thereon. The defendants and the stockholders of the defendant corporations have expended many thousands of dollars in constructing dams, ditches and reservoirs, and in improving said lands, building fences, and other structures, establishing schools and constructing highways and other improvements, usually had and enjoyed in a civilized community, and that the only supply of water to irrigate the lands is from Milk River. If defendants are deprived of the waters their lands cannot be successfully cultivated, and they will become useless and homes cannot be maintained thereon.

That there are other lands within the watershed of the

Milk River and its tributaries and dependent upon its waters for irrigation upon which large numbers of persons have settled under the land laws of the United States and are irrigating and cultivating the same by means of said waters, and have assisted the defendants "in establishing a civilized community in said country and in building and maintaining churches, schools, villages and other elements and accompaniments of civilization; that said communities consist of thousands of people, and if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, the said communities will be broken up and the purpose and object of the Government in opening said lands for settlement will be wholly defeated."

It is alleged that there are a large number of springs on the reservation and several streams from which water can be obtained for stock and irrigation purposes, and particularly these: People's Creek, flowing about 1,000 inches of water; Big Horn Creek, flowing about 1,000 inches; Lodge Pole Creek, flowing about 600 inches of water; Clear Creek, flowing about 300 inches. That all of the waters of these streams can be made available for use upon the reservation, and that it was not the intention of the Government to reserve any of the waters of Milk River or its tributaries. That the respective claims of the defendants to the waters of the river and its tributaries are prior and paramount to the claims of the United States and the Indians, except as to 250 inches used in and around the agency buildings, and at all times there has been sufficient water flowing down the river to more than supply these 250 inches.

And it is again alleged that the waters of the river are indispensable to defendants, are of the value of more than $100,000 to them, and that if they are deprived of the waters "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated, but will greatly exceed $100,000," and that they will

be wholly without remedy if the claim of the United States and the Indians be sustained.

Mr. Edward C. Day and *Mr. James A. Walsh* for appellants:

The decree is, in fact, separate and severable.

It is not charged that the defendants acted jointly. Neither one is responsible for the acts of the other. In so far as the record shows, the defaulting defendants are not the owners of any lands and are not interested in this suit. *Hancock* v. *Patrick*, 119 U. S. 156; *Forgay* v. *Conrad*, 6 How. 201; *Gilfillan* v. *McKee*, 159 U. S. 303; *City Bank* v. *Hunter*, 129 U. S. 578; *Milner* v. *Meek*, 95 U. S. 252; *Todd* v. *Daniel*, 16 Pet. 521; *Railroad Co.* v. *Johnson*, 15 Wall. 8; *Germain* v. *Mason*, 12 Wall. 261. See also *Hill* v. *Chicago and Evanston Ry. Co.*, 140 U. S. 52; *Basket* v. *Haskell*, 107 U. S. 602; *Louisville & N. A. C.* v. *Pope*, 74 Fed. Rep. 5; *Farmers' Loan & Trust Co.* v. *McClure*, 49 U. S. App. 146; *Mercantile Trust Co.* v. *Adams Express Co.*, 16 U. S. App. 37.

In the agreement with the Indians and the act of Congress, ratifying that agreement, there was no reservation of the waters of Milk River or its tributaries for use on the Fort Belknap Indian Reservation. Nor can it be held that the Indians understood that there was any reservation of the waters of Milk River for use upon the Belknap Reservation, or that they ceded and relinquished to the Government anything less than the absolute title to the lands and all waters thereon to that portion of the former reservation to which they relinquished their claims.

The rule that the treaty must be construed most favorably to the Indians does not apply to this case. Here the controversy is between the United States, as guardian of the Indians, and the appellants who are citizens and grantees of the United States, and the controversy has reference to the titles granted by the United States to them. In such case, the appellants are the public in whose behalf the grants must be construed most strongly. The property granted to them by their

entry upon and settlement of the public lands of the United States, and the appropriation of the waters flowing in the streams upon or adjacent thereto pursuant to the laws, decisions of the courts, rules and customs of the country, is property of which they cannot be deprived without due process of law, and without just compensation.

There is nothing before the court for construction or interpretation, but the plain, unambiguous language of the agreement, and that is so clear that it does not require any construction or interpretation.

The appellants made valid appropriations of the waters of Milk River and its tributaries under the laws, customs and decisions of Montana, and the laws of Congress, and their rights as grantees of the Government are superior to any rights which the Indians may have by reason of the agreement entered into between them and the Government.

The doctrine of riparian rights is not recognized, does not prevail and never was in force in Montana, and the rights of the parties to the use of the waters of Milk River and its tributaries must be construed according to the laws of this State.

Even if the doctrine of riparian rights did prevail, the appellants would be entitled to a reasonable use of the water for the purpose of irrigating their lands, having in view the equitable rights of others.

The right to appropriate water is recognized by the laws of the United States, the laws and decisions of the courts and the customs prevailing in Montana, which are now and were in force in Montana at the time the agreement was made with the Indians, and these appellants have shown that they acquired title to their lands under the grant from the Government and made valid and prior appropriations of the waters to reclaim such lands.

Mr. Assistant Attorney General Sanford and *Mr. Assistant Attorney General Van Orsdel*, with whom *The Solicitor General*

and *Mr. A. C. Campbell,* Special Attorney, were on the brief, for appellee:

The decree below adjudging the complainants' right to the flow of the waters of Milk River as against all of the defendants before the court, is a joint decree within the meaning of the rule that all parties against whom a joint judgment or decree is rendered must join in prosecuting a writ of error or appeal, and that if prosecuted by less than the whole number of such parties, without a summons and severance or other equivalent proceeding, the appellate court acquires no jurisdiction of the case and the writ of error or appeal will be dismissed. *Owings* v. *Kincannon,* 7 Pet. 399; *Masterson* v. *Herndon,* 10 Wall. 416; *Hampton* v. *Rouse,* 13 Wall. 187; *Wilson's Heirs* v. *Insurance Co.,* 12 Pet. 140.

The defect of lack of jurisdiction for want of necessary parties to the appeal was not waived by the final decree entered by the Circuit Court of Appeals upon the merits without objection on that ground. *Union & Planters Bank* v. *Memphis,* 189 U. S. 71, 73.

Under the just and reasonable construction of this agreement with the Indians, considered in the light of all the circumstances and of its express purpose, the Indians did not thereby cede or relinquish to the United States the right to appropriate the waters of Milk River necessary to their use for agricultural and other purposes upon the reservation, but retained this right, as an appurtenance to the land which they retained, to the full extent in which it had been vested in them under former treaties, and the right thus retained and vested in them under the agreement of 1888, at a time when Montana was still a Territory of the United States, could not be divested under any subsequent legislation either of the Territory or of the State.

While the United States may itself abrogate rights granted to the Indians under a treaty with them, it alone has this power, and unless such rights are abrogated by the United States itself by subsequent legislation it is well settled that all

rights acquired by the Indians under the treaty are to be fully protected against invasion by other parties. *The Cherokee Nation* v. *Georgia*, 5 Pet. 1; *United States* v. *Cook*, 19 Wall. 591.

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

A question of jurisdiction is presented by the United States. Five of the defendants named in the bill failed to answer and a decree *pro confesso* was taken against them. The other defendants, appellants here, after the affirmance by the Circuit Court of Appeals of the interlocutory injunction, filed a joint and several answer. On this answer and the bill the case was heard and a decree entered against all of the defendants. From that decree the appellants here appealed to the Circuit Court of Appeals without joining therein the other five defendants. The contention is that the Circuit Court of Appeals had no jurisdiction and that this court has none, because the five defaulting defendants had such interest in the case and decree that they should have joined in the appeal, or proceedings should have been taken against them in the nature of summons and severance or its equivalent.

The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established.[1] But the rule only applies to joint judgments or decrees.[2] In other words, when the interest of a de-

[1] *Williams* v. *Bank of United States*, 11 Wheat. 414; *Owings* v. *Kincannon*, 7 Pet. 399; *Heirs of Wilson* v. *Insurance Company*, 12 Pet. 140; *Mussina* v. *Cavozos*, 6 Wall. 355; *Masterson* v. *Herndon*, 10 Wall. 416; *Hampton* v. *Rouse*, 13 Wall. 187; *Simpson* v. *Greeley*, 20 Wall. 152; *Feibelman* v. *Packard*, 108 U. S. 14; *Estis* v. *Trabue*, 128 U. S. 225, 230; *Mason* v. *United States*, 136 U. S. 581; *Dolan* v. *Jennings*, 139 U. S. 385; *Hardee* v. *Wilson*, 146 U. S. 179; *Inglehart* v. *Stansbury*, 151 U. S. 68; *Davis* v. *Mercantile Trust Company*, 152 U. S. 590; *Beardsley* v. *Railway*, 158 U. S. 123, 127; *Wilson* v. *Kiesel*, 164 U. S. 248.

[2] *Todd* v. *Daniel*, 16 Pet. 521, 523; *Germain* v. *Mason*, 12 Wall. 259; *Forgay* v. *Conrad*, 6 How. 201; *Brewster* v. *Wakefield*, 22 How. 118, 129; *Milner* v. *Meek*, 95 U. S. 252; *Basket* v. *Hassell*, 107 U. S. 602, 608; *Hanrick*

fendant is separate from that of other defendants he may appeal without them. Does the case at bar come within the rule? The bill does not distinguish the acts of the defendants, but it does not necessarily imply that there was between them, in the diversion of the waters of Milk River, concert of action or union of interest. The answer to the bill is joint and several, and in effect avers separate rights, interests and action on the part of the defendants. In other words, whatever rights were asserted or admission of acts done by any one defendant had no dependence upon or relation to the acts of any other defendant in the appropriation or diversion of the water. If trespassers at all, they were separate trespassers. Joinder in one suit did not necessarily identify them. Besides, the defendants other than appellants defaulted. A decree *pro confesso* was entered against them, and thereafter, according to Equity Rule 19, the cause was required to proceed *ex parte* and the matter of the bill decreed by the court. *Thomson* v. *Wooster*, 114 U. S. 104. The decree was in due course made absolute, and granting that it might have been appealed from by the defaulting defendants, they would have been, as said in *Thomson* v. *Wooster*, absolutely barred and precluded from questioning its correctness, unless on the face of the bill it appeared manifest that it was erroneous and improperly granted. Their rights, therefore, were entirely different from those of the appellants; they were naked trespassers, and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights and submitted those rights for judgment. There is nothing, therefore, in common between appellants and the other defendants. The motion to dismiss is denied and we proceed to the merits.

The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to

v. *Patrick*, 119 U. S. 156; *City Bank* v. *Hunter*, 129 U. S. 557; *Gilfillan* v. *McKee*, 159 U. S. 303.

be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. The Government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule

should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.

Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676, "upon an equal footing with the original States." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk River were not to be subject of appropriation by the citizens and inhabitants of said State, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States* v. *The Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States* v. *Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union and the power over the waters of Milk River which the State thereby acquired

to dispose of them under its laws, is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the Government.

Decree affirmed.

MR. JUSTICE BREWER dissents.

OPINIONS PER CURIAM, ETC., FROM OCTOBER 14, 1907, TO JANUARY 6, 1908.

No. 14. GALBAN AND COMPANY, APPELLANTS, *v.* THE UNITED STATES. Appeal from the Court of Claims. Submitted October 15, 1907. Decided October 21, 1907. *Per Curiam.* Judgment affirmed. *Nealy* v. *Henkel*, 180 U. S. 109; *Pearcy* v. *Stranahan*, 205 U. S. 257, and cases cited. See opinion below, 40 C. Cl. 495. *Mr. Barry Mohun*, *Mr. W. W. Dudley* and *Mr. L. T. Michener* for appellants. *The Attorney General* and *Mr. Assistant Attorney General Van Orsdel* for appellee.

No. —, Original. *Ex parte:* IN THE MATTER OF THOMAS B. CLEMENT, PETITIONER. Submitted October 14, 1907. Decided October 21, 1907. Motion for leave to file petition for writ of mandamus denied. *Mr. George N. Baxter* for petitioner. *The Attorney General* opposing.

No. 260. CLARK WOODARD SPRAGUE, SOLE SURVIVING EXECUTOR, ETC., PLAINTIFF IN ERROR, *v.* JACOB BETZ ET UX. In error to the Supreme Court of the State of Washington. Motion to dismiss submitted October 21, 1907. Decided October 28, 1907. *Per Curiam.* Dismissed for the want of jurisdiction. *New Orleans Waterworks Company* v. *Louisiana*, 185 U. S. 336; *Newburyport Water Company* v. *Newburyport*, 193 U. S. 561; and see *Thomas* v. *Provident Loan and Trust Company*, 138 Fed. Rep. 348; *S. C.*, 200 U. S. 618. Case below, 87 Pac. Rep. 916. *Mr. Charles S. Fogg* for plaintiff in error. *Mr. John F. Shafroth* for defendants in error.

No. 306. W. F. Baird, Administrator, etc., Plaintiff in Error, *v.* J. D. Monroe et al. In error to the Supreme Court of the State of California. Motions to dismiss or affirm submitted October 21, 1907. Decided October 28, 1907. *Per Curiam.* Dismissed for the want of jurisdiction. *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Hulbert* v. *Chicago*, 202 U. S. 275; *Miller* v. *Cornwall Railroad Company*, 168 U. S. 134; *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 291; *Howard* v. *Fleming*, 191 U. S. 126; *New Orleans Waterworks Company* v. *Louisiana*, 185 U. S. 336. *Mr. Rufus H. Thayer* for plaintiff in error. *Mr. John M. York* for defendants in error.

No. 358. The Blythe Company, Plaintiff in Error, *v.* Bankers' Investment Company et al. In error to the Supreme Court of the State of California. Motions to dismiss or affirm submitted October 21, 1907. Decided October 28, 1907. *Per Curiam.* Dismissed for the want of jurisdiction. *Blythe* v. *Hinckley*, 84 Fed. Rep. 228; *Blythe Company* v. *Blythe*, 172 U. S. 644; *Blythe Company* v. *Hinckley*, 111 Fed. Rep. 827; *Blythe Company* v. *Hinckley*, 184 U. S. 701; *Blythe* v. *Hinckley*, 180 U. S. 333; *Dupaneur* v. *Rochereau*, 21 Wall. 130; *Metcalf* v. *Watertown*, 153 U. S. 671; *Blythe Company* v. *Bankers' Investment Company*, 147 California, 82; *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 558, 582; *Temple* v. *Hagar*, 4 Wall. 432, 434. *Mr. George W. Towle* for plaintiff in error. *Mr. Frederic D. McKenney*, *Mr. E. S. Heller* and *Mr. Thomas I. Bergin* for defendants in error.

No. 30. Mrs. William F. Hardin et al., Plaintiffs in Error, *v.* Cottonwood Lumber Company. In error to the Supreme Court of the State of Arkansas. Submitted October 30, 1907. Decided November 4, 1907. *Per Curiam.*

Judgment affirmed with costs. *Soper* v. *Lawrence Bros.*, 201 U. S. 359; *Turner* v. *New York*, 168 U. S. 90; *Lumber Company* v. *Hardin*, 78 Arkansas, 95; *Towson* v. *Denson*, 74 Arkansas, 302. *Mr. John W. Blackwood* for plaintiff in error. *Mr. John B. Jones* and *Mr. William L. Terry* for defendant in error.

No. 451. NATHANIEL C. FOSTER, PLAINTIFF IN ERROR, *v.* WILLIAM ROWE, IMPLEADED, ETC. In error to the Supreme Court of the State of Wisconsin. Motions to dismiss or affirm submitted October 28, 1907. Decided November 4, 1907. *Per Curiam.* Dismissed for the want of jurisdiction. *Foster* v. *Rowe*, 128 Wisconsin, 326; *S. C.*, 111 N. W. Rep. 688; *Eustis* v. *Bolles*, 150 U. S. 361; *Indiana Manufacturing Company* v. *Koehne*, 186 U. S. 681; *State Railroad Tax Cases*, 92 U. S. 575. *Mr. W. M. Tomkins* for plaintiff in error. *Mr. James Wickham* for defendant in error.

No. 35. C. B. BOYETT ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for the Eastern District of Arkansas. Submitted November 5, 1907. Decided November 11, 1907. *Per Curiam.* Judgment reversed and cause remanded with a direction to sustain the motion in arrest of judgment, on the authority of *Hodges* v. *United States*, 203 U. S. 1. *Mr. J. W. Blackwood* for plaintiffs in error. *The Attorney General* for defendant in error.

No. 42. WILLIAM COUTURE, JR., PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for the Western District of Wisconsin. Sub-

mitted November 1, 1907. Decided November 11, 1907. *Per Curiam.* Judgment affirmed. *United States* v. *Rickert,* 188 U. S. 432; *McKay* v. *Kalyton,* 204 U. S. 458. *Mr. W. M. Tomkins* for plaintiff in error. *The Attorney General* and *The Solicitor General* for defendant in error.

No. 362. The New York Continental Jewell Filtration Company, Plaintiff in Error, *v.* Mary E. Wynkoop. In error to the Court of Appeals of the District of Columbia. Motion to dismiss submitted November 11, 1907. Decided November 18, 1907. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. Code D. C., § 233; *Walker* v. *United States,* 4 Wall. 163; *Thompson* v. *Butler,* 95 U. S. 694; *District of Columbia* v. *Gannon,* 130 U. S. 229; *Baltimore & Potomac Railroad Company* v. *Hopkins,* 130 U. S. 210; *United States ex rel. Lisle* v. *Lynch,* 137 U. S. 280; *United States ex rel. Taylor* v. *Taft, Secretary,* 203 U. S. 461. *Mr. James H. Hayden* for plaintiff in error. *Mr. Charles A. Douglas* and *Mr. E. B. Sherrill* for defendant in error.

No. 47. W. J. Warder et al., Plaintiffs in Error, *v.* William C. Cotton and Walter B. Grant, Executors. In error to the Circuit Court of the United States for the Western District of Texas. Submitted November 11, 1907. Decided November 18, 1907. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *Walter* v. *Loomis,* 197 U. S. 619; *Coloin* v. *Jacksonville,* 157 U. S. 368; *Chappell* v. *United States,* 160 U. S. 499; *Spencer* v. *Duplan Silk Company,* 191 U. S. 526; *Muse* v. *Arlington Hotel Company,* 168 U. S. 430; *Budzisz* v. *Illinois Steel Company,* 170 U. S. 41; *Jones* v. *United States,* 137 U. S. 212. *Mr. A. Seymour Thurmond* for plaintiffs in error. *Mr. W. B. Grant* for defendants in error.

No. 46. OREGON SHORT LINE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* ADDA MCMANUS, ETC. In error to the St. Louis Court of Appeals, State of Missouri. Submitted November 11, 1907. Decided December 2, 1907. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *California Powder Works* v. *Davis*, 151 U. S. 389; *Dower* v. *Richards*, 151 U. S. 658; *Sayward* v. *Denny*, 158 U. S. 180; *Michigan Sugar Company* v. *Michigan*, 185 U. S. 112; *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 291. See opinion below, 118 Mo. App. 152. *Mr. Martin L. Clardy* and *Mr. J. D. Howe* for plaintiff in error. *Mr. W. C. Marshall* and *Mr. Henry W. Bond* for defendant in error.

No. 55. ALASKA COMMERCIAL COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* GEORGE H. MELSE ET AL. In error to the Supreme Court of the State of Washington. Argued November 14, 1907. Decided December 2, 1907. *Per Curiam.* Judgment affirmed with costs. *Gold Washing and Water Company* v. *Keyes*, 96 U. S. 199; *Chesapeake and Ohio Railway Company* v. *Dixon*, 179 U. S. 134; *Kansas City Suburban Belt Railway Company* v. *Herman*, 187 U. S. 63; *Alabama Great Southern Railway Company* v. *Thompson*, 200 U. S. 206; *Morris* v. *Gilmer*, 129 U. S. 328; *Offner* v. *Railroad Company*, 148 Fed. Rep. 201; *Knuth* v. *Railway Company*, 148 Fed. Rep. 3. *Mr. William H. Gorham* for plaintiffs in error. *Mr. Corwin S. Shank* and *Mr. John C. Higgins* for defendants in error.

No. 72. EUGENE F. ROBINSON, APPELLANT, *v.* ANDREW B. DUVALL, EXECUTOR, ETC., ET AL. Appeal from the Court of Appeals of the District of Columbia. Argued and submitted December 13, 1907. Decided December 16, 1907. Decree affirmed with costs. *Mr. Charles H. Merillat* and *Mr.*

Mason N. Richardson for appellant. *Mr. Edward H. Thomas* and *Mr. Andrew B. Duvall* for appellees.

No. 74. Louis Stewart, Plaintiff in Error, *v.* The State of Louisiana. In error to the Supreme Court of the State of Louisiana. Submitted December 16, 1907. Decided December 23, 1907. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *Jacobi* v. *Alabama*, 187 U. S. 133, 386; *Railway Company* v. *McGuire*, 196 U. S. 128; *Cox* v. *Texas*, 202 U. S. 446; *West* v. *Louisiana*, 194 U. S. 258; *Chapin* v. *Fye*, 179 U. S. 127; *Louisiana* v. *Deffele*, 44 La. Ann. 581, and cases cited; *Louisiana* v. *Hennessy*, 44 La. Ann. 805. *Mr. Murphy J. Foster* for plaintiff in error. *Mr. Walter Guion* and *Mr. F. C. Zacharie* for defendant in error.

No. 83. Val Marciniak, Plaintiff in Error, *v.* The State of Minnesota. In error to the Supreme Court of the State of Minnesota. Argued December 17, 1907. Decided December 23, 1907. *Per Curiam.* Judgment affirmed with costs. *Natal* v. *Louisiana*, 139 U. S. 623; *Wilson* v. *North Carolina*, 169 U. S. 586; *Hamblin* v. *Western Land Company*, 147 U. S. 531. *Mr. Ernest S. Cary* and *Mr. Anson B. Jackson* for plaintiff in error. *Mr. A. C. Finney* and *Mr. Frank Healy* for defendant in error.

No. 88. The City of Omaha et al., Appellants, *v.* The Omaha Water Company. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Argued December 19, 1907. Decided December 23, 1907. *Per Curiam.* Appeal dismissed for the want of jurisdiction. *Schlosser* v. *Hemphill*, 198 U. S. 173; *Boom Company* v. *United States*, 202

U. S. 613; *California Consolidated Mining Company* v. *Manley*, 203 U. S. 579. Certiorari denied. *Chicago and Northwestern Railway Company* v. *Osborne*, 146 U. S. 354; *McLish* v. *Roff*, 141 U. S. 661; *Forsythe* v. *Hammond*, 166 U. S. 506. *Mr. John L. Webster* and *Mr. Carl C. Wright* for appellants. *Mr. Lucius H. Beers*, *Mr. Howard Mansfield* and *Mr. R. S. Hall* for appellee.

Decisions on Petitions for Writs of Certiorari from October 14, 1907, *to January* 6, 1908.

No. 310. Paul F. Vogel, Petitioner, *v.* William Worth Burson. October 21, 1907. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. E. T. Fenwick* and *Mr. E. M. Kitchin* for petitioner. *Mr. George W. Rea* for respondent.

No. 316. The City of Defiance, Petitioner, *v.* William J. McGonigale, Receiver, etc. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John H. Doyle* and *Mr. Henry B. Harris* for petitioner. *Mr. Henry Newbegin* and *Mr. Robert Newbegin* for respondent.

No. 323. William Gordon Crawford, Petitioner, *v.* The United States. October 21, 1907. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. A. S. Worthington* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 327. FIDELITY AND CASUALTY COMPANY OF NEW YORK, PETITIONER, *v.* BANK OF TIMMONSVILLE. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. P. Kennedy Bryan* for petitioner. *Mr. Henry A. M. Smith* and *Mr. P. A. Willcox* for respondent.

No. 328. EDWARD E. BLODGETT, PETITIONER, *v.* THE PORTLAND CHEMICAL AND PHOSPHATE COMPANY ET AL. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. Philip Wardner* for petitioner. *Mr. Horatio Bisbee* and *Mr. George C. Bedell* for respondents.

No. 329. JEROME P. PORTER ET AL., PETITIONERS, *v.* TONOPAH NORTH STAR TUNNEL AND DEVELOPMENT COMPANY. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John E. Humphries* and *Mr. Frederick DeC. Faust* for petitioners. *Mr. Joseph C. Campbell* and *Mr. Wm. H. Metson* for respondent.

No. 330. CENTRAL RAILROAD COMPANY OF NEW JERSEY, OWNER, ETC., PETITIONER, *v.* ELIZA E. WREN ET AL. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. E. Grenville Benedict* and *Mr. R. W. DeForest* for petitioner. *Mr. J. Parker Kirlin* and *Mr. Eliot Tuckerman* for respondents.

No. 331. THE FEDERAL CONTRACTING COMPANY, PETITIONER, *v.* BOWERS HYDRAULIC DREDGING COMPANY. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Rowland B. Mahany* and *Mr. Edward W. Norris* for petitioner. *Mr. Horace L. Cheyney* for respondent.

No. 333. R. H. WRIGHT, PETITIONER, *v.* GORMAN-WRIGHT COMPANY ET AL. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. L. L. Lewis* and *Mr. S. S. P. Patteson* for petitioner. *Mr. G. A. Hanson* for respondents.

No. 335. J. I. CASE THRESHING MACHINE COMPANY, PETITIONER, *v.* THE INDIANA MANUFACTURING COMPANY. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. R. S. Taylor, Mr. I. K. Boyesen* and *Mr. James H. Peirce* for petitioner. *Mr. W. H. H. Miller, Mr. Charles K. Offield, Mr. Charles C. Linthicum, Mr. Chester Bradford* and *Mr. Harold Taylor* for respondent.

No. 336. PENROSE MCCLAIN, UNITED STATES COLLECTOR, ETC., PETITIONER, *v.* WILLIAM DISSTON ET AL., EXECUTORS, ETC. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. No appearance for respondents.

No. 340. N. A. MUNN ET AL., PETITIONERS, *v.* CLINTON REED; No. 341. N. A. MUNN ET AL., PETITIONERS, *v.* THE IBEX MINING COMPANY; No. 342. N. A. MUNN ET AL., PETITIONERS, *v.* THE IBEX MINING COMPANY; and No. 343. N. A. MUNN ET AL., PETITIONERS, *v.* THE IBEX MINING COMPANY. October 21, 1907. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edwin H. Park* and *Mr. T. J. O'Donnell* for petitioners. *Mr. Charles J. Hughes, Jr.*, and *Mr. Charles Cavender* for respondents.

No. 371. SECURITY MUTUAL LIFE INSURANCE COMPANY, PETITIONER, *v.* FREDERICK L. MICHAELSEN. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederic W. Jenkins* for petitioner. *Mr. J. M. Vale* for respondent.

No. 442. GEORGE G. WARE, PETITIONER, *v.* THE UNITED STATES. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. J. Mahoney* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 453. THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER, *v.* JAMES B. MCCUNE. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert J. Fisher* for petitioner. *Mr. James M. Martin* for respondent.

No. 455. WEEMS STEAMBOAT COMPANY OF BALTIMORE CITY, PETITIONER, *v.* PEOPLE'S STEAMBOAT COMPANY ET AL. Octo-

ber 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. George Weems Williams, Mr. St. George R. Fitzhugh* and *Mr. Nicholas P. Bond* for petitioner. *Mr. William D. Carter* for respondents.

No. 456. MILO H. OSBORN, PETITIONER, *v.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. A. Hoehling, Jr.,* for petitioner. *Mr. Gardiner Lathrop, Mr. Robert Dunlap* and *Mr. A. B. Browne* for respondent.

No. 460. THE MILWAUKEE RUBBER WORKS COMPANY, PETITIONER, *v.* THE RUBBER TIRE WHEEL COMPANY. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Charles Quarles, Mr. John C. Spooner* and *Mr. J. L. Bishop* for petitioner. *Mr. Augustine L. Humes* for respondent.

No. 461. CONTRACTORS' SUPPLY AND EQUIPMENT COMPANY ET AL., PETITIONERS, *v.* T. E. HILL COMPANY ET AL. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lloyd C. Whitman* for petitioners. *Mr. Charles P. Abbey* for respondents.

No. 464. ÆTNA INDEMNITY COMPANY, PETITIONER, *v.* JAMES R. CROWE COAL AND MINING COMPANY. October 21, 1907. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Eighth Circuit denied. *Mr. James S. Botsford* and *Mr. William B. Horner* for petitioner. *Mr. L. C. Boyle* and *Mr. W. F. Guthrie* for respondent.

No. 466. HENRY WINEMAN, JR., PETITIONER, *v.* M. M. DRAKE ET AL. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles E. Kremer* for petitioner. *Mr. Harvey D. Goulder* and *Mr. F. S. Masten* for respondents.

No. 467. ARMOUR PACKING COMPANY, PETITIONER, *v.* THE UNITED STATES; No. 468. SWIFT & COMPANY, PETITIONER, *v.* THE UNITED STATES; No. 469. MORRIS & COMPANY, PETITIONER, *v.* THE UNITED STATES; and No. 470. CUDAHY PACKING COMPANY, PETITIONER, *v.* THE UNITED STATES. October 21, 1907. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Frank Hagerman, Mr. A. R. Urion* and *Mr. John C. Cowin* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant to the Attorney General Purdy* for respondent.

No. 476. THE CHARLES NELSON COMPANY, CLAIMANT, ETC., PETITIONER, *v.* THE STANDARD THEATRE COMPANY. October 21, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. B. Browne* and *Mr. Alexander Britton* for petitioner. No appearance for respondent.

No. 479. GREAT SOUTHERN GAS AND OIL COMPANY, PETITIONER, *v.* LOGAN NATURAL GAS AND FUEL CO. October 21,

1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William B. Sanders* and *Mr. A. R. Sheriff* for petitioner. *Mr. James H. Beal, Mr. C. H. Grosvenor, Mr. John G. Reeves* and *Mr. M. A. Daugherty* for respondent.

No. 380. MOLLIE E. DUPREE ET AL., PETITIONERS, *v.* C. W. MANSUR. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. J. J. Darlington* for petitioners. *Mr. J. M. McCormick* for respondent.

No. 475. EUGENE C. KREIGH, PETITIONER, *v.* WESTINGHOUSE, CHURCH, KERR & COMPANY. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. James S. Botsford* for petitioner. No appearance for respondent.

No. 480. ELIZABETH PECK, PETITIONER, *v.* THE TRIBUNE COMPANY. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Rufus S. Simmons* and *Mr. S. C. Irving* for petitioner. *Mr. John Barton Payne* for respondent.

No. 309. ALBERTA J. SHARPE ET AL., PETITIONERS, *v.* EDWARD W. RANNELS. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Ap-

peals for the Eighth Circuit denied. *Mr. W. H. H. Miller, Mr. John B. Jones, Mr. Augustin Boice, Mr. U. M. Rose, Mr. G. B. Rose, Mr. W. E. Hemingway* and *Mr. Herbert R. Marlatt* for petitioners. *Mr. C. C. Calhoun* for respondent.

No. 332. JOHN BLAKELY, PETITIONER, *v.* FIDELITY MUTUAL LIFE INSURANCE COMPANY. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. W. B. Linn* and *Mr. George H. Stein* for petitioner. *Mr. Ira Jewell Williams* for respondent.

No. 412. RUMFORD CHEMICAL WORKS, PETITIONER, *v.* HYGIENIC CHEMICAL COMPANY. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Philip Mauro* for petitioner. *Mr. Willard Parker Butler* for respondent.

No. 444. C. K. MCINTOSH AND JAMES P. BROWN, TRUSTEES, ETC., PETITIONERS, *v.* THE PETALUMA SAVINGS BANK ET AL. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William A. Coulter* for petitioners. *Mr. A. B. Browne* for respondents.

No. 462. FREDERICK S. GOSHORN ET AL., PETITIONERS, *v.* ROYAL TRUST COMPANY ET AL. October 28, 1907. Petition for a writ of certiorari to the United States Circuit Court of

Appeals for the Seventh Circuit denied. *Mr. Henry W. Leman* for petitioners. *Mr. Frank H. Scott* and *Mr. Edgar A. Bancroft* for respondents.

No. 463. SAMUEL PECK ET AL., PETITIONERS, *v.* JAMES HAMILTON LEWIS. November 4, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Levi Davis* for petitioners. *Mr. Holmes Conrad* for respondent.

No. 484. ERIE RAILROAD COMPANY, PETITIONER, *v.* MARY E. KANE, ADMINISTRATRIX, ETC. November 11, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Wm. E. Cushing* for petitioner. *Mr. George F. Arrel* for respondent.

No. 191. ESTILL COUNTY, KENTUCKY, PETITIONER, *v.* TALTON EMBRY. November 18, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles W. Friend* for petitioner. *Mr. Harry L. Gordon* for respondent.

No. 443. ARNOLD LOUCHHEIM & CO. ET AL., PETITIONERS, *v.* JAMES WATSON BOYD. November 18, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. C. Prendergast* for petitioners. No appearance for respondent.

No. 491. GREAT NORTHERN RAILWAY COMPANY, PETITIONER, *v.* THE UNITED STATES. November 18, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Wm. R. Begg, Mr. Rome G. Brown* and *Mr. C. S. Albert* for petitioner. *The Attorney General* and *Mr. Assistant to the Attorney General Purdy* for respondent.

No. 300. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, PETITIONER, *v.* J. WILCOX BROWN. December 9, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Wm. B. Hornblower* and *Mr. Allan McCulloh* for petitioner. *Mr. John R. Dos Passos* and *Mr. Joseph DeF. Junkin* for respondent.

No. 496. GRAND TRUNK WESTERN RAILWAY COMPANY, PETITIONER, *v.* WILLIAM H. GRAY. December 9, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George W. Kretzinger* for petitioner. *Mr. John A. Brown* for respondent.

No. 506. MACKIE-LOVEJOY MANUFACTURING COMPANY, PETITIONER, *v.* MARION H. CAZIER. December 9, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. L. S. Bacon* for petitioner. No appearance for respondent.

No. 507. HAIGHT & FREESE COMPANY, PETITIONER, *v.* ANNA L. H. WEISS, ADMINISTRATRIX, ETC., ET AL. Decem-

ber 9, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Albert I. Sire* for petitioner. No appearance for respondent.

No. 508. DEMETRIUS M. STEWARD ET AL., PETITIONERS, *v.* AMERICAN LAVA COMPANY ET AL; and No. 509. MORITZ KIRCHBERGER ET AL., PETITIONERS, *v.* AMERICAN LAVA COMPANY ET AL. December 16, 1907. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Louis C. Raegener* for petitioners. *Mr. Charles Neave* for respondents.

No. 517. JOHNSON & JOHNSON, PETITIONER, *v.* THE UNITED STATES. December 16, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward S. Hatch* for petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Sanford* for respondent.

No. 520. THE UNITED STATES, PETITIONER, *v.* JAMES A. HAYES & COMPANY. December 16, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Albert H. Washburn, Mr. J. Stuart Tompkins* and *Mr. Charles P. Searle* for respondents.

No. 501. OLD NICK WILLIAMS COMPANY, PETITIONER, *v.* THE UNITED STATES. December 23, 1907. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Charles A. Moore* for petitioner. *The Attorney General* for respondent.

No. 409. Corsicana Petroleum Company, Petitioner, *v.* W. H. Staley. December 23, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. McKie* and *Mr. Frederick S. Tyler* for petitioner. *Mr. E. St. Clair Thompson* and *Mr. R. S. Neblett* for respondent.

No. 504. Richard Cohen et al., Petitioners, *v.* The United States. December 23, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joel M. Marx* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Cooley* for respondent.

No. 505. Benjamin D. Greene et al., Petitioners, *v.* The United States. December 23, 1907. Petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederic R. Coudert, Mr. B. F. Tracy, Mr. Howard Taylor, Mr. William W. Osborne, Mr. Alexander A. Lawrence, Mr. William Garrard* and *Mr. P. W. Meldrim* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Marion Erwin* for respondent.

No. 525. The Mills Transportation Company, Petitioner, *v.* The Great Lakes Towing Company. Decem-

ber 23, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. F. H. Canfield* for petitioner. *Mr. Harvey D. Goulder, Mr. S. H. Holding* and *Mr. Frank S. Masten* for respondent.

No. 527. JAMES C. WHITTAKER, ADMINISTRATOR, ETC., PETITIONER, *v.* A. B. BAXTER AND COMPANY; and No. 528. ADOLPH JOSEPH, PETITIONER, *v.* A. B. BAXTER AND COMPANY. December 23, 1907. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick M. Czaki* for petitioners. *Mr. Edward Jacobs* for respondents.

No. 536. UTAH CONSOLIDATED MINING COMPANY, PETITIONER, *v.* JAMES GODFREY ET AL. December 23, 1907. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Louis Marshall, Mr. George Sutherland, Mr. Waldemar Van Cott* and *Mr. Samuel Untermyer* for petitioner. *Mr. J. L. Rawlings* and *Mr. William H. King* for respondents.

No. 535. BRADLEY W. PALMER ET AL., PETITIONERS, *v.* THE STATE OF TEXAS ET AL. January 6, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Moorfield Storey* and *Mr. J. L. Thorndike* for petitioners. *Mr. T. W. Gregory* for respondents.

No. 542. LAWRENCE W. SEXTON, RECEIVER, ETC., PETITIONER, *v.* ARMSTRONG CORK COMPANY. January 6, 1908.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William D. Guthrie* for petitioner. *Mr. James R. Sloane* and *Mr. Herbert Noble* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 14, 1907, TO JANUARY 6, 1908.

No. 133. A. R. STUART, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. October 14, 1907. Dismissed on motion of *Mr. L. T. Michener* for the plaintiff in error. *Mr. W. W. Dudley* and *Mr. L. T. Michener* for plaintiff in error. *The Attorney General* and *The Solicitor General* for defendant in error.

No. 52. JOHN C. ORRELL ET AL., PLAINTIFFS IN ERROR, *v.* BAY MANUFACTURING COMPANY. In error to the Supreme Court of the State of Mississippi. October 14, 1907. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. E. M. Barber* for plaintiffs in error. *Mr. E. J. Bowers* for defendant in error.

No. 134. HELEN ROWLAND, PLAINTIFF IN ERROR, *v.* FRANK GODFREY, TRUSTEE. In error to the Supreme Court of the Territory of Hawaii. October 14, 1907. Dismissed, per stipulation. *Mr. E. B. McClanahan* for plaintiff in error. *Mr. A. G. M. Robertson* and *Mr. C. F. Clemons* for defendant in error.

No. 148. ALBERT K. HISCOCK, TRUSTEE, ETC., APPELLANT, *v.* AMERICAN WOOLEN COMPANY OF NEW YORK. Appeal from the United States Circuit Court of Appeals for the Second Circuit. October 14, 1907. Dismissed, per stipulation. *Mr. Will B. Crowley* for appellant. *Mr. Lee M. Friedman* for appellee.

Nos. 182 and 183. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, APPELLANT, *v.* THE TERRITORY OF OKLAHOMA. Appeals from the District Court of Garfield County, Oklahoma Territory. October 14, 1907. Dismissed with costs, on motion of counsel for the appellant. *Mr. M. A. Low* for appellant. No appearance for appellee.

No. 279. AMES REALTY COMPANY, APPELLANT, *v.* THE STATE OF MONTANA ET AL. Appeal from the Circuit Court of the United States for the District of Montana. October 14, 1907. Dismissed, per stipulation. *Mr. N. W. McConnell* for appellant. *Mr. Albert J. Galen* for appellees.

No. 483. ARTHUR U. DENNIS ET AL., PLAINTIFFS IN ERROR, *v.* SYRENUS DAVIS ET AL. In error to the Supreme Court of the State of Washington. October 15, 1907. Docketed and dismissed with costs, on motion of *Mr. John Sidney Webb* for the defendants in error. No one opposing.

No. 66. ABE STRAUSS, PLAINTIFF IN ERROR, *v.* THE COMMONWEALTH OF MASSACHUSETTS. In error to the Superior Court of the State of Massachusetts. October 15, 1907. Dis-

missed with costs, per stipulation, on motion of *Mr. Dana Malone* for the defendant in error. *Mr. Junius Parker* for plaintiff in error. *Mr. Dana Malone* for defendant in error.

No. 3. TONY KERSCH, PLAINTIFF IN ERROR, *v.* THE CITY OF TOPEKA. In error to the Supreme Court of the State of Kansas. October 15, 1907. Dismissed with costs, on motion of *Mr. C. A. Magaw* for the plaintiff in error. *Mr. G. C. Clemens* and *Mr. C. A. Magaw* for plaintiff in error. No appearance for defendant in error.

No. 10. JAMES SHEASLEY, PLAINTIFF IN ERROR, *v.* THE STATE OF KANSAS. In error to the Supreme Court of the State of Kansas. October 15, 1907. Dismissed with costs, on motion of *Mr. C. A. Magaw*, the case having abated by reason of death of plaintiff in error. *Mr. G. C. Clemens* and *Mr. C. A. Magaw* for plaintiff in error. *Mr. C. C. Coleman* for defendant in error.

No. 349. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* CLARA ALFONSO Y BUENAVENTURA. In error to the Supreme Court of the Philippine Islands. October 21, 1907. Dismissed on motion of *Mr. Attorney-General Bonaparte* for the plaintiff in error. *The Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 486. FERDINAND HOPP, PLAINTIFF IN ERROR, *v.* THOMAS H. PICKFORD. In error to the Court of Appeals of the District

of Columbia. October 21, 1907. Docketed, and dismissed with costs on motion of *Mr. H. Prescott Gatley* for the defendant in error. No one opposing.

No. 1. AGUSTIN CASTELLO, APPELLANT, *v.* ERNEST RUFFER ET AL. Appeal from the District Court of the United States for Porto Rico. October 28, 1907. Dismissed with costs, pursuant to the fifteenth rule, on motion of *Mr. George H. Lamar* in behalf of counsel for the appellees. *Mr. James S. Harlan* and *Mr. John Maynard Harlan* for appellant. *Mr. N. B. K. Pettingill* for appellees.

No. 100. ARIZONA EASTERN RAILROAD COMPANY, APPELLANT, *v.* PHŒNIX AND EASTERN RAILROAD COMPANY. October 29, 1907. Appeal from the Supreme Court of the Territory of Arizona. Dismissed, per stipulation. *Mr. Eugene S. Ives* and *Mr. Maxwell Evarts* for appellant. *Mr. Robert Dunlap, Mr. T. J. Norton* and *Mr. E. W. Camp* for appellee.

No. 296. EVALYN S. FRANCE, FORMERLY EVALYN S. TOME, APPELLANT, *v.* JOSEPH M. COLEMAN ET AL. Appeal from the Court of Appeals of the District of Columbia. October 29, 1907. Dismissed with costs, on motion of counsel for appellant. *Mr. George E. Hamilton, Mr. M. J. Colbert* and *Mr. John J. Hamilton* for appellant. No appearance for appellees.

No. 93. GOVAN BEARD, PLAINTIFF IN ERROR, *v.* THE STATE OF ARKANSAS. In error to the Supreme Court of the State

of Arkansas. November 5, 1907. Case having abated by reason of the death of plaintiff in error, writ of error dismissed. *Mr. Baldy Vinson* for plaintiff in error. No appearance for defendant in error.

No. 146. HENRY T. ANDERSON, APPELLANT, *v.* ANDREW J. ZARING. Appeal from the Supreme Court of the Territory of Oklahoma. November 11, 1907. Dismissed with costs, on motion of counsel for the appellant, and mandate granted. *Mr. S. H. Harris* for appellant. No appearance for appellee.

No. 58. MODESTO MUNITIZ AGUIRRE, APPELLANT, *v.* SOBRINOS DE EZQUIAGA. Appeal from the Supreme Court of Porto Rico. November 12, 1907. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles Hartzell* for appellant. *Mr. James S. Harlan* and *Mr. John Maynard Harlan* for appellee.

No. 153. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* JOHN STIBBS. In error to the Supreme Court of the Territory of Oklahoma. December 2, 1907. Dismissed, per stipulation. *Mr. M. A. Low* for plaintiff in error. *Mr. P. C. Simons* for defendant in error.

No. 192. NICOLAS ARCEO, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. December 2, 1907. Dismissed, pursuant to the tenth rule. *Mr. Nicolas Arceo pro se. The Attorney General* and *The Solicitor General* for defendant in error.

No. 534. EUGENIO BUITRAGO, APPELLANT, *v.* THE PEOPLE OF PORTO RICO. Appeal from the Supreme Court of Porto Rico. December 16, 1907. Docketed and dismissed with costs on motion of *Mr. Henry M. Hoyt* for appellees. No one opposing.

No. 50. JOHN A. CURTIN, TRUSTEE, APPELLANT, *v.* GERTRUDE F. TUCKER. Appeal from the United States Circuit Court of Appeals for the First Circuit. December 16, 1907. Dismissed, per stipulation. *Mr. Lee M. Friedman* and *Mr. Robert K. Dickerman* for appellant. *Mr. W. Hall Harris* and *Mr. John H. Sherburne, Jr.*, for appellee.

No. 335. J. I. CASE THRESHING MACHINE COMPANY, PETITIONER, *v.* THE INDIANA MANUFACTURING COMPANY. On a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. December 16, 1907. Dismissed without costs to either party, per stipulation, on motion of *Mr. Melville Church* in behalf of counsel. *Mr. R. S. Taylor, Mr. I. K. Boyesen* and *Mr. James H. Peirce* for petitioner. *Mr. W. H. H. Miller, Mr. Charles K. Offield, Mr. Charles C. Linthicum, Mr. Chester Bradford* and *Mr. Harold Taylor* for respondent.

No. 86. JOHN SHALEEN, PLAINTIFF IN ERROR, *v.* THE COMMONWEALTH OF PENNSYLVANIA. In error to the Supreme Court of the State of Pennsylvania. December 16, 1907. Dismissed with costs, pursuant to the tenth rule. *Mr. William S. Opdyke* for plaintiff in error. *Mr. William John Barr* and *Mr. John R. Jones* for defendant in error.

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No. 131. REVERE WATER COMPANY, PLAINTIFF IN ERROR, *v.* THE INHABITANTS OF THE TOWN OF WINTHROP. In error to the Supreme Judicial Court of the State of Massachusetts. September 21, 1907. Dismissed, pursuant to the twenty-eighth rule. *Mr. A. E. Pillsbury* for plaintiff in error. *Mr. Lauriston L. Scaife* for defendants in error.

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Where a fund is being distributed in a proceeding to limit the liability of the owners of a vessel, all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. *The Hamilton*, 398.

2. *Right of seaman to recover for tort, in action brought under state statute—Damages recoverable.*

Where both vessels in collision are in fault the representatives of a seaman on one of the vessels, killed without contributory negligence on his part, may, where a state statute gives an action against the owner of the other vessel, recover full damages, and are not limited to damages recoverable under the maritime law against the seaman's own vessel for death or injury caused by negligence of the master thereof or his fellow servants thereon. Neither the seaman's contract with the owners of the vessel he is on, nor the negligence of his own vessel, nor any provision of the Harter Act affects the claim against the other vessel. *Ib.*

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cused to acquire state lands is competent as tending to establish guilty intent, purpose, design or knowledge, and is admissible if the trial judge so limits its application as to prevent it from improperly prejudicing the accused by showing the commission of other crimes. (*Holmes* v. *Goldsmith*, 147 U. S. 164.) *Ib.*

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5. *Sufficiency of complaint to afford due process of law under Philippine bill of rights.*
A complaint, sufficiently clear to the mind of a person of rudimentary intelligence as to what it charges the defendant with, informs the accused of the nature and cause of the accusation against him, and a conviction thereunder is not in that respect without due process of law under the Philippine bill of rights. *Paraiso* v. *United States*, 368.

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2. *Gros Ventre Indians—Construction of agreement of May* 1, 1888—*Reservation of water rights.*

In view of all the circumstances of the transaction this court holds that there was an implied reservation in the agreement of May 1, 1888, 25 Stat. 124, with the Gros Ventre and other Indians establishing the Fort Belknap Reservation, of a sufficient amount of water from the Milk River for irrigation purposes, which was not affected by the subsequent act of February 22, 1889, 25 Stat. 676, admitting Montana to the Union, and that the water of that river cannot be diverted, so as to prejudice this right of the Indians, by settlers on the public lands or those claiming riparian rights on that river. *Ib.*

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1. *Duty of carrier to intending passenger.*

An intending passenger coming to a place where passengers habitually board the cars of a trolley company, and which, in itself, is safe unless made otherwise by the manner in which the cars are operated, is not a trespasser nor a mere traveler upon the highway, but one to whom the company owes an affirmative duty and it is for the jury to determine whether the car injuring such person was operated with the vigilance required by the circumstances. *Chunn* v. *City & Suburban Ry.*, 302.

2. *Contributory negligence; question for jury—Right of passenger of trolley car to assume care on part of carrier.*

Where a trolley car platform is so narrow that its width cannot fairly be considered without taking into consideration the dangers on both sides of it, one taking a car on one side of it has a right to assume that he will not be put in peril by a car running rapidly in the opposite direction, and he cannot, as a matter of law, be held guilty of contributory negligence in taking the car at that place. That issue is for the jury. *Ib.*

3. *Contributory negligence excused.*

Even if the plaintiff carelessly places himself in a position of danger, if the defendant discovers the danger in time to avoid the injury by using reasonable care, the failure so to do, and not the plaintiff's carelessness, may be the sole cause of the resulting injury. *Ib.*

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1. *Infringement, contributory; notice to charge vendee of patented article with notice of license restriction.*

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1. *Considerations in testing constitutionality of act of Congress.*

In testing the constitutionality of an act of Congress this court confines itself to the power of Congress to pass the act and may not consider any real or imaginary evils arising from its execution. *Employers' Liability Cases*, 463.

2. *Limitation of rule in favor of constitutionality.*

While it is the duty of this court to so construe an act of Congress as to render it constitutional if it can be lawfully done, an ambiguous statute cannot be rewritten to accomplish this result. *Ib.*

3. *Statutes constitutional in part only; limitation of rule as to enforcement.*

Where a statute contains some provisions that are constitutional and some that are not, effect may be given to the former by separating them from the latter, but this rule does not apply where the provisions of the statute are dependent upon each other and are indivisible, or where it does not plainly appear that Congress would have enacted the constitutional legislation without the unconstitutional provisions. *Ib.*

4. *Objects, purposes and conditions of enactment considered in arriving at legislative intent.*

In construing a statute, while the court must gain the legislative intent primarily from the language used, it must remember the objects and purposes of the statute and the conditions of its enactment so as to effectuate rather than destroy the spirit of that intent. *American Tobacco Co.* v. *Werckmeister*, 284.

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